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

From July 1, 1977 to June 30, 1978

Commonwealth of Virginia
Department of Purchases and Supplies
Richmond
1978
Letter of Transmittal

THE HONORABLE JOHN N. DALTON
Governor of Virginia
State Capitol
Richmond, Virginia 23219

July 1, 1978

My dear Governor Dalton:

Enclosed is the Annual Report of the Attorney General for the fiscal year July 1, 1977 to June 30, 1978. The Report contains official opinions which were rendered during the fiscal year and are of general interest or helpful in promoting uniformity in the construction of the laws of the Commonwealth. Also included is a listing of cases currently pending or completed since transmittal of the 1976-1977 Report.

Many changes have taken place in the Office of Attorney General during the past year. Most of the changes are the result of a new management focus which has been directed towards achieving maximum efficiencies with a limited number of staff members. As most large private law firms have done, the Attorney General's Office has adopted a system of time reporting for the attorneys working both in the central offices and through State agencies. The system is designed to produce efficiencies in distribution of work and to determine where new emphasis is needed.

In addition, attempts are being made to limit the growth of government by putting the lid on growth in this Office. The first step towards this effort was taken when $120,000, earmarked for five new positions, was returned to the General Assembly.

Also a new emphasis has been evident in several of the five divisions of the Attorney General's Office. For example, the Antitrust Section has been successful in obtaining what is believed to be the first bribery indictment against a Virginia municipal official other than a law enforcement officer.

In another investigation, the Antitrust Section has reached cash settlements with automobile dealers in lieu of penalties for charges of odometer tampering. These settlements will result in refunds to many Virginians who bought automobiles whose odometers may have been set back.

In the Environmental Division, the Attorney General successfully initiated a nuisance suit which has resulted in an investigation of a Patrick County dam, believed to be a possible safety hazard. This is the first time the Attorney General's Office has acted on its own behalf, rather than on behalf of a State agency, in initiating such an environmental action suit.

In addition, this year significant progress was made in the area of obtaining cash settlements against Virginia companies which violated State environmental regulations.

Attorneys in the Consumer Protection Division have taken an aggressive role
in representing consumers in the $246 million VEPCO rate case, and in several other rate cases before the State Corporation Commission. In this connection, a nine-member Energy Advisory Panel has been appointed to serve for the next three years in an advisory capacity to the Attorney General. It is the hope of this office that the panel, which consists of experts in the field of energy and rate making, will assist the Attorney General in proposing new legislation relative to the utility rate structure in Virginia.

As you will notice in the Report, the Consumer Protection Division has assumed a greater role in responding to consumer complaints and initiating consumer actions.

An effort is being made to make the Attorney General’s Office as responsive as possible to the needs of Virginians. In addition to representing State agencies, the Attorney General’s Office will continue to assume a responsive role towards its most important clients, the citizens of the Commonwealth.

ANTITRUST

One of the most basic commitments of the Attorney General’s Office is to promote a more competitive economy in Virginia through vigorous but reasoned enforcement of the Virginia Antitrust Act. I am convinced that only through antitrust enforcement, which allows the market to allocate goods and services, can we preclude more economic regulation by government.

The Attorney General’s role, however, in promoting competition includes more than bringing enforcement actions. In addition, as counsel to the Commonwealth’s various agencies, the Attorney General advocates competitive policy in day-to-day advice to the agencies and their regulatees. Most importantly, the Attorney General’s Office attempts to assure that the Commonwealth’s citizens recognize the benefits which flow from competition and their rights and duties under the antitrust laws.

Primary responsibility for antitrust enforcement, competitive policy advocacy and antitrust education falls upon the Antitrust Unit. Presently staffed by three attorneys, an investigator, a paralegal and two secretaries, the Unit provides a wide range of services to the Commonwealth and her citizens to help insure that they are not subjected to trade restraints or other anticompetitive conduct which artificially inflate the prices of goods and services.

Within this reporting period, the Unit has brought six antitrust enforcement actions and was instrumental in obtaining one criminal indictment. In a case filed last November, the Unit sued a franchisor of auto parts stores, charging that the franchise system engaged in illegal price fixing and tying. In the first bid rigging case involving State contracts filed under the Virginia Antitrust Act, the Unit charged several Kansas concerns with fixing the price at which certain types of highway safety equipment were sold to the Commonwealth and Fairfax County. The suit resulted in civil penalties paid to the Commonwealth, damages paid to the Department of Highways and Transportation and Fairfax County, and divestiture of ownership between two of the defendants.

Thus far, the Unit has filed and settled four of its “spinners” cases, which involved the turn-back of numerous automobile odometers. The Antitrust Unit became involved in this action because agreements between car dealers and individuals who turn odometers constitute price fixing resulting in an increased resale price of the automobiles. The settlements provided that car dealers who engaged in the conspiracy make restitution to purchasers who paid an illegally
inflated price for the cars, and that civil penalties be paid to the Commonwealth. The investigation is continuing, and more suits will be filed.

The Unit planned and played the major role in an investigation which resulted in the indictment of a former municipal official for bribery. In addition, one of the Unit's attorneys will be lead counsel and work with the Commonwealth's Attorney in prosecuting the case when it comes to trial. The investigation of the matter is continuing, with several civil antitrust suits to follow.

The Antitrust Unit is conducting a study of certain utility purchasing practices to ascertain whether fundamental principles of competitive procurement were followed and, if not, what savings would be achieved if they were followed. The theory underlying the study will be useful in other facets of public and private procurement and could result in significant savings for consumers.

To insure that the Commonwealth's citizens are familiar with basic antitrust principles the Antitrust Unit has presented educational seminars and speeches, including in the past year an intensive two-day seminar dealing with the investigation of antitrust violations and other forms of white-collar, economic crime to the Investigators School of the Virginia Department of Police; three seminars presented across the Commonwealth to members of the Virginia Retail Merchants Association; and a presentation of a paper on current trends in State antitrust law enforcement at the American Bar Association meeting in New York.

CONSUMER PROTECTION

In the past year, the Consumer Protection Act of 1977 has become effective, giving to the Attorney General's Office important investigatory powers in the area of consumer protection. Under the provisions of this Act, the Division of Consumer Counsel has begun major investigations of deceptive advertising in the sale of home insulation, the sale of electrical "energy saving" devices, the sale of invention development services, the sale of stereo equipment, and in home solicitation sales. These investigations are continuing. One investigation, involving misrepresentation of the benefits of certain water purification devices which were being sold for $19.95 apiece, resulted in the reimbursement of money to 24 Virginians.

The suit against General Motors Corporation, which alleged that some 1977 model Oldsmobiles were delivered to consumers with non-Oldsmobile engines, has been concluded. Under the terms of the settlement of that suit, those Virginians who purchased 1977 Oldsmobiles, Pontiacs or Buicks prior to April, 1977 are offered a $200 cash payment plus a 36 month or 36,000 mile transferable insurance policy worth $200. The total value of this settlement to the 1,597 Virginia consumers who benefit from it, is $638,800.

Additionally, the Division obtained restitution totaling over $13,000 for 32 customers of a Fredericksburg furniture store in a suit for deceptive advertising and fraudulent sales practices.

Consumer representation in two major rule-making proceedings before the State Corporation Commission was provided by the Division. The first proceeding involved the rate standards and reporting requirements for the credit life insurance industry in Virginia. The Division argued for lower rates and more stringent reporting requirements for companies selling credit life insurance in connection with consumer purchases. The second proceeding involved the rules to curb unfair claims settlement practices in the insurance industry. The Division
presented several consumer witnesses to argue in support of the rules to curb such practices.

Complying with its statutory mission, the Division of Consumer Counsel presented a series of legislative recommendations in the interests of consumers during the 1978 General Assembly. One of the more noteworthy recommendations acted favorably upon by the General Assembly, was the Virginia Solar Easements Act. This law recognizes solar easements for the purpose of guaranteeing the exposure of a solar energy device to incident sunlight during the entire year. It is not the intent of the law to require such easements, but only to provide the legislative recognition necessary to give solar easement agreements legal standing. The purpose of the law is to encourage the utilization of solar energy by providing a means to help protect the investment in solar energy equipment made by property owners.

During the fiscal year, the Division of Consumer Counsel participated in 37 proceedings before the State Corporation Commission. These involved the insurance industry and public utilities providing electric, gas, water, and telephone service. Of these cases, 24 involved rate increases, load management experiments, and the fuel adjustment clause hearings concerning electric utilities. A major rate proceeding involving Appalachian Power Company (APCO) was concluded during the fiscal year. The Division opposed the increase and sponsored testimony in opposition to the size of the increase and various proposals requested by APCO. The case presented by the Division contributed to the reduction in the rate increase awarded by the Commission.

For several years, VEPCO and the electric cooperatives of Virginia have been conducting negotiations concerning the sale of a portion of VEPCO's generating facilities to the cooperatives. The successful completion of the negotiations could result in VEPCO's having to raise less capital and would benefit all affected customers. The Division has supported the negotiations through the years and advocated their speedy conclusion. A letter of intent was signed by VEPCO and the cooperatives which raises hopes of a final agreement.

The Division and the State Corporation Commission filed an amicus curiae brief in the United States Supreme Court, in support of Appalachian Power Company's appeal of a rate decision in West Virginia. The effect of the West Virginia decision, which required APCO to refund approximately $45 million, may be to impair APCO's ability to raise capital in financial markets. Such a result could impair the service received by APCO's Virginia consumers. In view of such a possibility, the Division decided that it was necessary to support APCO's appeal in order to avoid the potential detriment to Virginia consumers. Unfortunately, APCO's petition was denied by the Court.

The Division continues to be concerned about the rising cost of electricity and, accordingly, continues to promote the study of ways to control electric bills. One such project initiated by the Division in 1975 is known as the "ACES" house.

"ACES" stands for "Annual Cycle Energy System," an experimental heating and air conditioning system which also provides domestic hot water. Developed by engineers at the Oak Ridge National Laboratory, the ACES system depends upon the transfer of energy by an electrically driven heat pump, which obtains heat from water contained in an insulated storage tank. As heat is removed from the contained water during the winter heating season, ice is formed. During the summer cooling season, the stored ice is used to provide air conditioning. The purpose of the ACES project is to demonstrate one possible system to help
reduce residential demand for electricity and provide consumers with a means to control their individual electric bills.

The ACES house is a private residence in Henrico County. Virtually all of the materials, equipment and professional services for the project were provided at no expense to taxpayers by a group of Virginia and national firms and organizations.

The Virginia Energy Office (now the Division of Energy, Office of Emergency and Energy Services) has received money from the Department of Energy to conduct an independent evaluation of the ACES system, as compared with conventional heating and cooling systems in similar houses in the same area. A consultant engineering firm in Richmond has been secured, and the first year's evaluation is due in 1980.

The Division's goal of finding ways to control the cost of electricity prompted it to notify local government officials, electric utilities, State agencies and small dam owners in Virginia about the availability of a United States Department of Energy grant program. The grant program will finance studies of existing small dam sites to determine the feasibility of using the small dams to generate electricity.

The program is significant because a recent federal study concludes that existing small dam sites throughout the nation potentially can supply a significant amount of conventional hydroelectric power. The program has the potential for helping to retard the need for building more expensive fossil-fired or nuclear generation plants and to conserve scarce nonrenewable energy resources.

Approximately 200 proposals for projects were submitted to the Department of Energy from throughout the United States. Four proposals were submitted by small dam owners in Virginia. Of the 56 projects selected to receive a grant, one is located in Virginia.

Participation by the Division has continued in licensing proceedings before the Nuclear Regulatory Commission (NRC) concerning VEPCO's North Anna Power Station and other NRC proceedings. The North Anna Power Station received an operating license from the NRC. The Atomic Safety and Licensing Appeal Board has the license before it for review.

The Division of Consumer Counsel continued its participation in Federal Energy Regulatory Commission (formerly the Federal Power Commission) proceedings concerning natural gas curtailment and supply. The Division has participated in an investigation concerning the gas supply problems experienced by the Columbia Gas Transmission Corporation during the severe Winter of 1976-1977. The FERC also undertook hearings in 1977 to investigate the estimated gas supply during the Winter heating season (1977-1978) on the Transcontinental System, and on the Columbia Gas Transmission and East Tennessee Gas Pipeline Systems, all of which serve Virginia.

CRIMINAL DIVISION

The primary function of the Criminal Division is to represent the interests of the Commonwealth in criminally related cases filed in State and federal courts. The number of cases handled by this division increases yearly. In 1977-1978 there were 845 petitions for writs of habeas corpus filed, compared with 783 the previous year; prisoner complaints increased from 576 to 626. In addition, 37 petitions for writs of mandamus and writs of prohibition were received and
appellate briefs were filed in 87 cases. This heavy caseload was managed despite a reduction in the division staff.

The Criminal Division provides assistance to Commonwealth’s Attorneys throughout the State. This assistance ranges from research on questions of law provided by the Technical Assistance Unit to authorizations to intercept wire communications in investigations of criminal activity. The Division has made available a Commonwealth’s Attorney's Manual of procedure and case law, which is supplemented yearly, and publishes three newsletters on criminal law—*The Virginia Prosecutor* for Commonwealth's Attorneys, *The Virginia Peace Officer* for law enforcement officers, and *The Virginia Magistrate* for magistrates.

The Division also provides legal advice and “preventive law” guidance to those State agencies which deal with law enforcement, including the Department of State Police, the Criminal Justice Services Commission, the Virginia Parole Board and the Department of Corrections. The four Assistant Attorneys General assigned to the Department of Corrections cooperate with department personnel to insure that the inmate's rights, as well as those of the public, are protected.

In addition, the Criminal Division provides legal advice and assistance to State and local officials as required, answering inquiries from police officers, judges, magistrates, sheriffs and prosecutors. It prepares all official opinions dealing with criminal law and, within statutory limitations, attempts to provide assistance on citizen inquiries.

The Deputy Attorney General of the Criminal Division serves as the Attorney General’s designee on the State Crime Commission. In addition, he represents the Commonwealth at extradition hearings. He also serves in the Federal-State Prosecutors Association, whose agreement for temporary transfer of prisoners in federal custody in Virginia was so successful that it will be adopted in other states.

A major development in criminal law is the concept of uniform sentencing. I proposed legislation to the 1978 General Assembly that would set standard sentences for crimes and would abolish the present system of parole.

The proposed legislation would not take from the General Assembly the power to establish the range of punishment for each category of crime. Nor would it be an inflexible system when special circumstances of either the offense or the offender call for a special sentence. However, while it is a means of individualized justice within an organized framework, it eliminates the subjectivity that has resulted in unjustified sentencing disparities throughout the State.

The legislation establishes a sentencing council composed of professionals in the criminal justice system including at least one prosecutor who would work with the assistance of an advisory panel of judges. The council would establish sentencing guidelines which would take into account both the seriousness of each offense and the past record of the particular offender.

Under the law, a judge would be expected to give the prescribed sentence based on the circumstances involved, unless he explained in writing his reasons for deviating.

Parole would be eliminated. However, an effective “good time” provision would be established by which prisoners would be given a day off for every day of good behavior in the penitentiary. This would give penitentiary officials a management tool, and at the same time would assure a judge and jury that the
The passage of a uniform sentencing bill is one of the main interests of the Attorney General's Office. I feel it will restore society's confidence in the criminal justice system and at the same time will act as a deterrent to crime. I am pleased to report that in a recent meeting of the National Conference on Uniform State Laws, 42 of the 50 states approved the uniform sentencing concept.

EDUCATION

The Public Education Section provides legal services to Virginia's public education system and to the system of higher education. In public education the major legal developments were in the field of special education. The constitutionality of Virginia's special education laws were successfully defended in a favorable ruling of the Supreme Court of the United States in the case of *Campbell v. Kruse*. In the meantime the personnel of this Section were active in developing legislation amending Virginia's statutes to comply with federal right to education laws to take effect on September 1, 1978. These modifications represent significant movement toward the provision of free and appropriate education for all handicapped individuals.

The Supreme Court of Virginia ruled in *Parham v. School Board of the City of Richmond* that the Board of Education could not require compulsory arbitration of employee grievances. This Section represented the State Board of Education in its intervention into this litigation and in the development of subsequent policies adopted by the Board of Education.

As in past years, defense of major litigation involving civil rights claims and personal injury claims occupied a significant portion of the duties of this Section. Other major litigation involved defending the constitutionality of Virginia statutes dealing with such diverse topics as appointment of school board members, child abuse reporting procedures, sterilization requirements, health insurance coverage and placements in special education. In administrative proceedings, multimillion dollar claims by federal agencies against several colleges and the Department of Education alleging misappropriation or misuse of federal monies were shown to be groundless, resulting in no monetary liability on the part of the State.

The fifth Attorney General's Conference on College Law was held with representatives of all of Virginia's public colleges and most of the private institutions in attendance. This continues the practice of this Office in providing regular summaries of legal developments to employees of State institutions of higher education.

ENVIRONMENTAL PROTECTION

The Commonwealth continues to suffer from the adverse effects of the discharge of kepone into the James River. Further progress was made in dealing with these problems during the last year, including the $5.25 million settlement of the State's civil penalty action for illegal discharges of kepone against Allied Chemical Corporation and other companies. This settlement is viewed as Phase I of the cleanup operations.

Enforcement of statutory deadlines for the treatment and reduction of pollutant discharges to State waters was another major activity carried out by the
Environmental Section in the past year. Suits for civil penalties were filed against several major industries that failed to meet the deadline for installation of required water pollution control equipment. Three of those suits have been settled recently for a total of $65,000. Several suits are still pending.

In other environmental litigation, the corporation responsible for the July, 1977 fish kill in the Piney and Tye Rivers—the largest fish kill in Virginia in 20 years—paid in full for the fish killed and investigation costs after a suit for recovery was filed by this Office. Members of my staff also worked with the corporation and the staff of the State Water Control Board to ensure that no further damage occurs. A number of civil penalty actions arising out of water pollution permit violations have been concluded and others are pending.

This Office assisted in drafting and securing passage by the 1978 General Assembly of major amendments to the State’s oil spill law. In addition to strengthening the State’s ability to respond to these spills and collect cleanup costs from those responsible, the legislation established the Virginia Oil Spill Contingency Fund to make funds immediately available for cleanup and protection of wildlife and other natural resources. This Office also assisted in the preparation of extensive comments on pending federal oil spill liability and tanker safety legislation. The federal suit for recovery of more than $1 million in damages and cleanup costs incurred by the State as a result of the February 1976 Chesapeake Bay oil spill is awaiting the outcome of the barge owner’s interlocutory appeal (of the decision in favor of the State) to the United States Fourth Circuit Court of Appeals. Another action has been brought in United States District Court in Norfolk seeking a $10,000 penalty for an oil spill in the York River last year.

The United States District Court ruling that Smith Mountain Lake is subject to the Army Corps of Engineers regulatory jurisdiction was appealed by the Commonwealth. The Fourth Circuit Court of Appeals sustained the lower Court’s finding that the Roanoke River was historically navigable up to Smith Mountain, but it reversed the lower Court’s decision that § 154 of the Water Resources Act of 1976 was not applicable to Smith Mountain Lake. The effect of this decision is that the Corps of Engineers no longer has jurisdiction to require permits for the construction of wharves and piers on Smith Mountain Lake.

The Office assisted the State Water Control Board in the implementation of its dam safety program. When negotiations with the owner of a questionable dam over necessary safety studies reached an impasse, the Attorney General brought suit under his common law powers to abate the dam as a public nuisance. This action is pending in the Circuit Court of Patrick County.

The Environmental Section has assisted in preparing legislation which authorizes the Commonwealth to administer and enforce the federal Surface Mining and Reclamation Act, in order to minimize federal enforcement actions. The Section also prepared legislation which will establish a minerals trust fund, paid for entirely by quarry operators, that will be used to reclaim quarries in cases where an operator’s permit has been revoked. The Section is also working on legislation which will allow the Commonwealth to comply with the federal Clean Air Act.

The Environmental Section has participated in two petitions for judicial review of federal surface mining regulations. There is also pending a petition for review of EPA designations of air quality attainment status. The Section is also involved in litigation which seeks to require the Federal Aviation Administration
to prepare an environmental impact statement before constructing a radar tower on Bull Run Mountain.

HEALTH AND WELFARE

Major emphasis was again placed on the Department of Welfare's Support Enforcement program. That program, now in effect for over two years, involves actions against absent persons who are responsible for supporting recipients of public assistance, as well as persons who have otherwise failed to pay support for their children.

There was considerable litigation involving the Department of Welfare which could have potentially affected a number of that department's ongoing programs, primarily within the department's Division of Financial Services. My staff was successful in defending the Department of Welfare against several actions which sought to change its ongoing assistance programs. This successful effort resulted in a savings to taxpayers. The Department has also initiated several lawsuits against the federal Department of Health, Education and Welfare to make it conform its actions to the requirements of law.

The environmental protection activities carried out within the State Health Department have continued to expand. The expanding occupational health, water supply, solid waste, and toxic substance programs have resulted in increased enforcement litigation. Suit was brought to protect shellfish waters by enforcing the Health Department regulations requiring boat sewage pump out facilities at marinas. My staff has five water supply protection suits and one solid waste suit presently pending. We have also provided staffing to legislative committees revising the State OSHA law and septic tank statutes and regulations.

The State's Health Regulatory Boards were consolidated on an administrative basis in the newly established Department of Health Regulatory Boards. The Office of the Attorney General has assisted the Department in attempting to consolidate, centralize, and improve the Board's investigative functions. In that regard, the Office of the Attorney General researched and prepared an investigative procedures manual. After much time and work on such manual, it is believed that the Boards will continue their past practices in investigation.

The Assistant Attorneys General assigned to the Department of Mental Health and Mental Retardation have in the past year spent most of their time meeting the daily legal services demands of the Department, the largest hospital system in the Commonwealth. They have been involved in a considerable amount of State and federal litigation, at both the trial and appellate level, in cases ranging from reimbursement to civil rights actions.

While providing these necessary services, the Office has also engaged in providing preventive legal services. On a national level, the Assistant Attorneys General have been instrumental in developing the Association of State Mental Health Attorneys, which provides a forum for monitoring developments in mental health law. Statewide, the Office has fostered the development of the Mental Health Legal Studies Center at T. C. Williams School of Law, which has as its goal the improved understanding of mental health law on the part of judges, attorneys, mental health professionals, and citizens of the Commonwealth. Finally, in conjunction with the Department of Mental Health and Mental Retardation, the Attorney General's Office has begun to provide much needed legal education to staff members of the State's mental health facilities. Several programs dealing with mental health legal issues have been presented at
various institutions. Based on these trial programs, a course outline is currently being developed which will allow the Office to provide legal training on a continuing basis. In providing this sort of guidance, it is our hope that we can relieve recently heightened concerns about patient rights and staff responsibilities. I believe that this will result in the enhancement of service delivery to the mentally disabled citizens of the Commonwealth.

EQUAL OPPORTUNITY

The Office of the Attorney General has increased its efforts in the field of equal employment opportunity and affirmative action activities. Advice and litigation in these areas are provided primarily through the Education Section, the Litigation Section, the Public Rights Section and an Assistant Attorney General who is assigned express responsibility in the equal employment opportunity area. The Office has assisted State agencies in developing affirmative action plans in employment consistent with federal law. Legal services were provided to assist in the settlement of the long-standing Adams v. Califano litigation involving allegations that the public colleges of the Commonwealth are not effectively desegregated. The resulting affirmative action plans are designed to increase the attractiveness of Virginia's institutions of higher education to students of all races while retaining the authority of individual institutions to establish admissions standards and maintain quality. Assistant Attorneys General have been active in complaint investigation and resolution. As in the past, the Office has participated in equal employment opportunity training programs for State employees. A Special Assistant Attorney General has been assigned full-time responsibility in the area of fair housing.

TRANSPORTATION

In a unique admiralty action, the Attorney General's Office, acting on behalf of the Department of Highways and Transportation, has successfully prosecuted a liability claim in federal court against the S/T Marine Floridian, its owners and operators for damages to the Benjamin Harrison Bridge.

The Marine Floridian ran into the Benjamin Harrison Bridge, which connects Charles City County with Prince George County just east of Hopewell, in February 1977, resulting in the collapse of a portion of the bridge and subsequently its north tower.

The court's finding was a significant victory for the Commonwealth because the court found all three parties, the ship, its owners, and operators liable for damages, and refused to set a limit on the damages. While damages are still to be negotiated, they could amount to as much as $10 million. Had the court found only the S/T Marine Floridian liable, the State would not have been able to collect damages exceeding the value of the ship.

In addition to the finding of liability, the court ruled that the Department of Highways and Transportation acted prudently in trying to save the north tower, but that the tower fell as the result of the initial impact from the ship, and not as a result of Departmental negligence.

In the Office's more routine role, the Deputy and the Assistant Attorneys General assigned to the Department of Highways and Transportation supervised, reviewed, and, on occasion, participated in the trial of 934 right-of-way condemnation cases. There were 1,134 new condemnation cases instituted during this same period, and the Division supervised and reviewed the legal steps in the
Department's acquisition of $45 million worth of right-of-way property.

Special Assistant Attorneys General have been employed to examine land titles for the Department in each of the highway districts throughout the State. They examined a total of 1,950 titles, in addition to closing 1,941 real estate transactions by deed. Also, 727 titles not assigned, but which required a limited search in order to effect a closing, were completed by these attorneys.

Assistant Attorneys General for the Department have handled one case before the U.S. Supreme Court, nine cases before the Supreme Court of Virginia, 95 cases before the Circuit and General District Courts throughout Virginia, eleven cases before the U.S. District Courts for the Eastern and Western Districts of Virginia and the District of Columbia, eight cases before the United States Circuit Court of Appeals for the Fourth Circuit and the District of Columbia Circuit, seven cases before the Industrial Commission and two Personnel and Administrative Hearings.

Many additional cases were closed, compromised or settled, or are presently being negotiated with various attorneys throughout Virginia and other parts of the United States.

These cases involved the full range of possible civil litigation—personal injury, Workmen's Compensation (both before the Industrial Commission and against third-party tortfeasors as subrogees), property damage, contract, injunction, mandamus, actions against employees and agents of the Department, eminent domain, and various other actions not mentioned. The cases concerned issues which, in monetary value, ranged from hundreds to millions of dollars.

The Assistant Attorneys General provided counsel and innumerable legal opinions to the Department of Highways and Transportation and other transportation agencies. In addition, many other legal opinions relative to transportation matters were rendered to judges and Commonwealth, county and city attorneys throughout the State.

In a case before the Supreme Court of the United States, Raymond Motor Transportation, Inc., et al. v. Rice, et al., the Division prepared an amicus curiae brief in opposition to the position taken by Raymond Motor Company and other truckers which attempted to abrogate the right of state highway departments to control their roads in the traditional and historical manner. The trucking companies' specific argument was that twin trailers should be allowed on roads in Wisconsin; however, in preparing their arguments to the Supreme Court, they took the position that no state highway and transportation department should be allowed the control that was established in a 1938 Supreme Court case. They argued that there was now a national system of commerce and that the state's control should give way to the national control. The Supreme Court ruled against the State of Wisconsin; however, the Court specifically exempted other states from that decision and furthermore sustained the proposition argued by Virginia that the 1938 Supreme Court case was still valid and should not be overturned.

Several civic associations in northern Virginia and the District of Columbia attempted to stop the construction of Interstate 66 on the grounds that Virginia had failed to follow properly federal statutory and regulatory directives concerning the environment. After protracted litigation, the Fourth Circuit Court of Appeals sustained Virginia's position and refused to grant an injunction against the construction.

Although Virginia was successful in her first appeal to the Wage Appeals
Board for the United States Department of Labor and prevented the application of "heavy wage rates" to the great majority of the construction on Interstate 66, the Wage Appeals Board did determine, nonetheless, at a second hearing on a similar matter that a tunnel being constructed for WMATA should be constructed at "heavy wage rates." Virginia has filed suit in the Federal District Court alleging the improper application of the Davis-Bacon Act and the unconstitutional discrimination toward the I-66 project.

In railroad matters, the Transportation Division has provided legal assistance to the Secretary of Transportation and the Department of Highways and Transportation regarding the operation of the Delmarva Rail Line which runs from Pocomoke, Maryland, along the Eastern Shore of Virginia to Norfolk, crossing the Chesapeake Bay from Cape Charles to Little Creek. The creation of the Accomack-Northampton Transportation District Commission in 1976 with the legal assistance of this Division, allowed continuation of the line after the declaration in bankruptcy by the former operator, the Penn Central Transportation Company.

This Office assisted in the preparation of the operation agreement between the District Commission and the Virginia and Maryland Railroad Company and the grant agreement between the State and the Federal Railroad Administration. Legal assistance was rendered to the District Commission regarding many contracts, including lease agreements for the land portion of the railroad and the floating equipment with the trustees of the Penn Central.

The Transportation Division represented the Attorney General in a mandamus proceeding against the Comptroller in the Supreme Court of Virginia in a successful attempt to establish the constitutionality of an Act of the General Assembly which authorized the Virginia Port Authority to replace the Chesapeake and Ohio Railway Company as operator of the port facility at Newport News; also established was the City of Newport News' authority to guarantee the continued payment of principal and interest on revenue bonds by which VPA financed construction of the port facility. Both the City and VPA desired to replace C&O with a more aggressive, innovative operator who would attract new business to the port which, under the railway's operation, had experienced declining revenues detrimental to the economy of the Newport News area. Notwithstanding the Comptroller's argument that the City's guarantee violated the "credit clause" of Article X, Section 10, of the Constitution of Virginia and the argument of a union of railway employees as amicus curiae that the Supreme Court lacked jurisdiction to decide the case, the writ was awarded and C&O has since been replaced by a new operator.

On behalf of the Secretary of Transportation, the Transportation Division cooperated with counsel for the State Corporation Commission in filing a number of pleadings before the Civil Aeronautics Board in matters in which the interest of the Commonwealth was involved. These pleadings included: the application of Braniff Airways and others for permission to operate a Concorde Aircraft between Dallas/Fort Worth and Dulles Airport; Pan American World Airway's application for "fill-up" authority on the domestic leg of their London-Washington-Detroit flight; and actions to have "Super Saver" flights made applicable to flights from Dulles to the West Coast.

Many other pleadings were filed with the goal of enhancing commercial aviation service to the Commonwealth.

Finally, this Division played a major role in drafting the Department's
legislative program including the legislation germane to expansion of the State's role in public transportation; we are actively carrying forward a program in anticipation of the next session of the General Assembly.

COLLECTIONS

The Collections Section created in this Office July 1, 1976, through its operations during the fiscal year of 1977-1978, continued to prove itself as an effective concept in the collection of delinquent accounts of the various State agencies. As compared with collections of $647,620.05 in the fiscal year of 1976-1977, the Collections Section collected $1,147,537.01 in the 1977-78 fiscal year. Based upon an appropriation for that fiscal year, of $161,840.00, the cost of the Commonwealth for these collections equals 14.1%, which is a substantially lower rate than that obtainable in the private sector.

In conjunction with the Secretary of Administration and Finance, continued efforts have been made toward a more efficient and successful system of collecting delinquent accounts prior to their being forwarded to this Office for legal action.

TAXATION

The three Assistant Attorneys General assigned to the Department of Taxation have represented the Commonwealth in more than one hundred cases in both State and federal courts. Among the most significant decisions in favor of the Commonwealth were three cases clarifying the tax liability of corporations. One State court decision found an investment broker to be subject to income tax on investments held by the corporation. A federal court decision held a building contractor who contracted with the federal government subject to sales and use tax on personal property purchased in completing the contract. The remaining case held a corporation liable for sales and use tax on certain building materials and equipment incorporated into its manufacturing installation. Each of these decisions enables the Department of Taxation to impose a rightful share of the tax burden upon corporations doing business in the Commonwealth.

The Office continues to receive increasing numbers of requests for opinions on Virginia tax laws. The advent of California's Proposition 13 and the resultant increase of taxpayer awareness of the tax structure is certain to manifest itself in a greater number of questions relating to the real property tax.

Other areas in which the Office has experienced an increase of litigation include proceedings in bankruptcy where the tax liability to the Commonwealth is sought to be preserved and suits involving charitable trusts where this Office has a statutory responsibility to protect the interests of unnamed charitable beneficiaries within the Commonwealth.

Development of legislative improvements for the Department of Taxation has benefited from the support of these three assistants in the modification of generation-skipping transfer taxes, the restructuring of the inheritance tax and the implementation of the business, professional and occupational license tax.

CONCLUSION

This Annual Report is a brief overview of the activities of the Attorney General's Office in the past fiscal year. The Report does not fully portray the dedication of the Attorney General's staff and the fine legal services offered by this staff.
We hope that it does provide some indication as to the Office's commitment to agencies of the Commonwealth and to the citizens of the Commonwealth.

Respectfully submitted,

Marshall Coleman
Attorney General
# PERSONNEL OF THE OFFICE

(Post Office Address, Richmond)

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<tr>
<td>Marshall Coleman</td>
<td>Staunton City</td>
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REPORT OF THE ATTORNEY GENERAL

ATTORNEYS GENERAL OF VIRGINIA

FROM 1776 TO 1978

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 ........................................ 1970-1977
#Anthony F. Troy ......................................... 1977-1978
John Marshall Coleman .................................... 1978-

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

Abbitt, Jim v. Virginia. Petition for a writ of certiorari to the Supreme Court of Virginia; propriety of jury instructions. Certiorari denied.


Appalachian Power Company v. Public Service Commission of West Virginia. Amicus curiae brief filed supporting petition of appeal from West Virginia's Supreme Court of Appeals. Petition denied.

Brickhouse, Elvin, Jr. v. Robert Zahradnick. Petition for writ of certiorari from the Fourth Circuit Court of Appeals. Petitioner's right to a jury trial denied because no pre-sentence report allowed in a jury trial. Denial of jury trial because conscientious objectors in death penalty cases should be stricken. Certiorari denied.

Brown, Harry Hardin v. Blankenship. Petition for a writ of certiorari from the United States Court of Appeals for the Fourth Circuit sustaining the United States District Court's grant of summary judgment. Issue: Whether the plaintiff was subjected to cruel and unusual punishment by virtue of gross negligence, having been attacked by a deer at the Bland Correctional Center. Certiorari denied.

Byrd, Marvin v. Commonwealth. Petition for a writ of certiorari to judgment of Virginia Supreme Court on issue of whether prosecution unconstitutionally failed to secure evidence in the case and to reveal evidence allegedly favorable to the defense. Certiorari denied.


Carson, Charlotte v. Frances Elrod, et al. Appeal from the granting of a motion to dismiss by the lower court in which the termination of the parental rights of a natural mother was challenged. Certiorari denied.


Harris, Leroy v. Walter Riddle, Superintendent. Petition for a writ of certiorari to the United States Court of Appeals; propriety and validity of a confession. Certiorari denied.


Miller, Mark Andrew v. Commonwealth. Petition for writ of certiorari to judgment of Supreme Court of Virginia. Speedy trial and double jeopardy. Certiorari denied.


Raymond Motor Transportation, Inc., et al. v. Rice, et al. Trucking companies asked the Court to overturn certain Wisconsin restrictions on vehicle length on the basis of certain Commerce Clause objections. Amicus curiae brief filed on behalf of Commonwealth in support of Wisconsin. Supreme Court overturned Wisconsin's restrictions but specifically limited decision so as not to affect similar restrictions in other states such as Virginia.


Welch, Van Prince v. Captain Evans and Walter Riddle, Superintendent. Petition for a writ of certiorari to the right to nominal damages in civil rights action. Certiorari denied.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Frazier, Steven v. Glen Weatherholtz, Sheriff. Petition for writ of certiorari to judgment of Fourth Circuit Court of Appeals reversing U. S. District Court and sustaining conviction. Issue involves whether due process was violated by instructions to jury on self-defense.
Jones, Roderick Cecil v. Commonwealth. Petition for writ of certiorari to judgment of Virginia Supreme Court. Double jeopardy (robbery and grand larceny).


CASES DECIDED OR PENDING IN THE UNITED STATES COURTS OF APPEAL

Albin, Eugene v. Wanda Albin. The Commonwealth filed an amicus in the Ninth Circuit Court of Appeals on behalf of the appellee in this support action. Pending.


Armstrong, Gary Lee v. R. F. Zahradnick, Warden of Virginia State Penitentiary. Appeal from dismissal of a civil rights action alleging that plaintiff's access to the law library at the Penitentiary was not constitutionally sufficient. Reversed in favor of Commonwealth and remanded.


Borowski, John v. Robert F. Zahradnick, Superintendent. Appeal from denial of a writ of habeas corpus. Whether trial court erred in allowing petitioner to defend himself; sufficiency of the evidence, and whether issues not raised below could be considered. Affirmed.


Campbell, Boyd Henson v. A. W. Lipes. Appeal of a civil rights action. What is the degree of negligence necessary to award damages against a prison guard.


Commonwealth v. EPA. Petition for review of federal air pollution regulations. Pending.


Davis, Jack F., Director, et al. v. Roger Trenton Davis. Appeal from grant of writ of habeas corpus in District Court. Issue: Whether petitioner’s sentence for convictions of possession of marijuana with intent to distribute and distribution constitutes cruel and unusual punishment. Pending.


District of Columbia v. Costle. On remand, the Court of Appeals held that: (1) decision with respect to validity of EPA retrofit and bicycle land regulations was reinstated; (2) regulations concerning establishment of exclusive bus lanes were valid, and (3) aspect of case dealing with vehicle maintenance and inspection regulations should be remanded to EPA to permit parties to pursue administrative remedies on a new record.


Edwards, Anthony Tyrone v. L. W. Sink. Appeal of a civil rights action. Whether the defendants were entitled to a good faith defense.

EPA v. Brown, et al. EPA seeking to enforce their regulations through mandate to states. Remanded to District Court by the Supreme Court of the United States for determination of issues being moot. Lower court referred regulations to EPA.

Fairfax County Wide Citizens, etc. v. Fugate and County of Fairfax. Racial discrimination in maintaining roads. The Fourth Circuit rules that the
District Court did not have jurisdiction to enforce a settlement agreement which had not been incorporated in Order of Dismissal. The Commonwealth had been dismissed as a party by the District Court.

Faison, Dossie X., Jr. v. Robert Zahradnick, etc. Appeal from District Court denying writ of habeas corpus. Right to preliminary hearing transcript; lineup. Affirmed.

Ferguson, Herbert Levi v. F. C. Boyd. Appeal from denial of writ of habeas corpus in District Court. Issue: Whether petitioner's confession was involuntary. Reversed and remanded, petition for rehearing en banc denied by equally divided vote.

Fox, John Christopher v. W. F. Parker, et al. Plaintiff's motion to set aside verdict of District Court as to damages denied. Pending.


Frazier, Steven Franklin v. Glen Weatherholtz, Sheriff. Appeal from issuance of writ of habeas corpus relief on ground that placing burden of proving self-defense on defendant violates due process. Reversed in favor of Commonwealth.


Gibson, Theodore Roosevelt v. Superintendent. Appeal from denial of writ of habeas corpus. Whether admission into evidence of inculpatory statement made by petitioner to State psychiatrist during court-ordered psychiatric examination violates right against self-incrimination; whether Miranda warnings must be given prior to court-ordered psychiatric examination; and denial of instruction on insanity defense. Pending.


Hailey, Linda Patrice v. William B. Dorsey, Sheriff. Appeal from denial of habeas corpus in District Court. Issues: The legality of a jail sentence for a juvenile and increased sentence from trial in Circuit Court on appeal. Affirmed.


Harris, Ruby C. v. Lewis M. Walker, Jr., et al. Appeal by plaintiff from District Court order dismissing complaint alleging due process violations by Mary Washington College. Pending.

Henry, Nadia B., Adm'x., etc. and Elmer W. Ramsey, Adm'r., etc. v. Textron,

Henry, Prescott L. v. Simmon, et al. Appeal from dismissal of civil rights action alleging that inmate plaintiff was denied adequate medical attention. Affirmed in favor of State defendants.


Hudspeth v. Figgins, et al. Appeal from a grant of summary judgment by the United States District Court in an action brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The United States District Court granted summary judgment to the defendants on plaintiff's allegations that he was subjected to cruel and unusual punishment because of an intimidating remark made by a correctional officer at Correctional Unit 30. This case was briefed and orally argued and is presently pending decision.

Hughes, Earl Jerome v. R. M. Muncy, et al. Appeal for dismissal of civil rights action alleging that plaintiff's legal resource material at the Powhatan Correctional Center was not constitutionally sufficient. Pending.


Johnson, John Calvin v. Walter M. Riddle, Superintendent. Appeal from United States District Court; Order denying habeas corpus relief. Standing to seek relief; exhaustion of State remedies; prejudice to the Commonwealth because of delay; illegal search and seizure; illegal arrest; grand jury discrimination; improper identification procedure; effective assistance of counsel. Decided.

Justice, Samuel, Jr., et al. v. Joan S. Mahan, et al. Appeal from District Court's refusal to grant temporary restraining order and preliminary injunction which would declare unconstitutional the hours set for voter registration by local registrars of the Commonwealth. Judgment affirmed as to preliminary injunction; dismissed.


Los Angeles County v. Brock. Suit to enjoin enforcement of FHWA/UMTA regulations giving MPOs implementation authority. Virginia joined as amicus curiae. Dismissed.


Nature Conservancy, The v. The Machipongo Club, Inc. (Commonwealth of Virginia, amicus curiae.) Cross appeals by parties from decision of U.S. District Court regarding ownership of land and rights of parties with respect to marshes and shores of Hogg Island, Virginia. U.S. District Court's findings were affirmed and petition for rehearing was denied.

Nottingham, Raymond Bradley, Jr. v. Robert F. Zahradnick, Superintendent. Appeal from District Court denial of habeas corpus. Issue: Whether adult defendant was subjected to double jeopardy due to his conviction in subsequent trial after first trial ended in mistrial on trial court's ruling that preliminary hearing is mandatory in Juvenile Court when the victim is a juvenile. Reversed and remanded for issuance of writ of habeas corpus.


Potomac Electric Power Co. & Washington Gas Light Co. v. Fugate. Utility companies challenging relocation of utility facilities located on federal property with license without compensation. Court reversed District Court's order to pay compensation and remanded for further evidence. Petition for rehearing pending.

Rudisill, William Richard v. W. R. Riddle, Superintendent. Appeal from grant of summary judgment denying habeas corpus in District Court. Issue: Whether plea of guilty to the amended indictment was provident. Vacated and remanded for evidentiary hearing.

Satterfield, Jessie Wayne v. Robert F. Zahradnick, Superintendent. Appeal from a denial of habeas corpus in District Court. Issues: Whether the defendant's constitutional rights were violated by the trial court's refusal to appoint a private psychiatrist at State expense and the prosecutor's comment, in a non-jury trial, on his failure to testify when the defense counsel did not object. Affirmed.

Scott, Jimmy Lee v. Walter M. Riddle. Appeal from denial of habeas corpus in District Court. Issue: Whether trial counsel was ineffective in failing to offer insanity defense when evidence indicated voluntary drunkenness. Affirmed.


Smith v. Virginia Department of Corrections, et al., etc. Appeal from a grant of summary judgment by the United States District Court in a case filed under
provisions of 42 U.S.C. § 1983 and 28 U.S.C. § 1343. The United States District Court summarily denied the prisoner's application for relief on allegations that he was transferred between institutions of the Virginia Department of Corrections in violation of the Fourteenth Amendment of the Constitution and that Virginia's system of court-appointed attorneys is insufficient to provide him adequate access to the courts. The case is presently pending oral argument.


Steuart Transportation Company v. Allied Towing Corporation, et al. Appeal from District Court decision holding that federal limits on oil spill clean up costs do not apply to State claims. Pending.


Taliaferro, Ruth H. v. Henry I. Willett, Jr., et al. Appeal from finding of District Court that plaintiff was denied due process in retirement from Longwood College. Pending.


United States of America and Hercules, Inc. v. W. H. Forst. Appeal from federal district court decision upholding sales and use tax on purchases of tangible personal property pursuant to a contract with the U.S. Army for production of military propellants and explosives. Affirmed.


Williams, Lee Royal v. Virginia Probation and Parole Board. Appeal from District Court of civil rights action relating to application of due process of law to parole procedures. Opinion of District Court affirmed in part and reversed in part.

Williams, Roosevelt v. Robert F. Zahradnick, Superintendent. Appeal from denial of writ of habeas corpus. Issue on suggestiveness of pre-trial con-
frontation of victim and accused. Affirmed.


CASES DECIDED OR PENDING IN THE UNITED STATES DISTRICT COURTS


American Druggists Ins. Co. v. Anderson Excavating Company, Inc. Suit to determine the claims of persons supplying labor and material in the construction of the Beautiful Run Watershed Dam Project in Madison County, including claim of Commonwealth for withholding taxes. Pending.


REFINERY. PENDING.


Commonwealth of Virginia, ex rel. Commissioner, Virginia Department of Highways and Transportation v. Ray Marshall, Secretary, Department of Labor. Complaint requesting mandamus, declaratory and injunctive relief to compel the Secretary to comply with the Davis-Bacon Act, the Federal-Aid Highway Act, the Administrative Procedure Act and the U.S. Constitution. Pending.


Demas, Regina K. v. A. W. Tiedemann, Jr., et al. Civil rights action dismissed with prejudice for failure to make discovery; second suit dismissed in part, remainder pending.


Doe, John v. Jack Davis, et al. Suit for money damages under provisions of 42
REPORT OF THE ATTORNEY GENERAL


Farmer, Jerry Roger v. Vern L. Hill, Director, Division of Motor Vehicles; Jimmy L. Warren, Clerk, Circuit Court of Smyth County; Louise Robbins, Clerk, General District Court of Smyth County. Complaint and Notice of Motion for an Injunction seeking reinstatement of driving privilege of person adjudged an habitual offender. Dismissed.


Greer, Curtis C. v. Phillip Duane Alexander. State is seeking reimbursement for Workmen’s Compensation benefits paid and payable and for damages to State vehicle. Pending.


Henningens v. Dickerson, et al. Plaintiff is an employee of the Commonwealth suing Commonwealth and three of its agents (personally) for damages relating to his demotion. Pending.

seeking damages for alleged physical abuse and improper detention and treatment at a State mental health hospital. Summary judgment granted.

**Hines v. J. Sargeant Reynolds Community College, et al.** Suit alleged violation of civil rights with respect to administration of federal grant. Dismissed.


**Holstein v. Davidson, et al.** Suit by probation officer transferred by judge’s order, seeking injunctive relief and damages. Pending.


**Hsu, Hsiu-Sheng v. Virginia Commonwealth University.** Employment discrimination suit. Settled.


**In re Ampicillin Antitrust Litigation.** Action brought under Sherman Act against pharmaceutical manufacturers. Pending.

**In re Chicken Antitrust Litigation.** Action brought under Sherman Act against broiler producers. Settled. Distribution of settlement fund pending.

**In re Fleet Discount Automobile Litigation.** Action brought under Sherman Act against automobile manufacturers. Judgment for defendants. Affirmed by Seventh Circuit.

**In re Master Key Antitrust Litigation.** Action brought under Sherman Act against manufacturers of master key hardware systems. Settled. Distribution of settlement fund pending.

**In re Plywood Antitrust Litigation.** Action brought under Sherman Act against plywood manufacturers. Pending.

**In re SMS, Inc.** Petition in Bankruptcy. Relief from debts. Pending.

**In re Sugar Antitrust Litigation.** Action brought under Sherman Act against sugar producers. Pending.

**In re W. T. Grant Company.** (Southern District of New York.) Bankruptcy. Trustee’s objection to Commonwealth’s claim for sales and use taxes. Pending.

**In re Thomas Daniel Woodward.** Petition of Bankruptcy. State sought to recover debt. Bankrupt release from all claims.

**In the Matter of the Complaint of Allied Towing Corporation for Exoneration from or Limitation of Liability.** Suit to recover civil penalties for oil spill at Amoco Yorktown refinery. Pending.

**In the Matter of the Complaint of Steuart Transportation Company for Exoneration from or Limitation of Liability.** Suit to recover damages, cleanup costs and penalties for February, 1976 Chesapeake Bay oil spill. Limitation of liability denied. Determination of damages pending disposition of interlocutory appeal.

**Inmates of the Richmond City Jail v. Jack Davis, et al.** Suit to enjoin over-
crowded conditions at the Richmond City Jail and to enjoin the Com-
monwealth to transfer various petitioners to the Virginia Correctional
System. Pending.

**Jamison, Mildred C. v. Lewis M. Walker, Jr., et al.** Civil rights action alleging
violation of due process. Judgment for defendants.

**Joe, Vernon Lee v. Jack Davis, et al.** Suit seeking monetary damages and in-
junctive relief making broad sweep allegations concerning the operation of
the Mecklenburg Correctional Center. Pending.

**Karara v. Willis, et al.** Suit seeks injunctive and monetary relief for alleged
violation of constitutional rights. Pending.

**Keel, Thomas v. Godwin, et al.** Twelve consolidated suits to enjoin State of-
ficials to transfer the petitioners from the Richmond City Jail and to award
§ 1343. Pending.

**Keith, Rex Lawrence v. W. E. Campbell, et al.** Suit for special education
assistance. Dismissed.

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

**Kite, Billy Wayne v. Godwin, et al.** Suit seeking money damages pursuant to the
the plaintiff due to lack of proper supervision and provision of medical care
to the plaintiff by the defendants. Dismissed.

**Kite, Billy Wayne v. Godwin, et al.** Suit seeking money damages pursuant to the
supervise and negligent failure to provide proper medical attention to the
plaintiff. Pending.

**Knight, Timothy Benton v. The College of William and Mary, et al.** Suit by
student alleging First Amendment violation in campaign spending rule.
Judgment for defendants.

declaratory, injunctive and monetary relief. Partial summary judgment
granted for defendants. Motion to consolidate with other cases filed by
plaintiff. Pending.

**Landmark Communications, Inc. v. Campbell.** Suit for temporary restraining
order, preliminary and permanent injunctive relief preventing prosecution
under Virginia law making a misdemeanor to divulge information concerning
proceedings before the Virginia Judicial Inquiry and Review Commission.
Suit dismissed. Defendant's motion for attorneys' fees denied.

**Leigh, Douglas Allen, etc. v. Diane V. Gilbert, et al.** Suit challenging proced-
ures followed in State court which involved domestic issues. Motion to
dismiss granted.

**Lewis, Jan v. Mildred G. Davis, et al.** Suit challenging method by which ap-
plications for welfare assistance are distributed. Plaintiffs granted voluntary
dismissal.

**McGhee, Garland v. Hutto, et al.** Suit seeking monetary damages under
a result of an alleged assault upon the plaintiff and consequent lack of
supervision of defendants over inmates at the Bland Correctional Center.
Dismissed.


Northern Virginia Women’s Medical Center v. Horan, et al. Permanent injunction obtained to prevent interference by defendants with plaintiffs’ constitutional right to first trimester abortions. Pending.


Osmond, Margaret P. v. Virginia Commonwealth University. Sex discrimination case. Pending.


Poddar, Bhagwati P. K. v. Madison College. Suit for declaratory, injunctive relief and damages under Title VII. Pending.


Potomac Electric & Power Co. and Washington Gas Light Co. v. Fugate. Action seeking enforcement of order. Court awarded judgment to plaintiff which is being appealed in Court of Appeals.


Robertson, Donald Walter v. Daniel A. Blevins. Civil rights action alleging improper treatment at Southwestern State Hospital. Dismissed.


Simms, Pete Sylvester v. J. P. Mitchell. Suit seeking monetary damages for Fourteenth Amendment violations in the plaintiff’s disciplinary hearing by the Department of Corrections at the Powhatan Correctional Center. Dismissed.

Southeastern Fidelity Insurance Company v. Kar Kare, Inc., et al. Interpleader action to determine claims and priorities of creditors of plaintiff’s insured. Pending.


Stratman, Standley O. v. State Board of Medicine, et al. Action for damages and injunctive relief based on a denial of due process and violation of civil rights in denial of professional license. Dismissed.

Surface Mining Litigation. Petition for review of federal surface mining regulations. Voluntary dismissal without prejudice.

Thomas, David R. v. Donald N. Dedmon. Action by former faculty member. Summary judgment for defendant.


United States v. Commonwealth of Virginia, Department of State Police. Civil rights action against the Department of State Police for alleged discrimination in employment. Pending.


United States v. Virginia Department of State Police. Civil rights action against the Department of State Police for alleged discrimination in employment. Pending.


Vought, Mary, et al. v. William L. Lukhard, et al. Suit challenging the
procedure of the Virginia Department of Welfare used to determine eligibility of applicants for welfare. Voluntary dismissal granted.

*Washington Area Metropolitan Transit Authority v. One Parcel of Land.* Condemnation suit by a federal authority. Pending.


*Wells v. Virginia Western Community College,* et al. Suit seeks monetary damages for alleged deprivation of civil rights. Dismissed.

*Welsh, James J. v. Dr. Dimitris.* Pro se suit pursuant to 42 U.S.C. § 1983 seeking damages for alleged improper, involuntary medication at a State mental health hospital. Motion for summary judgment granted. Motion to amend complaint and add Miller M. Ryans, M.D., as defendant granted. Pending.


**CASES BEFORE FEDERAL AGENCIES**


*In re Review of Wage Determination Decision 77-Va-770 for Interstate 66*
Project, 0.152 Miles West of Its Intersection With Route 7 in Fairfax to the Arlington County Line. Wage Appeals Board Case No. 77-33. Administrative appeal challenging heavy wage rates imposed on part of I-66 project by the Department of Labor. With two exceptions, the Department of Labor's Wage determination was upheld.


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.


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.

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 and operate two nuclear reactors and appurtenant facilities.

Virginia Electric and Power Company (Surry Power Station, Units 1 and 2). Before Nuclear Regulatory Commission. Proceedings with respect to the proposed issuance of an operating license amendment to permit repair and modification of the steam generators.


CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

Abdo, Hanna Yousef v. Commonwealth. From Circuit Court, Fairfax County. Effect of statutory reduction in maximum penalty for offense where
defendant files motion to reduce sentence pursuant to Court's authority under § 53-272. Affirmed.

Adams, John, a/k/a Donald Mooremen Clodfelter v. Commonwealth. From Circuit Court, City of Virginia Beach. Rehearing. Issue: Whether the evidence sustained the conviction when evidence not admitted by the trial court but erroneously included on appeal was removed. Reversed and remanded.

Adkins, William Howard v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of burglary. Search and seizure; admissibility of statement. Affirmed.


Barthule, Debra Elaine v. Commonwealth. From Circuit Court, City of Richmond, Division II. Sufficiency of the evidence. Reversed.


Brennan, Gerald Francis v. W. D. Blankenship, Superintendent. From Circuit Court, Montgomery County. Appeal from a denial of a writ of habeas corpus. Issue: Whether counsel was ineffective for failing to offer an insanity defense. Affirmed.

Cash v. Board of Pharmacy. From Circuit Court, City of Roanoke. Petition for appeal requesting reversal of Circuit Court order dismissing petitioner's suit relating to administrative disciplinary action. Writ denied.

Cogdill, F. Lee v. First District Committee of the Virginia State Bar. From Circuit Court, City of Newport News. Appeal from decision suspending the license of an attorney to practice law for six months. Petition denied.


Commonwealth of Virginia, Department of Mental Health and Mental Retardation v. Janie C. Sharrett. From Circuit Court, City of Bristol. Appeal from judgment ordering patient's committee to pay a monthly rate below statutory charges and disallowing past due charges. Reversed and remanded.

Cox, Charles F. v. Commonwealth. From Circuit Court, Hanover County. Appeal from conviction of entering a bank armed with a firearm with intent to commit larceny and the use of a firearm during the commission of a felony. Meaning of a deadly weapon. Affirmed.

Cox, Ervin Ray, Sr. v. Commonwealth. From Circuit Court, City of Norfolk.
Sufficiency of the evidence in a rape case, force penetration; credibility of the prosecutrix. Reversed.


Doane, Dallas Nathaniel v. Commonwealth. From Circuit Court, Smyth County. Sufficiency of the evidence; whether the felonious act must be the proximate cause of death to establish felony murder; constitutionality of § 18.2-33. Reversed and remanded.


Garland, Roosevelt W., Jr. v. M. S. Rea, Superintendent. From Circuit Court, Amherst County. Issue: Whether the evidence showed ineffective assistance of counsel at trial. Affirmed.


Hofmann, Ruth Estelle v. Commonwealth. From Circuit Court, Sussex County. Writ of error to a judgment finding defendant guilty of operating vehicle equipped with radar detector under § 46.1-198.1. Statute upheld as to Supremacy Clause—Judgment reversed and dismissed on invalid statutory presumption.

Hyde, James Taylor v. Commonwealth. From Circuit Court, James City County. Appeal from conviction for rape and murder. Petition for writ of error was granted, case argued and conviction reversed and remanded.

In re John Cole Gayle and Matthew Perkins, Petitioners. Application for a writ of mandamus to require the Clerk and Judge of the Circuit Court of the City of Richmond, Division I, to, respectively, certify the filing of proper petitions and order a referendum on the issuance of bonds by the City of Richmond. Application denied.


In re Margaret Rose Tierney Workman, Petitioner. From Circuit Court, Henrico County. Suit seeking writ of mandamus to order a judge to issue an
opinion. Dismissed.


Jones, Edward v. Commonwealth. From Circuit Court, Greensville County. Issue: Whether the Commonwealth's Attorney's comment on the failure of the accused's wife to testify in support of his alibi defense constituted reversible error. Reversed and remanded.


Knarr, Charles William v. Commonwealth. From Circuit Court, City of Richmond, Division II. Sufficiency of affidavit for search warrant. Affirmed.

Landis, Lewis J. v. Commonwealth. From Circuit Court, City of Lynchburg. Refusal to allow defense psychologist to testify on issue of mental illness at malicious wounding trial. Affirmed.

Lemke, Linda Jones v. Commonwealth. From Circuit Court, City of Roanoke. Appeal from conviction of operating a bawdy house. Waiver of attorney; denial of continuance. Reversed.

Lenden, Kevin v. Commonwealth. From Circuit Court, City of Norfolk. Application of felony murder rule. Affirmed.


Mason, Donny Lee v. City of Chesapeake. From Circuit Court, Prince William County. Writ of error to a judgment finding defendant guilty of operating vehicle equipped with radar detector under § 46.1-198.1. Statute upheld as to Supremacy Clause—Judgment reversed and dismissed on invalid statutory presumption.

Mayo, Edward S. v. Commonwealth. From Circuit Court, City of Virginia Beach. Petition for appeal from conviction of involuntary manslaughter. Affirmed.


Moore, Nancy Rebecca v. Commonwealth. From Circuit Court, City of Richmond, Division I. Legality of indictment by grand jury after dismissal of charge at preliminary hearing; double jeopardy. Affirmed.

Nobles, James Calway v. Commonwealth. From Circuit Court, City of Richmond, Division II. Sufficiency of the evidence. Affirmed.

O'dell, Marion Lee v. Commonwealth. From Circuit Court, Washington County. Writ of error to a judgment finding defendant guilty of operating vehicle equipped with radar detector under § 46.1-198.1. Statute upheld as to Supremacy Clause—Judgment reversed and dismissed on invalid statutory presumption.

Parham, Margaret W. and State Board of Education, Intervenor v. School
Board of Richmond. From Circuit Court, City of Richmond. Appeal from judgment for plaintiffs that State mandated school board binding grievance arbitration is constitutional. Reversed.

Pierceall, William Louis v. Commonwealth. From Circuit Court, Prince William County. Issue: Whether the affidavit presented in application for a search warrant was a sufficient basis for the magistrate's finding of probable cause. Affirmed.


Richmond Shopping Center v. State Highway Commissioner. From Circuit Court, City of Richmond, Division I. Inverse condemnation. Writ of appeal denied.

Ricks, Andra Eugene v. Commonwealth. From Circuit Court, City of Norfolk. Appeal from conviction of statutory burglary and grand larceny. Sufficiency of the evidence and propriety of certain actions by the trial court. Affirmed.


Sizemore, Jerry Martin v. Commonwealth. From Circuit Court, Smyth County. Sufficiency of the evidence to establish attempted murder where there was no attempt to pull the trigger. Affirmed.

Skibinski, et al. v. Board of Pharmacy. Petitioners sought to have the suspension of their pharmacy licenses reviewed by the Supreme Court. Petition denied.

Smith, James Louis, Jr. v. Commonwealth. From Circuit Court, City of Roanoke. Writ of error to a judgment finding defendant guilty of "hit and run." Reversed and dismissed.

Smith, Michael Angelo v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of robbery. Instruction to jury. Reversed.

State Board of Health, et al. v. Chippenham Hospital, Inc. From Circuit Court, City of Richmond, Division II. Declaration that § 32-211.16 violated Article IV, Section 12, of the Virginia Constitution. Affirmed.


Tamburino, Vincent Anthony v. Commonwealth. From Circuit Court, City of Richmond, Division II. Sufficiency of affidavit for search warrant. Affirmed.

Thomas, Ralph v. Commonwealth. From Circuit Court, City of Richmond, Division II. Appeal from conviction of by threat attempting to intimidate and impede a witness from testifying, thereby attempting to obstruct or impede the administration of justice. Refusal of trial court to allow withdrawal of waiver of trial by jury. Reversed and remanded.

Troy v. Walker. Mandamus against Comptroller under § 8.01-653 to determine
constitutionality of payment of debt service on revenue bonds to facilitate removal of C&O Railway as operator of Newport News port facilities. Writ of mandamus granted.


*Webster Brick Company, Inc. v. Commonwealth.* From Circuit Court, Botetourt County. Appeal from denial of sales and use tax exemption for packing materials and other tangible personal property used in manufacturing. Affirmed.

*Wiche, Nathaniel Jackson v. Commonwealth.* From Circuit Court, Mecklenburg County. Appeal from a conviction of murder and the commission of a felony and robbery. Whether the plaintiff was denied a fair trial by the trial court’s ruling which prohibited him from examining one of the Commonwealth’s witnesses as to the number and nature of prior felony convictions. Affirmed.


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

*Blair, John W. v. Commonwealth.* From Circuit Court, City of Norfolk. Appeal from convictions for statutory burglary and grand larceny. Refusal of trial court to allow defendant’s retained attorney to represent the defendant at trial.

*Blue Cross of Virginia v. James B. Kenley and Chesapeake Hospital Authority, et al.* From Circuit Court, Henrico County. Petition for appeal concerning the dismissal of an action alleging the improper award of a certificate of public need to Chesapeake Hospital Authority.

*Blue Cross of Virginia v. James B. Kenley and Mary Immaculate Hospital, et al.* From Circuit Court, Henrico County. Petition for appeal concerning the dismissal of an action alleging the improper award of a certificate of public need to Mary Immaculate Hospital.

*Branch, (Prayer) Vernon L., Jr. v. Virginia Employment Commission and Virginia Chemical Company.* From Circuit Court, City of Portsmouth. Unemployment insurance benefits.

*Cartera, Harold William v. Commonwealth.* From Circuit Court, Fairfax County. Appeal from a conviction of rape and sodomy. Whether the defendant was deprived of a fair trial by the court allowing the Commonwealth’s chief investigator to remain at counsel table. Whether the defendant was prejudiced by inflammatory remarks of the Commonwealth’s
Attorney. Whether the defendant was entitled to a pre-sentence report and whether the testimony of an expert witness should have been excluded.


Cogdill, F. Lee v. Commonwealth. From Circuit Court, City of Newport News. Appeal from conviction of procuring for the purpose of prostitution. Admission into evidence of tape recordings of conversations between the defendant and the complainant; entrapment.

Coleman v. Pross. Petition for writ of mandamus against Comptroller for refusal to disburse funds for referendum on constitutional amendment.


Commonwealth of Virginia, Department of Mental Health and Mental Retardation v. Solomon King Jefferson. From Circuit Court, Nottoway County. Appeal from judgment disallowing past due charges for the care and treatment of the defendant.

Cunningham, Nancy Ann v. Commonwealth. From Circuit Court, Madison County. Sufficiency of evidence to prove larceny by false pretenses.

Davis, Victor L. v. Commonwealth. From Circuit Court, City of Norfolk. Application of due process of law to contempt proceedings.


Hinton, Frank L. v. Commonwealth. From Circuit Court, City of Norfolk. Propriety of judge's remarks to jury concerning defendant's possible parole.

Hummel, Lindberg v. Commonwealth. From Circuit Court, Rockingham County. Whether eavesdropping by government witnesses after indictment deprived the defendant of his Sixth Amendment right to counsel.

In re Bonnie C. Cord. Writ of mandamus of judge's decision not to grant certificate of moral character for individual seeking to take Virginia Bar exam.

In re City of Hampton. From Circuit Court, City of Newport News. Appeal seeking a writ of prohibition against a juvenile and domestic relations court judge.

In re John E. Harwood, State Highway and Transportation Commissioner. From Circuit Court, City of Newport News. Mandamus to compel court to honor a certificate of taking filed by State Highway and Transportation Commissioner.

Jenkins, Danny Eugene v. Commonwealth. From Circuit Court, Gloucester County. Admissibility of wife's testimony against husband.
King, Ricky v. Commonwealth. From Circuit Court, Franklin County. Constitutionality of accommodation defense in Virginia, whether such issue is properly before the Court, and refusal of the trial court to instruct the jury on that defense. Appeal from convictions for distribution of controlled substance.


Miller-Morton Co. v. Commonwealth. From Circuit Court, City of Richmond. Appeal of decision finding sample drugs not subject to sales and use tax.

Minnick, David Mathew v. Commonwealth. From Circuit Court, City of Radford. Appeal from conviction for attempted rape. Sufficiency of the evidence; view of scene of crime by jury in absence of defendant, cross-examination of defendant by prosecution, and denial of an instruction requested by the defense.

Munro, Michael D. v. Virginia Employment Commission and The Hertz Corporation. From Circuit Court, City of Alexandria. Unemployment insurance benefits.

Orange-Madison Cooperative Farm Service v. State Tax Commissioner. From Circuit Court, Orange County. Appeal of decision finding certain machinery exempt from sales and use tax.

Price, Lawrence M. v. Commonwealth. From Circuit Court, City of Norfolk. Appeal from conviction of burglary and grand larceny. Conflict of interest in dual representation of codefendants.


Robinson, Joe Nathan v. Commonwealth. From Circuit Court, City of Richmond, Division II. Sufficiency of description in affidavit and search warrant.

Rozier, John Wesley v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of possession of narcotics with intent to distribute. Admissibility of hearsay testimony elicited from defendant on cross-examination.

Ryan, William P. v. Commonwealth. From Circuit Court, City of Portsmouth. Appeal from convictions for burglary, sodomy, and attempted rape. Judicial notice, sufficiency of the evidence, exclusion from evidence of civil claim by prosecutrix against defendant's employer as a result of offenses, admission of evidence of prior sexual assaults, and alleged conflict of instructions to the jury.

School Board of the City of Richmond v. State Board of Education and Chesterfield County School Board. From Circuit Court, City of Richmond. Appeal from judgment in favor of plaintiff.

Schrum, Lewis v. Commonwealth. From Circuit Court, Henrico County. Appeal from conviction of rape. Sufficiency of evidence; motion for mistrial based on testimony that defendant exercised Fifth Amendment right.


Simmons, Johnny Carl v. Commonwealth. From Circuit Court, City of Virginia
Beach. Sufficiency of evidence to prove embezzlement.

**Smarr, Paula Sue v. Commonwealth.** From Circuit Court, City of Richmond, Division II. Appeal from conviction of maiming. Admissibility of evidence; testimony of witness in violation of sequestration order; sufficiency of evidence.

**Smith, Michael Marnell v. Commonwealth.** From Circuit Court, City of Williamsburg. Appeal from conviction of capital murder. Constitutionality of death penalty; admissibility of evidence; striking juror; instructions.

**Smith, Peter Daniel v. Commonwealth.** From Circuit Court, Gloucester County. Admissibility of physical evidence and expert testimony.

**State Highway Commission of Virginia v. Thomas A. Carter.** From Circuit Court, Smyth County. Appeal of condemnation proceeding which allowed evidence of possible future damages.

**State Highway Commissioner of Virginia v. Newton, et al.** From Circuit Court, Buckingham County. Appeal of award in condemnation proceeding.

**State Highway and Transportation Commissioner v. Calvin Percy Allmond, et al.** From Circuit Court, Isle of Wight County. Asking that award in condemnation be set aside as not supported by admissible evidence.

**State Highway and Transportation Commissioner v. Parsonage, Broadford Methodist Episcopal Church South.** From Circuit Court, Smyth County. Order in condemnation proceeding to reverse ruling on the date upon which interest was to be computed.

**State Highway and Transportation Commissioner v. E. B. Edwards Company, Inc.** From Circuit Court, City of Newport News. To determine Commissioner's power to condemn personal property and factual questions relating to status of such property.

**Stillwell, Jerry Dean v. Commonwealth.** From Circuit Court, Washington County. Constitutionality of the accommodation statute.

**Trainham, William Keith v. Commonwealth.** From Circuit Court, City of Williamsburg and County of James City. Search and seizure.


**United Air Lines, Inc. v. Commonwealth.** From Circuit Court, City of Richmond. Appeal of decision exempting four categories of tangible personal property sold to and used by commercial airline.


**Waye, Alton v. Commonwealth.** From Circuit Court, Mecklenberg County. Death penalty.

**Wilder, L. Douglas v. Third District Committee of the Virginia State Bar.** From Circuit Court, City of Richmond. Appeal of disciplinary action against attorney.

**York Street Inn, Inc. v. Virginia Alcoholic Beverage Control Commission.** From Circuit Court, City of Richmond. Appeal from reversal of Commission's order refusing licensee's request to use backgammon boards.

**CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE**

Accredited Surgical Sales Company of Maryland, Inc. v. State Board of
Pharmacy. Circuit Court, Henrico County. Action for declaratory judgment in interpretation of Board regulations. Pending.


Barfield, Willie G. v. Director, Tidewater Support Enforcement Office. Circuit Court, City of Virginia Beach. Bill of complaint to enjoin the director from collecting money. Temporary restraining order denied.

Bell v. Norfolk State College. Circuit Court, City of Richmond, Division I. Suit seeks equitable relief for breach of employment contract. Pending.


Blue Cross of Virginia v. James B. Kenley, Chesapeake Hospital Authority, et al. Circuit Court, Henrico County. Action challenging the award of a certificate of public need to Chesapeake Hospital Authority. Complaint dismissed.

Blue Cross of Virginia v. James B. Kenley, Mary Immaculate Hospital, et al. Circuit Court, Henrico County. Action challenging the award of a certificate of public need to Mary Immaculate Hospital. Complaint dismissed.


Bureau of Support Enforcement, etc. v. Willie L. Miller. Circuit Court, Bedford County. Appeal of juvenile and domestic relations district court's decision to reverse administrative hearing officer's finding of obligation of support. Pending.


Chandler v. Division of Forestry. Circuit Court, City of Suffolk. Breach of prescribed burning contract.

Chisman Company v. Virginia Marine Resources Commission. Circuit Court,
City of Newport News. Claim for injunctive relief to prevent award of a permit to construct piers adjacent to a dry storage marina, in Sunset Creek, City of Hampton. Dismissed for lack of jurisdiction.

City of Richmond, Department of Public Welfare v. Mary Cronk. Circuit Court, City of Richmond. Suit seeking permanent injunction against operation of child-care facility. Dismissed.

City of Virginia Beach v. Virginia Marine Resources Commission. Circuit Court, City of Newport News. Appeal of decision permitting the placement of fixed fixing devices in Chesapeake Bay adjacent to the City of Virginia Beach. Pending.


Commonwealth v. Fishbach and Moore, Inc., et al. Circuit Court, Arlington County. Action by State Health Department to obtain inspection warrant to carry out occupational health inspection. Warrant granted.


Commonwealth v. George Harvey McCray. Circuit Court, City of Lynchburg. Appeal of decision of juvenile and domestic relations district court establishing obligation of support. Pending.


Commonwealth v. Pearson and Warner. Circuit Court, City of Richmond. Injunction action by State Health Department to prohibit unlawful instal-
lation of sewage treatment facilities. Pending.

**Commonwealth v. Ruark, et al.** Circuit Court, Middlesex County. Action by State Health Department to enforce marina sewage pump out regulations. Pending.


**Commonwealth v. Satchell and Lumbermen Mutual Insurance Company.** Circuit Court, City of Richmond. Action for property damage. Pending.

**Commonwealth v. Surety Title Insurance Agency, Inc.** Circuit Court, City of Virginia Beach. Chancery suit for declaratory and injunctive relief regarding the unauthorized practice of law by a title insurance agency. Pending.

**Commonwealth v. Tidewater Funeral Directors Association, Inc.** Circuit Court, City of Norfolk. Bill for injunction and civil penalties. Pending.

**Commonwealth v. Howard A. Toone.** Circuit Court, City of Richmond. To enjoin violation of provisions of Virginia Fair Housing Law. Decree entered granting relief requested.


**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. Dismissed.

**Commonwealth of Virginia, ex rel. State Water Control Board v. William S. Barlow, Jr.** Circuit Court, Henrico County. Suit to enjoin compliance with State Water Control Law. Injunction entered. Pending.

**Commonwealth of Virginia, ex rel. State Water Control Board v. Days Inns of America, Incorporated.** Circuit Court, Henrico County. Suit for injunctive relief and civil penalties for violations of NPDES permit. Pending.

**Commonwealth of Virginia, ex rel. State Water Control Board v. Disston, Incorporated.** Circuit Court, Henrico County. Suit for civil penalties for operation without a permit. Dismissed pursuant to settlement.


**Commonwealth of Virginia, ex rel. State Water Control Board v. FMC Corporation.** Circuit Court, Henrico County. Suit for civil penalties for violation of special order. Dismissed pursuant to settlement.


**Commonwealth of Virginia, ex rel. State Water Control Board v. Laburnum Manor Limited Partnership.** Circuit Court, City of Richmond. Suit for civil penalties and injunctive relief for violation of special order. Pending.

**Commonwealth of Virginia, ex rel. State Water Control Board v. Lennox, et al.** Circuit Court, City of Waynesboro. Suit for civil penalties and injunctive
relief for violations of NPDES permit. Injunction entered. Dismissed.

Circuit Court, Accomack County. Suit for civil penalties for violation of NPDES permit. Pending.

Commonwealth of Virginia, ex rel. State Water Control Board v. Fred Q. Rickards.
Circuit Court, City of Martinsville. Suit to enjoin compliance with NPDES permit. Injunction entered. Pending.

Circuit Court, City of Virginia Beach. Suit for civil penalties and injunctive relief for violation of a special order. Dismissed.

Circuit Court, Henrico County. Suit for civil penalties for violation of special order. Pending.

Circuit Court, Isle of Wight County. Suit to enjoin compliance with NPDES permit limitations. Dismissed pursuant to settlement.

Circuit Court, Montgomery County. Suit for civil penalties for operation without a permit. Dismissed pursuant to settlement.

Circuit Court, Nelson County. Suit to recover cost of fish kill. Dismissed upon full payment.

Commonwealth of Virginia, ex rel. State Water Control Board v. United States Titanium Corporation.
Circuit Court, Nelson County. Suit for civil penalties for violation of No-discharge certificate. Pending.

Commonwealth of Virginia, ex rel. State Water Control Board v. United States Titanium Corporation.
Circuit Court, Nelson County. Suit to enjoin compliance with special order. Injunctions entered. Pending.

Commonwealth of Virginia, ex rel. State Water Control Board v. Virginia Oak Tannery, Inc.
Circuit Court, Page County. Suit for civil penalties for violation of NPDES permit. Judgment for Commonwealth.

Commonwealth of Virginia, ex rel. State Water Control Board v. Virginia Oak Tannery, Inc.
Circuit Court, Page County. Suit to recover cost of fish kill. Dismissed upon full payment.

Circuit Court, City of Richmond. Suit to enjoin unauthorized practice of law. Dismissed.

County Utilities Corporation v. State Water Control Board.
Circuit Court, City of Virginia Beach. Appeal of NPDES permit issuance. Pending.

Couram v. Couram.
Circuit Court, Orange County. Support proceedings are being contested and the Commonwealth of Virginia has been joined in. Pending.

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

Dart Drug Corporation v. Virginia Milk Commission.
Circuit Court, City of Richmond, Division I. Petition for Appeal of Milk Commission Orders 6 and 7. Pending.

Dart Drug Corporation v. Virginia State Milk Commission.
Circuit Court, Albe-
marle County. Declaratory judgment that Orders #6 and 7 promulgated by the State Milk Commission are invalid. Pending.

*Delta, Basil G. v. Helen Hackman, M.D., et al.* Circuit Court, Arlington County. Action by a physician alleging libel by health department officials. This case is in the discovery stage but has been dormant for over two years.


*Dowdy, Raymond M. v. Kathleen M. Dowdy.* Circuit Court, City of Richmond. Notice for requirement of compliance of support payments and request for transfer of jurisdiction of support payments. Pending.


*Fisher, Michael v. Old Dominion University.* Circuit Court, City of Richmond. Freedom of Information Act suit. Dismissed by plaintiff.


*Grain Processing Corporation v. Virginia Department of Agriculture and Commerce.* Circuit Court, City of Richmond. Appeal from the decision of the Board of Agriculture and Commerce rejecting proposed amendments to regulations governing frozen deserts and similar products. Hearing pending.


*Grey Line Auto Parts, Inc. v. Troy.* Circuit Court, City of Richmond. Bill to enjoin enforcement of antitrust civil investigative demand. Judgment that civil investigative demand valid.


*Hall, James T. v. Virginia Marine Resources Commission.* Circuit Court, Mathews County. Appeal of a decision to award 6.95 acres, more or less, of oyster ground in Milford Haven, Mathews County. Affirmed.


*Holstein v. Davidson, et al.* Circuit Court, City of Richmond. Suit by probation officer transferred by judge's order, seeking injunctive relief and damages.
Pending.

_In re Grace Berger._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Richard Ferrel Berkley._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Henry Bess._ Circuit Court, Augusta County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re James Billups._ Circuit Court, Dinwiddie County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Charles Boley._ Circuit Court, Dinwiddie County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Shirley Fay Carroll._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

_In re Flossie May Carr._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Frances Carter._ Circuit Court, Albemarle County. Motion to treat and medicate patient pending appeal of commitment to a State mental health hospital. Motion granted.

_In re Harry Beadles Chisholm._ Circuit Court, Nottoway County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Florence Clay._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Drema Joy Gilmer._ Circuit Court, City of Roanoke. Petition to open sealed adoption records. Settled.

_In re Shirley A. Green._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

_In re Amy Lorene Grishaw._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re City of Hampton._ Circuit Court, City of Newport News. Suit seeking a writ of prohibition against a juvenile and domestic relations court judge. Writ of prohibition denied.

_In re Opal Handy._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re Jacqueline Ann Hayslett._ Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

_In re David Ezra Hohensheld._ Circuit Court, Augusta County. Petition for a determination of partial incompetency and appointment of a limited guard-
ian. Petition granted.

In re Elridge F. Hudgins. Circuit Court, Mathews County. Appeal of decision to permit construction of a pier in Queens Creek, Mathews County. Settled out of court.

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

In re Edna Christine Hundley. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

In re Otis Lee Johnson. Circuit Court, Augusta County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

In re Mamie Jones. Circuit Court, Dinwiddie County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

In re George Keith. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Loila Marie Kirby. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

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

In re Mauck Meeting House. Circuit Court, Page County. Action to appoint new trustees. Settled.

In re Rosemary Ellen McCoy. Circuit Court, Montgomery County. Suit seeking reimbursement for the cost of care and maintenance at a State mental health hospital. Pending.


In re Suburban Mining, Inc. Circuit Court, Buchanan County. Appeal from revocation of mining permit. Pending.

In re Maggie Moore. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In re Louise Pannell. Circuit Court, Dinwiddie County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

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

In re Catherine Harris Purks. Circuit Court, Hanover County. Petition to open sealed adoption records. Pending.

In re Louise M. Silby. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

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

In re Donald Thurston. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and appointment of a limited guardian. Petition granted.

In the matter of Malcolm Joseph Vega. Circuit Court, City of Norfolk. Appeal from juvenile and domestic relations court order requiring Department of Education to pay full cost of private school special education program. Reversed.

In re Ellen Wade. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

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

In re James Wheatley. Circuit Court, City of Lynchburg. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.

In re Rachael L. Winborne. Circuit Court, Amherst County. Petition for a determination of partial legal incompetency and the appointment of a limited guardian. Petition granted.


Johnson, Eugene v. Accomack County Wetlands Board. Circuit Court, Accomack County. Appeal of decision of Virginia Marine Resources Commission upholding wetlands board determination that a property owner was authorized to construct a road with a twenty-five foot surface without a permit. Affirmed.


Kite, Billy Wayne v. City of Richmond, et al. Circuit Court, City of Richmond. Suit seeking damages for alleged failure to supervise by correctional officials and medical malpractice by correctional doctors. Pending.


Leavitt, Charles H., Sheriff v. Hutto. Circuit Court, City of Richmond. A petition for a preemptory writ of mandamus seeking an order from the court
transferring all prisoners from the Norfolk City Jail. Nonsuited.

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 local board of public welfare was properly constituted. Pending.

Lendys of Blacksburg, Inc. v. Virginia Alcoholic Beverage Control Commission.
Circuit Court, City of Roanoke. Appeal from Commission revocation order. Pending.

Little Chef Restaurant, Inc. v. Virginia Alcoholic Beverage Control Commission.
Circuit Court, City of Roanoke. Appeal from Commission revocation order. Pending, but appeal apparently abandoned.

Little Corner v. Virginia Alcoholic Beverage Control Commission.
Circuit Court, Fairfax County. Appeal from Commission order suspending license. Affirmed.

Lukhard v. Paulette Collins.
Circuit Court, City of Salem. Suit seeking injunction against the operation of a home for adults without a license. Pending.

Lukhard v. Willie Gilmore.
Circuit Court, City of Roanoke. Suit seeking injunction against the operation of a home for adults without a license. Injunction was issued.

Lukhard v. S. F. Patton.
Circuit Court, City of Roanoke. Suit seeking injunction against the operation of a home for adults without a license. Injunction issued.

Circuit Court, City of Chesapeake. Suit seeking permanent injunction against the operation of a home for adults without a license. Permanent injunction issued.

MCL Corporation v. Virginia Alcoholic Beverage Control Commission.
Circuit Court, City of Richmond. Appeal from Commission order suspending license. Dismissed on motion of petitioner.

Mallory Electric Company v. The College of William and Mary.
Circuit Court, City of Williamsburg and James City County. Breach of contract. Pending.

Martin, Calvin I. v. Timothy B. Allen.
Circuit Court, City of Virginia Beach. Motion to enforce employer's subrogation rights in third party action involving an injury for which Workmen's Compensation was paid. Subrogation rights enforced.

Mayes, Catherine B. v. Bernard S. Patterson and Virginia State College.
Circuit Court, City of Colonial Heights. Action for damages due to personal injury. Pending.

McCorkel, Hugh D., Doing Business as Mac's Auto Servicenter v. Superintendent of the Virginia Department of State Police.
Circuit Court, Giles County. Notice to move court to issue a temporary restraining order to reinstate inspection privileges to inspection station No. 1989. Motion denied.

Circuit Court, City of Richmond. Action by former Capitol Police officer. Pending.

Medicenters of America, Inc. v. Commonwealth.
Circuit Court, City of Richmond. Suit for additional reimbursement from the Medicaid Program. Pending completion of the discovery phase of the litigation.

Mickey's Incorporated v. Virginia Alcoholic Beverage Control Commission.
Circuit Court, City of Norfolk. Appeal from Commission order revoking license. Pending but appeal apparently abandoned.

Circuit Court, City of Rich-

Moore, Edith M. v. Timothy B. Allen. Circuit Court, City of Virginia Beach. Motion to enforce employer's subrogation rights in third party action involving an injury for which Workmen's Compensation was paid. Subrogation rights enforced.


Peerless Insurance Company v. Commonwealth. Circuit Court, City of Richmond. Interpleader action to distribute bond proceeds to proprietary school students. Pending.


Richardson, Anna v. Central State Hospital. Circuit Court, City of Richmond. Action seeking damages pursuant to Virginia's Wrongful Death Statute. Pending.

Roberts v. Board of Pharmacy. Circuit Court, City of Portsmouth. Appeal from administrative disciplinary action. Pending.


Shaw, Sheron Murray t/a Woody's Drive Inn v. Virginia Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Appeal from Commission order suspending license. Commission's motion to dismiss sustained.


Southall v. Troy. Circuit Court, City of Richmond. Bill to enjoin enforcement of antitrust civil investigative demand. Judgment that civil investigative demand valid.


Teaster, Gary R. v. Commonwealth. Circuit Court, City of Richmond. Appeal of a decision by the Virginia Department of State Police to terminate the services of a State trooper. Pending.

Thomas, George P.; James A. Fields; Con T. Puckett, Jr.; Charlotte I. Hale, and David J. "Jack" Spangler v. A. G. Griffith, Jr.; Richard A. "Dick" Calver; Daisy B. Campbell; Robert O. Hillman; J. Harold "Doodle" Jesse; Ronald E. Jones; Billy Tignor; Charlie Campbell; Linda Tignor; Betsy Chaffin; George Ben Whited; Fred Lawson; Carl Nuckols; Emmitt Buckles; Robert Bundy; Joan Mahan and James A. Taylor. Circuit Court, Russell County. Town election contest. Pending.


Virginia, Commonwealth of, Department of Mental Health and Mental Retardation v. Patricia May Vermillion. Circuit Court, City of Roanoke. Bill of review filed at the denial of reimbursement suit which sought to enforce payment of the charges for the care and treatment of a patient in a State mental health hospital. Denied.


Walter, William H. v. Leo E. Kirven, Jr., M.D., et al. Circuit Court, City of Richmond. Suit to enjoin determination of a State employee and to prohibit
implementation of the Department of Mental Health and Mental Retardation grievance process. Dismissed.


*Western Southern Construction Co., Inc. v. Division of Mined Land Reclamation.* Circuit Court, Buchanan County. Appeal from revocation of mining permit. Pending.


*York River Pines Recreation Association v. Department of Conservation and Economic Development.* Circuit Court, City of Richmond, Division I. Bill to declare issuance of mining permit void. Pending.

*Young, Cora Lee v. The College of William and Mary, et al.* Circuit Court, City of Richmond. Suit to construe will. Will construed in favor of colleges.

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


Burrow, Lillian H. v. Brian Peter Margolis. Circuit Court, City of Colonial Heights. Suit for tortious injury by the estate of a deceased employee who died in the course of his employment. Commonwealth intervened to protect its statutory subrogation rights that arose due to the payment of workmen’s compensation benefits to the employee’s widow. Pending.


Butler, Judson Rae v. Carroll E. Staton, et al. Circuit Court, Fairfax County. Suit for tortious injury by department employee who was injured in the course of his employment. Commonwealth intervened to protect its statutory subrogation rights that arose due to the payment of workmen’s compensation benefits to its employee. Pending.


County of Franklin v. Russell E. Calloway, et al. Circuit Court, Franklin County. Condemnation proceeding by County. Virginia Department of Highways and Transportation joined by the Court because it will be deeded the right of way after condemnation. Pending.


Eley, Carl G. v. Harwood, et al. Circuit Court, City of Portsmouth. Suit for damages alleging failure of a bus driver on the Tidewater Metro Transit to perform a duty the omission of which is alleged to be the proximate cause of physical injury and mental anguish arising out of an assault on the streets of Portsmouth. Dismissed. Agreed with prejudice to the plaintiff.


Eley, Carl G. v. Harwood, et al. Circuit Court, City of Portsmouth. Suit for damages alleging failure of a bus driver on the Tidewater Metro Transit to perform a duty the omission of which is alleged to be the proximate cause of physical injury and mental anguish arising out of an assault on the streets of Portsmouth. Dismissed. Agreed with prejudice to the plaintiff.


Hudgins, Elizabeth L. v. John E. Harwood. Circuit Court, City of Richmond. Alleged negligence on the part of the Highway Department for injuries re-
ceived in an accident. Pending.


_Irby, William v. Thomas Martin._ Circuit Court, Lunenburg County. Intervenor under Workmen's Compensation statutes. Pending.

_Jablonski v. Charles M. Baker, Donald E. Keith (employee), et al._ Circuit Court, Fairfax County. Motion for judgment. Pending.

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

_Jordan, L. W. v. Commonwealth of Virginia, Department of Highways and Transportation._ Circuit Court, City of Norfolk. Motion to dismiss. Personal injury negligence. Pending.

_Keelan, James W. and Meredith v. The Board of Supervisors of Surry County and John E. Harwood, State Highway Commissioner._ Circuit Court, Surry County. For compensation for land taken and damages in widening of Route 654. Pending.

_Kerns, Oliver Bruce v. State Highway Commissioner._ Circuit Court, Scott County. Inverse condemnation. Pending.

_Lee v. Fugate._ Circuit Court, Roanoke County. Inverse condemnation. Settled.


_Martin, Lilburn v. State Highway Commissioner._ Circuit Court, Bland County. A large slide allegedly caused by highway construction damaged property. Settled.


_Minor, Trula J. and Carl N. Mitchell v. English Construction Co. and State Highway Commissioner of Virginia._ Circuit Court, Wise County. Drainage damage. Department was nonsuited.


_Olton, Ronald v. John E. Harwood and Adel C. Genessee._ Circuit Court,
Henrico County. Injunction to prevent sale of property to Commonwealth. Pending.

**Phillips, Dallas, et al. v. State Department of Highways and Transportation.**
Circuit Court, City of Richmond. Injunction against Department for letting developer have permit to install drainage pipe from his property to live stream. Petitioners lived on other side of stream. Injunction to prohibit construction of pipe. Amended to prohibit use of pipe. Dismissed.

**Phillips, Robert R. v. State Department of Highways and Transportation.**
Circuit Court, City of Richmond. Claim that VDHT is condemning private property for nonpublic use. Enjoin construction of drainage facility. Dismissed.

**Poindexter, Joseph W. and Eleanor C. v. John E. Harwood.** Circuit Court, Louisa County. Inverse condemnation. Pending.

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


**Putman, et ux. v. Fugate.** Circuit Court, Alleghany County. Inverse condemnation. Pending.


**Rose v. Smith and the Commonwealth of Virginia.** Circuit Court, City of Virginia Beach. Alleges negligence against Department officials as proximate cause of injury and death of the plaintiff’s interstate child who had trespassed on the Virginia Beach-Norfolk Expressway. Department dismissed.


**Scott, Dorothy Geter v. Harry C. Geter, et al.** Circuit Court, City of Martinsville. Action by an heir against other heirs and attorney representing Department in condemnation proceeding. Requesting judicial sale of property owned by heirs, part of which has been condemned. Pending.

**Scaraceno, Ignatius N. v. Reggie L. Burnette.** Circuit Court, Dinwiddie County. Intervenor under Workmen’s Compensation statutes. Pending.

**Service Oil Co. v. Fugate.** Circuit Court, Halifax County. Motion for judgment. Pending.


**Smith, Stanley Anthony v. Commonwealth of Virginia.** Circuit Court, City of Virginia Beach. Plaintiff suing for pain and suffering arising out of his collision with a pedestrian on the Virginia Beach-Norfolk Expressway. Pending.

**Sperry Rand Corporation v. Commonwealth.** Circuit Court, City of Richmond, Division I. Action by contractor for additional compensation under con-
struction contract with VDHT. Pending.


Wright, John James, Jr. v. Curtis C. Hundley and Virginia Department of Highways. Circuit Court, City of Richmond. Alleged negligence of Highway employee and Department of Highways in accident in which Plaintiff was injured. Nonsuited.

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


Arrington, Victor v. Travel Trailer and Patricia Hall and Vern Hill. Circuit Court, Washington County. Petition for attachment under § 8-519. Voluntary nonsuit as to Vern Hill. 


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. 

Brooks, Ricky Lee v. Commissioner, Division of Motor Vehicles. Circuit Court, City of Roanoke. Petition to restore operator's license suspended pursuant to § 46.1-514.11. Pending. 

Busic, Larry Neal v. Vern L. Hill, Commissioner. Circuit Court, Stafford County. Notice of appeal from the suspension of license to operate a motor vehicle issued pursuant to § 46.1-383. Pending. 

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


Connelly, Thomas John, In Re. General District Court, City of Arlington. Petition for reinstatement of driving privileges under § 18.2-271.1(b1), 1950 Code of Virginia (1977) replacement volume to restore operator's license revoked pursuant to § 46.1-421(a). Pending. 


Davis, Joseph Warren v. Vern L. Hill, Commissioner. Circuit Court, Spot-
sylvania County. Petition of appeal to restore operator's license revoked pursuant to §§ 46.1-421(b) and 46.1-418. Pending.

Dilks, Calvin Phillip, In Re. Circuit Court, Fairfax County. Notice of appeal for reinstatement of driving privilege suspended pursuant to § 46.1-514.13. Commissioner's order of suspension vacated.


Eagle, Kenneth R., In Re. Circuit Court, Campbell County. Petition to establish ownership of Willys Jeep. Pending.


Ferguson, Mary C. v. J. J. Yarbrough & Anne Schmidt Yarbrough & Hechler Chevrolet, Inc. General District Court, City of Richmond. Subpoena duces tecum re driving record. Dismissed.


Griffith, A. Hundley, Jr., In Re. Circuit Court, City of Lynchburg. Petition to establish ownership of 1910 Metz Runabout. Title awarded to petitioner.

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


Johnson, Edward Earl v. Vern L. Hill, Commissioner. Circuit Court, City of Richmond, Division I. Petition of appeal to restore operator's license suspended pursuant to § 46.1-514.13. Affirmed — modified.


Johnson, Keith, etc. v. Vern L. Hill, Commissioner. Circuit Court, Halifax County. Petition to appeal Commissioner's order of suspension issued pursuant to § 46.1-167.4. Suspension vacated.
Joynt, Thomas V. v. Vern L. Hill. Circuit Court, City of Virginia Beach. Order on appeal from revocation of automobile dealer's license and salesman's license pursuant to § 46.1-535. Pending.


King Dodge, Inc., a Virginia Corporation v. Vern L. Hill, Commissioner. Circuit Court, City of Portsmouth. Petition for appeal for court review of Commissioner's administrative hearing decision pursuant to § 46.1-547(e). Dismissed.

Kirby, Barry Branner v. Commonwealth of Virginia. Circuit Court, Rockingham County. Petition of appeal to restore operator's license suspended pursuant to § 46.1-430. Affirmed.


McDonough, James Scott v. Vern L. Hill, Commissioner. General District Court, Arlington County. Petition to stay revocation of driving privileges issued pursuant to § 46.1-421(a). Dismissed.

Magee, James Thomas v. Vern L. Hill, Commissioner. Circuit Court, City of Suffolk. Notice for hearing to move court to reinstate petitioner's privilege to drive. Motion denied.


Meiselman, Sumner, In Re. Circuit Court, Fairfax County. Notice to establish ownership of 1969 Volvo automobile. Title awarded to petitioner.


Montclair Country Club, Inc., In Re. Circuit Court, Prince William County. Petition to establish ownership of Triumph automobile. Pending.

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

One Murray Boat Trailer, In Re. Circuit Court, City of Norfolk. Petition to establish ownership to 1974 Murray Boat Trailer. Title awarded to petitioner.

Padgett, Douglas Stuart v. Commonwealth of Virginia. Circuit Court, City of Roanoke. Notice of appeal to reinstate operating privileges revoked and suspended pursuant to § 46.1-417. Order entered striking case from docket to allow petitioner leave to file petition pursuant to § 18.2-271.1(b1).


Passarelli, Frank Andrew v. Division of Motor Vehicles. Circuit Court, City of Alexandria. Notice and petition for appeal to restore operator's license suspended pursuant to § 46.1-514.13. Pending.

Philamena Porter's Administrator v. City of Chesapeake, et al. Circuit Court, City of Richmond, Division I. Subpoena duces tecum re accident reports.
Dismissed.


**Richards, Gary Lee v. Anthony Durkin & Joaquin Aniceto & Vern L. Hill.** Circuit Court, City of Norfolk. Petition to obtain title to automobile. Pending.

**Rowell, Buddy Daniel v. Vern L. Hill, as Commissioner of Motor Vehicles of the Commonwealth of Virginia.** Circuit Court, Arlington County. Appeal of operator’s license revocation pursuant to § 46.1-421(a). Pending.

**Sanderson, Alduster v. Vern L. Hill, Commissioner.** Circuit Court, City of Virginia Beach. Petition to restore operator’s license revoked pursuant to § 46.1-421(b). Pending.

**Samaha, Nabih Rage v. Commissioner of Motor Vehicles.** Circuit Court, Arlington County. Petition of appeal from order of Commissioner of Motor Vehicles to restore operator’s license suspended pursuant to § 46.1-514.13. Pending.

**Schwetz, Boris v. Vern L. Hill, Commissioner, Division of Motor Vehicles.** Circuit Court, City of Virginia Beach. Petition to restore operator’s license suspended pursuant to § 46.1-514.13. Affirmed — modified.

**Scott, Melvin Stanley v. Corvette Center, Inc., a Virginia Corporation.** Circuit Court, Pittsylvania County. Motion for joinder of additional party to answer motion for judgment for damages. Pending.

**Sheckells, William A., In Re.** Circuit Court, City of Richmond, Division I. Petition to establish ownership of 1967 Oldsmobile. Title awarded to petitioner.

**Shafer, Michael Robert v. Commonwealth of Virginia.** Circuit Court, Appomattox County. Petition to appeal Commissioner’s order of suspension issued pursuant to § 46.1-167.4. Suspension vacated.

**Sheets, David Russell v. Division of Motor Vehicles.** Circuit Court, Fairfax County. Petition of appeal of Commissioner’s order of revocation issued pursuant to § 46.1-430, et seq. Pending.

**Sims, John Homer, III v. Vern L. Hill, Commissioner.** Circuit Court, City of Lynchburg. Petition to restore operator’s license suspended pursuant to § 46.1-514.13. Pending.

**Smith, David L. v. Division of Motor Vehicles.** Circuit Court, Fairfax County. Petition to establish ownership of 1976 Kawasaki motorcycle. Title awarded to petitioner.

**Smith, James Eric v. Vern L. Hill, Commissioner.** Circuit Court, Fairfax County. Petition to appeal Commissioner’s order of suspension issued pursuant to § 46.1-514.11. Dismissed.

**Smith, Willie Lee v. Division of Motor Vehicles.** Circuit Court, City of Richmond, Division I. Bill of complaint to restore operator’s license suspended pursuant to § 46.1-514.16. License reinstated.

**Snellings, Herbert Hoover v. Vern L. Hill, Commissioner.** Circuit Court, Stafford County. Petition to restore operator’s license suspended pursuant to § 46.1-514.13. Petition denied.

**Southwest Bank of Virginia, The v. Vern L. Hill, Commissioner.** Circuit Court, City of Richmond, Division I. Motion for judgment to seek relief on account of alleged negligence in allegedly failing to perform duty under § 46.1-69.
REPORT OF THE ATTORNEY GENERAL

Nonsuit.


Tanner, Gary T. v. Commonwealth of Virginia, Division of Motor Vehicles. Circuit Court, Fairfax County. Appeal of order of revocation to restore operator's license revoked pursuant to § 46.1-421(a). Dismissed.


Trautman, John v. Vern L. Hill, Commissioner, Division of Motor Vehicles. Circuit Court, City of Richmond, Division I. Appeal from denial of motor vehicle salesman license following an administrative hearing. Appeal dismissed.


Cases Decided or Pending in the Circuit Courts of the State in Which the Department of Taxation Was Involved

County. Petition to intervene and assert claim for sales tax. Pending.


Association for Research and Enlightenment, Inc. v. Forst. Circuit Court, City of Virginia Beach. Application for correction of sales tax assessment. Pending.


Central National Bank v. Catherine Gunn Brown, et al. Circuit Court, City of Richmond. Suits to reform two charitable trusts to comport with federal law requirements.


Commonwealth v. Little Chef Restaurant, Inc. Circuit Court, City of Roanoke. Bill of Complaint to enjoin continuing violation of sales and use tax registration and payment requirements. Settled.

Community Colleges, State Board of v. Get-Em-Up-Go, Inc., et al. Circuit Court, City of Richmond. Bill of Interpleader for payment into court of funds against which there is a lien for State taxes. Pending.


Dunton, et al. v. Treakle, et al. Circuit Court, Lancaster County. Suit to amend a will and trust to comply with federal requirements. Retained on court's docket pending Internal Revenue Service approval.

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.

Faye, Millicent C. v. Anthony F. Troy. Circuit Court, Lancaster County. Decree entered reforming a will creating a charitable trust to comport with federal tax requirements. Retained on docket until Internal Revenue Service approval is obtained.


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. Decision for taxpayer.

Foster, James B., et al. v. American National Bank and Trust Company of


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

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.


Hicks & Ingle v. Eastern Industries, Inc., et al. Circuit Court, City of Richmond. Interpleader action to determine the priorities of various liens upon a fund. Pending.


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


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.

Merrill Lynch, Pierce, Fenner and Smith v. State Tax Commissioner. Circuit Court, City of Richmond. Application for correction of income tax assess-
ment. Decision for taxpayer. Notice of appeal and assignment of error filed. 

*Miller-Morton Co. v. Commonwealth.* Circuit Court, City of Richmond, Division I. Whether sample drugs are taxable. Decision for taxpayer. Writ of error granted.

*Moore, Richmond, Jr. v. Blandy Boocock, et al.* Circuit Court, City of Charlottesville. Suit to insure that a decedent's will complies with federal tax requirements. Pending.


*Nationwide Communications v. Commonwealth.* Circuit Court, City of Richmond, Division I. Application for correction of use tax upon tangible personal property used in broadcasting. Pending.


*Ocean Sands Holding Corp. v. Commonwealth.* Circuit Court, City of Virginia Beach. Application for correction of sales tax assessment. Pending.


*Parsons, Mary M. v. Commonwealth.* Circuit Court, City of Richmond. Application for correction of income tax assessment. Pending.


*Richmond, City of v. Ellen R. Davies, et al.* Circuit Court, City of Richmond, Division I. Bill of Complaint for the sale of land for delinquent taxes, joining the Commonwealth for potential inheritance tax lien. Pending.

*Richmond Foundation, The v. Marshall Coleman.* Circuit Court, City of Richmond. Bill of Complaint seeking court permission to liquidate portion of
assets of charitable foundation and merge remaining assets into another charitable entity. Pending.


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


**Shipley, Danny S. v. Commonwealth.** Circuit Court, City of Richmond. Suit seeking payment of attorney's fees for services rendered to juvenile indigents. Pending.

**Silver's Enterprises v. Commonwealth.** Circuit Court, City of Richmond. Application for correction of income tax assessment. Pending.

**Slaughter, D. French, Executor v. Wiltshire, et al.** Circuit Court, Culpeper County. Suit to reform a will to comply with federal tax requirements. Retained on court's docket until Internal Revenue Service approval is obtained.


**Television Antenna Cable, Inc. v. J. Monroe Burke, Jr., et al.** Circuit Court, Warren County. Petitioner contends certain broadcasting equipment exempt from taxation. Closed.

**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. Dismissed.

**Tidewater Heating & Air Condition v. Summit Insurance Co. of New York, et al.** Circuit Court, City of Richmond, Division I. Request to sell securities held by Treasurer of Virginia to pay lien. Pending. Consolidated with Eastern Roofing Corporation.


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

Virginia Insurance Guaranty Association v. Robert C. Watts, Jr., Treasurer, et al. Circuit Court, City of Richmond, Division I. Petition claiming subrogation rights to the assets of an insolvent insurer in the hands of the Treasurer, petitioner having paid just claims of insureds. Claims ordered to be paid. Pending final order for disposition of remaining assets.


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


Alexandria Yellow Cab, Incorporated v. Virginia Employment Commission. Circuit Court, City of Richmond, Division I. Pending.

Alive, Inc. t/a Alive Child Development Center v. Virginia Employment
Commission. Circuit Court, City of Richmond. Pending.

Anderson, Stewart C. v. Virginia Employment Commission. Circuit Court, City of Richmond, Division I. Pending.


Binswanger Glass Company, a Virginia Corporation v. Virginia Employment Commission and Bernard D. Coles. Circuit Court, City of Richmond, Division I. Pending.


Clarke, Margaret P. v. Virginia Employment Commission and Office of the Adjutant General (Finance & Accounting Office). Circuit Court, County of
Fairfax. Pending.


Columbia Music, Inc. v. Virginia Employment Commission. Circuit Court, City of Richmond, Division I. Pending.


Earl Haines, Inc. v. Elmer R. Crewe and Virginia Employment Commission. Circuit Court, County of Frederick. Pending.


Garrett, Andrew v. Virginia Employment Commission and Omega Homes, Inc.
Circuit Court, County of Campbell. Pending.


Gray, Lawrence E. v. Virginia Employment Commission and Westvaco. Circuit Court, City of Richmond, Division I. Pending.


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


Harris, Stanley S. v. Virginia Employment Commission and Concrete Pipe and Products Company, Inc. Circuit Court, City of Richmond, Division I. Pending.


Hicks, Ernest W. v. Virginia Employment Commission and Macke Vending. Circuit Court, City of Richmond. Pending.


Keirn, Harvey F. v. Virginia Employment Commission. Circuit Court, County
of Bath. Pending.

Klein, Mary H. v. Virginia Employment Commission and University of Virginia. Circuit Court, County of Albemarle. Pending.


Lamm, George T., Sr. v. Badger Powhatan. Circuit Court, County of Albemarle. Pending.


The Lester Group v. Virginia Employment Commission and Bruce A. Lemmert. Circuit Court, City of Martinsville. Pending.


Martin, Melvin H. v. Virginia Employment Commission and Holiday Inn #2. Circuit Court, City of Lynchburg. Pending.


Massie, Harvey T. v. Virginia Employment Commission and Nationwide Insurance. Circuit Court, City of Richmond, Division I. Dismissed.


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


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


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


Affirmed.


Norfolk General Hospital, Division of Medical Center Hospitals v. Virginia Employment Commission and Roddy Williams. Circuit Court, City of Norfolk. Reversed.


Reiley, Patrick, In the Matter of. Circuit Court, County of Fairfax. Pending.


Court, County of Greensville. Affirmed.


Tolliver, Cynthia K. v. Riverside Hospital. Circuit Court, City of Newport News. Pending.


Wilhelm, John E. v. Virginia Employment Commission and Darnell's, Inc. Circuit Court, City of Richmond, Division II. Pending.


CASES BEFORE THE STATE CORPORATION COMMISSION

Accomack-Northampton Electric Cooperative (Case No. 19884). Application for an increase in rates to customers on Tangier Island. By order of July 12, 1977, the applicant was granted a rate increase on a temporary basis which was later made permanent.

Accomack-Northampton Electric Cooperative (Case No. 19914). Application to revise its tariffs. By order of March 14, 1978, the applicant was granted $84,069 of the requested $87,181 rate increase.

Adopting Rules Governing Credit Life Insurance (Case No. 19885). Ex Parte proceeding to consider the adoption of a regulation governing credit life insurance. Pending.

Adopting Rules Governing Unfair Claim Settlement Practices (Case No. 19961). Ex Parte proceeding to consider the adoption of a regulation governing unfair insurance claim settlement practices. Pending.

Amelia Telephone Corporation (Case No. 19891). Application for an increase in rates and charges. By order of November 21, 1977, the applicant was granted $97,380 of the requested $113,600 rate increase.

Appalachian Power Company (Case No. 19723). Application for an increase in rates. By order of October 14, 1977, the applicant was granted $25,685,000 of the requested $44,500,000 rate increase.

Appalachian Power Company (Case No. 19942). Application for authority to implement an experimental Load Management Program for residential electric heating and cooling customers. Approval of the voluntary test program was granted by order from the bench on January 24, 1978.

Appalachian Power Company (Case No. 19984). Application for an increase in rates. Pending.

Central Telephone Company of Virginia and Southern Telephone Company (Case No. 19773). Application for an increase in rates. By order of April 18, 1978, the Central Telephone Company was granted $1,600,366 of its requested $4,667,194 rate increase. A refund of all revenue collected under the temporary rates approved by order of December 22, 1976 in excess of the amount granted above was ordered. Southern Telephone Company was granted its total rate increase request of $263,775.

Chesapeake & Potomac Telephone Company of Virginia (Case No. 19994). Application for authority to withdraw one-party business flat rate service, to time all message rates services, and to freeze offering of multi-party business service. Pending.

Clifton Forge-Waynesboro Telephone Company (Case No. 19910). Application for an increase in rates and charges. By order of December 28, 1977, the applicant was granted the total rate increase request of $884,765.

Colchester Public Service Corporation (Case No. 19916). Application for an increase in rates and charges for sewage disposal service. By order of February 10, 1978, the monthly rate for sewage disposal service was approved to increase from $16 to $24 instead of the requested $27.

Columbia Gas of Virginia, Inc. (Case No. 19988). Application for an increase in
gas rates. Pending.


*Craig-Botetourt Electric Cooperative* (Case No. 19886). Application for an increase in rates and charges. By order of October 6, 1977, the applicant was granted the total rate increase request of $129,354.

*Delmarva Power & Light Company of Virginia* (Case No. 19943). Application to revise its rates. Pending.

*Electric Rate Design Investigation* (Case No. 19611). *Ex Parte* proceeding to investigate whether the public interest will be served by revision of electric rate schedules to follow time-of-usage and peak-load pricing concepts. Continuing investigation.

*General Telephone Company of the Southwest* (Case No. 20003). Application for an increase in rates. Pending.

*Graninger Sewerage Services, Inc.* (Case No. 19917). Application for an increase in rates. Hearings held on application but later dismissed at request of applicant.

*Investigation to Determine the Impact of Abnormal Weather Conditions on the Earnings of Privately Owned Electric and Gas Utilities* (Case Nos. 19811, 19820) during the 1976-77 Winter heating season.

*Investigation to Determine Priority for Available Gas Supplies* (Case No. 19548). Administrative proceeding to consider the adoption of a statewide natural gas curtailment plan.

*Investigation of Fuel Adjustment Clauses* (Case No. 19526). *Ex Parte* proceeding to determine whether the fuel adjustment clauses used by the electric utilities are in the public interest. By final order of July 15, 1978, the rules and reporting procedures were clarified and the investigation closed.

*Investigation of Fuel Adjustment Clause of Virginia Electric and Power Company* (Case No. 19818). *Ex Parte* proceeding to determine if VEPCO's fuel adjustment clause causes unreasonable fluctuations in customer bills and has the potential to lessen incentives for efficient operation. By order of August 30, 1977, the applicant was required to file certain data and the investigation was removed from the active cases until further notice.

*Lake of the Woods Utility Company* (Case No. 19867). Application for an increase in rates. By order of August 5, 1977, the applicant was granted $111,963 of the requested $167,733 rate increase.

*Northern Piedmont Electric Cooperative* (Case No. 19964). Application for an increase in rates and charges. Pending.

*Northern Piedmont Electric Cooperative* (Case No. 19831). Application for an increase in rates and charges. By order of July 27, 1977, the inclusion of the wholesale power adjustment costs in the base rates was approved.

*Northern Piedmont Electric Cooperative* (Case No. 19989). Application for authority to implement an experimental load management program for residential customers. By order of June 29, 1978, the application was ap-
proved as requested.

**Potomac Edison Company** (Case No. 19810). Application for an increase in electric rates. By order of June 13, 1978, the applicant was granted $2,887,802 of the requested $3,825,380 rate increase.

**Potomac Edison Company** (Case No. 19955). Application for authority to surcharge customers for recovery of additional cost of emergency energy purchases. By order of February 14, 1978, the application was denied.

**Potomac Electric Power Company** (Case No. 19905). Application for an increase in rates. By order of June 19, 1978, the applicant was granted $355,551 of the requested $1,578,000 rate increase.

**Prince George Electric Cooperative** (Case No. 19896). Application for an increase in rates and charges. By order of November 3, 1977, the inclusion of the wholesale power adjustment costs in the base rates was approved.

**Prince William Electric Cooperative** (Case No. 19859). Application for an increase in rates and charges. By order of October 13, 1977, the applicant was granted the total rate increase request of $402,523.

**Quarterly Hearings on Fuel Adjustment Clauses, Etc.** (Case No. 19883). *Ex Parte* proceeding to publicly review and evaluate information relating to fuel adjustment clauses and other related matters. Continuing proceeding.

**Roanoke Gas Company** (Case No. 19985). Application for an increase in gas rates. Pending.

**Shenandoah Telephone Company** (Case No. 19920). Application for an increase in rates for telephone service. By order of May 1, 1978, the applicant was granted $354,317 of the requested $379,360 rate increase.

**Shenandoah Valley Electric Cooperative** (Case No. 19987). Application for authority to implement an experimental load management program for residential customers. By order of June 29, 1978, the application was approved as requested.

**Southside Electric Cooperative, Inc.** (Case No. 19833). Application for an increase in rates and charges. By order of August 1, 1977, the inclusion of the wholesale power adjustment costs in the base rates was approved.

**Stoney Creek Utilities Corporation** (Case No. 19853). Application for an increase in rates and charges for water and sewerage disposal service. Pending.

**Suffolk Gas Corporation** (Case No. 19894). Application for an increase in rates for gas service. Granted, subject to refund in part.

**Tri-County Electric Cooperative** (Case No. 19812). Application for a change in rates. By order of July 13, 1977, the inclusion of wholesale power adjustment costs in the base rates was approved.

**Virginia Electric Cooperative** (Case No. 19834). Application for an increase in rates and charges. By order of August 1, 1977, the inclusion of wholesale power adjustment costs in the base rates was approved.

**Virginia Electric and Power Company** (Case No. 19982). Application for an increase in gas rates. Pending.

**Virginia Electric and Power Company** (Case No. 19960). Application for an increase in rates. Pending.


**Washington Gas Light Company** (Case No. 19737). Application for an increase in gas rates. Granted.

**Washington Gas Light Company** (Case No. 19992). Application for an increase...
REPORT OF THE ATTORNEY GENERAL

in gas rates. Pending.


*Wintergreen Utility Company* (Case No. 19697). Application for a Certificate of Public Convenience and Necessity pursuant to the Utility Facilities Act. By order of July 25, 1977, the certificate was issued as requested.

CASES BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA


**Bell, Rebecca** v. *Lynchburg Training School and Hospital.* Claim for Workmen’s Compensation benefits. Award based on compensation compromise.


**Cannon, Jean N.** v. *Southern Virginia Mental Health Institute.* Claim for Workmen’s Compensation benefits. Compensation awarded. Award vacated on appeal to full Commission. Award reinstated upon rehearing.


**Corson, David C.** v. *Western State Hospital.* Claim for Workmen’s Compensation benefits. Pending.

**Crowder, Lucius A.** v. *Commonwealth.* Workmen's Compensation benefits sought for alleged ankle injuries to employee. Evidence indicated employee had ankle complaints before and after employment with the Highway Department. Also, no evidence to support any specific ankle injury at work. Employee did not report accident to foreman or superintendent. Dismissed.


**Horsley, David L.** v. *Department of Highways and Transportation.* Employee failed to report that he became gainfully employed while receiving temporary total disability. At first level, the outstanding award was terminated, but amount of award received fraudulently not ordered repaid. Appealed to full Commission. Pending.


**Meir, Steven H.** v. *Northern Virginia Training Center.* Claim for Workmen’s Compensation benefits. Award entered based upon compromise.


**Simmons, Geraldine E.** v. *Department of Highways and Transportation.* Employee's version industrial accident disputed. Pending.

Vest, Alease v. Lynchburg Training School and Hospital. Claim for Workmen's Compensation benefits. Award entered based upon compromise.

## REPORT OF THE ATTORNEY GENERAL

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

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<th>Date of Hearing</th>
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<td>July 18, 1977</td>
<td>Curtis Walker</td>
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<td>Robert Coward</td>
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<td>Frank Philbrick</td>
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February 21, 1978
Terry Russell Goins
Allen Vaughan, Sr.
Christine Chambers a/k/a Sharon Marie
Candala a/k/a Sharon Marie Davis

February 21, 1978
Hubert Wilson
John Sotos
Debbie Johnson Sotos

February 21, 1978
March 20, 1978
March 20, 1978
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Alger G. Huffman
William Brewster Allen
Arthur C. Bunton, III
Stephen Roy Jones
Lewis Ollis

Algie McGill

Stephen Morgan
Jerome Clark
Virgil Nixon
Lonnie Jack Gignilliat
Donnell Holmes
Bonnie Sue Lutz
Thomas Wyman Taylor

May 15, 1978
May 15, 1978

May 15, 1978
Paul Thomas Baker, Jr.
Robert C. Bowling

June 19, 1978
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June 19, 1978
Linda Faye Shelley
Dale Baines
William Gustafson
Kevin Charles Gray
David Francis Wood
Paul Eugene Henderson
James Allen Smith
Donald Edwin Starr
Dennis Styron
ABORTIONS—Medicaid Program—State may pay for abortions not meeting federal funding requirements, if solely State funds used.

ADMINISTRATIVE PROCESS ACT— Abortions—If changes made in service, "substantive regulation," notice and public procedures of Act must be followed.

ADMINISTRATIVE PROCESS ACT—State Plans Developed Pursuant To A State/Federal Program Are State Regulations.

APPROPRIATIONS—Abortions—Nothing in Appropriations Act prohibits Virginia Medicaid Program from continuing to pay for.

MEDICAID—State May Design Program To Satisfy Needs Of Its Indigent Citizens—State's plan not derived from Title XIX, but from State's laws and policies.

September 7, 1977

THE HONORABLE JAMES B. KENLEY, M.D.
Commissioner of Health

This is in reply to your inquiry of August 23, 1977, concerning abortions for women enrolled in the Virginia Medical Assistance Program (Medicaid). You state that the United States Department of Health, Education, and Welfare (HEW) has advised you that a statute previously enacted by the Congress, popularly known as the Hyde Amendment [see Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976)], prohibits the use of federal matching funds for abortions, except in those cases where the life of the mother "would be endangered if the fetus were carried to term." In view of this fact, you have asked:

"If sufficient State monies are available, is it legally permissible under the laws of the Commonwealth of Virginia for the Virginia Medical Assistance Program to pay for those abortions, which do not meet the recently revised federal funding requirements, for women enrolled in the program, using solely State funds?"

The Medicaid program is an example of "cooperative federalism" where the states are encouraged to appropriate funds to provide medical care to indigents in order to obtain federal funds for the same purpose. Title XIX of the Social Security Act, 42 U.S.C. § 1396 to 1396l (Supp. V, 1975), specifies the minimum requirements a Medicaid program must satisfy to obtain federal financial participation. Beyond these minimum requirements, the states are free to include additional medical benefits and services or to extend coverage to additional classes of indigents. Consequently, a participating state is able to design a program which satisfies the unique needs and priorities of its citizens.

In Virginia, the General Assembly has authorized the State Health Commissioner, subject to the approval of the Governor and the State Board of Health, to prepare and administer a State plan of medical assistance for
Virginians. See § 32-30.1 of the Code of Virginia (1950), as amended. Once the plan is formulated and approved, the General Assembly then appropriates biennially the necessary State funds to implement this plan. Likewise, the United States Congress passes, from time to time, an appropriations bill for the United States Department of Health, Education and Welfare, part of which is earmarked as the federal share for Medicaid programs in which it participates. Thus, a Medicaid program is dependent upon not only Title XIX of the Social Security Act and the State plan for its substantive provisions but also State and federal appropriations for the necessary funding.

The Hyde Amendment does not amend Title XIX; rather it is an amendment which restricts, in the manner specified, the appropriations for HEW. As indicated, the minimum substantive requirements that must exist in a state plan are found in Title XIX. The United States Supreme Court in commenting on the statutory minimums has stated only that "serious statutory questions might be presented if a state Medicaid plan excluded necessary medical treatment from its coverage . . . " See Beal v. Doe, ___ U.S. ___, 97 S.Ct. 2366, 2372 (1977); see also Maher v. Roe, ___ U.S. ___, 97 S.Ct. 2376, 2386 (1977). Clearly, the Hyde Amendment's language falls within this standard of medical necessity, but whether danger to the life of the mother is the sole definition of medical necessity is an unresolved question. In short, as far as federal law is concerned, the Virginia Medical Assistance Program may continue to provide for all abortions presently available under the State plan or it may elect to restrict them. Id. The Hyde Amendment, as I have indicated, however, will fund abortions only in those cases in which the mother's life is endangered.

Except for the minimum requirements, the substantive provisions of a state's plan for medical assistance are not derived from Title XIX, but instead, from the state's laws and chosen policies, as adopted by the legislature and as implemented by the executive and administrative officers of the state. Your question thus becomes whether funds appropriated by the General Assembly may be used for abortions which do not endanger the mother's life. The General Assembly appropriated funds for the current biennium for the Virginia Medical Assistance Program "pursuant to Title XIX [Medicaid] of the Social Security Act." See Item 665, Ch. 779 [1976] Acts of Assembly 1345. (Emphasis added.) While § 174 of that same Chapter provides, in part, that "none of the monies mentioned in the Act shall be expended for any other purpose than those for which they are specifically appropriated" [id. at 1413], I am of the opinion that nothing in the language of Item 665 prohibits the Virginia Medical Assistance Program from continuing to pay for an abortion in a case where the life of the Medicaid mother is not endangered by the pregnancy; the State money would still be expended for services provided "pursuant to Title XIX [Medicaid] of the Social Security Act."

Consequently, the Virginia Medical Assistance Program has three options:

1. It may continue the provision of all therapeutic and all non-therapeutic abortions for Medicaid mothers, using only State funds in those cases in which the mother's life is not endangered; or
2. It may adopt the current federal position and pay for abortions only in those cases where the life of the mother "would be endangered if the fetus were carried to term;" or
3. It may fashion an approach to abortion services which falls between these two alternatives.

If a decision is made to limit or to change abortion services, the procedures of the Administrative Process Act must be followed. See § 9-6.14:1 to -6.14:20 of the Code. The provisions of the State plan for medical assistance concerning
abortion and other family planning alternatives, and the State Health Department’s interpretation thereof, comprise a “substantive regulation.” See §§ 9-6.14:4F and H of the Code. As such, modification of the State plan to adopt the federal financial position on abortions must be in accordance with the Administrative Process Act, which requires both the publication of a notice of intent to modify the regulation and “an opportunity [for interested persons] to submit data, views, and argument orally and in writing to the agency or its specially designated subordinate . . . .” See § 9-6.14:7 of the Code. Moreover, § 9-6.14:6(iv) which permits an agency to dispense with the public procedures of § 9-6.14:7 upon regulations which “are required to conform to basic State or federal laws or regulations . . . where no agency discretion is involved,” is not applicable here because, as discussed above, neither State law nor federal law requires amendment of the State plan.

Accordingly, in my opinion, the Virginia Medical Assistance Program must follow its current regulations by continuing to provide therapeutic and non-therapeutic abortions to Medicaid mothers unless and until it modifies those regulations. If it elects to retain its present regulations, it must use only State funds to finance those abortions in which the mother’s life is not endangered. If it elects to restrict abortions in any way, then it must give public notice of the intent to modify the regulations and afford interested parties an opportunity to submit oral or written comment and argument.

ADMINISTRATIVE PROCESS ACT—Applicability To Department Of Planning And Budget—Virginia Budget Manual and § 2.1-405—Boundaries of planning districts.

ADMINISTRATIVE PROCESS ACT—Purpose Of Act.

DEFINITIONS—“Agency”—Any unit of State government empowered by basic laws to make regulations or decide cases.

DEFINITIONS—“Regulation” As Used In Administrative Process Act—“Procedural” as opposed to “substantive” regulations—Requirements in Virginia Budget Manual.

October 25, 1977

THE HONORABLE JOHN R. MCCUTCHEON, DIRECTOR
Department of Planning and Budget

This is in response to your inquiry in which you request my opinion of the Department of Planning and Budget’s interpretation of the following matters:

“1. The Department of Planning and Budget is not affected by the Administrative Process Act, inasmuch as its ‘regulations’ (e.g., Virginia Budget Manual) are not ‘for public or private observance . . . .’ Section 2.1-405, Code of Virginia, may well be related to the intent of the Act, but the specific hearing requirements stipulated in the Section would appear to be controlling.

“2. The responsibility for administering § 2.1-71, Code of Virginia, lies with the State agency preparing or approving a payment document to disburse funds, and does not require action by the Department of Planning
and Budget prior to its making an allotment of funds which ultimately may be paid to a political subdivision."

Your first inquiry refers specifically to the Virginia Budget Manual and § 2.1-405 of the Code of Virginia (1950), as amended, which concerns the establishment of boundaries of planning districts. The issue to be resolved is whether the Administrative Process Act, §§ 9-6.14:1 through -6.14:20, applies to either the preparation of the Virginia Budget Manual or to the establishment, pursuant to § 2.1-405, of boundaries of planning districts.

The purpose of the Administrative Process Act is:

"... to supplement present and future basic laws conferring authority on agencies to either make regulations or decide cases ... save as laws hereafter enacted may otherwise expressly provide; but this chapter [the Act] does not supersede or repeal additional procedural requirements in such basic laws." Section 9-6.14:3 A.

An "agency" is generally "any ... unit of the State government empowered by the basic laws to make regulations or decide cases." Section 9-6.14:4A. The term "regulation" is defined, in pertinent part, as follows:

"... any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance or for the decision of cases thereafter by the agency or by any other agency, authority, or court ..." Section 9-6.14:4F.

The Virginia Budget Manual consists of instructions directed to the various State agencies detailing the procedures to be followed in preparing biennial budget requests. The term "regulation" as used in the Administrative Process Act is very broad and, in my opinion, encompasses the requirements set forth in the Virginia Budget Manual. The public hearing requirements of the Administrative Process Act, however, are only mandated for the formulation of "substantive regulations." See § 9-6.14:7. The term "substantive regulations" includes regulations requiring certain conduct or stating certain requirements for obtaining or retaining a right or benefit. Procedural regulations are excluded. See § 9-6.14:4H. I am of the opinion that the Virginia Budget Manual consists of "procedural" as opposed to "substantive" regulations. Accordingly, the Department of Planning and Budget may formulate the regulations contained in the Virginia Budget Manual without following the public procedures set forth in the Administrative Process Act. See §§ 9-6.14:7 and -6.14:8.

In establishing boundaries of planning districts on a continuing basis pursuant to § 2.1-405, the Department of Planning and Budget is required to conduct certain specified studies and surveys. The Department is also required to "hold such public and other hearings upon such notice as it may deem advisable; provided at least one public hearing shall be held in each proposed planning district." Section 2.1-405D. Section 2.1-405 vests authority in the Department of Planning and Budget to change the boundaries of planning districts as it deems advisable subject to the specified statutory criteria and procedures. I am of the opinion that in performing this quasi-legislative function the Department is issuing a "substantive regulation" within the meaning of the Administrative Process Act. Accordingly, the public procedure requirements of the Act supplement those public hearing procedures set forth in § 2.1-405.

With regard to your second inquiry, § 2.1-71 reads as follows:
"Each county, city, and town, and each authority, commission, district or other political subdivision of the State to which any money is appropriated by the State or any county, city or town or which levies any taxes or collects any fees or charges for the performance of public services under authority of any statute or expends public moneys derived from any revenue-producing activity or derived from the State shall annually on or before June thirtieth file with the Secretary of the Commonwealth, on forms prescribed by him, a statement of its official title, its location, the names of the members of its governing board or body and executive officer, if any, and the statutory authority under which it was created. The Secretary of the Commonwealth shall publish such information in his annual report to the Governor. No public moneys shall be paid to or received by any such authority, commission, district or other political subdivision unless such information has been filed."

This section prohibits payment of State funds under certain circumstances. Since the Department of Planning and Budget only allots funds, such funds would not be paid by it within the meaning of § 2.1-71. Accordingly, the Department would have no responsibilities imposed by this section. Further, it should be noted that § 2.1-71 is silent with respect to the "administration" of that section. The method to be used for implementation of its requirements raises administrative, rather than legal, questions.

ADMINISTRATIVE PROCESS ACT—Statewide Health Coordinating Council — Promulgation of a State health plan and review of applications for federal funds by Council — Substantive regulations and making of case decisions as defined by Act.

ADMINISTRATIVE PROCESS ACT—Statewide Health Coordinating Council—May not issue regulations or make case decisions, as defined by Act, based solely upon executive order of Governor.

GENERAL ASSEMBLY—Legislative Power Of Commonwealth Vested In General Assembly By Constitution — Governor may not exercise any of that power.

GENERAL ASSEMBLY—Power To Promulgate Regulations And Make Case Decisions Must Be Conferred By General Assembly.

GOVERNOR—Executive Orders — Governor cannot legislate by executive order where an Act of Assembly is required.

GOVERNOR—Executive Orders — Governor has inherent authority to issue executive orders so he can take care that the laws be faithfully executed.

GOVERNOR—Executive Orders — Neither Constitution nor statutes of Virginia provides a general grant of authority to Governor to issue.

GOVERNOR—Power Granted By Constitution To Governor As Chief Executive Of Commonwealth.

GOVERNOR—Executive Orders — When Governor may issue.
LIABILITY—Statewide Health Coordinating Council — Members of will not incur any liability if Council does not exceed its authority.

STATUTES—State Agency Or State Official Cannot Gain Authority From A Federal Law.

VIRGINIA FREEDOM OF INFORMATION ACT—Statewide Health Coordinating Council — Subject to provisions of.

January 13, 1978

THE HONORABLE JAMES B. KENLEY, M.D.
Commissioner, State Department of Health

This is in reply to your inquiry concerning the Statewide Health Coordinating Council. Specifically, you ask the following questions:

1. Whether individual members of the Council may be liable for actions which the Council takes?

2. If so, whether the Attorney General will provide legal representation to the Council members?

3. Whether the Council's activity is subject to the provisions of the Virginia Freedom of Information Act?

Before replying to your questions, I must discuss pertinent legislative enactments and case decisions which bear upon the nature and authority of the Council. The United States Congress passed the National Health Planning and Resources Development Act of 1974, see 42 U.S.C. §§ 300k to 300t (Supp. V, 1975), which prescribes a comprehensive approach to health care on a national scale. The general purposes of the Act are to contain health care costs, to ensure accessible quality health care services to all citizens, to educate the public about proper personal health care and methods for effective use of available health services, and to foster the development of a national health planning policy for achieving those ends. See 42 U.S.C. § 300k (Supp. V, 1975). Within the statutory scheme of the Act, there is a provision that each state must "provide for adequate consultation with, and authority for, the Statewide Health Coordinating Council . . ." (Emphasis added.) See 42 U.S.C. § 300m-l(b) (3) (Supp. V, 1975). The Congress clearly contemplated, as you described in your letter, that the Council play an integral role in the Act's implementation.

If the Commonwealth were not to establish a Statewide Health Coordinating Council with the requisite authority, it would not be in compliance with the requirements of the federal Act. The consequences of such noncompliance could include, among other things, the denial of federal funds to the Commonwealth for expenditure in various health care and planning programs which the Commonwealth has undertaken. See 42 U.S.C. § 300m(d) (Supp. V, 1975). Therefore, except for the federal Act and the Commonwealth's desire to obtain federal funding, no need would exist to create the Commonwealth's Statewide Health Coordinating Council.

Remembering this fact, the answers to the questions which you present depend, in part, upon an appreciation of the powers and responsibilities of the Council as envisioned in the federal Act. The Council is supposed to prepare a State health plan, as well as review the State Department of Health's State plan, with approval and disapproval authority over: (1) the expenditure of federal funds that may be appropriated under the Public Health Service Act, see 42
U.S.C. § 201 to § 300t (Supp. V, 1975); and (2) over any application submitted from within the Commonwealth to the Secretary of the United States Department of Health, Education and Welfare for federal funds which may be available under specified federal acts. See 42 U.S.C. § 300m-3(c) (2) and (6) (Supp. V, 1975). In my opinion, the Council's State health plan qualifies as a "substantive" regulation under the laws of the Commonwealth because it assists the Council in its review of applications for federal funds. See § 9-6.14:4H of the Code. Such reviews with decisions of approval or disapproval would also constitute "case decisions" as that term is defined by the Administrative Process Act, § 9-6.14:4D of the Code. See also Opinion to the Honorable James B. Kenley, State Health Commissioner, dated September 7, 1977. Thus, the federal Act envisions that the Statewide Health Coordinating Council would have a significant role in the scheme of State government, a role which includes promulgation of regulations and making case decisions.

Our inquiry thus becomes whether the Council has authority to perform these duties. Any authority which the Council has must be derived from State law because no State body or official can gain authority from federal law. This principle is expressly recognized in the provisions of the federal Act itself, which require each State to provide authority for the Council. See 42 U.S.C. § 300m-1(b) (3) (Supp. V, 1975). In response to this requirement, Governor Godwin issued Executive Order 32(76) on June 18, 1976, directing that the Council be established effective July 1, 1976, "to carry out the responsibilities of such a body as specified in Section 1524 (c) of the National Health Planning and Resources Development Act of 1974 [see 42 U.S.C. § 300m-3(c) (Supp. V, 1975)]. . . ."

In my judgment, an analysis of the legal effect of this executive order is necessary in order to respond to your questions. No provision of the Constitution of Virginia (1971) explicitly authorizes the Governor to issue executive orders. Further, no Virginia statute provides a general grant of authority to issue such orders; particular State statutes do, however, authorize such orders to aid in the implementation of those statutes. See, e.g., § 44-146.17 (1) and § 58-46 of the Code. Historically, though, the Governors of the Commonwealth have issued executive orders in the absence of a specific statute expressly conferring the authority or a statute generally conferring such authority. In my opinion, it is a well-established principle of Virginia law that the Governor has the inherent authority to issue executive orders so that he can "take care that the laws be faithfully executed . . . ." See Article V, Section 7, of the Constitution. In other words, there is a general reservoir of power granted by the Constitution to the Governor as the Chief Executive of the Commonwealth. See Opinion to the Honorable William M. Tuck, Governor of Virginia, dated April 18, 1946, and found in Report of the Attorney General (1945-1946) at 144.

One must bear in mind, however, that the legislative power of the Commonwealth is vested in the General Assembly. See Article IV, Section 1, of the Constitution of Virginia (1971). The Governor may not exercise any of that power. See Article III, Section 1, of the Constitution of Virginia (1971); accord Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587, 72 S.Ct. 863,567 (1952). Thus, the Governor cannot legislate by executive order where an Act of Assembly is required.

Examples of situations in which executive orders are appropriate are as follows:

(1) Whenever a statute of the Commonwealth confers that authority upon the Governor. Compare Boyd v. Commonwealth, 216 Va. 16, 215
S.E.2d 915 (1975), with Jackson v. Hodges, 176 Va. 89, 10 S.E.2d 566 (1940); see also Opinion to the Honorable James H. Price, Governor of Virginia, dated July 17, 1941, and found in Report of the Attorney General (1941-1942) at 75;

(2) Whenever there is a genuine emergency which requires the Governor to issue an order, pursuant to his constitutional responsibility and power, to abate a danger to the public regardless of the absence of explicit authority. See Opinion to the Honorable William M. Tuck, supra; and

(3) Whenever the order is administrative in nature, as opposed to legislative. See, e.g., Opinion to the Honorable Robert H. Kirby, Coordinator, Economic Opportunity Programs, dated July 21, 1965, and found in Report of the Attorney General (1965-1966) at 143.

With these principles in mind, attention may be focused on the Council’s authority. First, the Council has, pursuant to the Virginia Medical Care Facilities Certificate of Public Need Law, the power to advise the State Health Commissioner whether to issue certificates of public need. See §§ 32-211.6(b)(1) and -211.7. The only other general statute which in any way relates to the Council is an appropriation item to the State Board of Health. This item appropriates money from special funds made available by the federal government for planning activities that will be conducted by the Council. See Chapter 779, Item 651 [1976] Acts of Assembly 1344. This item, however, does not mention the Council by name, nor does it empower the Council to conduct any activity.

If the Council has any further authority, it must be derived from Executive Order 32(76). That order, the pertinent portion of which is quoted above, authorizes the Council to carry out the responsibilities specified in the federal Act. Those functions include planning and rendering advice, but also include promulgation of regulations and making of case decisions. Because the Council’s reason for being is not occasioned by a genuine emergency, and because the power to make case decisions and promulgate regulations can only be granted by the legislature, Executive Order 32(76) cannot be construed to authorize the Council to undertake those latter functions. Such authority must be conferred by the General Assembly.

Consequently, with respect to the liability of members of the Council for actions which the Council may take, I can conceive of no situation in which liability can arise, absent some malicious intent, unless the Council exceeds its authority under State law. As indicated, that authority is limited to a planning and advisory role. If an action were instituted against the Council or its members on account of, e.g., its recommendation on an application for a certificate of need, this Office would provide representation. If the Council were to exceed its present responsibilities, e.g., by purporting to promulgate a State health plan or by approving or disapproving applications for federal funds, those actions would be ultra vires and may create personal liability on the part of the Council’s members.

Concerning your third inquiry, the Virginia Freedom of Information Act, §§ 2.1-340 to -346.1 of the Code, applies to “other organizations, corporations or agencies in the State, supported wholly or principally by public funds.” See § 2.1-341(a) of the Code. I am advised that members of the Council are reimbursed expenses by the Commonwealth and that the Council’s activities are likewise financed. I am of the opinion, therefore, that the Council is an
"organization" within the meaning of § 2.1-341(a) and that, therefore, it must comply with the provisions of the Virginia Freedom of Information Act.

ADVERTISING—False Identification — Neither the advertisements for nor their mailing is a crime — Furnishing such materials might violate 18 U.S.C. § 1426.

CRIMES—Not A Crime To Mail Advertisements For False Identification Cards, False Birth Certificates And Books Which Explain Ways To Change Identity — Furnishing certain materials to obtain unauthorized United States citizenship might violate 18 U.S.C. § 1426.

March 21, 1978

THE HONORABLE WARREN E. BARRY
Member, House of Delegates

You have asked whether certain advertisements received in the mail are illegal. The material was mailed from California, and advertised false identification cards and false birth certificates. Books were also advertised which explain various ways to change one's identity to achieve the following results, among others:

"Cover any undesirable employment record; Make a new name for yourself . . . and never be detected; Change citizenship to any country; Become a member in any organization you want . . . free; Cover arrest, jail, or prison records . . . permanently; Return from exile without detection."

I am unable to find any law which is violated by the mere mailing of these advertisements into Virginia. If, on the other hand, certain of the items were actually furnished, the Code of Virginia would be violated. For example, the furnishing of a false birth certificate would violate both § 18.2-168, which proscribes the forging of public records, and § 32-353.31, which prohibits the furnishing of false birth certificates to be used for a deceptive purpose.

I am likewise unable to locate any provision of the United States Code which would be violated by the mere mailing of these advertisements. Again, however, actually furnishing of some of these materials might violate federal law. For example, furnishing certain materials to help a person obtain unauthorized United States citizenship might violate 18 U.S.C. § 1426 (1970).

Accordingly, while these advertisements are for items to be used for improper purposes, it appears that neither the General Assembly nor Congress has prohibited the advertisements themselves or the mailing of such advertisements. I am of the opinion, therefore, that neither the advertisements, nor their mailing, is illegal in Virginia.

ADVERTISING—Lawyers — Extent to which Bates v. State Bar of Arizona prevents enforcement of rules of Supreme Court of Virginia limiting.

ADVERTISING—Restrictions Valid On Advertisements With False, Deceptive Or Misleading Content — Standards for legal advertising and other types of
commercial speech — Time, manner and place restrictions — Greater societal cost than benefit.

CONSTITUTION—First Amendment Right Of Free Speech — Extent to which lawyers may advertise.

March 28, 1978

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

You have asked the extent to which the United States Supreme Court's recent decision in Bates v. State Bar of Arizona, 97 S.Ct. 2691 (1977), prevents enforcement of rules of the Supreme Court of Virginia which limit advertising by lawyers.

A. Bates Decision

On June 27, 1977, the Supreme Court, in a 5-4 decision, ruled that Arizona could not prevent truthful advertisement in newspapers of routine legal services. Bates v. State Bar of Arizona, 97 S.Ct. 2691, 2709 (1977). The question before the Court was whether it is constitutional to prevent lawyers from advertising "the prices at which certain routine services will be performed." Id. at 2701 (emphasis in original).

1. Facts

Two members of the State Bar of Arizona, Bates and O'Steen, were charged with violating the Arizona Supreme Court's prohibition on advertising. The charge arose from a newspaper advertisement placed by the attorneys, which stated the fees they would charge for uncontested divorces, uncontested adoptions, personal bankruptcies and name changes. The Arizona Supreme Court held that the attorneys had violated the rule and rejected arguments that their activities were protected under the antitrust laws and the First Amendment. Matter of Bates, 113 Ariz. 394, 555 P.2d 640 (1976).

The Supreme Court of the United States unanimously affirmed that portion of the judgment which rejected the antitrust claim, finding that the "state action" exemption of Parker v. Brown, 317 U.S. 341 (1943), was applicable. A majority of the Court held, however, that application of the disciplinary rule against Bates and O'Steen violated their First Amendment right of free speech.

2. Review of Virginia Pharmacy Board

The Court's decision in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748 (1976), held Virginia's statutory prohibition of drug price advertising unconstitutional under the First Amendment. Specifically left unresolved was whether differences between the work of pharmacists and attorneys led to sufficiently different constitutional considerations to distinguish pharmacist and attorney advertising.

In Bates, the majority began its discussion with an analysis of Pharmacy, which held that the First Amendment protects speech in the form of a paid advertisement. The Court there had weighed the competing interests of the citizenry desiring and needing drug price information on one hand and the state desiring to prohibit such advertisements on the other. It recognized that commercial speech disseminates important information on the availability and prices of products and services, which aids decision-making and furthers the proper allocation of resources. The Court concluded that if commercial speech is to be
treated differently than other forms of speech under the First Amendment, such treatment must be based on the content of the speech rather than its type.

3. Justifications for Prohibiting Advertising

The majority in *Bates* then examined the justifications for the prohibition of advertising by attorneys. Of central concern was whether some facet of the legal profession or its work led to a different rule than that of *Pharmacy* and whether some characteristic of the advertisement’s content negated First Amendment protection. The Court first noted that it was not deciding whether advertisements relating to the quality of services or in-person solicitation were protected, and that the arguments offered for the prohibition of price advertising had little force concerning factual, non-price advertisements, such as name and address. It then examined each argument advanced to determine if any justified a complete prohibition of price advertising by attorneys.

a. Advertising Decreases Professionalism

The first justification was that allowing advertising would decrease professionalism in three ways: (1) The service orientation of the profession would be damaged if attorneys joined in the "hustle of the marketplace"; (2) price advertising, which exemplifies the attorney's profit motive, would erode the trust a client otherwise would have in his attorney; and (3) price advertising would diminish the profession's dignity. Although it would have "reason to pause" if it thought advertising would decrease the spirit of public service within the profession or erode the client's trust in his attorney, the majority failed to see a connection between price advertising and these facets of "true professionalism." The majority rejected the third rationale out-of-hand; it found the belief that attorneys are above trade to be an anachronism.

b. Advertising is Misleading

The State argued that price advertising inherently is misleading because of the individualized nature of attorneys' services. The majority agreed that some services are unique and that the propriety of advertising fixed prices for these is "doubtful"; but other services, even if not fungible, vary to such a small extent that advertising a fixed fee is not misleading, so long as the attorney completes the task at the advertised price. The majority expressed more concern over the State's corollary argument that leaving out information necessary for reliable decision-making could mislead consumers. It concluded, however, that truthful information, even if incomplete, would be better than no information.

c. Advertising Increases Litigation

That price advertising would affect the administration of justice by stirring up litigation was rejected out-of-hand. Implicit in the majority's rejection was that increased litigation would be warranted to redress a legal wrong.

d. Advertising Increases Costs

The State then argued that the cost of price advertising would be passed on to consumers, raising the price of legal services, and that advertising would create a barrier to entry in the market by new attorneys who could not afford to advertise. Both theories were rejected, the first because advertising often reduces prices and the second, because advertising, in fact, decreases barriers to entry rather than raising them. Moreover, neither theory distinguished attorneys from pharmacists, and thus the *Pharmacy* result could not be avoided on these bases.
e. Other Arguments

Rejected also were arguments, first, that price advertising would induce poor work because the attorney would perform the advertised service notwithstanding the client's need, and, second, that a false, deceptive or misleading standard would be impossible to enforce. With respect to the first, the Court said that an attorney who would provide low quality work would do so whether or not he were allowed to advertise. The second was not addressed at length, the Court simply saying that there is no correlation between allowing advertising and the number of attorneys who engage in unscrupulous behavior.

After rejecting each justification for the prohibition of price advertising in general, the Court rejected invocation of the overbreadth doctrine, the acceptance of which would have meant holding the rules unconstitutional despite the specific content of the particular advertisement in question. It found, however, that the contents of the advertisement before it were not misleading and therefore were protected by the First Amendment.

4. Valid Restrictions

In the final section of its opinion, the majority discussed what types of restrictions are valid. Advertisements with false, deceptive or misleading content may be restrained. Moreover, the standard for determining what is false, deceptive or misleading is broader with respect to legal advertising than other types of commercial speech because of the public's lack of sophistication with respect to legal services. Accordingly, claims of quality of service may be misleading because they often cannot be verified empirically; in-person solicitation also might be prohibited. Additionally, the State properly may require, even as to the type of advertisement approved in Bates, some warning or further disclosure to correct omission of information necessary for informed decision-making. Certain time, manner and place restrictions also may be valid; and the advertising of illegal activities may be restrained. Finally, use of the electronic media might present special problems which may justify certain limitations.

5. Dissents

Chief Justice Burger dissented from the majority on the First Amendment question, arguing that legal problems and services are not "fungible" and that they could "rarely, if ever, be 'standardized' . . . ." Id. at 2710. Justice Powell, in an opinion joined by Justice Stewart, also dissented, arguing that fee advertising is inherently deceptive because there is in fact no "'routine" legal service. Justice Rehnquist dissented on the basis that commercial speech is not protected by the First Amendment and that Pharmacy was decided incorrectly.

B. The Virginia Rules

DR 2-101 and DR 2-102 read as follows:

"DR 2-101 Publicity in General.

"(A) A lawyer shall not prepare, cause to be prepared, use, or participate in the use, of any form of public communication that contains

1The Court will decide the constitutionality of a state prohibition on in-person solicitation by attorneys this term. See In re Smith, 233 S.E.2d 301 (S.C.), prob. juris. noted, 98 S.Ct. 49 (1977) (No. 77-56); Ohralk v. Ohio State Bar Association, 48 Ohio St.2d 217, 357 N.E.2d 1096 (1976), prob. juris. noted, 98 S.Ct. 49 (1977) (No. 77-1650)."
professionally self-laudatory statements calculated to attract lay clients; as used herein, 'public communication' includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, magazine, or book.

"(B) A lawyer shall not publicize himself, his partner, or associate as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf except as permitted under DR 2-103. This does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

"(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

"(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

"(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

"(4) In and on legal documents prepared by him.

"(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

"(C) A lawyer shall not compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

"DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

"(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

"(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification but may not be published in periodicals, magazines, newspapers, or other media.

"(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

"(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the
nature of the practice, except as permitted under DR 2-105.

"(4) A letterhead of a lawyer identifying him by name and as a lawyer and giving his addresses, telephone numbers, the name of his law firm and any information permitted under DR 2-105. The letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated 'Of Counsel' on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as 'General Counsel' or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

"(5) A listing of the office of a lawyer or law firm in the alphabetical and classified sections of the telephone directory or directories for the geographical area or areas in which the lawyer resides or maintains offices or in which a significant part of his clientele resides and in the city directory of the city in which his or the firm's office is located; but the listing may give only the name of the lawyer or law firm, the fact he is a lawyer, addresses, and telephone numbers. The listing shall not be in distinctive form or type. A law firm may have a listing in the firm name separate from that of its members and associates. The listing in the classified section shall not be under a heading or classification other than 'Attorneys' or 'Lawyers', except that additional headings or classifications descriptive of the types of practice referred to in DR 2-105 are permitted.

"(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105 (A) (4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.
“(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain 'P.C.' or 'P.A.' or similar symbols indicating the nature of the organization and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

“(C) A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners.

“(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

“(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

“(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use, in connection with his name, of an earned degree or title derived therefrom indicating his training in the law.”

With some exceptions, the rules state what can be advertised rather than what cannot. It is not possible to list the myriad facts which may not be advertised under the rules but which are protected by Bates. It is possible, however, to analyze and draw from Bates several general principles which shed light on restraints which the State may place on attorney advertising.

Attorneys have a constitutional right to advertise truthfully. While the right is not absolute, any exception must be based upon resulting public harm which outweighs the benefits which normally flow from advertising. Moreover, the burden will be on the State to justify any limitation.

1. Content of Advertisements

In determining what advertising the State may prohibit, focus must be placed, first, on the content of specific advertisements. Clearly, advertisements soliciting illegal transactions may be suppressed. Beyond this, however, subjective judgments are necessary. False, deceptive or misleading advertisements may be restrained. The limitations imposed by DR 2-101, on publicity in general and professionally self-laudatory statements in particular, are examples of restrictions which will be judged under this standard. The wide leeway granted advertisers in other contexts, for example “puffing” by merchants, might not be
condoned in legal advertisements because of its tendency to mislead the unsophisticated. The State may require warnings, disclaimers or further disclosure so long as they are necessary to present a complete picture to the consumer and so long as the requirement is not so onerous that it effectively precludes price advertising. While the Court stated that "[the] only services that lend themselves to advertising are the routine ones," what constitutes a routine legal service must be determined on a case-by-case basis.

2. Time, Manner and Place Restrictions

The State also may impose reasonable time, manner and place restrictions on advertising. It is impossible now to state in the abstract what time, manner and place restrictions are constitutional. The limitation must further some legitimate state interest and be no more restrictive than necessary to achieve that interest. The varying limitations under DR 2-102 with respect to the content of advertisements in newspapers or magazines, telephone directories, legal directories, or on television or radio, professional cards or office signs, and other similar restrictions will be judged by these principles.

3. Societal Costs and Benefits

Finally, there may be harmful results of attorney advertising which are not related to the advertisement's content and cannot be cured by time, manner and place limitations, but which result in greater societal cost than benefit. In this situation, the advertisement may be suppressed. For example, if in Bates the State had proved that advertising by attorneys increased substantially the price of legal services and that this outweighed other benefits which result from advertising, the advertising could have been prohibited.

In such a cost-benefit analysis, certain arguments of this type rejected in Bates will be found unavailing. The most obvious is that advertising, irrespective of its content, lessens the dignity of the profession. Another is the purported adverse effect which advertising has on the administration of justice by stirring up litigation.

Conclusion

To the extent, then, that DR 2-101 and DR 2-102, (1) prohibit the dissemination of truthful and non-deceptive information concerning prices at which attorneys will perform routine legal services; (2) impose unreasonable time, manner and place limitations on attorney advertising; or (3) otherwise prohibit advertising which results in greater public benefit than harm, the rules are unenforceable under the First Amendment. A time, manner or place limitation is reasonable only if it furthers a legitimate public interest and, even then, only if it is no more restrictive than necessary to achieve that interest. In every case, the State bears the burden of showing that the prohibition or limitation is justified under one of the exceptions stated above.

ALCOHOL SAFETY ACTION PROGRAM—Several Jurisdictions May Combine — Constitutes governmental purpose — Liabilities and immunities of public employees apply.

July 11, 1977

THE HONORABLE JAMES H. HARVELL, III, JUDGE
Seventh Judicial District of Virginia, Traffic Division

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

"In my capacity as Administrator of the Peninsula VASAP Project, I have been requested by the Citizens Advisory Board to obtain an opinion from you concerning liability for negligence of ASAP employees. Our VASAP project includes six different jurisdictions, with the City of Newport News acting as fiscal agent. The employees of Peninsula VASAP are paid by the City of Newport News out of fees paid from cases in each jurisdiction. This was done to help reduce costs of accounting, etc. . . ."

The term VASAP is commonly used to designate the Virginia Alcohol Safety Action Programs authorized by § 18.2-271.1 of the Code of Virginia (1950), as amended. Subsection (d) of § 18.2-271.1 states, in relevant part, the following:

"The Highway Safety Division, or any county, city, town, or cities or any combination thereof may establish alcohol safety action programs or driver alcohol treatment and rehabilitation programs or driver alcohol education programs in connection with highway safety. . . ." (Emphasis added.)

Section 15.1-21 of the Code states as follows:

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

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

It is my understanding that the "Peninsula VASAP Project" has been formed by appropriate action of six political subdivisions, including the cities of Newport News, Hampton, Williamsburg and Poquoson, and the counties of York and James City, all in compliance with §§ 15.1-21 and 18.2-271.1 of the Code. The employees involved are paid by the City of Newport News, which is reimbursed from fees collected pursuant to § 18.2-271.1 in the several jurisdictions. Section 18.2-271.1 (a) requires each person entering a VASAP program to pay a fee of not more than two hundred dollars, for the administration of such programs.

A major thrust of the VASAP law, as found in § 18.2-271.1, is the rehabilitation of the drinking driver as opposed to the application of criminal sanctions. In my view, the objective is the promotion of the public health, safety and welfare, and, therefore, its administration constitutes a governmental purpose. See Black's Law Dictionary 826 (4th ed. 1951). It follows that the City of Newport News could not be held liable for torts which resulted from the performance of the VASAP services. Ashbury v. Norfolk, 152 Va. 278, 147 S.E. 223 (1929). Further, persons entering a VASAP program under § 18.2-271.1(a) do so on a voluntary basis. A person may enter such program with leave of court or upon court order.

In light of the foregoing, the liability of the employees in question would be comparable to that of other public employees performing similar duties. While
the duties of the employees are not outlined in the correspondence furnished, information received indicates that some employees perform ministerial duties while others, or the same employees at times, perform acts which require judgment and discretion. It is generally held that a public employee may be held personally liable for damages resulting from negligent acts in the performance of a ministerial duty. Berry v. Hamman, 203 Va. 596, 125 S.E. 2d 851 (1962). In performing an activity which requires judgment and discretion, unless the employee commits an intentional tort or exceeds the scope of his employment, he is protected from liability for damages resulting from his acts by the doctrine of sovereign immunity. There is no immunity for an employee who commits an intentional tort, nor is there immunity for one who 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).

ALCOHOLIC BEVERAGE CONTROL LAWS—City Cannot Impose Excise Tax On Alcoholic Beverages.

August 5, 1977

THE HONORABLE JOHN D. GRAY
Member, House of Delegates

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

"I am enclosing an ordinance of the City of Hampton which places a tax on persons obtaining food, etc. It would be appreciated if you would give your opinion on its validity in view of the fact of the definition of food which they have interpreted to include all liquid refreshments, including alcoholic beverages. It was my thought that the State had preempted a tax on alcoholic beverages and that localities could not impose a tax thereon.

"Also, I would like an opinion as to Section 39-126 as to when a 'state or federal' government employee would be on official business when eating in a public restaurant."

"Food" is defined in § 39-115 of the Hampton ordinance, which became effective July 1, 1977, as follows:

"'Food' means any and all refreshments and nourishment, liquid or otherwise.'"

You advise that the Commissioner of Revenue has interpreted "food" to include alcoholic beverages. Section 39-116 of the ordinance levies a tax "on the total amount paid for food, in or from any restaurant, whether prepared in such restaurant or not and whether consumed on the premises or not."

"'Restaurant' is defined in § 39-115 as follows:

"'Restaurant' means any coliseum, confectionery, delicatessen, eating house, drugstore, club, resort or other place in the city at which food, as defined in this section, is served."

It is apparent that a person buying a six-pack of beer for off-premises consumption at a delicatessen, for example, would have to pay the tax under the interpretation given the ordinance. In effect, an excise tax on alcoholic beverages
has been imposed. In my opinion the imposition of such a tax is beyond the city’s power.

In an opinion to the Honorable John M. Hart, Commissioner of Revenue of the City of Roanoke, dated January 6, 1949, and found in the Report of the Attorney General (1948-1949) at 2, copy of which is enclosed, the reasons why the City was prohibited from imposing an excise tax on beer and wine were spelled out as follows:

"Section 26 [now § 4-38] of this Act authorizes the governing body of each city and town in the State to provide for the issuance of city and town licenses and to collect license taxes from persons licensed by the Alcoholic Beverage Control Board. The Legislature was careful, however, to classify such licensees and to prescribe a maximum limitation upon the amount of license tax which might be charged and collected.

"This is a clear manifestation of legislative policy, that in assuming complete governmental control of alcoholic beverages the State has preempted the entire domain and has yielded to the political subdivisions only specific grants of authority relative to any phase of taxation.

"The language of section 65 [now § 4-96] clearly indicates a legislative intent to limit the political subdivisions of the State in the field of Alcoholic Beverage Taxation to the imposition of a license tax circumscribed by the restriction established by section 26."

In a later opinion to the Honorable J. T. Camblos, Commonwealth’s Attorney for the City of Charlottesville, dated August 31, 1965, and found in the Report of the Attorney General (1965-1966) at 294, it was ruled that sales of beer and wine could be included in the base for measuring a general retail sales and use tax, assuming the power of the city to impose a sales tax.

Since the ordinance is not within the scope of the 1965 opinion, but, under the interpretation given it, imposes an excise tax on alcoholic beverages, I am of the opinion that it is invalid.

Your second inquiry requires only an interpretation of the ordinance. There is no necessity to construe any applicable provisions of State law in conjunction with the ordinance. As this office has previously ruled, such question should be referred to the City Attorney for the City of Hampton, for it would be inappropriate for this office to make an interpretation. See opinion to the Honorable Nathan H. Miller, Member, Senate of Virginia, dated March 17, 1977, copy enclosed.

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ALCOHOLIC BEVERAGE CONTROL LAWS—Minor Not Criminally LIABLE For Unlawful Possession Of Alcoholic Beverages If Employed As Undercover Agent.

CRIMINAL LAW—Minimum Age For Lawful Purchase Or Possession Of Alcoholic Beverages — Minor as undercover agent.

CRIMINAL LAW—Selling Alcoholic Beverages Without License — Misdemeanor.

CRIMINAL LAW—Use Of Undercover Agents Or Feigned Accomplices — Minors.
DEFINITIONS—“Alcohol,” “Alcoholic Beverages” And “Beer” Defined By Statute.

WITNESSES—Immunity For Minor In Illegal Possession Of Alcoholic Beverages If Called As Witness For Commonwealth In Prosecution Of Vendor.

February 17, 1978

THE HONORABLE JAMES A. CALES, JR.
Commonwealth’s Attorney for the City of Portsmouth

This is in response to an inquiry made in your behalf requesting my opinion on the following questions:

“1. Can officers investigating 4-58 and 4-62 use persons who are unauthorized by state law to possess alcohol because of the age stated in the Code?
“2. Is there any indication within the state law that persons who cannot legally possess alcohol receive immunity from prosecution because the work being done is under the supervision of the police department?”

I am advised that your concern is limited to whether a minor would be criminally liable for unlawful possession of alcoholic beverages if employed as an undercover agent. The statute, of course, deals with other classes of persons besides minors.

Section 4-58 of the Code of Virginia (1950), as amended, makes it a misdemeanor to sell alcoholic beverages without a license. Under § 4-62 a person under twenty-one years of age may not lawfully purchase or possess alcoholic beverages, other than beer; with respect to beer the minimum age for lawful purchase or possession is eighteen. “Alcohol,” “alcoholic beverages” and “beer” are defined in § 4-2. My comments will pertain to “alcoholic beverages” and “beer” as there defined.

**Question 1**

The use of undercover agents or feigned accomplices in not new. It is said in 23 C.J.S. Criminal Laws § 788:

“[A] person who is employed or used by law enforcement officers to obtain evidence of a criminal act by a third person is not an accomplice of his in a prosecution for such act; nor are the officers themselves accomplices in such case. So, also, one who is furnished by the police with money to play at a crap game in order to procure evidence for a prosecution is not an accomplice of one accused charged with maintaining the gaming table.”

In Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938), it was held that an inspector employed by the ABC Board (now Commission) who purchased liquor illegally sold by the defendant was not an accomplice and did not incur any criminal liability. The Court indicated the importance of criminal intent by quoting with approval the following language from another case:

“‘While it may properly be urged that there can be no sale without a purchaser, that the purchaser contributes as much to the violation of the law as the vendor, it must be borne in mind, however, that the intention of the vendor is different from that of the detective vendee. The object of the
vendor is with criminal intent to violate a law of the state, and that of the vendee to determine whether the defendant is engaged in such violation, not to encourage, but to discourage, the commission of the offense; not to conceal and cover, but to disclose the violation of the law. . . ’ State v. Jenkins, 66 Mont. 359, 365, 213 P.590, 592.’” Id. at 469.

Accordingly, it is my view that a minor employed by police officers for the purpose of uncovering evidence of illegal sales of alcoholic beverages to minors does not himself incur any criminal liability by becoming a purchaser of alcoholic beverages in the course of such employment.

Question 2

If there is no criminal liability the question of immunity from prosecution for a criminal offense does not arise. The phrasing of your question indicates employment of the minor by police officers. (I am advised that your concern with respect to both questions is limited to possession of alcoholic beverages by minors.)

In a case where there has been no employment and a minor has been apprehended in illegal possession of alcoholic beverages, § 4-94 authorizes immunity for the minor if he is called as a witness for the Commonwealth in a prosecution of the vendor.

AMENDMENTS—Effective Date — Different dates provided in 1977 amendment.

STATUTES—Amendment—Each part of an act should be given effect if possible—Word or clause inserted through inadvertence or mistake may be rejected as surplusage—Legislative intent.

TAXATION—Deeds Of Trust—Gradually declining rate of taxation—Effective date of 1977 amendment.

January 6, 1978

THE HONORABLE LEWIS H. VADEN, CLERK
Circuit Court of Chesterfield County

This is in reply to your letter in which you request my opinion regarding the effective date of the 1977 amendment to § 58-55 of the Code of Virginia (1950), as amended, which added thereto the fifth through tenth paragraphs. See Chapter 611 [1977] Acts of Assembly 1019. Section 58-55 provides, inter alia, for the computation of the tax imposed upon the recordation of deeds of trust. The 1977 amendment provides for a gradually declining rate of taxation for deeds of trust in excess of $10,000,000. The fifth paragraph of § 58-55 provides that the effective date of the 1977 amendment shall be July 1, 1977. In contrast, clause 2 of Chapter 611 provides that “this act shall be effective beginning on and after July one, nineteen hundred seventy-eight.” The internal inconsistency between the effective date of the Act, contained in clause 2, and the effective date of the amendment to § 58-55, found in the fifth paragraph of § 58-55, gives rise to your inquiry.

A frequently stated principle of statutory construction is that each part of an act should be given effect if possible. Burnette v. Commonwealth, 194 Va. 785,
788-789, 75 S.E.2d 482, 484-485 (1953). Application of that principle, in this instance, is not possible because there is no rational way to give effect to both provisions. Another principle of statutory construction well-settled in Virginia is that "if a word or clause be found in a statute which appears to have been inserted through inadvertence or mistake, . . ., such word or clause may be rejected as surplusage." Burnette v. Commonwealth, supra. "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." National Railroad Passengers Corporation et al. v. National Association of Railroad Passengers, 414 U.S. 453, 458 (1974); Neuberger v. Commissioner, 311 U.S. 83, 88 (1940). Accordingly, we turn to the legislative history of Chapter 611.

The amendment to § 58-55 was first proposed during the 1976 Session of the General Assembly as House Bill No. 1075, and contained a July 1, 1976, effective date. The Bill was not reported out of the House Committee on Finance, but was carried-over to the 1977 Session of the General Assembly.

In 1977, the House Committee on Finance proposed a committee amendment in the nature of a substitute for the Bill which (1) changed the effective date contained in the fifth paragraph of the amendment to § 58-55 from July 1, 1976, to July 1, 1977; (2) proposed an amendment to § 58-514.2:1, which would require the State Corporation Commission to consider the savings realized by public utilities companies as a result of the proposed amendment of § 58-55, when the Commission reviewed requests for rate increases by public utilities during the years 1979 through 1983; and (3) inserted a new clause 2, which provided that the entire Act (Chapter 611) should have an effective date of July 1, 1977. At this point in time, the effective dates contained in the body of the amendment to § 58-55, and in clause 2 of Chapter 611 were in harmony.

On January 19, 1977, the patron of the Bill proposed a floor amendment which changed the effective date in clause 2 of the Act from July 1, 1977, to July 1, 1978, although no change in the effective date found in the body of the amendment to § 58-55 was proposed. The Bill was subsequently enacted, incorporating the effective date change in clause 2. I am advised that the floor amendment to clause 2 was proposed to protect State revenues for the fiscal biennium, 1976-1978. The legislative history of the Bill clearly demonstrates that the amendments to §§ 58-55 and 58-514.2:1 were meant to be complementary in order to accomplish the legislative intent. Consequently, the clear legislative intent is that each section was to have the same effective date.

Based upon the foregoing, it is my opinion that the effective date stated in clause 2 is controlling as to the entire Act, and the inconsistent effective date stated in the fifth paragraph of § 58-55 is of no effect, being the result of a clerical error.

ANIMALS—Spotlighting—Section 29-144.4 intended to prohibit off-the-road spotlighting deer and elk from vehicle, whether vehicle is on or off roadway.

STATUTES—Should Not Be Construed So As To Achieve Absurd Construction.

February 28, 1978

THE HONORABLE DONALD W. DEVINE
Commonwealth’s Attorney for Loudoun County
You have asked whether the spotlighting statute, § 29-144.4 of the Code of Virginia (1950), as amended, applies only to persons in vehicles which are on roadways.

The pertinent language found in subsections (a) and (b) of § 29-144.4 states that

"[a]ny person in any vehicle ... who ... employs a light attached to such vehicle or a spotlight or flashlight to cast a light beyond the water or surface of the roadway upon any place used by deer or elk shall be guilty of a misdemeanor."

The obvious intent of the statute is to forbid spotlighting, from a vehicle, of those off-the-road areas where deer and elk may be expected, with the objective of curtailing the incidence of illegal night hunting. See Yeatts v. Ninton, 211 Va. 402 (1970). Section 29-144.4 contains no language which provides that a person may be convicted only if it is shown that light was being cast from a vehicle on a roadway.

As a general rule, a statute should not be construed so as to achieve an absurd construction. Buzzard v. Commonwealth, 134 Va. 641 (1922). Such a construction would result if § 29-144.4 were interpreted to prohibit spotlighting only from a vehicle on a roadway; obviously, the objective of the statute could be circumvented merely by removing one's vehicle from the roadway.

Accordingly, it is my opinion that § 29-144.4 was intended to prohibit off-the-road spotlighting from a vehicle, regardless of whether the vehicle is located on or off a roadway.

APPEAL—Repeal Of § 16.1-214 Does Not Suspend Reference To It In § 20-79—Case referred from a court of record to a juvenile court—Appeal from order or judgment of such juvenile court taken to court of record which had original jurisdiction.

AMENDMENTS—Reference Statute Incorporates Terms Of One Statute Into Provisions Of Another—Two statutes coexist as separate enactments; repeal of one does not affect its operation in other statute.

January 4, 1978

THE HONORABLE ROBERT F. WARD, JUDGE
Pittsylvania Juvenile and Domestic Relations District Court

This is in reply to your inquiry concerning the court to which appeals from an order of the juvenile court lie in those cases where the matter is before the juvenile court under transfer from the circuit court pursuant to § 20-79 of the Code of Virginia (1950), as amended.

Section 20-79(c) provides, in pertinent part, as follows:

"After the entry of a decree of divorce a vinculo matrimonii the court may transfer to the juvenile and domestic relations district court any other matters pertaining to support and maintenance for the spouse, maintenance, support, care and custody of the child or children on motion by either party. ... An appeal of an order by such juvenile and domestic relations district court which is to enforce or modify the decree in the

In cases such as this, where a reference statute incorporates the terms of one statute into the provisions of another, "the two statutes coexist as separate distinct legislative enactments, each having its appointed sphere of action." IA Sutherland, Statutory Construction 278-279 (4th ed. Sands 1972). As a result, since neither statute depends on the other's enactment for its existence, the repeal of the provision in one enactment does not affect its operation in the other statute. Id. This applies with even greater force when we consider that the same legislature that passed the reference statute (§ 20-79) repealed the statute to which reference was made (§ 16.1-214). Under these circumstances it is irrelevant that § 16.1-214 was replaced by § 16.1-296. Accordingly, I am of the opinion that the repeal of § 16.1-214 did not operate to suspend the reference to it in § 20-79, and that, "in any case which has been referred from a court of record to a juvenile court, and an appeal is taken from an order or judgment of such juvenile court, then the appeal shall be taken to the court of record which had original jurisdiction of the case." Section 16.1-214 of the Code.

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**APPROPRIATIONS**—Courtroom Security—Bailiffs in district courts not included within number of security deputies available under Appropriations Act; in circuit courts, bailiffs are included.

**DISTRICT COURTS**—Bailiffs—Not included within number of security deputies available to provide courtroom security.

**SALARIES**—Appropriations Act Prevents State From Paying Any Amounts To Deputies In Excess Of Number Permitted By Act, Even Though Additional Security In Courthouse Was Required By Judge's General Order—Additional deputies paid solely from local funds.

**SHERIFFS**—Authority—Sheriff has no statutory authority to appoint deputy to serve as bailiff in district court within his jurisdiction; has statutory duty to perform functions of bailiff in circuit courts within his jurisdiction.

**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.

September 21, 1977

THE HONORABLE DANIEL M. CHICHESTER
Commonwealth's Attorney for Stafford County

This is in response to your opinion request whether the term "security deputies" as used in Item 149, § 46, Ch. 685 [1977] Acts of Assembly 1407, excludes bailiffs. If so, you suggest that a sheriff can use all of the bailiffs that he
has available to him, in addition to the deputies envisioned by the aforementioned chapter, to provide courtroom security.

Item 149, § 46 provides an appropriation for payment of the State's share of salaries and other allowances fixed by the Compensation Board for local sheriffs and city sergeants and their deputies and employees, and states, in part:

"Except in special cases when the judge specifically orders it, and notwithstanding the provisions of § 53-168.1 or any other section of the Code of Virginia, no expenditures shall be made out of this appropriation to provide courtroom security deputies for civil cases, more than one deputy for criminal cases in a district court nor more than two deputies for criminal cases in a circuit court, or to operate security devices such as magnetometers in standard use in major metropolitan airports."

A response to your inquiry must be separately made with regard to courts not of record and courts of record.

In an Opinion of this Office to the Honorable George R. St. John, County Attorney for Albemarle County, dated August 4, 1975, and found in the Report of the Attorney General (1975-1976) at 99, it was opined that a sheriff does not have the authority to appoint a deputy to serve as bailiff in district courtrooms within his jurisdiction; a sheriff, however, must appoint a deputy to provide courtroom security for every courtroom within his jurisdiction. See § 53-168.1 of the Code of Virginia (1950), as amended. Deputies so appointed have no statutory function other than security. Consequently, in courts not of record, bailiffs are not contemplated within the provisions of Item 149, § 46 because bailiffs are not part of the personnel of the sheriff. Deputies, of course, may voluntarily perform the function of a bailiff.

With regard to courts of record, however, § 17-13 of the Code provides, in part:

"... a circuit or other court, held only for a city, shall, except when otherwise specially provided, be attended by the sergeant of such city, who shall act as its officer. In all other cases, the sheriff of the county in which any court is held shall attend it and act as its officer."

Effective July 1, 1971, the office of city sergeant was abolished; city sergeants, however, continued in office as city sheriff for the remainder of their terms. Section 15.1-796.1. Both city and county sheriffs, therefore, have a statutory duty under § 17-13 to perform the functions of a bailiff in circuit court. Since the deputies designated to perform those functions are part of the personnel of the sheriff, I am of the opinion that the bailiff must be included in the number of security deputies available to the circuit court under Item 149, § 46.

Additionally, I would note that in a recent opinion to the Honorable Fred G. Pollard, Chairman, Compensation Board, dated August 3, 1977, a copy of which is enclosed, I opined that the language "[e]xcept in special cases when the judge specifically orders it..." refers to individual cases before a court where the special (meaning extraordinary, uncommon, unique) circumstances of a specific case warrant the conclusion that additional security is required to prevent disruption and violence from erupting in the courthouse because of the particularly volatile factors surrounding that case. Accordingly, general orders of the court requiring additional security in all cases, or certain classes of cases, or for particular structures because of the peculiar security problems a building design creates, do not meet the statutory requirements of Item 149, § 46.
APPROPRIATIONS—Eminent Scholars Program—Endowment funds must be so earmarked by donor to qualify for matching appropriation.

COLLEGES AND UNIVERSITIES—Eminent Scholars Program—Endowment funds must be so earmarked by donor to qualify for matching appropriation.

July 20, 1977

THE HONORABLE GORDON DAVIES, DIRECTOR
State Council of Higher Education

This is in reply to your inquiry regarding the appropriations for the Eminent Scholars Program. Item 432 of the Appropriations Act, Ch. 779 [1976] Acts of Assembly 1319, provides an appropriation of $726,000 during each fiscal year of the 1976-1978 biennium for the purpose of attracting and retaining eminent scholars in institutions of higher education. The item further conditions the appropriation as follows:

"This sum shall be apportioned, in accordance with plans approved by the Governor, to institutions of higher education to equal the interest earned by endowment funds created for the purpose after June 30, 1964, or, for Old Dominion University, after June 30, 1966. This appropriation and the apportionments therefrom do not constitute a State commitment to match, in any subsequent biennium, endowment income in excess of this appropriation."

Your specific question is whether otherwise unrestricted endowment funds earmarked for the Eminent Scholars Program by an institution qualify as "endowment funds created for the purpose," or whether the endowment funds must be so earmarked by the donor.

As can be readily ascertained from Item 432, the purpose of the Eminent Scholars Program is to attract and retain eminent scholars in State institutions of higher education. To fulfill this purpose, the General Assembly appropriated a sum of money to be apportioned among the various institutions to match, to the extent possible within the appropriation, "the interest earned by endowment funds created for the purpose." The "purpose" referred to is the purpose of the Program, to attract and retain eminent scholars. It is clear, therefore, that, in order to qualify for matching funds, and endowment must have been created for the purpose of attracting and retaining eminent scholars.

An endowment is "created" when a sum of money is bequeathed or given to the institution by an individual. See In re Petton's Will, 74 N.Y. S. 2d 743 (1947). It makes no difference whether the funds are given to the institution itself or to its tax-exempt foundation, as long as the funds are for the benefit of the institution. See Report of the Attorney General (1974-1975) at 14. In order for an endowment to qualify for the matching funds it is necessary for the donor to have created the endowment "for the purpose" of attracting and retaining eminent scholars. This is a factual question depending on the donor's intent at the time of the creation of the endowment. An endowment which, when donated to either the institution or its foundation, was created for a purpose other than attracting and retaining eminent scholars, or which was unrestricted, does not, however, qualify for the matching appropriation even though the institution may utilize the funds for the purpose of attracting and retaining such scholars. In those situations, the endowment fails to meet the requirement expressly set forth in Item 432 that it be "created for the purpose" of attracting and retaining
eminent scholars.

In sum, it is my opinion that the express language in Item 432 limits the appropriation to matching the interest earned on endowments created by the donor for the purpose of attracting and retaining eminent scholars.

APPROPRIATIONS—Money Paid Into State Treasury May Not Be Disbursed Except By Appropriation Made By Law—Refunds.

APPROPRIATIONS—Accounting System Designation Of Payments As Refunds.

APPROPRIATIONS—“Sum Sufficient” Appropriations.

AUDITOR OF PUBLIC ACCOUNTS—Responsible For Devising System Of Accounting And Bookkeeping For Commonwealth And Agencies.

DEFINITIONS—“Object” Synonymous With “Subject” Within Context Of Article IV, Section 12.

GENERAL ASSEMBLY—Acts Of Assembly—No law shall embrace more than one object, which shall be expressed in its title.

GENERAL ASSEMBLY—Authority—To enact general appropriation bill to refund various amounts paid into State treasury to which Commonwealth not entitled.

STATE TREASURY—Procedure For Disbursing Money From—Refunds—Appropriations.

TAXATION—Refunds Of Taxes—Appropriations.

January 27, 1978

THE HONORABLE JOHN R. MCCUTCHEON, DIRECTOR
Department of Planning and Budget

This is in response to your request in which you make several inquiries concerning Article X, Section 7, of the Constitution of Virginia (1971), and § 2.1-224 of the Code of Virginia (1950), as amended, both of which provide, in pertinent part:

“No money shall be paid out of the State treasury except in pursuance of appropriations made by law; . . .”

I shall respond to your questions in order:

1. “Does the cited Section of the Constitution [and the Code of Virginia] require an appropriation for the restitution payment of amounts paid into the State treasury and to which the State is not entitled?”

The deposit of all moneys coming into the possession of the Commonwealth is controlled by § 2.1-180, which provides, in pertinent part:

“Every State department, division, officer, board, commission, institution or other agency owned or controlled by the State, . . . collecting or receiving public funds, or moneys from any source whatever, belonging to or for the use of the State, . . . shall hereafter pay the same promptly into
the State treasury, without any deductions on account of salaries, fees, costs, charges, expenses, refunds, or claims of any description whatever.”

(Emphasis added.)

The procedure for disbursing money from the State treasury is controlled by the clear, mandatory language of Article X, Section 7, and § 2.1-224, supra. See also, Button v. Day, 203 Va. 687, 694-695, 127 S.E.2d 122, 128 (1962). This result is not affected by a determination that the Commonwealth is not entitled by law, or otherwise, to a particular source of revenue. See generally: Commonwealth v. Ferries Co., 120 Va. 827, 92 S.E. 804 (1917). Based upon the foregoing, it is my opinion that once money is paid into the State treasury it may not be disbursed except by an “appropriation made by law,” regardless of the Commonwealth’s “entitlement” to such money.

2. “If the response is affirmative, can the [refund] appropriation be stated as a general one and not be provided for each separate type of payment?”

I am unaware of any general principle of law which prohibits a general appropriation for the refunding of money deposited in the State treasury to which the Commonwealth is not entitled. While certainty in the amount appropriated is essential to a valid appropriation of public moneys, Henderson v. Hovey, 46 Kan. 691, 27 P. 177 (1891), it is generally held that an appropriation bill is not void for uncertainty in not specifying a stated amount if it fixes the extent to which the treasury will be drawn upon. See 63 Am.Jur.2d Public Funds § 50 at 439 (1972). This rule of law is illustrated by the method of appropriating “refund” type payments currently used in Virginia. For example, pursuant to the Appropriations Act, Item 121, § 41, (Chapter 779 [1976] Acts of Assembly 1273), the Virginia Department of Taxation is authorized, as an operating expense, to make “refund” payments according to an appropriation which provides:

"Refunds of taxes, and interest thereon, in accordance with law — a sum sufficient."

Item 121 is unfunded, but since a refund appropriation is limited in extent to the amount of revenues taken in, the treasury cannot be depleted beyond its revenue and, therefore, the extent to which the treasury will be drawn upon is fixed.

The general rule concerning the format of all laws of the Commonwealth of course must be followed in this matter. That rule is contained in Article IV, Section 12, of the Constitution of Virginia (1971), which provides, in pertinent part:

"No law shall embrace more than one object, which shall be expressed in its title."


Within the context of Article IV, Section 12, the word "object" is synonymous with "subject." City of Richmond v. Pace, 127 Va. 274, 283, 103 S.E. 647, 650 (1920). If the subjects embraced by the Act, but not specified in the title, have congruity, or natural connection, with the subject stated in the title, or are cognate, or germane, thereto, the requirement of the Constitution that "[n]o law shall embrace more than one object, which shall be expressed in the title" is satisfied. Commonwealth v. Dodson, supra.
Based upon the foregoing, it is my opinion that the General Assembly is not prohibited from enacting a general appropriation bill for the purpose of refunding various amounts paid into the State treasury to which the Commonwealth is not entitled, provided the title and object of the statute comports with the Virginia constitutional requirements outlined herein.

3. "If the response is affirmative, does use of the word 'appropriation' in the Constitution, and in the Appropriations Act, preclude an accounting system designation of such a payment as a 'refund'?"

I am unaware of any constitutional provision or Code provision which could be interpreted to establish a particular system of accounting for the Commonwealth, or to require particular treatment of any items. Under § 2.1-156, the Auditor of Public Accounts is responsible for devising "a modern, effective and uniform system of bookkeeping and accounting" for the Commonwealth and its agencies, under the direction of the Joint Legislative Audit and Review Commission. It appears that the accounting practice in question comports with the general requirements of § 2.1-156. See Opinion to the Honorable Edward E. Lane, Member, House of Delegates, dated February 1, 1974, and found in the Report of the Attorney General (1973-1974) at 14.

Based upon the foregoing, it is my opinion that you may use an accounting system which designates such a payment as a "refund."


ARREST—Guard, Registered Employee Of Private Security Services Business, Has No Authority To Arrest Suspect Away From Premises He Contracted To Protect.

ARREST—Guard, Registered Employee Of Private Security Services Business, May Effect Arrest Off Premises He Contracted To Protect, Only As Any Other Private Citizen.

ARREST—Guard, Registered Employee Of Private Security Services Business, Required To Utilize "Detention" Procedure Of § 18.2-105.1 In Cases Of Shoplifting Misdemeanors Not Committed In His Presence.

CRIMINAL PROCEDURE—Citizen's Arrest—May make arrests for felonies, affrays or breaches of the peace committed in his presence.

CRIMINAL PROCEDURE—Registered Employee Of Private Security Services Business Authorized To Transport Arrested Person To Magistrate.

August 24, 1977

THE HONORABLE RUTH J. HERRINK, DIRECTOR
Department of Professional and Occupational Regulation

This is in reply to your letter in which you ask three questions dealing with the arrest powers of registered employees of private security services businesses. I will answer your questions seriatim:

"1.) Whether § 54-729.33 of the Code in regard to a registered security guard's arrest power while on the premises which he is assigned to guard is
merely a codification of the arrest powers of a citizen, as applied to registered security guards?"

A private citizen may make arrests for felonies committed in his presence and for affrays or breaches of the peace committed in his presence. See Report of the Attorney General (1975-1976) at 17. Prior to the enactment in 1976 of §§ 54-729.27 to -729.34 of the Code of Virginia (1950), as amended, the arrest authority of private citizens hired as security guards and not appointed as either special conservators of the peace or special police pursuant to applicable statutory authorizations was no greater than that of any other private citizen.

Sections 54-729.27 to -729.34 set requirements for licensing, registration, and training of registered employees of private security services businesses, including guards as defined therein, as well as provisions for rules and regulations regarding registration, licensing, and requirements for bonds or insurance. In consideration of the requirements placed upon registered employees of private security services businesses, a specific power of arrest was conferred. See § 54-729.33, which states:

"The compliance with the provisions of this chapter shall not of itself authorize any person to carry a concealed weapon or exercise any powers of a conservator of the peace; provided, however, that a registered employee of a private security services business while on a location which such business is contracted to protect shall have the power to effect an arrest for an offense occurring on such premises."

It is my opinion that § 54-729.33 is not merely a codification of the arrest powers of a citizen, as applied to registered employees of private security services businesses.

"2.) If the answer to number 1 is "no", then what power of arrest lies with the registrant while on the premises he is assigned to guard?"

Registered employees of private security services businesses may effect arrests while on the premises they are contracted to protect for offenses occurring on such premises. See § 54-729.33. Such power of arrest, though limited, is not unlike the general power of arrest possessed by police officers.

Such registered employee may arrest persons committing misdemeanors or felonies in his presence and persons whom he has probable cause to suspect of having committed a felony, though committed not in such registered employee's presence.

I would add that while an individual's arrest power under § 54-729.33 does not extend outside the premises he is protecting, he may effect an arrest off the premises, as any other private citizen can, for felonies and affrays or breaches of the peace which are committed in his presence, pending the arrival of a police officer. See Opinion to the Honorable James M. Thomson, Member, House of Delegates, dated November 4, 1976; Opinion to the Honorable Ruth J. Herrink, Director, Department of Professional and Occupational Regulation, dated January 4, 1977, copies of which are enclosed.

"3.) If the answer to number 1 is "no," specifically what can a registrant legally do with a suspect in his custody if a police officer refuses to accept the transfer of custody and/or orders the suspect to be released?"

Upon effecting an arrest pursuant to the power conferred upon him by § 54-729.33, a registered employee of a private security services business has the
concomitant authority to transport the person arrested to a magistrate. See Opinion to the Honorable Ruth J. Herrink, Director, supra. Consequently, a "transfer of custody" per se is not indispensable; the failure of a police officer to "accept" the arrestee would not totally thwart the efforts of the registered employee. I would emphasize, however, that the better procedure is to have a police officer summoned to the scene. His experience and training will be valuable in containing potentially violent situations and in assisting the registered employee in presenting sufficient probable cause to the magistrate for the issuance of an arrest warrant; this is similar to action that is provided for in shoplifting cases under § 18.2-105.1 of the Code. I would add that the registered employee is required to utilize the "detention" procedure of § 18.2-105.1 in cases of shoplifting misdemeanors not committed in his presence, inasmuch as he has no power to effect arrests for misdemeanors not committed in his presence. In shoplifting cases in which the value of the goods involved is one hundred dollars or more, however, the offense is a felony, and, as such, is within the arrest powers of the registered employee.


ATTORNEY GENERAL—Member Of Executive Department Of State Government—Duties defined by statute—Opinion-giving function; when refusal to opine necessary.

ATTORNEY GENERAL—Official Opinions—May be rendered on city charters, but may not interpret local ordinance or city code.

ATTORNEY GENERAL—Official Opinions—Not rendered on matters in litigation unless request made by court in which matter is pending.

CONSTITUTION—Legislative, Executive And Judicial Departments Are Separate And Distinct—None exercises powers of others.

GENERAL ASSEMBLY—Responsible For Settling And Enforcing Its Own Rules Of Procedure—House of Delegates sole judge of its rules.

GENERAL ASSEMBLY—Rule 69 Of Rules Of House Of Delegates—No member who has personal interest in result of question shall either vote or be counted on it.


October 25, 1977

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your letter which refers to my recent statement construing the statutory law of the Commonwealth as found in the Code of Virginia (1950), as amended. Your letter does not question the remarks or conclusions I made at that time, but rather requests my opinion regarding the Rules of the House of Delegates. Specifically, your inquiry asks that I interpret Rule 69 of the Rules of the House of Delegates which states:
"Upon a division of the House on any question, a member who is present and fails to vote shall, on the demand of any member, be counted on the negative of the question; and when the yeas and nays are taken shall, in addition, be entered on the Journal as present and not voting. But no member who has an immediate and personal interest in the result of the question shall either vote or be counted upon it." Manual of the Senate and House of Delegates 379 (1976).

Article III, Section 1, of the Constitution of Virginia (1971), provides in part:

"The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time..."

This provision is a broad statement of the principle of the separation of powers, a basic and fundamental principle of government in the Commonwealth. It has remained essentially unchanged since the Constitution of Virginia (1776). I A. Howard Commentaries on the Constitution of Virginia 433 (1974).

Article IV, Section 7, of the Constitution of Virginia confers powers on the General Assembly to determine its internal organization. That section of the Constitution provides in pertinent part:

"The House of Delegates shall choose its own Speaker; and, in the absence of the Lieutenant Governor, or when he shall exercise the office of Governor, the Senate shall choose from its own body a president pro tempore. Each house shall select its officers and settle its rules of procedure. The houses may jointly provide for legislative continuity between sessions occurring during the term for which members of the House of Delegates are elected. Each house may direct writs of election for supplying vacancies which may occur during a session of the General Assembly. If vacancies exist while the General Assembly is not in session, such writs may be issued by the Governor under such regulations as may be prescribed by law. Each house shall judge of the election, qualification, and returns of its members, may punish them for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member." (Emphasis added.)

The authority of the General Assembly to settle its own rules of procedure is another principle of law which has remained unchanged since the Constitution of 1776. See I A. Howard, id. at 503. The Supreme Court of Virginia has stated that each house of the General Assembly "is vested with the power of making rules for its own government." Wise v. Bigger, 79 Va. 269, 282 (1884). This Office has previously recognized that the Constitution of Virginia "vests in each house of the General Assembly the exclusive authority to establish its rules of procedure." See Opinion to the Honorable William F. Stone, Member, Senate of Virginia, dated April 22, 1959, and found in Report of the Attorney General (1958-1959) at 144.

It is the responsibility of the legislative branch to both establish and enforce its own rules. It would not be proper for the executive or judicial branches of government to inquire as to the legislature's observance of its own rules of procedure. Christoffel v. United States, 338 U.S. 84 (1949). In Virginia, such a matter must be left to the judgment of the General Assembly alone.

The Attorney General of Virginia is a member of the executive department of the State government. See Article V, Section 15, of the Constitution. Proceedings and Debates of the House of Delegates Pertaining to Amendment of
The constitutional provision declaring that the Attorney General shall perform such duties as may be prescribed by law is implemented by those sections of the Code of Virginia which define the various duties of the Office. See §§ 2.1-117 through 2.1-133.3. Section 2.1-118 articulates the authority of the Attorney General of Virginia to render official legal opinions. It is acknowledged that official opinions of the Attorney General must be confined to matters of law. II A. Howard Commentaries on the Constitution of Virginia 668 (1974). I view my duty to issue opinions as one of the most significant responsibilities of my Office. The requirements of this responsibility have been consistently acknowledged by constitutional commentators.

"The fact that Virginia's Attorney General was originally a member of the judicial department, and the Commonwealth's continuing insistence upon keeping the office popularly elected and independent of the Governor, would indicate that a Virginia Attorney General properly sees his opinion-giving function as a quasi-judicial one to be exercised to advance the best interests of the law and the public at large rather than to ease the job of state offices and agencies." (Emphasis added.) II A. Howard, id. at 669.

As a result, there are instances in which the Attorney General must refuse to render an official opinion so as not to interfere with matters of appropriate legislative or judicial consideration. One example is an issue which does not require an interpretation of a federal or State law, but would rather insert this Office into a matter solely of local concern. See Opinion to the Honorable Nathan H. Miller, dated March 17, 1977, a copy of which is enclosed. Another example concerns a matter which is in litigation. I have ruled that it is not necessary or desirable for the Attorney General to express an opinion upon matters which are currently being litigated, and it is, therefore, the policy of this Office not to do so unless requested by the court before which the matter is pending. Adherence to this policy ensures that this Office will not render opinions upon questions whose answers may bring it into conflict with judicial tribunals. See Opinion to the Honorable William E. Land, Judge, Danville General District Court, dated October 6, 1977, a copy of which is enclosed. This practice is analogous to the declination of the United States Attorney General to render an opinion upon a question contemporaneously pending before the courts for determination. See 38 Op. Att'y Gen. 149 (1934).

Another instance in which this Office should not render an official opinion would concern those questions which must be resolved solely by the legislative branch. Should the Attorney General, a member of the executive branch, render an opinion in a matter over which the House of Delegates alone has responsibility, a possible conflict with the basic constitutional principle of the separation of powers would result. The Attorney General would, in effect, be telling the House how to interpret and apply its own rules of internal organization. Such an unwarranted and unjustified insertion of the executive branch into the prerogatives of the legislative branch may not be permitted under the provisions of Article III, Section 1, of the Constitution of Virginia.

I therefore conclude that I may not render an official opinion interpreting Rule 69 of the Rules of the House of Delegates. It must remain the responsibility of the General Assembly to settle and enforce its own rules of procedure. Please note, however, that the provisions of House Rule 69 are similar, if not even
narrower, in principle to the statutory implications of § 2.1-358, which provisions govern standards of conduct for members of, and candidates for, the General Assembly. As I indicated in my recent statement, with which you agreed in your letter to me, there has been no violation of the Virginia Conflict of Interests Act.

If the interpretation given the Rules by the House of Delegates is that the principles of conduct of Rule 69 and § 2.1-358 are essentially similar, I would likewise be of the opinion that no conflict of interest has resulted. I am, however, as I have noted previously, bound to withhold an official opinion in this matter and allow the House of Delegates to remain the sole judge of its rules of procedure.

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ATTORNEY GENERAL—Official Opinions—Not rendered on matters in litigation unless request made by court in which matter is pending.

WARRANTS—Not Served—Matter in litigation; official opinion of Attorney General not rendered.

October 6, 1977

THE HONORABLE WILLIAM E. LAND, JUDGE
Danville General District Court
Twenty-second Judicial District

This is in response to your recent request for an opinion regarding certain warrants which have not been served.

I am informed that this matter is currently pending in the Circuit Court of the Twenty-second Judicial District. In light of this fact, I am unable to furnish you with the requested opinion.

It is not necessary or desirable for the Attorney General to express an opinion upon matters which are currently being litigated, and it is the policy of this Office not to do so unless so requested by the court before which the matter is pending. Adherence to such policy ensures that this Office will not render opinions upon questions whose answers may bring it into conflict with judicial tribunals.

This well-established practice is analogous to the declination of the United States Attorney General to render an opinion upon a question contemporaneously pending before the courts for determination. See 38 Op. Att'y. Gen. 149 (1934).

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BANKS—Interest On Loans—“Simple interest” (amortized) method of computation; add-on method—Service charge—Annual percentage rate.

INTEREST—Rates—Maximum rate that may be charged.

LOANS—Annual Percentage Rate—Not method of calculating interest but amount which reflects real cost of loan to borrower—Charges included in it.

USURY—Rate Of Interest Not Controlling; Amount Controlling.
REPORT OF THE ATTORNEY GENERAL

January 11, 1978

THE HONORABLE FRANKLIN P. HALL
Member, House of Delegates

This is in response to your question of whether banks may, consistent with the provisions of §§ 6.1-330.13 and 6.1-330.45 of the Code of Virginia (1950), as amended, make loans according to the "simple interest" method of computation but at a rate equal to whatever annual percentage rate, quoted in accordance with § 6.1-330.17 of the Code, corresponds to the add-on interest method of computation set forth in § 6.1-330.13.

Section 6.1-330.11 of the Code, which generally governs interest charges in Virginia, provides in pertinent part:

"Except as otherwise permitted by law, no contract shall be made, for the loan or forbearance of money at a greater rate of interest than eight per cent per annum, including points expressed as a percentage of the loan divided by the number of years of the loan contract.

***

"For contracts which may be at a greater interest than eight per cent per annum, reference is hereby made to article 3 (§ 6.1-330.12 et seq.) relating to add-on rates, . . . ." (Emphasis added.)

As you have noted, the General Assembly has fashioned a statutory exception for banks from the normal usury level of eight per cent per annum by allowing banks to use a special add-on method of computation. Thus, § 6.1-330.13 of the Code provides:

"Any bank may charge in advance at a rate of interest of seven per centum per annum upon the entire amount of any loan payable in weekly, monthly or other periodical installments.

"In addition to the charges permitted by the prior sentence a bank may impose a service charge not exceeding two per centum of the amount of the loan." (Emphasis added.)

Therefore, according to the statutory scheme set forth by the General Assembly at the present time, banks have two alternatives. Either interest is computed according to the "simple interest" or amortized method at a maximum rate of eight per cent per annum according to § 6.1-330.11 or it is computed according to the "add-on" method at a maximum rate of seven per cent per annum and a service charge of two per cent per annum pursuant to § 6.1-330.13. If the interest is computed according to the amortized method, it is paid on a progressively reduced principal balance, rather than on the original principal. If interest is computed according to the "add-on" method, the interest is added to the original principal before determining the installment amounts.

Section 6.1-330.17 of the Code provides that regardless whether the "simple interest" or amortized method is used or whether the "add-on" method is used the lender must state for the customer an "annual percentage rate." This "annual percentage rate" is not actually a rate, but rather an amount, expressed in percentage terms, which reflects the real cost of the loan to the borrower. According to 15 U.S.C. § 1606, 12 C.F.R. §§ 226.4 and 226.5, the stated "annual percentage rate" must reflect, in addition to the interest, (1) the service, transaction, activity or carrying charge, (2) loan fee, points, finder's fee or similar charge, (3) fee for appraisal, investigation or credit report, and (4)
charges or premiums for credit life, accident, health, or loss of income insurance required by the creditor in connection with the credit transaction.

Accordingly, the "annual percentage rate" amount may in many instances be the same as that resulting from the application of the add-on rate plus the service charge allowed by § 6.1-330.13, but it is not necessarily the same amount. In some cases it may be greater. For this reason, I do not believe that under the present statutory scheme the General Assembly intended that the "annual percentage rate" become a substitute for or alternative to the rates and methods of computing interest which it set forth in §§ 6.1-330.11 and -330.13 of the Code. As your letter illustrates, it would be less complicated for borrowers, and perhaps for banks, were § 6.1-330.13 of the Code and other lending statutes to speak in terms of unified annual percentage rates, or annual amounts of interest, but such statutes instead refer to rates and methods of calculating. I find no authority in the provisions cited above permitting banks to depart from that scheme.

Moreover, I do not find that the Opinion of the Attorney General to the Honorable Owen B. Pickett, Member, House of Delegates, dated August 20, 1973, and found in the Report of the Attorney General (1973-1974) at 199, permits such a practice. As was explained in that Opinion interpreting former § 6.1-330 of the Code, an "annual percentage rate" is merely an amount; it is not a rate or a method of calculating interest.

It is my opinion, therefore, that absent a statutory amendment, banks may not, consistent with the provisions of §§ 6.1-330.13 and 6.1-330.45 of the Code, make loans according to the "simple interest" method of computation but at a rate equal to whatever "annual percentage rate" is reached after use of the seven per centum add-on method set forth in § 6.1-330.13.

BOARDS OF SUPERVISORS—Authority—Mandatory water conservation measures in event of emergency—Emergency may be declared only by Governor upon petition of local governing body.

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

VIRGINIA EMERGENCY SERVICES AND DISASTER LAW—Emergency Management Of Resources—Authority of Governor to regulate sale, use or distribution of resources—Water conservation.

July 7, 1977

THE HONORABLE FREDERICK LEE RUCK
County Attorney for Fairfax County

This is in reply to your recent letter requesting my opinion whether a board of supervisors possesses the authority to impose mandatory water conservation measures in the event of an emergency posing a threat to the health, safety and welfare of the inhabitants of the county.

The powers of local government in Virginia have been interpreted on the basis of the principle known as Dillon's Rule or its corollary. See 1 J. Dillon, Law of Municipal Corporations, 448-50 (1911); Bd. of Supervisors v. Horne, 216 Va.
This position was recently reemphasized by the Virginia Supreme Court when it stated: "There can be no question that Virginia long has followed, and still adheres to, the Dillon Rule of strict construction concerning the powers of local governing bodies." Commonwealth v. Arlington County Bd., 217 Va. 558, 573, 232 S.E.2d 30 (1977).

As creatures of the State which are entirely subordinate to it, the powers of counties, like those of cities, can be no greater than those which the State has wished to confer upon them. Gordon v. Fairfax County, 207 Va. 827, 15 S.E.2d 270 (1967). Thus the authority of a board of supervisors to enact legislation of the type contemplated is dependent upon whether such power is expressly provided, or can be necessarily implied from, those powers granted by the State. Any doubt as to the existence of a power must be resolved against the county. 13 M.J. Municipal Corporations § 26 (1974).

The general law authorizes certain activities by local governments in managing the use of water resources. A board of supervisors is authorized to provide sources of water supply [see § 15.1-37 of the Code of Virginia (1950), as amended], and to take such actions, not inconsistent with the general law, to protect the quality of such sources of supply, and, in turn, the public health. See § 15.1-510 of the Code. The general law contains no express grant of authority to a board, however, nor can such authority necessarily be implied, to enact mandatory water conservation measures in the event of an emergency.

This conclusion is reinforced by the fact that the General Assembly has enacted legislation to deal with natural resource emergencies. The Virginia Emergency Services and Disaster Law, which is codified as Chapter 3.2 of Title 44 of the Code, establishes an Office of Emergency Services to prepare and coordinate plans to deal with emergency situations, and authorizes the Governor to take action to protect the safety and welfare of the State in time of natural or man-made disasters. The Act defines a resource shortage as the

"... absence, unavailability or reduced supply of any raw or processed natural resource, or any commodities, goods or services of any kind which bear a substantial relationship to the health, safety, welfare and economic well-being of the citizens of the Commonwealth." Section 44-146.16(10).

An emergency which would warrant the imposition of mandatory water conservation measures would, in my view, constitute a resource shortage. If that emergency could result in significant harm to the health, safety, welfare or property of the people of the Commonwealth, the Virginia Emergency Services and Disaster Law may be employed to avert that harm. See Opinion to the Honorable T. P. Credle, State Coordinator, Office of Emergency Services, found in Report of the Attorney General (1973-1974) at 448; Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975).

A local emergency may be declared when:

"... the threat or actual occurrence of a disaster is or threatens to be of sufficient severity and magnitude to warrant coordinated local government action to prevent or alleviate the damage, loss, hardship or suffering threatened or caused thereby; provided, however, that a local emergency arising wholly or substantially out of a resource shortage may be declared only by the Governor, upon petition of the local governing body, when he deems the threat or actual occurrence of a disaster to be of sufficient severity and magnitude to warrant coordinated local government action to prevent or alleviate the damage, loss, hardship or suffering threatened or caused thereby ..." (Emphasis added.) See § 44-146.16(6).
Upon the declaration of a local emergency arising out of a resource shortage, a local government may take those steps necessary, within constitutional limitations, to end the local emergency. Section 44-146.21 of the Emergency Services and Disaster Law Act provides in part that:

"... whenever the Governor has declared a state of emergency, each political subdivision within the disaster area may, under the supervision and control of the Governor or his designated representative, enter into contracts and incur obligations necessary to combat such threatened or actual disaster beyond the capabilities of local government, protect the health and safety of persons and property and provide emergency assistance to the victims of such disaster. In exercising the powers vested under this section, under the supervision and control of the Governor, the political subdivision may proceed without regard to time-consuming procedures and formalities prescribed by law pertaining to public work, entering into contracts, incurring of obligations, employment of temporary workers, rental of equipment, purchase of supplies and materials, levying of taxes, and appropriation and expenditure of public funds." (Emphasis added.)

In view of the foregoing, I am of the opinion that the board of supervisors is neither authorized by general law, nor does it have such authority by necessary implication from general law, to impose mandatory water conservation measures in the event of an emergency. The board may, however, petition the Governor pursuant to § 44-146.16(6) to declare a local emergency due to a water shortage, and to delegate to the board authority to deal with the shortage. If the Governor expressly delegates to the board his authority to impose mandatory water conservation measures, the board may enact an ordinance mandating such measures.

BOARDS OF SUPERVISORS—Authority—May designate employee of county to administer and enforce ordinance for removal, repair or securing of unsafe structures.

September 6, 1977

THE HONORABLE GEORGE R. ST. JOHN
County Attorney for Albemarle County

This is in response to your recent inquiry in which you ask the following:

"The Board of Supervisors of Albemarle County has recently adopted an ordinance, pursuant to § 15.1-11.2 of Code of Virginia (1950), as amended, regarding the removal, repair or securing of unsafe structures, a copy of which is enclosed herewith. The ordinance, as adopted, constitutes the building official of the County as the County's enforcing agent. Albemarle County has a building official whose principal duty heretofore has been the enforcement of the Uniform Statewide Building Code within the County. A question has now arisen as to whether the above-cited statute gives the Board of Supervisors the authority to delegate the responsibility of administering and enforcing this ordinance to an administrative officer or whether the board must serve as its own administrative agency."
It is clear that the Board of Supervisors of Albemarle County may employ agents and servants to exercise authority which has been delegated to the Board of Supervisors. *South Hampton Apartments v. Elizabeth City County*, 185 Va. 67, 78-79, 37 S.E.2d 841 (1946). Section 15.1-11.2 of the Code of Virginia (1950), as amended, provides that the governing body of any county may enact an ordinance containing certain provisions regarding the removal, repair or securing of buildings, walls or other structures that might endanger the public safety or health of county residents. The authority to prescribe such removal, repair or securing, is vested in the governing body of the county. Section 15.1-11.2(1). The ordinance enclosed with your letter incorporates the provisions of § 15.1-11.2 and vests the Building Official of Albemarle County with the authority to administer the ordinance subject to the guidelines and limitations embodied in § 15.1-11.2. I am of the opinion that the Board of Supervisors of Albemarle County may designate an employee of the County to administer and enforce such an ordinance. Accordingly, the answer to your inquiry is in the affirmative.

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**BOARDS OF SUPERVISORS—Minutes Of Meetings—What constitutes complete official minutes of proceedings of board.**

**BOARDS OF SUPERVISORS—Minutes Of Meetings—Motion which dies for lack of a second is official matter considered by board.**

**COUNTIES—Boards Of Supervisors—Minutes of—Should include brief summary of all questions of a public nature discussed by board.**

August 15, 1977

**THE HONORABLE HENRY LEE CARTER**

Commonwealth's Attorney for Orange County

This is in reply to your letter concerning the official minutes of the meetings and proceedings of the Orange County Board of Supervisors. You request my opinion in regard to the following matters:

1. May supporting documents relating to Board action be made a part of the official minutes of the proceedings of the Orange County Board of Supervisors and recorded in the Board’s minute book? In the alternative, may only a general synopsis of action taken by the Board be recorded on the pages of the minute book with the supporting documents filed in the pocket part of the minute book?

2. May a supervisor, in order to adequately reflect his position on issues before the Board, tender the documents outlined above to the chairman or clerk of the Board, and thereby cause them to be lodged with and filed with the minutes of the meeting, even if said documents are not made a part of the minutes by Board action?

3. If a Board member makes a motion and it dies for the lack of a second, should that motion be recorded on the pages of the minute book?

I shall answer your questions *seriatim*.

Section 15.1-543 of the Code of Virginia (1950), as amended, provides:

"The boards of supervisors shall cause to be recorded in well-bound books complete minutes of all their respective meetings and proceedings, including all bids submitted on any building, materials, supplies, work, or
In an Opinion to the Honorable W. Cary Crismond, Clerk of the Circuit Court of Spotsylvania County, the Attorney General considered the meaning of the terms "minutes" and "complete" in § 15-248, the predecessor statute to § 15.1-543. In that Opinion, found in Report of the Attorney General (1959-1960) at 77, the Attorney General concluded as follows:

"... the official actions of the Board shall be incorporated in the minutes. The term 'minutes' as used in this section means a brief summary of what the Board has considered at the meeting. Of course, all resolutions and ordinances must be transcribed in full. I believe that the minutes should contain all questions of a public nature which have been discussed and considered by the Board, even though a determination of such questions may have been deferred instead of being voted upon. The word 'complete' as used in this section does not, in my opinion, mean that a stenographic record of the proceedings is required. While the Board is the judge of what it shall have included in the minutes, I do not feel that their judgment should be exercised in such manner as to exclude therefrom any question of official nature that has been considered by the Board."

In light of the above-quoted language, I conclude that the Board's minutes must include, as a minimum, a brief summary of the matters considered by the Board. Supporting documents, which are presented to the Board for background, may be included as a part of the minutes, filed with the official minutes, or excluded therefrom, at the discretion of the Board.

A supervisor may tender supporting documents for inclusion in the minutes of Board meetings. That body is not required, however, to accept the documents tendered. As long as the Board includes within the minutes a brief summary of matters considered, it is free to accept or reject supporting documents as it deems proper.

A motion which dies for the lack of a second is an official matter which has been considered by the Board at its meeting. Such matters must be included in the minutes in order to provide a complete record of all questions of a public nature which were considered and accepted or rejected by the Board.

BOARDS OF SUPERVISORS—Number Of Votes Necessary To Fill Vacancy—Majority (three) of remaining four members required.

STATUTES—Specific § 24.1-76.1 Supersedes General Rule § 15.1-540—Number of votes necessary to fill vacancy on board of supervisors.

March 2, 1978

THE HONORABLE J. PAUL COUNCILL, JR.
Member, House of Delegates

This is in reply to your letter of February 27, 1978, in which you inquire as to the number of votes necessary to fill a vacancy which has recently occurred on a board of supervisors. You state:
"There are four remaining members on the Board. If one member were to abstain from voting, could this vacancy be filled by a majority of the three voting? Or would it be required that the considered person receive three of the four votes?"

Section 24.1-76.1 of the Code of Virginia (1950), as amended, provides in part that:

"When a vacancy occurs in the governing body of a county, and no other provision is made for filling same, it shall be filled by the remaining members of such body within thirty days of such vacancy. The person appointed to fill such vacancy shall be a qualified voter of the election district in which the vacancy occurred and shall hold office until the qualified voters shall fill the same by election, as hereinafter provided, and the person so elected shall have qualified. If a majority of the remaining members cannot agree, or do not act, then the judges of the circuit court of the county shall make the appointment in accordance with the provisions of § 24.1-76." (Emphasis added.)

Section 15.1-540 of the Code provides that as a general rule actions of a board of supervisors are based on a majority of those voting. However, because § 24.1-76.1 is specific in its requirement that "a majority of the remaining members" agree on filling a vacancy, I am of the opinion that this supersedes the general rule. Accordingly, a majority (three) of the remaining four members would be required in order to fill the vacancy.

BONDS—"Correctional Center"—Encompasses correctional field units, for purposes of Bond Act.

DEFINITIONS—"Correctional Center" As Term Used In Virginia Correctional Facilities Bond Act Of 1977.

November 2, 1977

THE HONORABLE H. SELWYN SMITH
Secretary of Public Safety, Office of the Governor

This is in response to your inquiry as to the meaning of the phrase "Correctional Center," as that term is used in § 2, Chapter 651 [1977] Acts of Assembly 1293, known as the "Virginia Correctional Facilities Bond Act of 1977." Specifically, you seek my opinion whether the term "correctional center" encompasses correctional field units, for purposes of the Bond Act.

In construing Chapter 651 the particular meaning to be attached to any word or phrase must be derived from the context in which it is used, the nature of the subject matter treated, and the purpose for enacting the legislation. McDaniel v. Commonwealth, 199 Va. 287, 292, 99 S.E.2d 623, 627 (1957). The Correctional Facilities Bond Act, if approved by a statewide referendum, will authorize funds for the constructing and outfitting of capital projects for correctional facilities of the Commonwealth. Such a purpose would militate against any distinction being made between correctional centers on the one hand, and correctional field units on the other, because both types of institutions are clearly correctional facilities and basically serve the same purpose.
Moreover, the phrase correctional center is not a term of art such that its use conveys a special, limited meaning. Nowhere is the term employed in Title 53 (Prisons and Other Methods of Correction) of the Code of Virginia (1950), as amended. Section 53-19.18 states that correctional institution or penal institution "means and includes every prison, prison camp, prison farm or correctional field unit heretofore or hereafter established with funds appropriated from the State Treasury." The correctional facilities located in Powhatan, Goochland, Bland, and Southampton Counties are frequently referred to as "the correctional centers"; however § 53-76 utilizes the term "correctional institution" to refer to them. The facility in Southampton County has also been called the Southampton Correctional Farm. See Brown and Kidd v. Commonwealth, 215 Va. 143, 144, 147; 207 S.E.2d 833, 835, 836 (1974).

The purpose of the Correctional Facilities Bond Act was to improve and enlarge the present Corrections System. To attempt to limit the definition of correctional centers would in my opinion do violence to the legislative intent and frustrate the very purpose of the Act. Accordingly, I am of the opinion that the term "correctional center" encompasses correctional field units.

BONDS—Elizabeth River Tunnel Revenue Bonds.

AMENDMENTS—Elizabeth River Tunnel Tolls—Cannot be used for purposes named in 1976 Act until bonded indebtedness has been retired.

CONTRACTS—Constitutional Prohibition Against Impairment By States.

ELIZABETH RIVER TUNNEL COMMISSION—Use Of Toll Revenues For Purposes Other Than Those Required By The Trust Indenture, Prior To Satisfaction Of Bonded Indebtedness.

TRANSPORTATION—Tolls For Use Of Elizabeth River Tunnel—Purposes for which funds may be used.

September 30, 1977

THE HONORABLE JOHN E. HARWOOD
State Highway and Transportation Commissioner

This is in response to your inquiry concerning Chapter 237 [1976] Acts of Assembly 274, as amended by Chapter 176 [1977] Acts 220. These provisions deal with the collection of tolls for use of the Elizabeth River Tunnel. Specifically, you have inquired whether this Act authorizes the expenditure of toll revenues, collected prior to the satisfaction of the bonded indebtedness, for purposes other than those required by the Trust Indenture.

Section 1 of the Act in question provides that:

"The State Highway and Transportation Commission is . . . authorized to continue to charge tolls for the use of the [Elizabeth River Tunnel] . . . after the bonds issued therefor and the interest on the bonds shall have been paid, or sufficient amount shall have been provided for their payment;"

This section restricts the authority for imposition of such tolls to a period not exceeding two years after the retirement of the present bonds.

Section 2 of the Act enumerates the uses to which "the tolls so collected
pursuant to Section 1" may be put. They are: 1) the purposes established by
Chapter 130, § 12 [1942] Acts of Assembly 168, 175, as amended. That Section
requires the cessation of tolls after retirement of the bonds or after a sufficient
amount has been provided for their retirement, except that tolls may be imposed
(a) to maintain, repair and operate the facility, when funds for that purpose are
unavailable from other sources, or (b) where tolls are required under the terms of
an agreement concerning the facility between the Commission (formerly
Elizabeth River Tunnel, now Highways and Transportation), the City of Ports-
mouth and Norfolk County (now City of Chesapeake); (2) providing a com-
muter service between Norfolk and Portsmouth on the two existing tunnel
facilities; (3) preliminary engineering for the proposed I-264 highway project
between Portsmouth and Norfolk; and, (4) research concerning feeder freeway
connections to the Elizabeth River Tunnels. The fourth purpose summarized
above was added by the 1977 amendment; that amendment did not alter the
import of the 1976 Act insofar as the imposition of tolls is concerned.

Section 3 of the Act authorizes the Commission to advance monies from the
State Highway Maintenance and Construction Fund for one of the purposes
enumerated in paragraph 2, but specifically provides that such advance not
exceed the projected revenues for the two-year period authorized by Section 1.

Upon review, I am of the opinion that the Act authorizes the expenditure of
tolls for purposes of Section 2 as above enumerated only after the bonded in-
debtedness is retired or sufficient funds have been collected to satisfy such
retirement. Tolls are presently being imposed under the authority of Chapter
130, § 12 [1942] Acts 168, 175, as amended. This provision controls the ex-
penditure of toll revenues prior to the retirement of the bonds. Expenditures are
allowed only for very narrow project-related purposes, primarily maintenance
and retirement of the bonds.

Section 13 of the 1942 Act requires cessation of tolls upon collection of suf-
ficient funds to retire the bonded indebtedness unless tolls are continued to be
needed for the purposes set out above. Section 1 of the 1976 Act authorizes
imposition of tolls, after this point, but does not extend or amplify the Com-
misson's authority to impose tolls during the period of bonded indebtedness.
Accordingly, inasmuch as Section 2 of the 1976 Act only purports to direct the
expenditures of "tolls so collected pursuant to Section 1" and is silent as to other
funds, it is my opinion that that section is not intended to effect the expenditure
of toll revenues until after the preconditions cited in Section 1, have been met.
Accordingly, I am of the opinion that, until the bonded indebtedness has been
retired or sufficient funds have been provided therefor, toll revenues can only be
expended for the purposes authorized by the 1942 Act, and that therefore the
additional purposes of the 1976 Act cannot be implemented with such revenues
until that time.

Additionally, you have asked whether the legislature could confer power on
the State Highway Commission to expend toll revenues, prior to retirement of
the bonds, for purposes other than those directed by the Trust Indenture and the
enabling law therefor. It is my opinion that such legislation would have serious
implications with respect to the Contract Clause of the U.S. Constitution, art. 1,
§ 10, cl. 1. Recently, the United States Supreme Court rendered a decision
concerning this issue in United States Trust Company of New York v. New
Jersey, acting jointly had attempted to repeal a statutory covenant enacted to
limit the extent to which the revenues and reserves of the Port Authority of New
York and New Jersey could be applied for certain purposes. The manifest
purpose of that covenant had been to promote investor confidence in the
Authority. The reason for the attempted repeal of the covenant was to allow the Authority to expend its revenues in various ways to promote the use of mass transit and energy conservation, goals which were not addressed in the original revenue project. The complex and far reaching opinion of the Court amplified the existing doctrine embodied in *El Paso v. Simmons*, 379 U.S. 497 (1965). In essence, while recognizing that States cannot abridge their reserved powers by contract, the Court ruled that, on all other matters, the constitutional prohibition against States impairing the obligations of contracts is applicable to the States' own contracts; even so, legislation may be adopted adjusting and amending the statutory rights and responsibilities of parties contracting with a State only to the extent that the amendment is of a character appropriate to the public purpose underlying the original legislation. Even though the repeal of the New York-New Jersey covenant would have allowed use of toll revenues to achieve the salutary public ends of promoting energy conservation and transportation economies, the Court held that they were exigencies unrelated to the purposes of the covenant; further those exigencies were not addressed in the covenant even though they were foreseeable when it was enacted. Although some modifications of governmental contracts by legislation, such as diversion of "new" or additional revenues, for different purposes may be permissible, such changes must not result in the diminution of revenues and reserves that historically secure the bonds.

In light of this decision, it is my opinion that, in the case of the Elizabeth River Tunnel Project, revenues derived from tolls imposed under laws authorizing the existing Trust Indenture cannot be diverted by legislation for purposes other than those addressed by those laws and the Indenture, prior to the retirement of the bonded indebtedness of the Elizabeth River Tunnel Project.

BONDS—Private Security Services (Detectives)—Cash bond, surety bond, liability insurance.

LIABILITY—Surety Bond On Private Security Services Business—Does not extend liability of surety company beyond amount set by Department of Professional and Occupational Regulation.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Bond For Private Security Services (Detectives)—Prospective licensee required to post cash bond, surety bond, or liability insurance in amount and coverage fixed by Department.

December 1, 1977

THE HONORABLE EDWARD M. HOLLAND
Member, Senate of Virginia

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

"I would be grateful if you would furnish me an opinion regarding § 54-729.31 of the Code, a new section added by the 1976 General Assembly, relating to the bonding of private security services (detectives).

"Paragraph (A) of this section requires that a prospective licensee either post a cash bond or evidence of coverage by a surety bond, or furnish
evidence of a policy of liability insurance in an amount and with coverage as fixed by the Department of Professional and Occupational Regulation.

"We are advised that a major writer of surety bonds for private security service personnel in Virginia has questioned the clarity of this paragraph and suggested the interpretation that, since the bond could be considered as in lieu of an insurance policy, liability for a bond issuer could be the aggregate of all bonds for each claimant. If such is the case, the cash bond requirements for such businesses will be so high as to be prohibitive."

Section 54-729.31 of the Code of Virginia (1950), as amended, permits a private security services business to secure either a surety bond or liability insurance. The statute provides:

"A. Every person licensed under § 54-729.29 A shall, at the time of receiving such license and before the same shall be operative, file with the Department (i) a cash bond or evidence that such person is covered by a surety bond, executed by a surety company authorized to do business in this State, in a reasonable amount to be fixed by the Department, conditioned upon the faithful and honest conduct of his business or employment; or (ii) evidence of a policy of liability insurance in an amount and with coverage as fixed by the Department."

Your request seeks an interpretation of § 54-729.31 and, in particular, the interrelationship between subparagraphs (i) and (ii) of paragraph A.

Chapter 17.3, of Title 54, §§ 54-729.27 through -729.34, governs the licensing and regulation of private security services businesses in Virginia. Section 54-729.31 requires each such business to file with the Department of Professional and Occupational Regulation ("Department") a cash bond or evidence that such business is covered by a surety bond or, in the alternative, evidence of a policy of liability insurance in an amount and with coverage as fixed by the Department. Each individual, group of individuals, firm, company, corporation, partnership, business trust, association or other legal entity licensed as a private security services business must meet the requirements of § 54-729.31 at the time of receiving such license and before the same shall be operative.

A surety bond issued pursuant to § 54-729.31 must be: (1) executed by a surety company authorized to do business in Virginia, (2) in the amount fixed by the Department, and (3) conditioned upon the faithful and honest conduct of the licensee's business or employment. Subsection B of the statute sets forth the following procedure for maintaining an action on the surety bond:

"If any person shall be aggrieved by the misconduct of any such person licensed under this article and shall recover judgment against him, such person may, after the return unsatisfied, either in whole or in part, of any execution issued upon such judgment, maintain an action in his own name upon the bond of the person licensed under this article [chapter]."

It is clear that a surety bond issued under § 54-729.31 has as its purpose the benefit of the members of the public who employ private security services businesses. From an examination of the pertinent authorities, I am of the opinion that as a general rule the liability of a surety on such a bond is limited to the face amount of the bond even though it is for the protection of more than one person or is subject to renewal from term to term. See Travelers Indemnity Company v. Askew, 280 So.2d 469 (Fla. Ct. App. 1973); 12 Am.Jur.2d Bonds § 45 (1964). Exceptions to this general rule have been founded on an interpretation of the particular wording of the bond instrument or the statute requiring the
bond that indicates an intention to extend the liability of the surety beyond the maximum amount set forth in the bond. *Travelers Indemnity Company v. Askew, supra.*

It is my opinion that § 54-729.31 which requires a surety bond in a fixed amount for the faithful and honest conduct of a private security services business does not extend the liability of a surety company beyond the amount set by the Department. Specifically, I am of the opinion that inclusion in the statute of an alternative requirement for a fixed amount of liability insurance does not evidence an intent to require a surety company to be liable for an undeterminable number of claims which, in the aggregate, exceed the fixed amount of the bond. A surety should be able to limit its liability by appropriate wording in the bond. The amount of the surety's total liability would then be determined by the amount of the bond required by the Board.

CEMETERIES—Endowment Care Fund—When required.

CEMETERIES—Perpetual Care—New cemeteries (developed after June 26, 1964) must provide for their future care.

DEFINITIONS—Cemeteries—What constitutes "adequate provision" for perpetual care decided on case by case basis.

DEFINITIONS—"Develop"—New cemeteries—Winchester cemetery continuously maintained since 1726, now expanding, is not new.

STATUTES—Interpreted As A Whole—Legislative intent to distinguish between pre-June 26, 1964, cemeteries and post-June 26, 1964, cemeteries.

April 4, 1978

The Honorable Dabney W. Watts
Commonwealth's Attorney for the City of Winchester

You have asked for an interpretation of the law requiring new cemeteries to provide for their future care.

Section 57-35.2 of the Code of Virginia (1950), as amended, makes it unlawful for any person or organization "owning, operating or developing any cemetery" to represent, after June 26, 1964, that it is selling "perpetual care" lots "unless adequate provision has been made for the endowment care of the cemetery and all lots, burial or entombment rights therein as to which such representations are made." The section further provides that:

"Each person who shall undertake to develop any such cemetery after June twenty-six, nineteen hundred and sixty-four, shall deposit in a bank or a savings and loan association in this State in an irrevocable endowment trust fund a minimum of twenty-five thousand dollars before the first lot, parcel of land, burial or entombment right has been sold." [Emphasis added.]

A Winchester church, founded prior to the Revolutionary War, intends to sell lots in a cemetery located where the organization's original log church once stood. Approximately 380 corpses have been buried in this cemetery continuously maintained since 1726, with only five such burials occurring since
The church has recently had the cemetery surveyed and plans to lay out nearly 600 new grave sites which will be offered for sale. The church intends to represent that the cemetery has been continually maintained and will continue to be so maintained in perpetuity.

You ask whether the trustees of the cemetery are required to deposit $25,000.00 in trust, or whether the cemetery need only insure that "adequate provision has been made for the endowment care of the cemetery." Since few burials occurred prior to formulation of this plan to lay out 600 more grave sites, you question whether the church is attempting to "develop" a perpetual care cemetery after June 26, 1964, such that the minimum $25,000.00 deposit is required.

"Develop" is defined by *Webster's Seventh New Collegiate Dictionary* 227 (1972) to mean "to set forth or make clear by degrees or in detail . . . to make active . . . to expand by a process of growth." It is clear that the church is "developing" the remainder of its cemetery property; however, in construing a statute, the statute must be interpreted as a whole. *Golden Skillet v. Commonwealth*, 214 Va. 276, 278, 199 S.E.2d 511, 513 (1973). An examination of the statute reveals a legislative intent to distinguish between pre-June 26, 1964, cemeteries and post-June 26, 1964, cemeteries. Old cemeteries need only make "adequate provision" for endowment care while new ones must deposit a minimum of $25,000.00 in trust. To attach a significance to the word "develop" that negates this distinction is clearly repugnant to the legislative intent and for that reason is to be avoided in construing this particular provision.

The sense of the word "develop" in the last sentence of § 57-35.2 does not logically include cemeteries already developed and in operation. See *Creech v. South Carolina Public Service Authority et al.*, 200 S.C. 127, 20 S.E. 2d 645 (1942). The statute is intended to reach new cemeteries "before the first lot . . . has been sold"; the first lot in this cemetery was sold long ago. A cemetery does not lose its character as such merely because future interments become uncommon or even impossible, particularly when some bodies remain interred therein and such grave sites have been maintained. See *14 Am. Jur. 2d "Cemeteries"* § 21 (1972).

I am, therefore, of the opinion that the expansion of a cemetery of this long duration is not the development of a new cemetery as contemplated by the last sentence of § 57-35.2, and that it is not subject to the minimum $25,000.00 deposit.

Of course, the question of what constitutes "adequate provision" for perpetual care remains. Its resolution must be made on a case by case basis by those local officials charged with certain statutory obligations by the Code of Virginia. See §§ 57-23 and -25. All the relevant facts and circumstances are known or available to such officials, and they must make the determination. Among the factors to be considered are the past history of the cemetery organization, the resources available for grave site maintenance from such organization, and intended charges for lots so that a judgment can be made to determine how rapidly the ten per cent deposit will reach the accumulation contemplated by § 57-35.4. Of course, such an inquiry may result in a conclusion that some minimum deposit in trust may be necessary. The ten per cent deposit required by § 57-53.3, by itself, may or may not constitute adequate security, depending upon the fact situation in question.

August 30, 1977

THE HONORABLE ELLIOT S. SCHEWEL
Member, Senate of Virginia

This is in reply to your recent letter in which you inquire whether a consumer reporting agency, acting on behalf of an employer, may be furnished by the Central Criminal Records Exchange (CCRE) with conviction data relating to an applicant for employment. The agency has been retained by the employer to procure that data. You suggest that the language of § 19.2-389 of the Code of Virginia (1950), as amended, does not appear to preclude such a construction.

Section 19.2-389 provides, in pertinent part, as follows:

"Notwithstanding any other provision of this chapter to the contrary, upon a written request sworn to before an officer authorized to take acknowledgements, the Central Criminal Records Exchange shall furnish a copy of conviction data covering the person named in the request to the person making the request, when the purpose for the dissemination of the conviction data is the gaining of employment by a prospective employee; provided, however, such person on whom the data is being obtained must consent in writing to the making of such request."

I find nothing in the quoted language or elsewhere in the Code of Virginia which would restrict dissemination of conviction data for this purpose to the employer only as opposed to an agent of the employer, provided the statutory requirements are met. It must be recognized, however, that a consumer reporting agency obtaining conviction data in this manner would not be authorized to utilize that data for any purpose other than consideration of the particular employment application for which it was received or to further disseminate the data to anyone but the employer on whose behalf it is acting. Section 9-111.6 of the Code of Virginia (1950), as amended, specifically provides that criminal history record information, which includes conviction data, shall be disseminated, whether directly or through an intermediary, only in accordance with § 19.2-389. Furthermore, § 19.2-389C states that no one shall confirm the existence or nonexistence of criminal history record information for employment inquiries except as provided by law.

Accordingly, I am of the opinion that the answer to your inquiry is in the affirmative.

CHARITABLE ORGANIZATIONS—Bingo Records Audit—When audit is limited to receipts and disbursements for bingo games—When may include other records.

BINGO—Restrictions On Use Of Proceeds From.

COMMISSIONERS OF ACCOUNTS—Audit Of Bingo Records—To insure that proceeds from bingo and raffles are used for charitable purposes—Scope of audit.
You have asked if the audit of bingo records required by § 18.2-335 of the Code of Virginia (1950), as amended, is limited to the receipts and disbursements relating to bingo games and raffles, or whether it may include other records of the charitable organization.

Section 18.2-335 requires the commissioner of accounts or a local official designated by the local governing body to audit records of receipts and disbursements of those organizations allowed to conduct bingo games and raffles and report promptly to the governing body. This section also provides that the proceeds of bingo games shall be for eleemosynary or charitable purposes. By its terms, games may be conducted by any qualified organization 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. . . ."

Other restrictions imposed on the use of the proceeds are prohibitions against an organization paying rent for a premises for bingo based on a percentage of the proceeds, and a prohibition of an organization receiving more than one-third of its receipts from bingo and raffles from "instant bingo" or "bingo in any rotation."

It is clear that the audit required by § 18.2-335 is to insure that the proceeds derived from bingo and raffles are used for charitable purposes. If the records of receipts and disbursements of bingo games and raffles are sufficient in themselves to show that the proceeds have gone for charitable purposes, it is my opinion that the audit is limited to those records. If, on the other hand, these records are insufficient to show that the proceeds have been expended in accord with the statute, it is my opinion that the person performing the audit may require other records and documentation to substantiate that the proceeds have in fact been disbursed properly.
You have asked whether the proceeds derived from the operation of a bingo game conducted by a charitable organization may be used to purchase real estate and improvements for a meeting place for the charitable organization.

Section 18.2-335 of the Code of Virginia (1950), as amended, allows charitable organizations to conduct bingo games provided, "no part of the gross receipts derived from such [bingo] activity inures directly or indirectly to the benefit of any private shareholder, member, agent or employee."

This Office has previously construed this section to prohibit proceeds from the operation of bingo games from being used either for the general maintenance or benefit of the sponsoring organization, see Report of the Attorney General (1974-1975) at 247, or for expenses of the organization's projects which benefit the individual members. See Report of the Attorney General (1975-1976) at 209.

It is my opinion that the membership of a charitable organization cannot be the object of charitable projects. Therefore, use of the proceeds of bingo games to purchase a meeting place for the membership of the charitable organization would be a use of proceeds for the benefit of a "member" in violation of the statute.

CHARITABLE ORGANIZATIONS—Registration Requirements For Any Person Or Organization Operated For Charitable Purpose—Must regularly register with Administrator of Consumer Affairs.

CHARITABLE ORGANIZATIONS—Exemptions—Based on nature of organization and nature of its fund-raising programs.

CHARITABLE ORGANIZATIONS—Exemptions—Burden of proof is on organization to file application and set forth reason for claim of exemption—Burden of proof of noncompliance with statute.

CHARITABLE ORGANIZATIONS—Exemptions—Code does not contain any complete exemptions for specifically named organizations other than American National Red Cross which is described as "instrumentality" of federal government.

CONSUMER AFFAIRS—Charitable Organizations—Filing of consolidated registration statements applies to organizations belonging to a "federated fund-raising organization."

CONSUMER AFFAIRS—Charitable Organizations—Soliciting funds within Commonwealth must file registration statement with Administrator of Consumer Affairs on forms acceptable to him—Local service club; "parent organization."

ORDINANCES—Charitable Organizations—Exempt under § 57-60(a)—May be required to file registration statement in locality where they solicit funds if ordinance requires licensing.

June 9, 1978

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You have asked about the registration requirements for charitable organ-
izations, contained in a statute, which will become effective on July 1, 1978. It applies to any person or organization which is, or holds itself out to be, organized or operated for a charitable purpose. It provides, among other things, that all charitable organizations must regularly register with the Administrator of Consumer Affairs. I will answer your questions in order.

**Question 1**

When filing a registration statement pursuant to § 57-49(a) of the Code, you ask if a local service club chapter in its registration statement must identify and list every other chapter of that service club in the State.

Section 57-49(a) of the Code requires every charitable organization, except those specifically exempted, which intends to solicit contributions within the Commonwealth, or have funds solicited on its behalf, to file a registration statement with the Administrator of Consumer Affairs on forms acceptable to him. The registration statement must contain the names and addresses of any chapters, branches or affiliates in this Commonwealth. Special provisions for filing consolidated registration statements apply to those chapters, branches or affiliates which have a "parent organization." If a local service club, such as the Kiwanis Club, Rotary Club, or Lions Club, does have to file a registration statement under § 57-49(a) of the Code because it is not otherwise exempt from the statute, and if that local service club is affiliated with a "parent organization" as defined in § 57-48(8) of the Code as most such local service clubs are, it could report the required information to its "parent organization," which would then file a consolidated registration statement for all nonexempt chapters, branches or affiliates soliciting charitable contributions in the Commonwealth. The local club, chapter or affiliate would not then be required to identify or list every other chapter of that service club in the Commonwealth.

Special provisions for filing consolidated registration statements also apply to those organizations which belong to a "federated fund-raising organization." Section 57-49(c) provides:

"Each chapter, branch or affiliate, except an independent member agency of a federated fund-raising organization, shall separately report the information required by this section or report the information to its parent organization which shall then furnish such information as to itself and all of its State affiliates, chapters and branches in a consolidated form. All affiliated organizations included in a consolidated registration statement shall be considered as one charitable organization for all purposes of this chapter. If a consolidated registration statement is filed all statements thereafter filed shall be upon the same basis unless permission to change is granted by the Administrator."  

"Parent Organization" is defined in § 57-48(8) of the Code as "[t]hat part of a charitable organization which coordinates, supervises or exercises control over policy, fund-raising, and expenditures, or assists or advises one or more chapters, branches or affiliates."

"Federated fund-raising organization" is defined in § 57-48(5) of the Code as "[a]ny federation of independent charitable organizations which have voluntarily joined together, including but not limited to a United Fund or Community Chest, for purposes of raising and distributing money for and among themselves and where membership does not confer operating authority and control of the individual agencies upon the federated group organization."
"Each federated fund-raising organization shall report the information required by this section in a consolidated form. Any federated fund-raising organization may elect to exclude from its consolidated report information relating to the separate fund-raising activities of all of its independent member agencies. No member agency of a federated fund-raising organization shall be required to report separately any information contained in such a consolidated report; provided, however, that any separate solicitations campaign conducted by, or on behalf of, any such member agency shall nevertheless be subject to all other provisions of this chapter."

Therefore, if a local service club does have to file a registration statement under § 57-49(a) of the Code because it is not otherwise exempt from the statute, and if that local service club belongs to a "federated fund-raising organization" as defined in § 57-48(5) of the Code, it could report the required information to the "federated fund-raising organization" which would then file a consolidated registration statement for all members of that federated fund-raising organization. The local service club would not then be required to identify or list other service clubs in the Commonwealth belonging to the "federated fund-raising organization."

Question 2

Does § 57-60 of the Code contain any complete exemptions for specifically named organizations other than the American National Red Cross?

Section 57-60 of the Code does not contain any complete exemptions for specifically named organizations other than that in § 57-60(d) for the American National Red Cross. The exemption for the American National Red Cross is consistent with the special status of that organization which was created by Congress and which performs certain functions for the federal government. 36 U.S.C. § 3 (1970). The American National Red Cross has been described as an "instrumentality" of the federal government. Department of Employment v. United States, 385 U.S. 355, 358 (1966). It is audited annually by the United States Department of Defense.

The remaining exemptions contained in § 57-60 of the Code, are based upon the nature of the organization and the nature of its fund-raising programs. For instance, § 57-60(a)(1) exempts specially accredited educational institutions; § 57-60(a)(2) exempts organizations which request contributions for the relief of a named individual and turn over all of the contributions to that named individual, and § 57-60(a)(4) exempts organizations which solicit contributions by means of their own members solely from their own membership. Thus, any organization, regardless of its name, may qualify for an exemption set forth in § 57-60(a), so long as either the nature of the organization or the manner of its solicitation meets the criteria set forth in one of the exemptions in that section. The exemptions evidence a judgment by the General Assembly that certain types of solicitations need not meet the record keeping and auditing standards set forth by the statute because the activities of the organization are already supervised and audited by some other agency as those qualifying for exemption under § 57-60(a)(1), or because there are no administrative or fund-raising expenditures as in § 57-60(a)(2), or because they affect a defined group of people who already have control of the solicitation as in § 57-60(a)(4).

Question 3

Must an organization which is exempt under § 57-60 of the Code from
State registration be required by local ordinance to file a registration statement under § 57-63 of the Code?

Organizations which are exempt under § 57-60(a) of the Code are not required to file a registration statement with the Administrator of Consumer Affairs. However, according to § 57-63(a)(2), those organizations may be required to file a registration statement in the locality in which they conduct their solicitations if the locality has enacted an ordinance which requires the licensing of charitable organizations soliciting in that locality.

Question 4

Is a simplified method for applying for exemptions under § 57-50 and -60 of the Code possible?

Section 57-60(c) of the Code provides that a charitable organization applying for an exemption, before any solicitation in any calendar year, must submit an application which sets forth the name, address and purpose of the organization and the reason for the claim for exemption. Sections 57-50 and 57-60(a) through (b) of the Code set forth in detail those reasons which form the basis for an exemption application. I am advised by the Administrator of Consumer Affairs that the forms proposed for the filing of applications under § 57-50 and § 57-60(a) through (b) of the Code are simplified forms which do not entail the filing of a complete registration statement. It should, therefore, be possible for most organizations applying for exemptions to do so without a significant expenditure of time and effort. If the application for exemption is granted, § 57-60(c) of the Code provides that the Administrator shall issue, annually, a letter of exemption which may be exhibited to the public. This exemption frees the organization from the registration and fiscal record-keeping requirements of §§ 57-49 and -53 of the Code; it does not exempt the organization from the provisions of § 57-57 of the Code, which prohibit certain acts.

Question 5

When a local service club chapter applies for an exemption under § 57-60 of the Code, is the burden of proof that the chapter is exempt upon the chapter or upon the Administrator of Consumer Affairs?

When a local service club chapter, or any other charitable organization, applies for an exemption under § 57-50 or § 57-60(a) through (b) of the Code the burden of proof that the organization is exempt is on the organization in the sense that it must file the application, and set forth the reason for the claim of exemption. In most instances this will entail merely checking the applicable

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1Section 57-63(a)(2) provides:

"The governing body of any city, town, or county may by ordinance not inconsistent with this chapter provide for the regulation and licensing of persons soliciting within the city, town or county, and for penalties for violation thereof, subject to the following limitations:

* * *

"No charitable organization exempt from registration under § 57-60(a)(1) or (4) shall be required to be licensed. Any such organization may obtain a local license, without payment of any license tax or fee, upon compliance with all such requirements of the local ordinance as would have been applicable had it been registered with the Administrator during each year in which it obtained an exemption letter under § 57-60(c)."
reason on a form application provided by the Administrator of Consumer Affairs. Section 57-59(b) of the Code provides that:

"The Administrator, upon his own motion or upon complaint of any person, may investigate any charitable organization, professional fund-raising counsel or professional solicitor to determine whether such charitable organization, professional fund-raising counsel or professional solicitor has violated the provisions of this chapter or has filed any application or other information required under this chapter which contains false or misleading statements."

In those situations where the Administrator of Consumer Affairs has reason to believe that the application for exemption contains some false or misleading statement, the Administrator could, under § 57-59(b) of the Code request additional information from the organization and, in that case, the burden would be upon the organization to produce the requested information.

**Question 6**

Is the burden of proof of noncompliance with the statute upon the organization or upon the Commonwealth?

The burden of proof of noncompliance with the statute governing the solicitation of contributions is upon the Commonwealth. It should be noted that within the statute governing the solicitation of contributions there are at least two ways in which the issue of an organization's compliance could be raised. The first is in an action commenced by the Commonwealth under § 57-59(c) of the Code against the organization to enjoin continued solicitations. In this situation, the burden of proof would be upon the Commonwealth to show that the organization did not comply with the provisions of the statute. The second way in which the issue of the organization’s compliance could be raised is in an action commenced under § 57-67 by the organization to obtain relief from a final order of the Administrator. In this situation, the burden of proof would be upon the organization to show that the organization acted in compliance with the provisions of the statute.

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**CHARTERS—Amended To Expand School Board To Five Members**— Additional members may be appointed by Council immediately.

**COUNTIES, CITIES AND TOWNS—Budget**—Public hearing required to be held by governing body prior to approval of local budget.

**ELECTIONS—School Board Members**—Charter provides method of appointment; § 22-59 inapplicable.

**MAYOR—Votes Only In Event Of A Tie**—Vote must be cast at meeting in which matter is considered.

**SCHOOLS—School Boards**—Public hearing not required for budget estimates school board submits to governing body—Only information enumerated in § 22-120.5 need be included—Alternative estimate.

**VIRGINIA FREEDOM OF INFORMATION ACT**—School Board Meeting At Which Budget Estimate Approved—Subject to Act but formal public hearing not required.
REPORT OF THE ATTORNEY GENERAL

VIRGINIA FREEDOM OF INFORMATION ACT—Working Papers, Letters, Reports, Maps Or Other Documents In Possession Of Member Of City Planning Staff Pertaining To Proposed Zoning Ordinance Are Official Records Subject To Public Disclosure.

June 5, 1978

THE HONORABLE CHARLES J. COLGAN
Member, Senate of Virginia

This is in reply to your recent letter in which you ask my opinion on three questions pertaining to the City of Manassas Park:

“1. The Mayor in the city of Manassas Park votes only in the event of a tie. How long does the Mayor have to cast his vote?”

Section 3.5(d) of the City Charter of Manassas Park, Chapter 722 [1976] Acts of Assembly 1131 provides:

“Except as otherwise provided by law, ordinances, resolutions, motions and votes shall be adopted only by the affirmative votes of a majority of the members present at a meeting open to the public.”

When the Mayor votes to break a tie he is acting, for that limited purpose, as a member of Council, and can only cast his vote in accordance with the terms of the Charter. 36 Am. Jur. 2d Municipal Corporations § 175 (1971). Accordingly, I am of the opinion that the vote must be cast by the Mayor at the meeting in which the matter is being considered.

“2. The Manassas Park City Charter was amended by the 1978 Session of the General Assembly to expand their school board from the present three members to five. When can these additional members be appointed? Are they required, for any reason, to wait until the beginning of the next fiscal year?”

Section 5.4 of Chapter 390 Acts of Assembly [1978] provides:

“The City of Manassas Park shall constitute a separate school division. The school board shall consist of five members, appointed by the council and the terms are to be for a period of three years except the two new appointees, which shall be one member for a term of one year and one member for a term of two years for a period to be in line with the other members.”

Section 2 of the Act further provides that this provision is in force from its passage. Since the date of passage was March 30, 1978, I am of the opinion that the two additional members of the School Board may be appointed by the Council immediately, upon their qualification under § 22-90 and upon taking the oath prescribed in § 22-91 of the Code of Virginia (1950), as amended. Their terms would begin on July 1, the date upon which the terms of board members begin. Section 22-89 of the Code, regarding appointments generally to city school boards, is inapplicable to this question because the statute provides that it is not applicable where another method of election is provided by charter.

“3. (a) Is a school board required by law to hold a public hearing on their proposed budget? (b) If so, may this be a lump-sum category or a line-item budget? (c) Does the school board have the right to refuse a line-item budget to the city council or their citizens?”
3a. The school board does not adopt a budget as such. Pursuant to § 22-120.3 of the Code the division superintendent, with the approval of the school board, submits to the governing body an estimate of the amount of money deemed to be needed during the next scholastic year for "the support of the public schools," or in the alternative the amount needed "for educational purposes." The governing body may, in its discretion, require both estimates. See Report of the Attorney General (1959-1960) at 66. Since these estimates constitute the only budgetary process required of the school board, I assume your inquiry to be whether a public hearing is required prior to adoption of the estimates.

Although the school board meeting at which the estimate is approved would be subject to the open meeting requirement of the Virginia Freedom of Information Act, § 2.1-340, et seq., of the Code, there is no requirement that a formal public hearing be held by the school board. A public hearing is required by § 15.1-162 to be held by the governing body prior to approval of the local budget.

3b. The estimates need not be in the form of a "line-item" budget. The only information which need be included in the two estimates is that enumerated in § 22-120.5. The estimate of the amount needed for the support of the public schools includes overhead charges, instruction, operations, maintenance, reserve fund, auxiliary agencies, miscellaneous, permanent capitalization, and "such other headings or items as may be necessary." The school board may wish to present further estimates within the categories prescribed by the State Board of Education pursuant to § 22-127 of the Code, since the governing body may only appropriate within those categories or by lump sum. The alternative estimate of the amount deemed necessary for educational purposes need only show the number of children who reside in the county, city or town between the ages of six and twenty, multiplied by the expected average cost per child, plus a sum sufficient for debt service.

3c. Any line-item estimates which had been prepared by the school board, even if not submitted to the governing body, would be subject to disclosure under the Virginia Freedom of Information Act, § 2.1-342, et seq., and subject to the exceptions therein. See Opinion to the Honorable Bernard G. Barrow, Member, House of Delegates, dated March 24, 1978, a copy of which is enclosed, which held that "working papers, letters, reports, maps or other documents in the possession of a member of the planning staff of a city government," were official records subject to the act.

CHARTERS—Procedure To Annul Charter Of Town Of Colonial Beach—Only by act of General Assembly.

TOWNS—Charters—No statute which would authorize a court or town to annul its corporate charter.

August 15, 1977

THE HONORABLE ROBERT B. FOX
Commonwealth's Attorney for Westmoreland County

This is in reply to your recent letter in which you request my opinion in regard to the procedures by which the Charter of the Town of Colonial Beach may be annulled. You state that the Town was incorporated by an Act of the General Assembly (Ch. 261 [1960] Acts of Assembly 321) and is silent as to how it may be
annulled. I construe your use of the term "annul" to be equivalent to repeal or dissolution of a town charter.

Article VII, Section 2, of the Constitution of Virginia (1971), provides in part:

"The General Assembly shall provide by general law for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties, cities, towns, and regional governments. The General Assembly may also provide by general law optional plans of government for counties, cities, or towns to be effective if approved by a majority vote of the qualified voters voting on any such plan in any such county, city, or town.

"The General Assembly may also provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine, but no such special act shall be adopted which provides for the extension or contraction of boundaries of any county, city, or town."

Article VII, Section 2, creates a system in which the General Assembly is generally free to organize, empower, consolidate, and dissolve local governments by general law or special act. II Howard, Commentaries on the Constitution of Virginia 805 (1974). There have been no direct attempts in the twentieth century to dissolve a municipal corporation by legislative action or court suit. This constitutional provision does make it clear, however, that the General Assembly retains the power to order a dissolution where it would serve the best interests of the Commonwealth and not conflict with other constitutional provisions. II Howard, supra, at 819.

There is no statute which would authorize a court or the Town to annul its corporate Charter. I, therefore, conclude that the Charter of the Town of Colonial Beach may only be annulled by act of the General Assembly.

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CHILDREN—Permanent Foster Care Placement—Residual parental rights; support—Preliminary award of custody to local department of public welfare/social services.

November 23, 1977

THE HONORABLE R. BAIRD CABELL, Judge
Juvenile and Domestic Relations District Court
Fifth District of Virginia

This is in reply to your request for my opinion concerning permanent foster care placement of children. I will answer your questions seriatim.

1. Must the court terminate residual parental rights when it enters an order placing a child in permanent foster care?

The Juvenile and Domestic Relations Court has jurisdiction over cases involving custody, control or disposition of a child who is alleged to have been abused, neglected, or in need of services. The Court has jurisdiction over proceedings where termination of residual parental rights and responsibilities is sought. See § 16.1-241 of the Code of Virginia (1950), as amended. The court
may terminate the residual parental rights and responsibilities of one or both parents, provided that the order terminating such rights and responsibilities makes provision for custody or guardianship of the child. See § 16.1-283. That statute sets forth in detail the findings which the court must make, and the procedure that the court must follow before entering such an order. Section 63.1-206.1 of the Code sets forth the procedure for placement of a child in permanent foster care. Whether such an order should be entered is a matter within the sound discretion of the court; neither of the above-stated statutes nor any other which relate to the powers of juvenile and domestic relations district courts, mandates the termination of such rights.

2. Does the court have the authority and the duty to order the natural parent(s) to pay for the support of the child placed in permanent foster care?

The parental duty to provide support for dependent children is well settled at common law. *McClaugherty v. McClaugherty*, 180 Va. 51, 21 S.E.2d 761 (1942). *Commonwealth v. Sheppard*, 212 Va. 843, 188 S.E.2d 99 (1972). The court has the power to compel payment of support (see §§ 20-71 and 20-72), and the willful neglect, refusal, or failure to provide for support is punishable upon conviction as a misdemeanor. See § 20-61. Your question, therefore, is whether that duty to support is terminated by the transfer of legal custody of the child to another. This question is answered partially by § 16.1-290(A), which provides, in pertinent part, as follows:

"Whenever legal custody of a child is vested by the court in someone other than his parents, after due notice to the parents . . . and after an investigation and hearing, the court shall order and decree that the parent . . . shall pay, in such a manner as the court may direct, a reasonable sum commensurate with the ability to pay, that will cover in whole or in part the support and treatment of the child after the decree is entered. If the parent . . . willfully fails or refuses to pay such sum, the court may proceed against him for contempt, or the order may be filed and shall have the effect of a civil judgment." (Emphasis added.)

The court may, of course, terminate the duty to provide such support at the same time it terminates residual parental rights.

3. Must there be a preliminary award of custody to a local department of public welfare/social services prior to placement of a child in permanent foster care?

As I understand your letter, the thrust of your question is whether this procedure is required or permitted in order that the court will have the benefit of a foster care plan for the child before considering whether to place the child in permanent foster care. Such a plan must be prepared by the local department of public welfare or social services or a child welfare agency where the court has given that department or agency legal custody of a child pursuant to subsections A or B of § 16.1-279. See § 16.1-281(A). Under that statute, the local agency must always prepare Part A of the plan and, if it is not reasonably likely that the child can be returned to his prior family within a practicable time, consistent with the best interests of the child, Part B of the plan must then be prepared. One of the possible alternatives to be considered in Part B of the plan is placement in permanent foster care. A court order is required before a local department of public welfare/social services can place a child over whom it has legal custody in a permanent foster care placement. See § 63.1-206.1. Prior to the entry of such
an order, the Court must find that the local department has made diligent efforts to place the child with his natural parents and such efforts have been unsuccessful, and that diligent efforts have been made to place the child for adoption and such efforts have been unsuccessful. See §§ 63.1-206.1(i) and (ii).

I am, therefore, of the opinion that a preliminary award of custody to a local department and preparation of a foster care plan are required for compliance with § 63.1-206.1.

Although the Code is silent regarding the need for a new juvenile petition requesting an order for permanent foster care placement, proceeding upon a new petition would be proper.

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CLERKS—Financing Statement With Continuation Statement Attached—Destruction time limits—Insolvency proceedings.

RECORDS—Clerks Shall Not Remove Records Or Papers Of A Court Except As Specially Provided By Law.

RECORDS—Destruction Of—Of financing statements, continuation statements, statements of assignment.

RECORDS—Termination Statement—Must be preserved by clerk; §§ 17-44 and -45.

May 9, 1978

THE HONORABLE JAMES E. HOOFNAGLE, CLERK
Circuit Court of Fairfax County

You ask (1) how long a circuit court clerk is required to retain an original financing statement with a continuation statement attached; (2) when it may be destroyed and (3) whether removal from the file, of a termination statement, connotes destruction.

Retention of Financing and Continuation Statements

Section 17-45 of the Code of Virginia (1950), as amended, provides that none of the records or papers of a court shall be removed by the clerk except as specially provided by law. Sections 8.9-403 (3) and -404(2) specifically authorize the clerk to remove documents, upon the occurrence of certain conditions.

Section 8.9-403(3) authorizes the clerk to remove lapsed financing statements and destroy them one year after the lapse, in the absence of microfilming capability. This provision further contemplates that financing statements continued by continuation statements shall be physically annexed together and retained. Continuation statements prolong the effectiveness of the original financing statement for an additional five years, at which time they are also subject to lapsing, unless continued by another continuation statement. A lapsed continuation statement is subject to the same treatment as lapsed financing statements and may be destroyed one year after the occurrence of the lapse.

Effect of Insolvency Proceedings

One note of caution must be sounded. Section 8.9-403(2) may extend the five-year period of effectiveness if the debtor is involved in "insolvency proceedings." As defined by § 8.1-201(22), an insolvency proceeding encom-
passes bankruptcy proceedings and other similar federal and state actions. The general rule is that a bankruptcy proceeding "freezes" the situation as of the moment of filing and a secured party need not file a continuation statement during bankruptcy since it can neither help nor hinder his priority. This general rule may prove to be an inadvertent trap to a secured party should the secured debt continue in existence after the end of the insolvency proceedings. For that reason, § 8.9-403(2) creates a special rule for such situations. See Roy D. Henson, Handbook on Secured Transactions under the Uniform Commercial Code, at 334 (1973). Thus five years may pass, and even though no continuation statement has been filed, the original financing statement will not have lapsed. Sixty days after the termination of such proceeding, a lapse will occur if no continuation statement is filed. The one-year period will not begin to run until that time.

If a clerk is unsure of the status of an apparently lapsed financing statement, there is no certain means of verifying such status. An inquiry to the secured party may be appropriate in that case, advising the creditor of possible removal and giving him some reasonable time to reply. Of course, that course of action may well generate the filing of a late continuation statement which the clerk would be required to record. However, I am not aware of any other way to resolve this problem.

Destruction of Statements

Section 8.9-404(2) discusses the removal of financing statements, continuation statements, statements of assignment, and statements of release from the file after receipt of a termination statement. Although no mention of the destruction of these removed documents is made, destruction of them can be reasonably implied from the power to remove. The value of such documents is their filing; if they are not part of the public record, they do not serve the purpose of giving notice, which is their sole function. Also, there is no requirement that they be stored elsewhere.

However, this provision does not provide for removal of the termination statement itself. Subsection (3) contemplates that the termination statement will be filed and indexed; nowhere is there any authority to remove it. Therefore, §§ 17-44 and -45 require that it be preserved by the clerk among the records.

CLERKS—Hunting And Fishing Licenses—Under 1977 amendment, clerks must now sell, whether or not they had heretofore been relieved of so doing.

August 23, 1977

THE HONORABLE HARRY B. WRIGHT, CLERK
Circuit Court of Rockbridge County

This is in reply to your request for my opinion whether clerks of court who have heretofore been relieved of selling hunting and fishing licenses are now required to sell such licenses.

Section 29-61 of the Code of Virginia (1950), as amended, states, in part, that the "clerks of the circuit courts of counties, and such agents as the Commission [of Game and Inland Fisheries] may otherwise designate, shall issue State [hunting and fishing] licenses and county licenses for their respective counties as provided for in this title."
Prior to July 1, 1977, clerks of court could be relieved of this duty, under § 29-65, which then provided, in part:

"...[T]he 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;..."


"... Those agents appointed hereunder shall be in addition to the clerks of the courts designated by § 29-61 and shall be chosen so as to best serve the public from the standpoint of geographic location and method of operation." (Emphasis added.)

In response to your specific inquiry, I conclude that the clerks must sell hunting and fishing licenses, whether or not they had heretofore been relieved of so doing. No change has been made in § 29-61, which imposes that duty. What has been changed is § 29-65, from which the General Assembly deleted the language which would permit the clerks to be relieved of that duty.

CLERKS—Land Books—Office of circuit court clerk is permanent repository for—Required to have on file, bound land books for all years from 1850 to present.

CLERKS—Land Books—No authority to use microphotographic process to preserve books and reduce storage problems.

COMMISSIONERS OF REVENUE—Land Books—Required to preserve books for six years after tax year to which they relate.

TREASURERS—Land Books—Required to preserve books for six years after tax year to which they relate.

March 15, 1978

THE HONORABLE JAMES E. HOOFNAGLE, CLERK
Circuit Court of Fairfax County

You have asked how long a circuit court clerk is required to retain his copy of the Land Books.

Section 58-806 of the Code of Virginia (1950), as amended, states as follows:

"Each commissioner of the revenue for a county shall file a copy of the land book in the office of the clerk of the circuit court of his county... Such clerks shall preserve such copies in their offices, but the commissioner of the revenue need not preserve the original nor the treasurer his copy for a longer period than six years following the tax year to which such books relate."

Article VII, Section 4, of the Virginia Constitution (1971), provides that the duties of the clerks of court elected in each county and city "shall be prescribed
by general law or special act." See generally §§ 17-40 to -92. Section 58-806
imposes the duty of preserving copies of the land book in their offices.
"Preserve" means "to keep safe from injury, harm, or destruction." Webster's
Seventh New Collegiate Dictionary (1972) at 673. While § 58-806 requires the
circuit court clerk to preserve such land books, it does not require that com-
missioners of revenue and treasurers preserve them longer than six years after
"the tax year to which such books relate." Since the Code specifies limits of
preservation time for the commissioner and treasurer and omits any mention of
the clerk, the inference is that the circuit court clerk does not fall within the
purview of the six-year relief clause. See 2A Sands, Sutherland Statutory
Construction, § 47.23 (3rd ed. 1973).
Section 17-44 states that papers filed in the clerk's office "shall be preserved
therein until legally delivered out," and § 17-45 states that "[n]one of the records
or papers of a court shall be removed by the clerk. . ., except" as provided
by statute. None of the exceptions provided is applicable to your situation. Fur-
thermore, § 17-73 requires that the circuit courts have on file the bound land
books for all years from 1850 to the present.
Nowhere in the statutory framework is there a provision authorizing the clerk
to purge his files of the old land books. In fact, the statutes leave the office of the
clerk as the permanent repository for such land books. Without authority to use
microphotographic process to preserve these books, I am aware of no other
means by which your office can reduce its storage problems.

CLERKS—Reportable Offenses Under § 46.1-413—Conviction from operation
or theft of a vehicle; conviction for littering under § 10-211 or § 46.1-303;
but weight violations under § 46.1-342 not reportable.

FINES AND COSTS—Trial Fee Of Fifteen Dollars—Assessed as costs in all
traffic cases required to be reported to Division of Motor Vehicles—Five
dollars for reportable violations; ten dollars for those not reportable.

HIGHWAYS—Trash, Garbage, Refuse Or Other Unsightly Matter Dumped On
Public Highway—Misdemeanor under § 33.1-346 but not reportable
conviction under § 46.1-413.

HIGHWAYS—Use Of Roadways And Streets By Pedestrians Limited By § 46.1-
234—Not reportable conviction under § 46.1-413.

MOTOR VEHICLES—Virginia Driver Improvement Act—All convictions
reportable under § 46.1-413 not listed in Rules and Regulations.

March 9, 1978

THE HONORABLE ROBERT N. BALDWIN
Executive Secretary
Supreme Court of Virginia

You have asked (1) whether § 46.1-413 of the Code of Virginia (1950), as
amended, requires courts and clerks to report convictions under §§ 46.1-234,
33.1-346, 10-211 and 46.1-342 to the Division of Motor Vehicles (DMV), (2)
whether the Virginia Driver Improvement Act Rules and Regulations lists all
convictions required to be reported under § 46.1-413, and (3) in what instances
the trial fee designated in § 14.1-123 (3a) is charged to the offender. I shall answer these questions in order.

1. Reportable Offenses

Section 46.1-413 of the Code requires an abstract of the record to be forwarded to DMV of convictions resulting from the operation or theft of a vehicle.

a. Section 46.1-234 of the Code limits the use of roadways and streets by pedestrians. Since it does not pertain to the operator or operation of a motor vehicle, it is not a reportable conviction under § 46.1-413.

b. Section 33.1-346 of the Code makes it a misdemeanor for any person to "dump or otherwise dispose of trash, garbage, refuse or other unsightly matter, on a public highway." It does not refer to the operator or the operation of a motor vehicle. The violation could be committed by a pedestrian or by means other than a motor vehicle. While this statute does make it unlawful to dump trash by any means including a motor vehicle, or to eject it from a motor vehicle, it is not confined to the operator or the operation of a motor vehicle. Accordingly, it is not a reportable conviction under § 46.1-413.

c. Section 10-211 of the Code appears under the "Virginia Litter Control Act." The relevant part of this section is substantively similar to § 46.1-303 which states that "[n]o vehicle shall be operated or moved on any highway unless such vehicle is so constructed as to prevent its contents from dropping, sifting, leaking or otherwise escaping therefrom." Both statutes pertain to the operation of a motor vehicle; accordingly a conviction of either is reportable under § 46.1-413.

d. Sections 46.1-339, -340 of the Code establish weight limitations for vehicles using the highways and liquidated damages assessable for violation of these sections are set forth in § 46.1-342. However, since § 46.1-341 provides that convictions of these weight violations shall not be reported, no report of a judgment for damages (under § 46.1-342) need be made under § 46.1-413.

2. Rules & Regulations

The Virginia Driver Improvement Act Rules and Regulations does not contain a complete list of all offenses for which § 46.1-413 of the Code requires that conviction abstracts be forwarded to DMV. It does contain a list of those offenses to which demerit points have been assigned. However, since there are violations which must be reported to the Division but which nonetheless do not receive demerit points, this is not a complete guide. For example, paragraph (c) of § 46.1-514.6 provides that no point assignment be made for those convictions that require mandatory revocation or suspension of the license by the Commissioner. However, § 46.1-413 provides that such convictions must be reported to the Division. Additionally, no convictions, relating to registration, insurance or equipment, are assigned demerit points but they must be reported to DMV unless otherwise provided for by law. [Section 46.1-514.6(a).]

3. Trial Fees

Former § 14.1-200.1 of the Code provided that the sum of five dollars "shall be added to all other costs, penalties and fines assessed or assessable against the defendant" whenever a person is convicted of a violation of State law or local ordinance and "such conviction is required to be reported to the Division of Motor Vehicles." This statute was repealed by Chapter 591 [1975] Acts of Assembly 1235, which amended § 14.1-123 to include such assessment. The latter statute was again amended by Chapter 585 [1977] Acts of Assembly 942 to
provide for fees in cases of written appearance and waiver of court hearing. Section 14.1-123 provides that:

"Fees for services performed by the judges or clerks of district courts in criminal or traffic actions and proceedings shall be as follows and such fees shall be included in the taxed costs:

*(3a) For trying or examining a case of traffic violation, including a case in which there has been written appearance and waiver of court hearing, and including swearing witnesses and taxing costs, fifteen dollars, which shall include the fee prescribed in § 46.1-413 for transmitting the abstract to the Division of Motor Vehicles and the assessment of five dollars 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." (Emphasis added.)

In the case of Carter v. City of Norfolk, 206 Va. 872, 147 S.E.2d 139 (1966), the Supreme Court held former § 14.1-200.1 constitutional and valid in taxing the sum of five dollars as costs in traffic cases to defray partially the expenses of the Division of Motor Vehicles in record keeping and reporting convictions which the courts and clerks of courts are required to forward to the Division under § 46.1-413. One of the constitutional issues decided was that the costs imposed bore a proper relation to the expenses incurred by the State for the administration of the Division of Motor Vehicles. The reference in § 14.1-123(3a) to the assessment of five dollars for reportable violations clearly means those violations required to be reported to the Division by the courts or clerks of courts pursuant to § 46.1-413.

Accordingly, it is my opinion that the trial fee of fifteen dollars designated in § 14.1-123(3a) is geared to the reporting requirements in § 46.1-413, and should be assessed as costs in all traffic cases so required to be reported to the Division. Since § 14.1-123(3a) recognizes that five dollars is to cover the assessment for reportable violations, the fee to be charged for traffic violations not reportable under § 46.1-413 would be ten dollars.

CLERKS—Required By Statute To Docket In Judgment Lien Book All Fines Imposed By Circuit Court.

STATUTES—Use Of Word “Shall” Indicates Mandatory Intent.

July 19, 1977

THE HONORABLE WILLIAM T. WILSON
Member, House of Delegates

This is in response to your request for an opinion whether the Clerk of the Circuit Court of Alleghany County is required to docket in the judgment lien book the amount of a fine that has been imposed by his court for the conviction of a misdemeanor. You point out that upon payment of the fine that the judgment is marked “paid and satisfied in full.” You are concerned that the record created by such docketing will create adverse publicity for the person who has been fined.

Section 19.2-340 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:
“... Fines imposed and costs taxed in a criminal prosecution for committing an offense against the State shall constitute a judgment in favor of the Commonwealth, and, if not paid at the time they are imposed, execution may issue thereon in the same manner as upon any other monetary judgment.” (Emphasis added.)

Section 8-373 of the Code provides, in pertinent part:

“The clerk of each court of every circuit . . . shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket, without delay, . . . every judgment for money rendered in his court or office. . . .” (Emphasis added.)


Inasmuch as § 19.2-340 directs that fines and costs imposed in a criminal prosecution “shall constitute a judgment,” and because § 8-373 provides that the clerk of every circuit court “shall docket, without delay . . . every judgment for money rendered in his court,” I am of the opinion that the Clerk of the Circuit Court of Alleghany County is required by statute to docket the amounts of all fines imposed by his court in the judgment lien book. The fact that a judgment is entered in the judgment lien book does not mean that an execution for collection of the fine will be issued. A writ of fieri facias for execution of the judgment will only issue under § 8-399 upon the request of a party in interest at the expiration of 21 days from the date of entry of the judgment. The judgment created by the fine produces a lien against the defendant that is discharged upon payment of the fine.

COLLEGES AND UNIVERSITIES—Campus Police At Mary Washington College—Procedural guarantees of Policemen’s Bill of Rights do not apply to.

DEFINITIONS—Political Subdivision—Public college is not.

POLITICAL SUBDIVISIONS—Mary Washington College—Governmental instrumentality, not political subdivision of Virginia—Law enforcement officers employed by College not subject to protection of Policemen’s Bill of Rights.

THE HONORABLE LEWIS P. FICKETT, JR.
Member, House of Delegates

You ask whether the procedural guarantees of “The Policemen’s Bill of Rights” apply to campus police at Mary Washington College.

The purpose of this legislation is to give certain procedural guarantees to State and local policemen who are under investigation and/or subject to disciplinary action. Section 2.1-116.1, paragraph 1, subparagraph b, of the Code of Virginia

¹This legislation was enacted as Chapter 19 of the Acts of Assembly [1978] and will take effect on July 1, 1978.
(1950), as amended, covers law enforcement officers employed by the Department of State Police and "of any political subdivision of the Commonwealth of Virginia."

Mary Washington College would be subject to the act only if it may be classified as a political subdivision of the Commonwealth. The attributes which are generally regarded as distinctive of a political subdivision are that it "exists for the purpose of discharging some function of local government, that it has a prescribed area, and that it possesses authority for subordinate self-government through officers selected by it." Kusera v. City of Wheeling, 153 W. Va. 531, 170 S.E.2d 217 (1969); McClanahan v. Cochise College, 540 P.2d 744 (1975).

Mary Washington College, as a State-supported institution of higher education, § 23-91.34 of the Code, has no local function. It acts in a statewide capacity as an agency of the Commonwealth, accepting students from throughout Virginia. The terms "political subdivision" and "agency of the State" are not synonymous. 21 A Michie's Jurisprudence Political Subdivision at 177 (1977 Cum. Supp.). Section 23-16 of the Code designates Mary Washington as a "governmental instrumentality."

Thus, in my opinion, Mary Washington College is not a political subdivision of Virginia, and the law enforcement officers employed by the College would not be subject to the protection of the act.

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COLLEGES AND UNIVERSITIES—Rehabilitation Act Of 1973—Sign language interpreters or other auxiliary aids for deaf students.

COLLEGES AND UNIVERSITIES—Handicapped Students—College has flexibility in choosing methods by which aids supplied—Facts of individual case.


November 9, 1977

THE HONORABLE JAMES C. WINDSOR, PRESIDENT
Christopher Newport College

This is in response to your inquiry whether Christopher Newport College is required by § 504 of the Rehabilitation Act of 1973 to provide sign language interpreters for a fully qualified deaf student recently admitted to the College and any other deaf students who might be admitted to the College in the future.


3 A public college is not included in the definition of a political subdivision set forth in § 51-111.2(i), of the Code, which allows employees of all "juristic entities" to participate in Federal Social Security programs. Employees of a State College would be "State employees" as defined in § 51-111.2(e). Thus the Attorney General's Opinion to the Honorable Andre Evans, Commonwealth's Attorney for the City of Virginia Beach, dated April 12, 1976, and found in the Report of the Attorney General (1975-76) at 298, is not applicable to your inquiry.
"No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Far-reaching Regulations implementing § 504 have been issued which apply to all recipients of federal financial assistance from the Department of Health, Education and Welfare (HEW) and to each program or activity that receives or benefits from such assistance. See 42 Fed. Reg. 22,676-702 (1977) (to be codified in 45 C.F.R. § 84.1, et seq.).

For purposes of § 504, a "recipient" means:

"[A]ny state or its political subdivision, any instrumentality of the state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient . . . but excluding the ultimate beneficiary of the assistance."

The College is a State college funded by the Commonwealth of Virginia, and receives federal financial assistance from HEW under various types of federal programs and grants. In addition, I am informed that the College has signed the compliance form which HEW requested of most recipients. The College is thus a recipient for purposes of § 504 and must comply with the statute and regulations consistent therewith.

Subpart E of the Regulations, applies to all recipients who operate post-secondary education programs and activities and provides that:

"(1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

"(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments. . . . Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature." 45 C.F.R. § 84.44(d).

These provisions of § 504 became effective on June 3, 1977, and must be implemented by the College beginning with the 1977-78 school year. See Barnes v. Converse College, No. 77-1116 (D.S.C., July 18, 1977).

Whether the College must make available auxiliary aids for this student and other deaf students is, however, a decision which must be made for each student on an individual basis, taking into account such factors as a student’s abilities and the severity of his handicap. I note that it is not necessary for the College to make available sign language interpreters for deaf students if they are able to receive the benefit of and participate in educational and other programs with the use of other effective auxiliary aids. Again, this is a decision which must be made for each student on an individual basis upon consideration of such factors as the type of course and course requirements involved. For example, for a large lecture class which does not allow student participation, the College may be able to meet the requirements of § 504 by providing a deaf student with a written text of the lecture.

I also note that it is not necessary that the College pay for the services of an
interpreter or other auxiliary aids if they are available from other sources. A post-secondary institution may meet its obligations pursuant to § 504 by assisting students in using existing resources for auxiliary aids such as State vocational rehabilitation agencies and private charitable organizations. In those instances where a college must provide the auxiliary aids, it has flexibility in choosing the methods by which the aids will be supplied. A college may use the services of student volunteers, if appropriate, and, as long as no handicapped student is excluded from a program because of a lack of an appropriate auxiliary aid, can set up certain time periods when such aids will be available to students. See 42 Fed.Reg. at 22,692-693.

Accordingly, I am of the opinion that a recipient, dependent on the facts of the individual case, may be obligated to provide sign language interpreters for deaf students.

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COLLEGES AND UNIVERSITIES—Tuition—Out-of-state students cannot be required to sign contracts agreeing to pay out-of-state tuition regardless of changes in residency status.

COLLEGES AND UNIVERSITIES—State Cannot Condition Attendance At State Institution Of Higher Education Upon Renunciation Of Person's Constitutional Rights—Due Process Clause.

CONSTITUTION—Due Process Clause—State may not prohibit student enrolling as out-of-state resident from establishing domicile and becoming entitled to resident tuition rate.

December 27, 1977

THE HONORABLE GORDON K. DAVIES
Director, Council of Higher Education

This is in response to your recent inquiry concerning the payment of resident tuition at Virginia institutions of higher education, specifically:

"[W]hether students entering Virginia's state-supported institutions as out-of-state students could be required to sign contracts agreeing to pay out-of-state tuition for the course of their studies in the Commonwealth regardless of possible changes in their residency status?"

Section 23-7 of the Code of Virginia (1950), as amended, allows State-supported institutions of higher education to set separate tuition rates for students who are residents of Virginia and those who are residents of other states. The applicable standard is whether the applicant "is and has been domiciled in Virginia for a period of at least one year immediately prior to the commencement of the term, semester or quarter for which any such reduced tuition charge is sought." Under the statute, it would be possible for a student, depending on the facts, to enroll as an out-of-state student, and by acquiring domicile in Virginia for the requisite year, to become eligible for in-state tuition during the latter portion of his enrollment.

In Vlandis v. Kline, 412 U.S. 441 (1973), the Supreme Court held that it would be a violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States for a state to prohibit students enrolling
originally as out-of-state residents from establishing domicile and becoming entitled to the tuition rates charged to resident students.

The answer to your question, therefore, turns on whether a state institution can require a student to waive this constitutional right as a condition of enrollment.


I am of the opinion that to require, as a condition of his attendance, a student to sign a contract agreeing to pay out-of-state tuition regardless whether he or she may become entitled to lower tuition under the statute would be an impermissible burden on the constitutional rights of the student. Therefore, your inquiry is answered in the negative.

**COMMISSIONERS OF ACCOUNTS—No Fee For Annual Audit Of Bingo Records.**

**COMMISSIONERS OF ACCOUNTS—May Not Do Act Expressly Forbidden By Statute Through Means Not Covered By Statute.**

**CHARITABLE ORGANIZATIONS—Annual Audit Of Bingo Records—Statute prevents charity from paying a fee.**

**DEFINITIONS—”Other Local Official”—Commissioner of Accounts may not be appointed as to receive reports.**

**STATUTES—Purpose For Which Enacted Is Of Primary Importance In Its Interpretation Or Construction.**

November 2, 1977

THE HONORABLE OWEN B. PICKETT
Member, House of Delegates

This is in response to your request for an opinion concerning the provisions of § 18.2-335, Code of Virginia (1950), as amended, which authorizes certain organizations to conduct bingo games and raffles.

Section 18.2-335 requires that organizations allowed to conduct bingo games and raffles must file records of all receipts and disbursements with the commissioner of accounts or a local official designated by the local governing body for that purpose. The recipient of the records is required to audit them and make a report to the local governing body. The statute specifically precludes the commissioner of accounts from receiving any fee for this duty other than a minimal recording fee as provided by law. The statute is silent whether an “other local official” may charge such a fee.

You inquire whether or not an “other local official” designated by the local body to receive the above-mentioned records may charge a reasonable fee for the
audit and report. You also inquire whether a local governing body may designate its commissioner of accounts as an "other local official" and receive the report not in the capacity of commissioner of accounts, but as the designated local official, and thus receive a reasonable fee for the audit and report. In order to answer your questions, it is necessary to analyze the duties of the commissioner of accounts and construe the statute.

The commissioner of accounts is an officer of the court and is appointed to his post by the circuit court having general probate jurisdiction. See § 26-8 of the Code. The court, having authority and responsibility over fiduciaries and fiduciary matters, must have someone to audit and make reports concerning the accounts; otherwise, the court would be unduly burdened performing this duty in addition to the normal business of the court. The person appointed as commissioner of accounts is compensated by the fees that are paid to him by those people who are required by law to submit records of receipts and disbursements.

In construing legislative intent, the Virginia Supreme Court in *McFadden v. McNorton*, 193 Va. 455, 69 S.E.2d 445 (1952), stated that:

"It is a well established rule of construction that a statute ought to be interpreted in such a manner that it may have effect, and not to be found vain and elusive. Every interpretation that leads to an absurdity ought to be rejected. It is our duty to give effect to the wording of a statute, and allow the legislative intention to be followed." 193 Va. 461.

In light of the above, I interpret the intent of the statute to be that the legislature wanted to allow certain charitable organizations to conduct bingo games and raffles, and to ensure that the monies received by these organizations be used for charitable purposes. I think it is significant that the legislature imposed the duty on the commissioner of accounts in the first instance until relieved by the local governing body. The commissioner of accounts is the most likely person equipped to perform this duty. The fact that the statute specifically precludes the commissioner of accounts, whose livelihood depends on fees he is allowed to charge, from receiving any fee leads me to the conclusion that the legislature intended that no fee other than the enumerated "minimal recording fee" is to be charged to the charitable organization. The intent of the statute then is not necessarily to prohibit the commissioner of accounts from charging a fee, but rather to prevent the charity from paying a fee.

It is my opinion, therefore, that neither the commissioner of accounts, nor that person designated by the local governing body to receive records of receipts and disbursements should be allowed to charge any fee for the audit and report required.

It is also my opinion that the commissioner of accounts would not be allowed to receive such reports in any capacity other than commissioner of accounts. In *Norfolk Southern Railway Company v. Lassiter*, 193 Va. 360, 364, 68 S.E.2d 641 (1952), the Virginia Supreme Court said:

"The purpose for which a statute is enacted is of primary importance in its interpretation or construction. 'A statute often speaks as plainly by inference, and by means of the purpose that underlies it, as in any other manner. A policy that is clearly implied is as effective as that which is expressed. * * * * The statute should have a rational construction consistent with its manifest purpose, and not one which will substantially defeat its object. A case not within the letter of a statute may be held to be within its meaning, because it is within the mischief for which a remedy is provided.' ""
To allow the commissioner of accounts to do something expressly forbidden by the statute through a means not covered by the statute would, in my opinion, be in violation of the spirit of the law and thus not allowed. Your inquiries are thus answered in the negative.

**COMMISSIONERS OF REVENUE—Assessment Of Real Estate Is Responsibility Of Single Assessor Rather Than Commissioner Of Revenue Of Norfolk—Value for tax purposes.**

**COMMISSIONERS OF REVENUE—Erroneous Assessment—No responsibility for correcting property valuations by single assessor—Procedure for aggrieved party to apply for relief.**

**TAXATION—Erroneous Assessment—Property valuations by single assessor subject to review by court-appointed board—Procedure for aggrieved party to apply for relief.**

August 29, 1977

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

You have inquired whether as Commissioner of the Revenue for the City of Norfolk you have “any responsibility in the assessment of real estate or any responsibility in the case of incorrect assessments.” In connection with this inquiry you advise:

“In 1947, by action of the General Assembly, the Charter of the City of Norfolk was changed to permit the Council to appoint a City Real Estate Assessor. This was done and Norfolk has had a Council appointed Assessor since that date.”

As used in the various statutes relating to the taxation of real property in Virginia the word “assessment” has a dual meaning, referring either to the valuation of property for tax purposes or to the levy of taxes on the basis of previously determined property values. See Hoffman v. Augusta County, 206 Va. 799, 146 S.E.2d 249 (1966). I am advised and assume that your inquiry deals with responsibility for determining the value of each parcel of real property in Norfolk for tax purposes and for correcting such values to the extent they are erroneous. I further assume that the governing body of the City of Norfolk has not adopted a resolution of the type contemplated by § 58-811.1, Code of Virginia (1950), as amended, regarding assessment of new buildings substantially completed.

The legislation to which you refer, Chapter 29, [1947] Acts of Assembly 70, continued in effect by § 58-769(2), authorizes the governing body of certain cities, in lieu of the method of revaluing real property during periodic general reassessments, to “provide for the annual assessment of real estate for taxation and to that end . . . appoint a single assessor to assess such real estate for taxation.” (Emphasis added.) It provides that “all such real estate shall be assessed at its fair market value;” that assessments made by the council-appointed “single assessor” are subject to review by a three-member court-appointed board; and that any person aggrieved by any assessment made either
by the single assessor or by the board of review is entitled to apply for relief under the provisions of what is now § 58-1145.

In St. Andrew's Ass'n. v. City of Richmond, 203 Va. 630, 635, 125 S.E.2d 864, 869 (1962), legislation similar in substance to Chapter 29 of the 1947 Acts of Assembly was construed to be concerned "with the fixing of the fair market value," as distinguished from the determination of who has to pay how much in real property taxes. Applying this construction to the facts at hand, I would conclude (1) that it is the single assessor appointed pursuant to Chapter 29 of the 1947 Acts rather than the commissioner of the revenue who is responsible for determining the value of real estate in the City of Norfolk for tax purposes, and (2) that that determination is subject to review by the three-member court-appointed board. Such responsibility could be conferred on the commissioner of the revenue only by resolution adopted pursuant to § 58-769.2 and then only with the commissioner's consent. Your first inquiry is answered in the negative.

As indicated, property valuations made by the single assessor are subject to review by a court-appointed board. If a value determined by the assessor or by the board of review is erroneous, the proper procedure is for the aggrieved party to apply for relief to the Circuit Court of the City of Norfolk under authority of § 58-1145. The Commissioner of the Revenue has no responsibility with respect to correcting such valuations.

COMMISSIONERS OF REVENUE—Authority—May require person to provide information on potential tax liability of another within his jurisdiction—Limitations.

January 11, 1978

THE HONORABLE WILLIAM N. ALEXANDER, II
Commonwealth's Attorney of Franklin County

This is in response to your inquiry concerning the authority of the commissioner of the revenue to discover information regarding the tax liability of taxpayers within his jurisdiction. Specifically, you wish to know whether a commissioner of the revenue may require a person to provide information regarding the potential tax liability of another person.

Section 58-874(5) of the Code of Virginia (1950), as amended, provides in pertinent part that each commissioner of the revenue shall:

"'(5) Call upon and require . . . any person . . . to furnish information relating to intangible personal property, money, income or license taxes of any and all taxpayers . . . .’"

Based on the foregoing, I am of the opinion that the commissioner of the revenue can require any person to provide information which may be helpful in determining the tax liability of another person within his jurisdiction, subject to any constitutional or statutory limitation on acquiring such information which may exist.

COMMISSIONERS OF REVENUE—Term Of Office—Not required to stay in office beyond his term—How vacancy filled.
CHARTERS—Elections—Charter of City of Franklin does not provide for filling vacancies—Circuit Court appoints successor to retiring commissioner of revenue if no one elected in November.

COMMISSIONERS OF REVENUE—Candidate—If no one qualifies for office, ballot will be blank—Qualified individual could be elected by write-in vote.

CITIES—Charter Does Not Authorize Abolition Of Office Of Commissioner Of Revenue—City Council may not abolish through election or referendum.

ELECTIONS—Amendments Effective July 1, 1977, Prohibit Holding Of Election Or Referendum To Abolish Any Office Set Forth In Constitution—Charter of city of Franklin does not authorize abolition of office of commissioner of revenue.

July 25, 1977

THE HONORABLE W. D. JOHNSON, SR.
Commissioner of the Revenue for the City of Franklin

This is in response to your letter in which you stated that your term of office as Commissioner of the Revenue will expire on December 31, 1977, at which time you expect to retire. You further stated that no candidate has qualified to run for the office in the primary or the general election. Your letter requested my opinion as to the following:

"1. In the event that no candidate or candidates qualify by 7:00 p.m. on June 14, (a) does the present Commissioner of the Revenue stay in office after December 31 until relieved from the duties of the office; or
   "(b) Does the Judge of the Circuit Court appoint a Commissioner of the Revenue on the recommendations of the City Council; or,
   "(c) Does the Judge of the Circuit Court issue an order for a special election to be held?

"2. If the present Commissioner of the Revenue is required to stay in office beyond his period of time, how long will he be required to stay?

"3. If no one qualified before the due date, can the City Council make the necessary arrangements to have a special election in the General Election to abolish the office of the Commissioner of the Revenue, to be effective as of January 1, 1978?"

In response to your first and second inquiries, if no candidate qualifies for the office of Commissioner of the Revenue for the City of Franklin, the ballot will be blank and a qualified individual could be elected Commissioner of the Revenue by write-in vote. See Report of the Attorney General (1975-1976) at 53. If there are no write-in votes (or if there are write-in votes and the person elected fails to qualify), the office will become vacant as of January 1, 1978, since your term of office will expire on December 31, 1977. Because the Charter for the City of Franklin does not provide for the filling of vacancies, § 24.1-76 of the Code of Virginia (1950), as amended, would apply in those circumstances.

That section provides, in pertinent part:

"When a vacancy occurs in any county, city, town or district office and no other provision is made for filling the same, it shall be filled by a majority of the circuit judges of the judicial circuit for such county or city in which it occurs. . . . When a vacancy occurs, if there be a deputy in the office, then the chief or senior deputy thereof shall perform all the duties of
such office until the qualification of the person appointed to fill the vacancy.

"When any vacancy shall occur in any county, city, town or district office, the court shall issue a writ of election to fill such vacancy as set forth in § 24.1-163. . . . Such elections shall be held at the next ensuing general election to be held in the county, city or town, or in the county in which the town is situated."

A vacancy in the position of Commissioner of the Revenue will therefore occur on January 1, 1978, if, as indicated, there were no write-in candidates, or a write-in candidate fails to qualify. If such a vacancy does occur, the Circuit Court, pursuant to § 24.1-76, must appoint a successor and issue a writ of election to fill the vacancy for an election to be held at the next "ensuing general election," which will be held in May, 1978. See Opinion to the Honorable Norman Sisisky, Member, House of Delegates, dated June 30, 1976, and found in the Report of the Attorney General (1975-1976) at 121.

In response to your inquiry whether the City Council may make arrangements for a special election to abolish the office of the Commissioner of the Revenue, recent amendments to Title 15.1 of the Code prohibit the ordering of, or holding of, any election or referendum which results in the abolition of any office set forth in Article VII, Section 4, of the Constitution of Virginia (1971). The office of Commissioner of the Revenue is included in Article VII, Section 4. Chapter 684, [1977] Acts of Assembly, provides:

"§ 15.1-836.1. Notwithstanding any provision of law to the contrary, the statutes found within this chapter shall not be used as authorization for the ordering of, or the holding of, any election or referendum which results of which would cause or result in the abolition of any office set forth in Section 4 of Article VII of the Constitution of Virginia.

"§ 15.1-915.1. Notwithstanding any provisions of law to the contrary, the statutes found within this article shall not be used as authorization for the ordering of, or the holding of, any election or referendum which results of which would cause or result in the abolition of any office set forth in Section 4 of Article VII of the Constitution of Virginia."

Sections 15.1-836.1 and 15.1-915.1 became effective on July 1, 1977. The City of Franklin is a city of the second class, see Report of the Secretary of the Commonwealth (1974-1975) at 252. The City of Franklin, thus, is covered by Chapter 18 of Title 15.1 of the Code, to which § 15.1-915.1 refers, and I find nothing in the Charter authorizing an election to abolish the office of Commissioner of the Revenue. In an opinion to the Honorable Betty Jane Jenkins, Commissioner of the Revenue for the City of Manassas Park, dated June 9, 1977 (a copy of which is attached), I opined that "§§ 15.1-833 through -836 and 15.1-909 through -915 may not be used to amend an existing charter or grant a new charter which would authorize the holding of a referendum to approve the abolishment of a constitutional office." Therefore, I am of the opinion that the City of Franklin Council may not through an election or referendum abolish the office of Commissioner of the Revenue.
This is in response to your request for my opinion whether § 15.1-66.2 of the Code of Virginia (1950), as amended, places a ceiling on the compensation to be given an attorney for his defense of a Commonwealth’s Attorney, who is made a defendant in a civil action arising out of the performance of his official duties. You note in your letter that the 1977 Session of the General Assembly, by Ch. 554 [1977] Acts of Assembly 835, repealed § 15.1-66.2, effective as of January 1, 1980. Simultaneously, the General Assembly enacted § 15.1-66.4, which accords the Circuit Court discretion in fixing the compensation of the attorney. This provision is effective January 1, 1980.

Section 15.1-66.2 provides that when a Commonwealth’s Attorney is sued in connection with the performance of his official duties, he has the right to have the circuit court assign counsel for his defense. The statute then provides: “The cost of such counsel shall be paid as provided in § 14.1-184 of the Code of Virginia.”

Section 14.1-184 was repealed by the 1975 General Assembly. See Ch. 593 [1975] Acts of Assembly 1239. The same Assembly also enacted § 19.2-163. See Ch. 495 [1975] Acts of Assembly 878. The latter section in large measure contains the provisions previously found in § 14.1-184. It sets forth various amounts of compensation that a court-appointed attorney may receive in connection with his representation of an indigent charged with a criminal offense. Further, it provides for the payment of reasonable expenses incurred by the attorney, and delineates the manner of payment of the compensation.

It is my view that the General Assembly by its repeal of § 14.1-184 did not mean to effect a similar repeal of § 15.1-66.2. Generally, where there has been a revision of the law, the presumption is that, in the absence of a clear intention to the contrary, no change in the former law was intended. Hamilton v. Commonwealth, 143 Va. 572, 130 S.E. 383 (1925). In addition, all statutory provisions dealing with the same subject should be construed together and reconciled whenever possible. Shepherd v. Kress Company, 154 Va. 421, 153 S.E. 649 (1930).

The 1975 General Assembly stated that § 14.1-184 was being repealed “so as to conform with the reenactment of the provisions of such section[s] in Title 19.2 of such Code.” Ch. 593 [1975] Acts of Assembly 1239. In this regard, what the Supreme Court of Virginia stated in Moore v. Commonwealth, 155 Va. 1, 155 S.E. 635 (1930) is noteworthy:

“[W]here a statute is repealed, and all or some of its provisions are at the same time re-enacted, the re-enactment neutralizes the repeal, and the provisions of the repealed act which are thus re-enacted continue in force without interruption so that all rights and liabilities that have accrued thereunder are preserved and may be enforced.” 155 Va. at 10.

Utilizing this rule of statutory construction, it appears that payment of counsel as provided for in § 15.1-66.2 must be done in accord with § 19.2-163, despite the absence of any express reference in § 15.1-66.2 to the latter provision.

The question therefore devolves into what effect § 19.2-163 has upon § 15.1-
66.2. Section 19.2-163 in part sets forth various maximum amounts of compensation to be tendered attorneys who represent indigents charged in criminal cases. The differing amounts permissible under § 19.2-163 are clearly based on the degree of difficulty present in the criminal proceeding and the severity of the charge alleged against the defendant. Conversely, § 15.1-66.2 involves only those cases in which a Commonwealth's Attorney is a defendant in a civil action. Therefore, the limitations contained in § 19.2-163 necessarily can have no applicability in affixing an appropriate compensation for services rendered under § 15.1-66.2.

The latter three paragraphs in § 19.2-163 state that a court-appointed lawyer shall be reimbursed for "reasonable expenses" incurred by his representation, and that the Commonwealth shall provide for the specified payment out of her treasury. It is my opinion that § 15.1-66.2, by its reference to § 14.1-184 (now § 19.2-163), must be construed to adopt these provisions regarding the nature and method, rather than amount, of reimbursement.

Accordingly, my answer to your inquiry is in the negative. A court is not limited by the $400 maximum amount of compensation provided in § 19.2-163. Rather, counsel representing a Commonwealth's Attorney pursuant to § 15.1-66.2 may be paid to the extent a court deems appropriate.

COMMONWEALTH ATTORNEYS—City Council Of Charlottesville May Supplement Salary Of—Payable wholly from city funds.

July 14, 1977

THE HONORABLE THOMAS J. MICHE JR.
Member, House of Delegates

You have inquired whether the City Council of the City of Charlottesville may supplement the salary set by the Compensation Board for the Commonwealth's Attorney for the City of Charlottesville, and if so, whether the supplement together with the salary set by the Board may exceed the maximum salary allowed under § 14.1-53, Code of Virginia (1950), as amended by Chapter 623, [1977] Acts of Assembly 1209. It is understood that any supplement to the salary set by the Compensation Board would be paid entirely from local funds. I am advised and assume for purposes of this opinion that the City of Charlottesville has a population of more than thirty-five thousand inhabitants.

Subject to the salary limits prescribed by § 14.1-53, the Compensation Board is required by § 14.1-51 to set "a fair and reasonable salary" to be paid to each attorney for the Commonwealth. Chapter 623 of the 1977 Acts amends § 14.1-53, effective July 1, 1977, to provide that the annual salary for attorneys for the Commonwealth in cities having a population of more than thirty-five thousand inhabitants "shall be not less than twenty-five thousand dollars, nor more than thirty-six thousand dollars." Unamended by Chapter 623 or other chapter of the 1977 Acts is § 14.1-11.4, which provides:

"Notwithstanding any other provision of law, the governing body of any county or city, in its discretion, may supplement the compensation of the sergeant, sheriff, treasurer, commissioner of the revenue, or attorney for the Commonwealth, or any of their deputies or employees, above the salary of any such officer, deputy or employee established in this title, in such amounts as it may deem expedient. Such additional compensation shall be
wholly payable from the funds of any such county or city." (Emphasis added.)

In my opinion, § 14.1-11.4 requires an affirmative answer to both your inquiries. The City Council of the City of Charlottesville enjoys, by virtue of that section, the discretion to supplement the salary set by the Compensation Board for the Commonwealth's Attorney for the City of Charlottesville in any amount it may deem expedient. This discretion is unaffected by § 14.1-53.

COMPENSATING VICTIMS OF CRIME ACT—Comptroller—No authority to deduct commission from additional court costs collected by clerks under § 19.2-368.18.

CLERKS—Commission—Not entitled to commission on additional ten dollar cost to be paid into Criminal Injuries Compensation Fund.

STATUTES—Legislature, When It Passes New Law, Or Amends Old One, Is Presumed To Act With Full Knowledge Of Law As It Stands.

CRIMINAL INJURIES COMPENSATION FUND—General Assembly Intended Not Only That Fund Remain Whole, But That Expenditures Be Made From It For Only The Two Purposes Stated.

STATUTES—Use Of Word "Shall" Indicates Mandatory Intent.

January 25, 1978

THE HONORABLE ROBERT P. JOYNER, CHAIRMAN
The Industrial Commission of Virginia

This is in response to your letter wherein you request my opinion whether the State Comptroller has authority under any provision of the Code of Virginia to deduct a commission from the additional court costs collected by the clerks pursuant to § 19.2-368.18 of the Code of Virginia (1950), as amended.

Chapter 21.1 of the Title 19.2 of the Code, §§ 19.2-368.1 through -368.18, establishes the Compensating Victims of Crime Act. Section 19.2-368.18B authorizes the clerk of the court to collect ten dollars ($10.00) in felony and specified misdemeanor convictions, and characterizes such money as "an additional cost authorized by that section be paid into the Criminal Injuries law . . . ." That subsection directs that such additional sum shall be paid to the Comptroller to be deposited into the Criminal Injuries Compensation Fund. Subsection D of § 19.2-368.18 states that:

"Sums available in the Criminal Injuries Compensation Fund shall be used for the purpose of payment of the costs and expenses necessary for the administration of this chapter and for the payment of claims pursuant to this chapter." (Emphasis added.)

Chapter 20 of Title 19.2 of the Code is entitled Taxation and Allowance of Costs. Under this chapter, circuit court clerks are required to make up a statement of all expenses incident to criminal prosecutions, and to issue and proceed with execution for such expenses. Section 19.2-336. This section provides for the same procedure with regard to Chapter 21 of Title 19.2 of the
Code (Recovery of Fines and Penalties). The money collected for the Commonwealth by the clerks under Chapters 20 and 21 is subject to their commission allowance. Section 58-972. Under that section commissions are permitted on all taxes and other money belonging to the Commonwealth collected by the clerk. Accordingly, your request presents the question whether the additional cost collected by the clerk pursuant to Chapter 21.1, for payment into the Criminal Injuries Compensation Fund, should be treated differently than the amounts collected by the clerk pursuant to Chapters 20 and 21.

A statute "by its use of the word 'shall' indicates a mandatory intent." Report of the Attorney General (1965-1966) at 175. Accordingly, I am of the opinion that the General Assembly, by its use of the word "'shall'" in § 19.2-368.18D, indicated a mandatory intent not only that the entire ten dollar ($10.00) additional cost authorized by that section be paid into the Criminal Injuries Compensation Fund, but also that expenditures be made from the Fund for the two purposes stated therein, and for those two purposes only.

The legislature, when it passes a new law, or amends an old one, is presumed to act with a full knowledge of the law as it stands. School Board of Stonewall District v. Patterson, 111 Va. 482, 487-488, 69 S.E. 337 (1910). Consequently, the General Assembly should be presumed to have been aware of the commissions provided for clerks under § 58-972 when it passed § 19.2-368.18D limiting the purposes for which the ten dollar ($10.00) cost could be expended. I am of the opinion, therefore, that the General Assembly, by enacting § 19.2-368.18D, evidenced an intent not only that the Criminal Injuries Compensation Fund remain whole, but also that court clerks not be entitled to a commission on the additional cost collected pursuant to § 19.2-368.18. Thus, the State Comptroller has no authority to deduct a commission from the additional court costs collected by the clerks pursuant to § 19.2-368.18.


CONFLICT OF LAWS—Compensating Victims Of Crime Acts—Sections 19.2-368.6C and 19.2-368.5D enacted simultaneously.

CRIMINAL PROCEDURE—Compensating Victims Of Crime Act—Construction of § 19.2-368.5D, processing of claims.

DEFINITIONS—"Criminal Prosecution" As Used In Compensating Victims Of Crime Act For Processing Of Claims.


STATUTES—"Shall" Is Mandatory—Deferral of proceedings required by § 19.2-368.5D of Compensating Victims of Crimes Act.

December 6, 1977

THE HONORABLE ROBERT P. JOYNER, CHAIRMAN
The Industrial Commission of Virginia

This is in response to your inquiry concerning the Industrial Commission of
Virginia's processing of claims filed pursuant to Virginia's Compensating Victims of Crime Act. Specifically, you ask whether the Commission would be in violation of § 19.2-368.5D of the Code of Virginia (1950), as amended, if the following procedure were followed:

"The Virginia Victims of Crime Act was taken practically verbatim from the Maryland statute. In processing claims we have used the same forms and procedures utilized by the Maryland Commission. Their procedure has been to notify the Commonwealth's Attorney when a claim has been filed from his county or city. If the Commonwealth's Attorney then notifies the Commission that an arrest has been made, he also indicates whether or not he is requesting that any further proceedings regarding the claim be deferred pending the criminal prosecution. If no such request is made the claim for compensation is then processed."

"Upon filing of a claim pursuant to this chapter, the Commission shall promptly notify the Commonwealth's attorney of the jurisdiction wherein the crime is alleged to have occurred. If, within ten days after such notification, the Commonwealth's attorney so notified advises the Commission that a criminal prosecution is pending upon the same alleged crime, the Commission shall defer all proceedings under this chapter until such time as such criminal prosecution has been concluded in the circuit court. When such criminal prosecution has been concluded in the circuit court the Commonwealth's attorney shall promptly so notify the Commission. Nothing in this section shall be construed to mean that the Commission is to defer proceedings upon the filing of an appeal, nor shall this section be construed to limit the authority of the Commission to grant emergency awards as hereinafter provided."

Chapter 21.1 of Title 19.2, § 19.2-368.1 through -368.18 of the Code, comprises the Virginia Compensating Victims of Crime Act. The purpose of the Act is to provide governmental financial assistance for persons who have suffered personal physical injury or death as a direct result of the commission of a crime. See § 19.2-368.1. An award of financial assistance must be based on a determination by the Commission that: (1) a crime was committed, (2) such crime directly resulted in personal physical injury to, or death of the victim, and (3) that such crime, according to police records, was promptly reported to the proper authorities. See § 19.2-368.10. There is, therefore, no requirement that the perpetrator of the crime be apprehended, prosecuted or convicted of the crime. In fact, § 19.2-368.6C provides as follows:

"Claims shall be investigated and determined, regardless of whether the alleged criminal has been apprehended or prosecuted for, or convicted of, any crime based upon the same incident, or has been acquitted, or found not guilty of the crime in question owing to a lack of criminal responsibility or other legal exemption."

Notwithstanding the immateriality of the apprehension, prosecution or conviction of the perpetrator of the crime to the granting of an award and apart from the making of emergency awards pursuant to § 19.2-368.9, § 19.2-368.5D requires that if the Commission has received timely notice "that a criminal prosecution is pending upon the same alleged crime," it "shall defer all proceedings" under Chapter 21.1 "until such time as such criminal prosecution has been concluded in the circuit court." The term "criminal prosecution" has been defined by the Supreme Court of Virginia as follows:
“In common and ordinary acceptation, according to the definition given by lexicographers, and authorities generally, the word ‘prosecution’ means the institution and carrying on of a suit or proceeding to obtain or enforce some right or the process of trying formal charges against an offender before a legal tribunal.

“In criminal law, it is the means adopted to bring a supposed criminal to justice and punishment by due course of law, and consists of a series of proceedings from the time formal accusation is made by swearing out a warrant, the finding of an indictment or information in a criminal court, the trial, and final judgment.” Sigmon v. Commonwealth, 200 Va. 258, 267, 105 S.E.2d 171 (1958). (Emphasis added.)

Upon receiving timely notice that a warrant, indictment or information has been issued, or that the case is before the grand jury or awaiting trial or final judgment, the Commission must defer "all proceedings" under the Act. A "proceeding" is defined as follows:

"In general, the same authorities define 'proceeding' as broad enough to cover any act, measure, step or all steps in a course taken in conducting litigation, civil or criminal." Sigmon, supra, at 267.

I am of the opinion, therefore, that the phrase "all proceedings" encompasses all acts by the Commission in the determination of the validity of a claim including those procedures set forth in § 19.2-368.6. Standing alone, however, § 19.2-368.6C appears to be in direct conflict with § 19.2-368.5D in that § 19.2-368.6C directs the Commission to investigate and determine a claim without regard to the apprehension, prosecution or conviction of the alleged criminal. Where two provisions of an Act which have been simultaneously enacted appear to conflict, the applicable rule of statutory construction is to read the Act as a whole and interpret its provisions consistent with the manifested intent of the legislature. If § 19.2-368.6C were interpreted to require that the Commission disregard the apprehension, prosecution or conviction of the alleged criminal in processing every claim, § 19.2-368.5D would become a nullity. The legislature cannot be presumed to have reached such an illogical result. On the other hand, if § 19.2-368.5D is applied to the processing of claims, the provisions of § 19.2-368.6C remain applicable in situations not covered by § 19.2-368.5D. Reading the Act as a whole, it accordingly is my opinion that § 19.2-368.5D controls where there is a pending criminal prosecution and timely notification of this fact has been given the Commission. The Act, however, contains no other exceptions to the mandatory requirement of § 19.2-368.6C that a claim be investigated and determined without regard to the status of the alleged criminal.

The deferral of proceedings required by § 19.2-368.5D is triggered by receipt of a timely notice from the appropriate Commonwealth's Attorney that a criminal prosecution is pending. Upon receipt of such notice, the Commission "shall defer all proceedings" under the Act. Normally, the word "shall" when it appears in a statute, is used in an imperative or mandatory sense. Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965). I am of the opinion, therefore, that an indication by the appropriate Commonwealth's Attorney that he has no objection to continuation of the Commission's investigation and determination of the claim is insufficient to permit the Commission to renew such proceedings prior to the conclusion of criminal prosecution in the circuit court. Accordingly, it is my opinion that the Commission would be in violation of § 19.2-368.5D if it followed the procedure outlined in your letter.
CONDEMNATION—Award—Distribution to unknown condemnees.

ATTORNEYS—Condemnation Cases—Responsibility of petitioners' attorney to determine unknown condemnees and their shares in award.

CLERKS—Condemnation Cases—Dismissal from docket when condemnees are unknown.

COURTS—Unclaimed Funds In Hands Of Court—Condemnation award; unknown condemnees.

August 29, 1977

The Honorable Austin Embrey, Clerk
Circuit Court of Nelson County

You have inquired as to the proper procedure under relevant provisions of the Code of Virginia for distribution of awards in condemnation cases in which parties unknown are defendant owners of the property condemned. You advise that the docket of your court reflects condemnation proceedings in which funds remain undistributed because all or some of the condemnees are unknown, and their shares in the award are, consequently, indeterminable from the record. Your inquiry further addresses (1) the authority of the court to dismiss the case from its docket after funds have been paid into court in the name of parties unknown, and (2) the responsibility of the attorney for the petitioner in such cases.

I shall answer you questions seriatim.

Section 25-46.28 of the Code of Virginia (1950), as amended, provides generally for the distribution of money paid into court upon confirmation of the report of commissioners in a condemnation proceeding. Under that section, when a "controversy" exists among claimants to the fund or as to the ownership of the property condemned, the court "shall enter an order setting a time for hearing the case and determining the rights and claims of all persons entitled to the fund or to any interest or share therein." Where there are both known and unknown condemnees, but the entitlements of such condemnees are unascertainable because the record, while showing that there are outstanding interests, does not reveal all the names or numbers of those holding such interests, I am of the opinion that such a "controversy" exists. The known condemnees' ability to recover their entitlements is thwarted by the existence of other uncounted condemnees, thus creating a "justiciable dispute." See Black's Law Dictionary 400 (Rev'd.4th Ed., 1968). The inert character of the opposition is tantamount to the active dispute which is generally connoted by the word "controversy." Of course, two necessary corollaries of this theory are that (1) at least one condemnee be known and (2) the known condemnees be actually desirous of ascertaining their entitlements under this section; otherwise there would be no controversy. In such cases, § 25-46.28 requires a hearing to determine entitlements, and, if necessary, permits appointment of a commissioner in chancery to take evidence on that issue; the condemnor is required to bear the costs incident to such determination where the fund is less than $500.00.

Section 25-46.28 further provides that "[u]pon a determination by the court of the rights and claims of the persons entitled to the fund, an order shall be entered directing the disbursement among the persons entitled thereto." If, under the varying circumstances noted above, the court cannot determine the entitlements of known condemnees, distribution cannot be accomplished, and the Code provides no authority for disposition of the funds. I am of the opinion that such
a case must be continued by the court until such time as sufficient evidence exists to establish the shares of known condemnees. Where the court does determine their shares, they may be distributed; however, this section does not provide authority for disposition of any remaining funds to which unknown condemnees may be entitled. In such a situation, disposition of those funds must be governed by statutes applicable generally to unclaimed funds in the hands of the court.

With regard to the funds of unknown condemnees, § 8-725 of the Code requires every circuit court of the Commonwealth to appoint a general receiver “whose duty it shall be, unless it be otherwise specifically ordered, to receive, take charge of, hold or invest in such manner as the court orders, all monies paid into court . . . and also to pay out or dispose of same as the court orders or decrees.” I am of the opinion that undistributable funds in condemnation proceedings may properly be paid to the general receiver pursuant to this statute. If, for any reason, the court believes that further inquiry as to the ownership of the funds is warranted, it may, pursuant to § 8-729, order the receiver “to make inquiry and due diligence to ascertain such person in order that payment may be made.” In doing so, the receiver is thereby authorized to summon witnesses and take evidence; if he does so, he is required to “report specifically to the court in each semiannual report, and at any other time when so ordered by the court, the details and results of his efforts.”

Should the court not wish to direct such an inquiry, or should the inquiry fail to ascertain all the condemnees and their respective shares, I am of the opinion that disposition of the funds would be subject to the provisions of §§ 8-746 through -749 of the Code. Section 8-746 provides as follows:

“Whenever any money has remained for five years in the custody or under the control of any court of this State without anyone known to the court claiming the same the court shall, when the amount is five hundred dollars or more, cause a publication to be made once a week for two successive weeks in some newspaper published in the city or county in which the court is located or if there be none then in a newspaper having general circulation therein, setting forth the amount of the money, the source from which it was derived, in what court and in what suit or proceeding it is held, and in whose hands it is, and requiring all persons having any claim to it to appear before the court within such time after the completion of the publication as the court prescribes and establish their claim. If the sum be less than five hundred dollars, the court shall direct the same to be paid into the State treasury, and a proper voucher for the payment taken and filed among the records of the court.”

Where this procedure is followed and no one establishes a claim to funds exceeding five hundred dollars, § 8-747 requires payment of the money, less the costs of publication “and any other proper charges” into the State treasury.

In the event that any of the parties to the condemnation proceeding who are unknown should later appear and assert a claim to their share of the funds, they may do so in accordance with the procedure prescribed by § 8-749 of the Code.

In response to your question as to the propriety of removing condemnation cases from your docket when such undistributable funds are deposited with the general receiver, I am of the opinion that § 8-164 of the Code is applicable. That section provides that, after each term of the court, the clerk “shall transfer from the current law docket all cases which have been ended and in which final orders or judgments have been entered to a . . . book known as the ‘ended law docket.’” In my opinion, a condemnation case is “ended” when the issue of just compensation has been decided and a final order of the court is entered
confirming the commissioners' report and directing distribution of the award. Where the order directs that all or a portion of the award be paid to the general receiver without instructing him to make further inquiry as to its ownership, I perceive no objection to removing the case from the current docket pursuant to § 8-164. The rights of unknown owners are not thereby prejudiced, for, as noted above, an owner's claim is not barred, even if the funds are paid to the State Treasurer.

Finally, you ask my opinion as to the responsibility of the attorney for the petitioner in such cases. Section 25-46.7 states, in part:

"The petition for condemnation shall contain:

(b) Short and plain statements of the following:

7. As to each separate piece of property to be taken or damaged, the names and residences, so far as known by petitioner, of the defendants who are joined as owners thereof, or of some interest therein, whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned; other persons or classes of persons, whose names are unknown, may be made defendants under the designation of 'Unknown Owners';"

In addition, the petitioner may object to withdrawal of funds pendente lite pursuant to § 25-46.30 of the Code on the ground that parties other than those named in the petition are "known or believed to have interests" in the property condemned. Other than the foregoing and the petitioner's duty to pay the cost of proceedings under § 25-46.28 to determine entitlements where the fund is less than $500.00, I know of no provisions of law which impose any additional duty on the petitioner to establish ownership of the property condemned. Accordingly, I am of the opinion that this responsibility of the petitioner, and, therefore, of his attorney, does not continue beyond the filing of the petition for condemnation and the proceedings outlined under §§ 25-46.28 and 25-46.30. Those landowners not discovered by the petitioner and, therefore, included in the petition as unknown owners, have the burden of establishing their claim to the fund in further proceedings by the court or general receiver.

CONDOMINIUMS—Places Of Public Accommodation Reasonably Accessible To Physically Handicapped Persons.

DEFINITIONS—"Places Of Public Accommodation"—Condominiums.

May 9, 1978

THE HONORABLE GEORGE M. WARREN, JR.
Commonwealth's Attorney for the City of Bristol

You have asked whether development complexes designated as condominium units reserved for the express purpose of sale to individual private owners are places of public accommodation. Section 36-124(6) of the Code of Virginia (1950), as amended, requires the State Board of Housing to promulgate design standards to ensure that places of public accommodation constructed,
remodeled or rehabilitated after the effective date of the standards are reasonably accessible to physically handicapped persons.

Apartment developments containing more than twenty dwelling units but not held under the condominium form of ownership are considered "places of public accommodation" under § 36-124(6) of the Code. Webster's New World Dictionary defines the term "condominium" as "[a]n arrangement under which a tenant in an apartment building or in a complex of multi-unit dwellings holds full title to his unit and joint ownership in the common grounds." The Virginia Condominium Act, at § 55-79.41(d) of the Code of Virginia (1950), as amended, defines "condominiums" as

"real property, and any incidents thereto or interests therein, lawfully submitted to this chapter by the recordation of condominium instruments pursuant to the provisions of this chapter. No project shall be deemed a condominium within the meaning of this chapter unless the undivided interests in the common elements are vested in the unit owners."

What these two definitions have in common is that under either, an apartment development containing more than twenty dwelling units may be classified as a condominium by virtue of its form of ownership, but that it is nevertheless an apartment development containing more than twenty dwelling units.

Accordingly, I am of the opinion that the provisions of § 36-124(6) of the Code of Virginia (1950), as amended, setting forth "places of public accommodation" include those apartment development complexes held under a condominium form of ownership.

CONFLICT OF LAWS—Hatch Act Amendment—H.R. 10 will not preempt §§ 2.1-30 and 2.1-33; they speak to two different aspects of political activity.

CANDIDATES—Federal Employees Permitted By Amendment To Hatch Act To Be Candidates For Federal, State And Local Elective Offices—State law prohibits them from holding certain offices.

FEDERAL EMPLOYEES—Federal Employees' Political Activities Act Of 1977—H.R. 10, amending Hatch Act, pertains solely to federal employees; does not cover State and local government employees.

PUBLIC OFFICERS—Conflict Of Interests—State restrictions on dual office holding—Amendment to Hatch Act pertains solely to federal employees.

STATE EMPLOYEES—Hatch Act And H.R. 10 (Federal Employees' Political Activities Act Of 1977)—Neither impairs ability of State government to regulate political activity of its employees, nor preempt State from enacting restrictions on dual office holding.

October 26, 1977

THE HONORABLE GERALD L. BALILES
Member, House of Delegates

This is in response to your inquiry whether H. R. 10, which passed the United States House of Representatives on June 7, 1977, would preempt restrictions against certain employees holding elective office in the Commonwealth.
Article II, Section 5(c), of the Constitution of Virginia (1971), provides, in pertinent part:

"[N]othing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual office-holding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision."

Article IV, Section 4, further provides in part:

"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."

Section 2.1-30 of the Code of Virginia (1950), as amended, provides:

"No person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, who holds any office or post of profit, trust, or emolument, civil or military, legislative, executive, or judicial, under the government of the United States, or who is in the employment of such government, or who receives from it in any way any emolument whatever; and the acceptance of any such office, post, trust, or emolument, or the acceptance of any emolument whatever under such government, shall, ipso facto, vacate any office, or post of profit, trust or emolument under the government of this Commonwealth or under any county, city, or town thereof."

H. R. 10, which, if passed by the Senate and signed into law by the President, will become known as the Federal Employees' Political Activities Act of 1977, pertains solely to employees of the federal government and does not purport to cover State and local government employees. The purpose of the bill is to encourage federal employees to exercise the "rights of voluntary participation in the political processes of our Nation." H. R. 10 § 2(a). In order to accomplish this purpose, the bill amends the Hatch Act, 5 U.S.C. § 7321, which in its present form, substantially prohibits partisan political activity on the part of federal employees.

It is clear that the Hatch Act, and H. R. 10 if it becomes law, relate only to federal employees. It simply constitutes action of the federal government, as an employer, regulating the activities of its employees. See Civil Service Commission v. Letter Carriers, 413 U.S. 548 (1973). Neither the Hatch Act nor H. R. 10 impairs the ability of State government to regulate the political activity of its employees. See Broadrick v. Oklahoma, 413 U.S. 601 (1973). Nor, in my opinion, does H. R. 10 preempt the State from enacting restrictions, such as those found in §§ 2.1-30 and -33, on dual office holding.

In order for federal legislation to preempt state action in any given field, it must be clear that Congress intended the legislation to occupy the field. Perez v. Campbell, 402 U.S. 637 (1971). The simple constitutional issue is whether the statutes are in conflict. As indicated, they are not. The purpose and objective achieved by H. R. 10 is to remove from the federal employer-employee relationship the restriction that, as a condition of employment, an individual must refrain from active participation in the political process. The bill does not speak nor purport to speak to the various qualifications and restrictions that must be met by an individual who intends to participate in the political process by offering as a candidate.

The applicable provisions of the Code of Virginia, and Article IV, Section 4,
of the Virginia Constitution which pertains to eligibility to be a member of the General Assembly, impose certain restrictions on the ability of a federal officer or employee to hold office in the Commonwealth or any county, city or town thereof. Similar provisions are found in the constitutions of nearly all the states and a similar provision regarding officers of the United States is found in the Federal Constitution. See I A. Howard Commentaries on the Constitution of Virginia 479 (1974); Article I, Section 6, of the United States Constitution.

As explained in Howard's Commentaries, the provisions of Article IV, Section 4 (as well as the statutes), speak of eligibility to be seated as a member of the General Assembly and operate as follows:

"Second, the mechanics of the second paragraph operate differently to resolve a conflict in the event a member holds a state or local office on the one hand or a federal office on the other. Since state and local offices are within the control of the Constitution, section 4 provides that qualification as a member of the Assembly by one who holds one of the enumerated state or local offices serves to vacate the office in question. In effect, if the member does not elect which office to retain, section 4 does the electing for him. By contrast, the Virginia Constitution cannot, of course, declare a federal office vacant; hence if the would-be legislator remains in a proscribed federal office, then he is ineligible to be a member of the Assembly." Howard Commentaries, supra, at 481.

Thus, the provisions of State law, about which you inquire, speak of eligibility to hold office. H. R. 10 speaks to a different subject — restrictions on an employee by the employer. I am therefore of the opinion that H. R. 10, if passed, will not preempt State law and hence your inquiry is answered in the negative.

CONTRACTORS—Licensing Of Contractor Either By State Registration Board For Contractors Or By A Local Government—Section 15.1-510 does not apply to licensing and examination of employees of contractors.

COUNTRIES, CITIES AND TOWNS—Authority—Licensing and examination of contractors who are not licensed by State pursuant to § 54-129.

COUNTRIES, CITIES AND TOWNS—Licenses—When examination of electrical contractors may be required.

September 13, 1977

This is in response to your recent letter in which you submit the following question:

"... would the licensing of a contractor by the Board as provided in § 54-129 of the Code of Virginia influence in any way the qualifying and licensing of a journeyman employee of a contractor registered by this Board?"

As you state, this inquiry was previously addressed in an Opinion to the
Honorable Sterling M. Harrison, Commonwealth's Attorney for Loudoun County, dated July 16, 1964, and found in the Report of the Attorney General (1964-1965) at 163. The question presented in the Harrison Opinion concerned whether Loudoun County had the authority to license and examine journeymen and master electricians pursuant to either § 54-145.2 or § 15.1-510 of the Code of Virginia (1950), as amended. The Opinion concluded that § 54-145.2, which permits counties, cities and towns to license persons who engage in, or offer to engage in, the business of home improvement, electrical, plumbing or heating or air conditioning contracting or the business of constructing single or multi-family dwellings in such county, city or town, applies only to those contractors who do not hold the State license required by § 54-129. Stated differently, the authority contained in § 54-145.2 is limited to the licensing and examination of those contractors who are not licensed by the State pursuant to § 54-129. No authority, therefore, has been granted to counties, cities and towns under § 54-145.2 to license and examine journeymen and master tradesmen who are employees of State licensed contractors. For the purpose of responding to Mr. Harrison's inquiry, § 54-129, in effect, removed from consideration State licensed contractors and left for interpretation the question whether § 54-145.2 allows a county, city or town to license and examine journeymen and master electricians who are employed by those contractors who are not licensed pursuant to § 54-129. As to this latter question, it was opined that § 54-145.2 did not provide such authority to a local governing body. Furthermore, it was stated in the Harrison Opinion and reaffirmed in an Opinion to the Honorable Ralph G. Louk, Commonwealth's Attorney for Fairfax County, dated October 8, 1964, and found in Report of the Attorney General (1964-1965) at 249, that § 15.1-510 does not apply to the licensing and examination of employees of contractors registered under § 54-129 or to employees of contractors licensed pursuant to § 54-145.2.

In sum, I am unaware of any statute permitting the licensing and examining of employees of contractors licensed either by the State pursuant to § 54-129 or by a local governing body pursuant to § 54-145.2. Accordingly, I reaffirm the earlier Opinions to Messrs. Harrison and Louk cited herein.

CONTRACTS—Architect Or Engineer—Retained by city, county or State agency to design a construction project, has no authority to draft specifications, channel work to particular contractor or use one specific brand of equipment or facility to exclusion of others.

COUNTIES, CITIES AND TOWNS—Construction Of Public Schools Or Other Public Buildings—Specifications as to equal brand products other than those named.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Architect Or Engineer—Statute, incorporated into public contracts, vests great discretion for assessment of proposed substitute—Fiduciary capacity.

September 9, 1977

THE HONORABLE GERALD L. BALILES
Member, House of Delegates

In your recent letter you seek my Opinion on the following question:
"Does a consulting engineer, when retained by a city, county or State agency to design a construction project, have the legal prerogative of drafting the specification, or using any device or mechanism, to channel work on the project to a particular contractor, or to insure the use of one specific brand of equipment or facility on the project to the exclusion of other worthy and well qualified contractors and suppliers in cases where in a free market condition, there are three or more contractors or suppliers available to produce the general end result required by the agency?"

Section 11-23.1 of the Code of Virginia (1950), as amended, provides:

"Whenever plans and specifications for the construction of public school buildings and other public buildings or additions thereto involve public funds, said specifications shall all include the following provisions relating to equal brand products other than those specified.

"The name of a certain brand, make, manufacturer, or definite specifications is to denote the quality standard of article desired, but does not restrict bidders to the specific brand, make, manufacturer or specification named; it is to set forth and convey to prospective bidders the general style, type, character and quality of article desired.

"Wherever in specifications or contract documents a particular brand, make or material, device or equipment is shown or specified, such brand, make of material, device or equipment shall be regarded merely as a standard. Any other brand, make of material, device or equipment which, in the opinion of the architect or engineer is recognized the equal of that specified, considering quality, workmanship and economy of operation and is suitable for the purpose intended, must be accepted."

In view of the hypothetical facts recited, the answer to your question must be in the negative, for the architect or engineer may reject a proposed substitute only if, in his opinion, the proposed substitute is not the equal of that specified, considering quality, workmanship, economy of operation, and suitability for the purpose intended.

The statute, which is incorporated into public contracts, does vest great discretion in the architect or engineer who, in assessing a proposed substitute, is acting in a public capacity. As such, he is acting in a fiduciary capacity. Courts applying Virginia law have permitted similar quasi-judicial determinations to be attacked by the contractor only on the basis of fraud, malice, bad faith, or that the architect or engineer exceeded his authority. See Ballou v. Basic Const. Co., 407 F.2d 1137 (4th Cir. 1969); John W. Johnson, Inc. v. J. A. Jones Const. Co., 369 F.Supp. 484 (E.D. Va. 1973); cf. Main v. Department of Highways, 206 Va. 143, 142 S.E.2d 524 (1965).
May 9, 1978

THE HONORABLE STANLEY C. WALKER
Member, Senate of Virginia

THE HONORABLE GLENN B. MCCLANAN
Member, House of Delegates

You have asked whether the Southeastern Public Service Authority of Virginia must seek competitive bids for a proposed contract with a firm performing services as a “construction manager,” and whether a bond is required.

The Southeastern Public Service Authority was created under the Virginia Water and Sewer Authorities Act, § 15.1-1239, et seq. of the Code of Virginia (1950), as amended. It is among the governmental bodies to which § 11-171 of the Code requiring competitive bidding for certain contracts applies. However, this section does not apply to all contracts to which a public body is a party. Rather, it applies by its terms only to contracts in excess of twenty-five hundred dollars “for the construction, improvement or repair of any building.” The same limitation obtains in § 11-233 requiring bonds on certain contracts.

Section 11-17 of the Code provides:

“Advertising for bids. — Every contract in excess of twenty-five hundred dollars, except in a case of emergency and except also contracts for the purchase of stone, soil, lumber, borrow pits, gravel, sand, hay, grain, repairs and supplies for standard equipment, and other materials bought locally from farmers and property holders, to which the State of Virginia, or any department, institution, agency or water, sewer or sanitation authority thereof is a party, for the construction, improvement or repair of any building, highway, bridge, street, sidewalk, culvert, sewer, reservoir, dam, dock, wharf, draining, dredging, excavation, grading, or other such construction work, shall be let by the State, or such department, institution, agency or water, sewer or sanitation authority thereof, only after advertising for bids for the work at least ten days prior to the letting of any contract therefor. The advertisement shall state the place where bidders may examine the plans and specifications for the work, and whether the contract will be let for a lump sum or on a cost plus per centum or fee basis, and the time and place where bids for the work will be opened.

“Notwithstanding the provisions of this section and of the sections following, all bids for work on the highways shall be governed by §§ 33-99 through 33-107 [§§ 33.1-185 through 33.1-192] whenever any provision of these sections is applicable.”

Section 11-23 of the Code reads, in pertinent part:

“Bonds on public contracts to which county, city, town, school board, or agency thereof, is party; conditions of such bonds. — No contract, in excess of two thousand five hundred dollars, to which any authority, county, city, town, school board, or any agency thereof, is a party, for the construction, improvement, or repair of any dwelling, school, auditorium, or other building, highway, bridge, street, sidewalk, sewer, water main, reservoir, dam, dock, wharf, draining, dredging, excavation, or other construction work, shall be entered into unless and until the person contracting to construct, improve or repair the work shall have entered into the following bonds with surety thereon payable to such authority, county, city, town, school board, or agency thereof, each in sums not less than one half the estimated cost of the work, and each approved by the attorney for such authority, county, city or town:

“(a) A performance bond solely for the protection of such authority, county, city, town, school board, or agency thereof, conditioned upon the faithful performance of the work in strict conformity with the plans, specifications and conditions for the same.

“(b) A payment bond conditioned upon the payment of all persons who have, and fulfill, contracts which are directly with the contractor for performing labor or furnishing materials in the prosecution of the work provided for in said contract.” (Emphasis added.)
According to the proposed contract, the construction manager assists the architect or engineer with the practical aspects of the design, coordinates the bidding of the several phases of the project, schedules the work of the several general contractors who may be present on the site simultaneously, and shares general supervisory authority over the general contractor's performance with the architect or engineer. In effect, the construction manager assumes functions which otherwise would fall upon the owner or the architect or engineer. None of the construction work may be undertaken by the construction manager, nor may it furnish any of the material to be used on the project. The actual construction work will be performed by a succession of general contractors (one for each phase of the project), each of whom will be awarded a contract by the Southeastern Public Service Authority for the construction work on the basis of competitive bids after proper advertising. The construction manager does not guarantee the outside price of the project.

In my opinion, the construction manager's contract is not "for the construction, improvement or repair" of the projected facility, but rather for personal services requiring special skills, analogous to a contract for architectural or engineering services. Therefore, § 11-17 of the Code does not require that such a contract be awarded on the basis of competitive bids, See Annot. 15 ALR 3d 733 (1967); and § 11-23 does not require that a bond be provided on such a contract.

However, I must add that the use of a construction manager is a relatively recent innovation, and the duties may vary according to the terms of each contract. In addition, the public contracting body may be subject to other restraints. The articles of incorporation or by-laws of an authority, a city charter provision, or the administrative procedures for State agency capital outlay projects, may preclude the use of such services, or may require that a contract for such services be awarded only after competitive bidding.

CONTRACTS—"Fixed Price Design/Build" Contracts—School Board may use this method of construction when no State aid is used for building project.

CONTRACTS—Awarded To Lowest Responsible Bidder—Applicable to both State and local government contracts.

CONTRACTS—"Fixed Price Design/Build" Contracts—State must use separate contracts for design and construction; advertise for bids.

POLITICAL SUBDIVISIONS—School Division Is Separate Entity From Local Governing Body Though Dependent For Funding.

SCHOOLS—School Boards—No statute applicable to, comparable to §§ 2.1-449 and 15.1-287 which prohibit purchase of building materials, supplies and equipment from architect on State, city, county or town projects.

October 28, 1977

THE HONORABLE DOROTHY S. McDIARMID
Member, House of Delegates

You recently inquired whether school boards are exempt from the competitive bidding requirements of Chapter 4, Title 11, of the Code of Virginia (1950), as
amended, when no State aid is used for a particular building project. If a school board is exempt, you inquire whether it may undertake a building project on the basis of the "fixed price design/build" method of construction.

As you know, I recently stated my opinion that neither the State nor local governments could use the "fixed price design/build" procedure on public works contracts because it was inconsistent with the competitive bidding mandated by §§ 11-17 through -23 of the Code. See Opinion to the Honorable Stanley C. Walker, Member, Senate of Virginia, dated September 8, 1977, a copy of which is enclosed.

School boards, while dependent for funding on the local governing body, are separate entities. "The Constitution of Virginia and the statutes of the State clearly set up the school board as an independent local agency." Board of Supervisors v. County School Board, 182 Va. 266, 28 S.E.2d 698 (1944). See Reports of the Attorney General (1971-1972) at 458; (1975-1976) at 298; Opinion to the Honorable Richard W. Elliott, Member, House of Delegates, dated August 9, 1976; Opinion to the Honorable Ross C. Horton, Acting County Attorney for Prince William County, dated December 8, 1976. School boards have the power and duty to provide for the erecting, furnishing, and equipping of necessary school buildings. See § 22-72 of the Code.

In 1975, the then Attorney General concluded that § 11-20 and § 11-23, read together, indicate a legislative intent to require that public contracts be awarded by local governments on the basis of competitive bidding. See Report of the Attorney General (1975-1976) at 73. That opinion did not address whether this legislative intent also encompassed contracts awarded by school boards. At first blush, it would seem to, because school boards are among the public bodies listed in § 11-23. But § 22-166.12 is pertinent, for that statute requires competitive bidding by school boards only when State aid funds are expended. It is a rule of statutory interpretation that a specific statute takes precedence over a general one. Considered together, it is my opinion that the legislative intent manifested in § 22-166.12 requiring competitive bidding on public contracts awarded by school boards only when State aid is expended is controlling. This has been the consistent interpretation of this Office. See Reports of the Attorney General (1974-1975) at 352; (1966-1967) at 243; (1963-1964) at 267; (1962-1963) at 231.

There is no statute applicable to school boards comparable to § 2.1-449 and § 15.1-287, which prohibit the purchase of building materials, supplies and equipment from any person employed or acting as architect on State or city, county or town projects, respectively. In view of the above, I am of the opinion that a school board constructing a facility without State aid is not required to award the contract on the basis of competitive bids. It thus may, if it chooses, utilize the "fixed price design/build" method of construction.

CONTRACTS—"Fixed Price Design/Build" Contracts—State must use separate contracts for design and construction; advertise for bids.

CONTRACTS—Awarded To Lowest Responsible Bidder—Applicable to both State and local government contracts.

COUNTIES, CITIES AND TOWNS—Public Works Contracts—Competitive bidding required—May not use "fixed price design/build" contracts.
SCHOOLS—School Boards—Construction of building for school purposes—Must use procedure for advertising for bids and letting contract prescribed in statute.

September 8, 1977

THE HONORABLE STANLEY C. WALKER
Member, Senate of Virginia

I am replying to your letter in which you asked several questions relating to "fixed price design/build" contracts.

Under a "fixed price design/build" contract, the contracting body provides no detailed plans or specifications for the proposed construction project, except perhaps for standard specifications dealing with materials and general aspects of construction. Instead, the contracting body stipulates that the total price for the project is some fixed amount, and instructs prospective contractors to submit proposed designs for the project, based on general aesthetic or functional criteria which the contracting body wishes the project to meet. The prospective contractors (often as architect/builder "teams") then prepare and submit plans and specifications for the facility, with the understanding that they will build the facility pursuant to these plans and specifications at the price previously fixed by the contracting body. The contracting body selects the design which it prefers from among those submitted and enters into a contract with that owner.

You first ask:

1) May the State of Virginia, or any department, institution, or agency thereof, award a public works contract in excess of $2,500 under this "fixed price design/build" scheme?

Examination of the pertinent statutes governing public contracts to which the State is a party indicates that such State agencies must use separate contracts for design and construction. For example, § 11-17 of the Code of Virginia (1950), as amended, provides:

"Every contract in excess of twenty-five hundred dollars, except in a case of emergency and except also contracts for the purchase of stone, soil, lumber, borrow pits, gravel, sand, hay, grain, repairs and supplies for standard equipment, and other materials bought locally from farmers and property holders, to which the State of Virginia, or any department, institution, agency or water, sewer or sanitation authority thereof is a party, for the construction, improvement or repair of any building, highway, bridge, street, sidewalk, culvert, sewer, reservoir, dam, dock, wharf, draining, dredging, excavation, grading, or other such construction work, shall be let by the State, or such department, institution, agency or water, sewer or sanitation authority thereof, only after advertising for bids for the work at least ten days prior to the letting of any contract thereof. The advertisement shall state the place where bidders may examine the plans and specifications for the work, and whether the contract will be let for a lump sum or on a cost plus per centum or fee basis, and the time and place where bids for the work will be opened.

"Notwithstanding the provisions of this section and of the sections following, all bids for work on the highways shall be governed by §§ 33-99 through 33-107 [§§ 33.1-185 through 33.1-192] whenever any provision of these sections is applicable."
Section 33.1-185 of the Code is a similar provision relating to construction contracts let by the State Highway Commission, except that it applies only to contracts over $25,000. These sections require advertising for bids for construction after plans and specifications have been prepared. The general or functional criteria provided by the owner under the “fixed price design/build” procedure cannot be considered the equivalent of the detailed plans and specifications as those terms are used in the construction industry.

Moreover, these public contracts must be awarded to the lowest responsible bidder. See §§ 11-20 and 33.1-187 of the Code. The purpose of these sections requiring competitive bidding is to obtain the work at the lowest available price. See Ragland v. Commonwealth, 172 Va. 186, 200 S.E. 601 (1939). Under the “fixed price design/build” procedure there is no low bid; each bidder offers to build his own design for the price previously fixed by the owner. A function of competitive bidding is that it serves to obviate potential favoritism by providing an objective standard for awarding the contract, a feature not available under the “fixed price design/build” procedure.

In addition to these provisions, § 2.1-449 of the Code provides:

“Except in cases of emergency, no building materials, supplies and equipment for any building or structure being erected or constructed or hereafter erected or constructed by, for, or on behalf of the Commonwealth, or any department, division, institution or agency thereof, shall be purchased from any person employed or acting as architect or engineer for such building or structure, or from any partnership, association or corporation of which such person employed or acting as such architect or engineer is an officer, director or stockholder, or in which such person is otherwise financially interested. If any person shall buy, sell or supply, or contract so to do, any building materials, supplies or equipment in violation of the provisions of this section, he or it, as the case may be, shall be guilty of a misdemeanor and upon conviction shall be punished accordingly, and in addition thereto all such contracts and agreements shall be null and void and of no effect.”

I would note that §§ 11-17, 33.1-185 and 2.1-449 all contain an exception in the event of an emergency. Absent that emergency, however, the “fixed price design/build” procedure, in my opinion, may not be used for the State public works contracts described in §§ 11-17 and 33.1-185.

2) May a county, city or town award a contract for the construction of a project partially or wholly financed by state-aid on the basis of this “fixed price design/build” scheme?

3) May a county, city or town award a contract for the construction of a project not partially or wholly financed by state-aid on the basis of this “fixed price design/build” scheme?

School boards, or any other agency, authority or political subdivision constructing any building for school purposes, or constructing a substantial addition to such a building, for which State funds are to be used, must use the procedure for advertising for bids and letting the contract prescribed in Chapter 4 of Title 11 (§§ 11-17 through 11-24.3 of the Code.) Although local governments are not required to formally advertise for bids on their public works contracts is required. See Report of the Attorney General (1975-1976) at 73. And § 15.1-287 of the Code contains a prohibition similar to that in § 2.1-449, quoted above.
Accordingly, in my opinion local governments may not contract for public works using the “fixed price design/build” procedure, regardless whether the project is financed wholly or partially with State funds.

COSTS—Circuit Court Assessment In Appeals From Juvenile And Domestic Relations District Court.

APPEAL—No Basis In § 16.1-296 For Appeal Of A Juvenile Court Disposition Of Custody Or Nonsupport Matter Treated Differently Than Appeal Of Nonsupport Case—Costs.

APPEAL—Non-traffic Case Appealed By Infant Defendant—Custody or nonsupport case.

FEES—Writ Tax Mandatory Upon Appeal From Order Of Juvenile Court.

INDIGENTS—Inquiry Into Possible Indigency Of Defendant Made In Circuit Court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Fees On Indigent Defendant In Nonsupport Case.

JUVENILES—Not “Convicted” If Tried In A Juvenile Court—Adjudged delinquent by circuit court upon appeal—Costs.

March 9, 1978

THE HONORABLE JAMES E. HOOFNAGLE, CLERK
Circuit Court of Fairfax County

You have asked about circuit court assessment of costs, in (1) an appeal of a non-traffic case by an infant defendant and (2) in an appeal of a custody or nonsupport case, from a juvenile and domestic relations district court.

1. Appeal by an Infant:

Specifically, you have asked whether the statutory provisions of §§ 16.1-133, 19.2-335 and 19.2-336 of the Code of Virginia (1950), as amended, relating to convicted criminals, are applicable to juveniles adjudged delinquent by a circuit court upon appeal from the judgment of a juvenile court.

Section 16.1-133 of the Code, providing for the withdrawal of appeals from various courts of the Commonwealth, speaks of a “conviction” in the court from which an appeal is taken. Sections 19.2-335 and -336 of the Code speak of certification of costs in a “criminal case.” This Office has held that the predecessor statutes to §§ 19.2-335 and -336 of the Code (which remain substantively similar) are inapplicable to findings against a juvenile by a juvenile court because a juvenile is not “convicted” if he is tried in a juvenile court. See Report of the Attorney General (1968-1969) at 12. Accord, Report of the Attorney General (1973-1974) at 201; Report of the Attorney General (1972-1973) at 242.

Thus, I am of the opinion that the assessment of costs in the circuit court provided for by §§ 16.1-133, 19.2-335 and 19.2-336 of the Code do not apply to juveniles adjudged delinquent by a circuit court, upon appeal from the judgment of a juvenile court.
2. Appeal of Custody and Nonsupport:

You have also inquired whether the assessment of costs is appropriate in the circuit court for cases appealed from the juvenile and domestic relations district court relating to matters of custody and nonsupport. This Office has previously held it to be mandatory that the clerk impose a writ tax required by § 58-71 upon receiving an appeal from a nonsupport proceeding in the juvenile and domestic relations district court. See Report of the Attorney General (1974-1975) at 179. This same Opinion held that other fees and costs may be chargeable against the appellant depending upon the particular circumstances of his case. Id. at 180. This holding was amplified in a subsequent Opinion which held that the writ tax is collectible by the clerk of the circuit court, rather than the clerk of the juvenile and domestic relations district court, and that any inquiry into the possible indigency of the appellant should be made in the circuit court. See Report of the Attorney General (1974-1975) at 182. I find no basis in § 16.1-296 upon which an appeal of a juvenile and domestic relations district court disposition of a custody or nonsupport matter must be treated differently from an appeal of a nonsupport case.

Thus, I am of the opinion that the assessment of costs is appropriate in the circuit court for cases appealed from the juvenile and domestic relations district court relating to matters of custody and nonsupport.

COSTS—May Be Assessed Against Defendant When Deferred Judgment Matters Are Dismissed After Conforming To § 18.2-251.

COSTS—Constitute No Part Of Penalty Or Punishment For Offense—Sole purpose to replace in treasury amount defendant caused to be withdrawn.

COSTS—Remedial Statutes, Not Penal Laws.

DRUGS—Deferred Judgment Probation—Dismissal of certain cases without court entering judgment of guilt—Dismissal in name only.

November 23, 1977

THE HONORABLE JOSE R. DAVILA, JR.
Judge, General District Court
Thirteenth Judicial District

This is in response to your request for my opinion whether the costs of a proceeding may be assessed against the defendant when deferred judgment matters are dismissed after conforming to § 18.2-251 of the Code of Virginia (1950), as amended.

Section 18.2-251 provides as follows:

"Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and
with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without adjudication of guilt and is a conviction only for the purposes or applying this section in subsequent proceedings."

Accordingly, § 18.2-251 provides for the dismissal of certain cases without the court entering a judgment of guilt. This dismissal is a dismissal in name only, however, because it only occurs in certain drug cases when the defendant has pled guilty or has pled not guilty and the court has found such facts as would justify a finding of guilt.

It has been previously ruled by this Office that costs may not be assessed upon acquittal, but rather may only be assessed against a defendant upon conviction. Report of the Attorney General (1971-1972) at 128; Report of the Attorney General (1967-1968) at 78. Moreover, because § 19.1-320, the predecessor to § 19.2-336, only required the clerk of the court to make up a statement of costs when the accused was convicted, it was also ruled that costs could not be assessed against a defendant when the charge had been dismissed. Report of the Attorney General (1960-1961) at 96.

The imposition of costs, however, "constitutes no part of the penalty or punishment prescribed for the offense," but rather "is a mere incident to the conviction and is "for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it." Wicks v. City of Charlottesville, 215 Va. 274, 208 S.E.2d 752 (1974); Commonwealth v. McCue's Executors, 109 Va. 302, 63 S.E. 1066 (1909). In addition, the laws of costs should not be interpreted as penal laws, but rather should be construed as remedial statutes and liberally and beneficially expounded for the sake of the remedy for which they administer. Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696, 701 (1853).

Accordingly, the fact that § 18.2-251, through deferred dismissal, relieves the defendant of punishment for certain drug related offenses, has no effect on the separate question whether costs will be assessed against the defendant. Section 18.2-251 does not acquit the defendant of the charges, but rather, allows a deferred dismissal upon compliance with terms and conditions of probation. A finding of guilt under § 18.2-251 is a "conviction" for the purpose of applying § 18.2-251 in subsequent proceedings. Consequently, I am of the opinion that a defendant has been convicted for the purposes of assessing costs when deferred judgment matters are dismissed after the defendant conforms to § 18.2-251, and that the costs of the proceeding may be assessed against him in such a case.

COSTS—Payment For Convictions On Multiple Charges In One Court Appearance.

November 2, 1977

THE HONORABLE FREDERICK H. CREEKMORE
Member, House of Delegates

This is in response to your inquiry regarding the applicability of § 14.1-
123(3a) of the Code of Virginia (1950), as amended, to the following factual situation:

"[O]n September 1, 1977, Officer Pierce charges Jane Doe with speeding and issues a ticket for her appearance in the General District Court of the City of Chesapeake returnable on September 26, 1977. On September 7, 1977, Officer Smith charges Jane Doe with failing to yield and issues a ticket for her appearance on September 26, 1977. In the event that she is found guilty of both charges and fines are imposed, should the Clerk collect court costs on each charge or one court cost for both charges."

Section 14.1-123 states in part:

"Fees for services performed by the judges or clerks of district courts in criminal or traffic actions and proceedings shall be as follows and such fees shall be included in the taxed costs:

. . . .

"(3a) For trying or examining a case of traffic violation, including a case in which there has been written appearance and waiver of court hearing, and including swearing witnesses and taxing costs, fifteen dollars, which shall include the fee prescribed in § 46.1-413 for transmitting the abstract to the Division of Motor Vehicles and the assessment of five dollars 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.

. . . .

"(iii) . . . No defendant with multiple charges shall be taxed the fee provided in this subsection more than once for a single appearance or trial in absence." (Emphasis added.)

The emphasized language clearly indicates that under the facts you hypothesize, only one fee of $15 could be imposed, despite the fact that defendant had been found guilty of two separate offenses. Nothing in the statute suggests that the $15 limitation applies only to multiple charges arising out of the same transaction, and not to separate charges occurring on separate days. On the contrary, all that § 14.1-123(3a) requires in order that the $15 fee be imposed no more than once is that a defendant "with multiple charges" make "a single appearance." Accordingly, I am of the view that, upon the facts you present, the defendant would be liable for costs only once.

COUNTRIES—Accounting System Of County Approved By Auditor Of Public Accounts—Itemized statement of receipts and disbursements need not be published within sixty days after end of fiscal year.

AUDITOR OF PUBLIC ACCOUNTS—Accounting System Of County Approved By—Condensed statement of receipts and disbursements published after receipt of report of audit of accounts.

AUDITOR OF PUBLIC ACCOUNTS—Annual Audit Of Accounts And Records Of Every County Regardless Of Whether County Has Approved Accounting System.
The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

This is in reply to your request for my opinion whether § 15.1-165 of the Code of Virginia (1950), as amended, relieves the governing body of certain counties of the duty to prepare an itemized statement of receipts and disbursements within sixty days of the close of the fiscal year.

Section 15.1-165 provides that:

"The governing body of the county annually shall cause to be made out within sixty days after the end of the fiscal year a statement showing the aggregate amount of the receipts and itemized disbursements of the twelve months next preceding. A copy of such statement shall be posted at the front door of the courthouse and at each of the voting places in the county, and published in one or more newspapers of the county or adjoining county or city. In any county having an accounting system approved by the Auditor of Public Accounts the publication of receipts and disbursements may be published in condensed, and not itemized, form immediately after receipt of the report of the audit of its accounts, using a form suggested and supplied by the Auditor of Public Accounts for such purpose. A copy of such publication shall be made a part of the audit of the county."

The purpose of § 15.1-165 is to establish a procedure by which a statement of receipts and disbursements shall be published by a locality. The statute establishes a general rule that a county governing body must prepare an itemized statement of the aggregate amount of receipts and disbursements within sixty days after the end of the fiscal year. That statement, prepared before the receipt of a completed report of an audit of its accounts, is unaudited. The governing body must publish the statement by posting it at the courthouse and county voting places, and by publishing it in one or more county newspapers no later than sixty days after the end of the fiscal year.

An exception, however, to this general rule is made for those counties which have an accounting system approved by the Auditor of Public Accounts. Such counties are permitted to publish a condensed statement of receipts and disbursements immediately after receipt of a report of the audit of their accounts. In other words, a condensed statement of the audit, on a form approved by the Auditor, can be published, rather than the unaudited itemized statement.

Section 15.1-167 provides that the Auditor of Public Accounts or a licensed certified public accountant shall annually audit all accounts and records of every county regardless of whether the county has an approved accounting system. The Auditor or licensed certified public accountant shall make a detailed report of the audit to the board of supervisors within thirty days of the completion of the audit. No time period is specified, however, within which the audit itself must be completed. It is therefore possible that the audit will not be completed until following the passage of the sixty-day time limit on publication.

I am of the opinion, therefore, that a county which has an accounting system approved by the Auditor of Public Accounts need not prepare an unaudited itemized statement within sixty days of the end of the fiscal year. The county will receive a condensed statement of receipts and disbursements as a part of the audit completed by the Auditor or a licensed certified public accountant pursuant to § 15.1-167. Immediately upon receipt of the condensed statement, the governing body of the county must publish that statement by posting a form.
suggested and supplied by the Auditor of Public Accounts at the front door of
the courthouse, at each of the voting places in the county, and by publishing it in
one or more newspapers of the county.

A county which does not have an accounting system approved by the Auditor
of Public Accounts must, of course, prepare an itemized statement of receipts
and disbursements within sixty days of the end of the fiscal year, since that
statement must be published throughout the county as required by § 15.1-165.

COUNTIES—County Treasurer Is Not Prevented From Initiating Proceeding
Under State Bad Check Law Because County Has Enacted County Bad
Check Ordinance.

March 21, 1978

THE HONORABLE WILLIAM J. McGHEE
County Attorney for Montgomery County

You have asked whether, in view of Montgomery County’s enactment of a bad
check ordinance, the Treasurer for Montgomery County is prohibited from
initiating proceedings under the State bad check law when he receives bad checks
on behalf of the County.

Section 15.1-29.4 of the Code of Virginia (1950), as amended, permits a local
governing body to impose by ordinance a fee of $10.00 or less for passing a bad
check in payment of one’s taxes or other sums due regardless of one’s intent or
knowledge of insufficient funds. Montgomery County has enacted such an
ordinance.

Section 18.2-181, on the other hand, provides that anyone who passes a check
with intent to defraud, knowing that the drawer does not have sufficient funds in
the bank for payment of such check, is guilty of larceny. Consequently, to prove
a violation of § 18.2-181 the Commonwealth must establish intent to defraud
and knowledge of insufficient funds. Huntt v. Commonwealth, 212 Va. 737, 187
S.E.2d 183 (1972). The County ordinance does nothing to prevent a prosecution
by the Commonwealth under State law and from proving that the check was
given with fraudulent intent and with knowledge of insufficient funds.

The General Assembly, by enacting § 15.1-29.4, did not evince any intention
to substitute the payment of a fee in lieu of a criminal prosecution under § 18.2-
181. Rather, it merely intended to authorize counties to provide for a fee, to
cover the administrative expense of processing returned bad checks, similar to
the provision for costs to be assessed in § 6.1-118.1 for individuals who are
pursuing their civil remedies following arrests under the State bad check law.

Accordingly, I am of the opinion that if the check is one upon which a
criminal prosecution could otherwise be brought, that Montgomery County’s
enactment of a bad check ordinance authorized by § 15.1-29.4 does not prevent
the County Treasurer from initiating a criminal proceeding under the State bad
check law.

COUNTIES, CITIES AND TOWNS—Budget—Publication in newspaper of
general circulation in locality; notice of public hearing.
**COUNTIES, CITIES AND TOWNS—Public Hearings On Budget—Only one is mandatory but governing body may hold additional hearings.**

**COUNTIES, CITIES AND TOWNS—Notice Requirements—Comparison of § 15.1-162 with other statutory provisions for.**

**PUBLICATIONS—Newspaper Of General Circulation—Publication of synopsis of budget at least seven days prior to date of public hearing.**

January 6, 1978

**THE HONORABLE JOHN C. BUCHANAN**
Member, Senate of Virginia

This is in reply to your recent letter requesting that I interpret § 15.1-162 of the Code of Virginia (1950), as amended. That statute provides, in relevant part, as follows:

"For informative and fiscal planning purposes only a brief synopsis of the budget shall be published in a newspaper having general circulation in the locality affected, and notice given of one or more public hearings, at least seven days prior to the date set for hearing, at which any citizen of the locality shall have the right to attend and state his views thereon. The governing body of any county not having a newspaper of general circulation may in lieu of the foregoing notice provide for notice by written or printed handbills, posted at such places as it may direct. The hearing shall be held at least seven days prior to the approval of the budget as prescribed in § 15.1-160; provided that the governing body may recess or adjourn from day to day or time to time during such hearing. The fact of such notice and hearing shall be entered of record in the minute book." (Emphasis added.)

Your inquiry relates the following questions:

"1. Is the legal requirement for a budget hearing by the governing body of a county satisfied by the holding of a single public hearing?

"2. Does publication of a budget synopsis in a single issue of a newspaper of general circulation in the county satisfy the legal requirement of this section for publication?"

This Office has previously held that § 15.1-162 requires that one or more public hearings be held, and that a synopsis of the proposed budget must be published prior to the approval of a budget by a county, city or town. See Opinions to the Honorable Lewis P. Fickett, Jr., Member, House of Delegates, dated May 14, 1974, and found in Report of the Attorney General (1973-1974) at 318 and to the Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, dated March 23, 1971, and found in Report of the Attorney General (1970-1971) at 446. The language of the statute indicates that only one public hearing is mandatory, although a governing body may, within its discretion, hold additional hearings.

Section 15.1-162 further indicates that publication of the synopsis in only one issue of a newspaper of general circulation at least seven days prior to the date of the public hearing will satisfy the requirements of the statute. See Opinion to the Honorable William J. McGhee, County Attorney for Montgomery County, dated July 7, 1972, and found in Report of the Attorney General (1972-1973) at 398. This conclusion is strengthened by comparison of § 15.1-162 with other statutory provisions establishing notice requirements. Section 15.1-431 requires
publication "once a week for two successive weeks" for ordinances relating to the planning and zoning of land. The same requirement applies to other ordinances enacted by a county. See § 15.1-504.

Since the synopsis and public hearing required by § 15.1-162 are for "informative and fiscal planning purposes only," extended notice and the holding of more than one hearing are not mandatory. I am therefore of the opinion that the legal requirement for a budget hearing is satisfied by the holding of a single public hearing. I am also of the opinion that the publication of a budget synopsis in a single issue of a newspaper of general circulation at least seven days prior to the date set for hearing satisfies the requirements of § 15.1-162. Note, however, that a locality may hold more than one hearing, and may publish the synopsis in more than one issue of a newspaper, if, in its judgment, such procedures would advance the informative and fiscal planning purposes of the statute.

COUNTIES, CITIES AND TOWNS—Museum—City of Bedford and Bedford County may construct—Referendum not required or permitted unless county contracts bonded indebtedness of type requiring approval of voters.

CONTRACTS—Two Or More Counties, Cities And Towns Authorized To Enter Into For Acquisition, Construction, Maintenance And Operation Of Any Project—Museum.

DEFINITIONS—"Project"—Buildings or improvements involving capital outlay.

ELECTIONS—Referendum May Not Be Held To Take Sense Of People On Local Issue.

THE HONORABLE HARRY W. GARRETT, JR. May 15, 1978
Commonwealth’s Attorney for Bedford County

You ask whether the City of Bedford and Bedford County have authority to enter into an agreement to purchase a building located within the City for the purpose of establishing a museum. The agreement would specify that title to the building would be held by a commission which would operate and maintain the building. You also inquire whether the project must be approved in a referendum.

The Joint Agreement

Section 15.1-305 of the Code of Virginia (1950), as amended, authorizes two or more counties, cities and towns to enter into contracts and agreements for the acquisition, construction, maintenance and operation of any project.¹

¹Section 15.1-304 of the Code defines "project" as "any building or improvement involving an outlay of a capital nature which may be required by or convenient for the purposes of any county, city or town and without limitation of the foregoing shall include water supply, waterworks, electric lights or other lighting system, wharves, docks, harbors, ferries, suitable equipment against fire, erection or improvement of school buildings, jails, city or town halls, firehouses, libraries and other public buildings, incinerators, auditoriums, armories, airports and equipment and furnishings for the same, grading, paving, repaving, curbing or otherwise improving any one or more of the streets or alleys or widening existing ones, locating, instituting and maintaining sewers and culverts, and any other public improvement." (Emphasis added.)
The agreement upon which the joint project is based may provide for the creation of a joint commission for the supervision and general management of the project. See § 15.1-306 and Opinion to the Honorable W. Byron Keeling, Commonwealth's Attorney for Charlotte County, dated March 7, 1973, and found in Report of the Attorney General (1972-1973) at 120.

I am therefore of the opinion that a museum purchased by the City and County of Bedford and operated by a joint commission of those two political subdivisions would be authorized by the above statutes. The City and County may, therefore, enter into a joint agreement to purchase, construct, operate and maintain the museum.

The Referendum

This Office has consistently held that, absent specific statutory authority, a referendum may not be held to take the sense of the people on a local issue. See Opinion to the Honorable Thomas Stark, III, Commonwealth's Attorney for Amelia County, dated June 23, 1977, and found in Report of the Attorney General (1976-1977) at 73. I find no authority that requires a referendum prior to entering into a joint agreement of the kind authorized by §§ 51.1-304 through -306.

If the purchase and operation of the museum should require the County or City to incur bonded debt, however, the provisions of Article VII, Section 10, of the Constitution of Virginia (1971) must be satisfied. Article VII, Section 10(a), provides that a city may incur bonded indebtedness, in an amount less than eighteen percent of the assessed value of real estate in a city subject to taxation, without a referendum. Article VII, Section 10(b), however, provides that a county may only incur debt by authority conferred by the General Assembly by general law. Unless the county elects to be treated as a city or the debt is of the type exempted from referendum requirements, the general law authorizing the indebtedness must provide for submission of the question of contracting the debt to the voters in a referendum. See Opinion to the Honorable A. L. Philpott, Member, House of Delegates, dated August 25, 1977, a copy of which is enclosed. The General Assembly has enacted general laws which authorize counties to construct public improvements, including museums, and to contract bonded debt to underwrite all or part of the costs of such improvements. See §§ 15.1-172(h), 15.1-175, 15.1-185 and 15.1-304 through -306. Since § 15.1-185 requires prior approval of the qualified voters in a referendum on the question of contracting the bonded debt, that statute conforms to the constitutional provision.

Thus, no referendum is required or permitted, unless the County contracts bonded indebtedness of the type requiring approval by the voters.

COURTS—District Court May Not Issue Writ Of Fieri Facias More Than Two Years After Judgment; Mandatory Then For Clerk Of Circuit Court To Issue.

CLERKS—Circuit Court—When may issue abstract of judgment rendered in court not of record.

CONFLICT OF LAWS—Writ Of Fieri Facias—Apparent conflict between §§ 8.01-466 and 16.1-116—Two years after judgment.

DEFINITIONS—When "May" Is Mandatory.
This is in response to your request for my opinion reconciling an apparent conflict between §§ 8.01-466 and 16.1-116 of the Code of Virginia (1950), as amended. You ask whether after two years from the date of judgment in a district court, the district court may issue executions, abstracts or garnishments on such judgment, and whether after two years from the date of judgment in a district court, it is mandatory upon the clerk of the circuit court in which the papers have been filed for preservation to issue a writ of execution or other process upon request of the judgment creditor.

Section 8.01-466 of the Code provides in part:

"On a judgment for money, it shall be the duty of the clerk of the court in which such judgment was rendered, upon request of the judgment creditor, his assignee or his attorney, to issue a writ of fieri facias at the expiration of twenty-one days from the date of the entry of the judgment and place the same in the hands of the proper officer of such court to be executed and take his receipt therefor." (Emphasis added.)

Section 16.1-98, a counterpart to § 8.01-466, provides in part that "[u]pon a judgment being rendered in a general district court a writ of fieri facias or a writ of possession shall be issued thereon only upon request of the judgment creditor, his assignee or his attorney."

Section 16.1-115 provides, with certain specific exceptions, that all papers connected with any civil action in a district court shall be retained for six months after the action is concluded, and at the end of such six months period they shall be delivered to the clerk of the circuit court for that jurisdiction where they shall be properly filed, indexed and preserved. Section 16.1-116 provides:

"When a judgment has been rendered in a civil action in a court not of record and the papers in the action have been returned to the clerk of the circuit or corporation court for filing and preserving, executions upon and abstracts of the judgment may be issued by the clerk of such circuit or corporation court within the periods permitted under §§ 8-396 and 8-397, provided, that such judgment has been duly entered in the judgment lien docket book of such court. However, for a period of two years from the date of any such judgment, the judge or clerk of the court not of record may also issue executions upon and abstracts of the judgment." (Emphasis added.)

This Office has previously construed § 16.1-116 to mean that a court not of record has no authority to issue an abstract of judgment nor an execution more than two years after the judgment has been rendered by that court. See Report of the Attorney General (1963-1964) at 35. Consequently, it is my opinion that if a district court has filed the papers in a civil action with the clerk of the circuit court pursuant to § 16.1-115, the district court may not issue a writ of fieri facias on a judgment in the action more than two years after the judgment is rendered.
Section 16.1-116 provides that the clerk of the circuit court wherein the papers are filed pursuant to § 16.1-115 “may” issue an execution upon the judgment rendered by the court not of record. Further, § 16.1-116 also provides that for a period of two years after the judgment was rendered, the court not of record “may” issue an execution upon that judgment as well. Consequently, from the time the papers are filed in the circuit court for preserving until two years after the judgment has been rendered, both the circuit court and the court not of record which rendered the judgment have concurrent authority to issue a writ of fieri facias upon that judgment. Report of the Attorney General (1963-1964) at 72. I am of the opinion, therefore, that the General Assembly used the word “may,” rather than “shall,” in § 16.1-116 to grant circuit courts and courts not of record concurrent authority to issue writs of fieri facias in cases where the papers have been filed pursuant to § 16.1-115.

Sections 16.1-116 and 8.01-466 should be construed together, however, when determining whether the clerk of the circuit court where the papers are filed for preservation has a duty to issue an execution upon demand of the judgment creditor. When one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. Report of the Attorney General (1974-1975) at 219. Section 8.01-466 deals generally with the issuance of executions and states that it “shall” be the duty of the clerk of the court in which the judgment was rendered to issue a writ of fieri facias upon the request of the judgment creditor, his assignee or his attorney. Section 16.1-116, on the other hand, deals with the specific instance where a judgment has been rendered in a court not of record and the papers have been returned to the circuit court for filing and preservation. In that instance, the clerk of the circuit court “may” issue a writ of fieri facias if the judgment has been docketed in the judgment lien book of such court. While § 16.1-116 states that the clerk “may” issue a writ of fieri facias, to construe “may” as permissive, rather than prescribing a mandatory duty upon the clerk to issue a writ of fieri facias, would defeat the purpose of §§ 16.1-98 and 8.01-466 which require that the clerk “shall” issue writs of fieri facias upon the request of a judgment creditor.

Moreover, although the word “may” is generally construed as permissive and discretionary, it is often construed as mandatory where it is necessary to accomplish the manifest purpose of the legislature. Report of the Attorney General (1974-1975) at 83. It is my opinion that the manifest purpose of the legislature in enacting § 16.1-116 was to enable judgment creditors to obtain executions upon abstracts of judgments. Accordingly, I am of the opinion that the word “may” in § 16.1-116 should be construed as giving the clerk of the circuit court a mandatory duty to issue a writ of fieri facias if the judgment creditor is entitled to it and has requested it.

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**CRIMINAL JUSTICE SERVICES COMMISSION—Authority**—Commission has no power to purge court record but may purge criminal history record information, including conviction data, from files under its jurisdiction.

**CRIMINAL JUSTICE SERVICES COMMISSION—Authority**—Commission may purge criminal record where pardon has been granted.

**PARDON, PROBATION AND PAROLE—Granting Of Absolute Pardon Does Not Require Destruction Or Sealing Of Criminal History Record In-**
You have asked four questions, as set forth below, which concern the authority of the Criminal Justice Services Commission, the effect of a pardon by the Governor on criminal records, and the result of purging a criminal record. I will answer them in order:

"1. Does the power of the Commission to purge criminal history record information extend to court records?"

Section 9-111.9B of the Code of Virginia (1950), as amended, which empowers the Commission to purge criminal history record information, is found in Chapter 16, Article 2, of Title 9. Section 9-111.3B(ii) states that the provisions of Article 2 do not apply to court records of public criminal proceedings. I am of the opinion, therefore, that the power of the Commission to purge a criminal record does not extend to court records.

"2. Can an individual who has had his record purged deny the fact of his arrest or conviction on an application for employment or in response to an inquiry while testifying in court?"

Section 19.2-392.4 of the Code specifically provides that when a person's arrest record has been "expunged" by a circuit court pursuant to § 19.2-392.2, he is not required to include a reference to or any information about the expunged arrest or charge when answering any question on an application for employment. I do not, however, find any equivalent provision regarding a record "purged" by order of the Commission, and I conclude that an individual who has had his record purged may not deny the fact of his arrest or conviction on an application for employment. Also, I find no authority for a witness who has had his criminal record purged and is testifying in court to deny the fact of his arrest or conviction.

"3. Does the granting of an absolute pardon by the Governor in and of itself require either sealing or destruction of criminal history record information pertaining to the conviction which is maintained by criminal justice agencies and the courts of the Commonwealth?"

The maintenance of criminal history record information, as required by §§ 15.1-135.1 and 19.2-388, does not constitute a part of the penalty imposed upon the offender within the meaning of Article V, Section 12, of the Constitution of Virginia (1971), and an absolute pardon does not wipe out the fact of his conviction. See Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941). It is my opinion, therefore, that an absolute pardon does not require either sealing or destruction of criminal history record information. Nevertheless, pursuant to § 9-111.9B, the Commission may find that maintaining a particular criminal record on a pardoned individual would result in manifest injustice, and in that event the Commission may purge that record from files under its jurisdiction.
"4. Does the Criminal Justice Services Commission have the power to purge criminal history record information in situations where the defendant has been convicted?"

Section 9-111.9B provides that the Commission may, in its discretion, "order that criminal history record information be purged" (emphasis added) if, in the opinion of the Commission, maintenance of that information would result in manifest injustice. "Criminal history record information" is defined in § 9-108.1C as:

"[R]ecords and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal charges, and any disposition arising therefrom. The term shall not include juvenile record information which is controlled by chapter 8 (§ 16.1-139 et seq.), [now chapter 11, § 16.1-266 et seq.] of Title 16.1, criminal justice intelligence information, criminal justice investigative information, or correctional status information." (Emphasis added.)

Inasmuch as criminal history record information is defined as including a record of "any disposition" arising from an arrest, indictment or other charge, it is my opinion that the Commission's purging power extends to records of conviction maintained under its jurisdiction. As noted above, a situation in which exercise of the power to purge a conviction record may be appropriate would be where an absolute pardon has been granted.

CRIMINAL JUSTICE SERVICES COMMISSION—Authority—Minimum training standards mandatory though no provision for enforcement.

COMPENSATION BOARD—Sheriffs And Deputies—Completion of minimum training program is factor in fixing salaries.

CORRECTIONS—Minimum Training Standards Of Correctional Officers—May be enforced through State Board of Corrections prerequisites for continued employment.

DEFINITIONS—Fire Marshals—Minimum training standards.

JAILS—Operation Of—Sheriff's responsibility.

LAW-ENFORCEMENT OFFICERS—Defined—Minimum training standards.

SHERIFFS—Courthouse And Courtroom Security Responsibility.

STATUTES—Construction; "Shall" As Mandatory.

November 15, 1977

The Honorable R. H. Geisen
Executive Director
Criminal Justice Services Commission

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

"The Criminal Justice Services Commission, through the appropriate legislative authority and the promulgation of rules and regulations, has
mandated training programs for the following personnel: full-time law enforcement officers (entry level and in-service); officers responsible for courthouse and courtroom security; jailers and custodial officers of local law enforcement agencies; corrections officers of the Department of Corrections, Division of Adult Services; and local fire marshals and their assistants. Each of these training programs has a specified time limit for completion as a requirement of the rules and regulations.

"It is Commission policy that when an individual does not comply within the prescribed period of time, an official notice of delinquent training is forwarded to the appropriate authorities. However, the Commission has been experiencing some difficulties recently with individuals who refuse to comply long after the notice of delinquent training has been forwarded."

You seek my opinion regarding the authority of the Commission. Because of the broad range of positions covered, I will deal with each in turn.

"Law-enforcement officer" is defined by § 9-108.1H, Code of Virginia (1950), as amended as:

"... 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 highways laws of this State, and shall include any member of the Enforcement or Inspection Division of the Alcoholic Beverage Control Commission vested with police authority."

It is my opinion that the provision found in § 9-111.1, requiring that law-enforcement officers comply with the Commission's minimum training standards, is mandatory for two reasons. First, the clear language of that provision is such that an objective reading thereof will afford no other interpretation. *Bonnie BeLo Enterprises, Inc. v. Commonwealth*, 217 Va. 84, 225 S.E.2d 395 (1976). Second, the use of the word "shall," when employed in a constitutional or statutory setting, is to be given mandatory effect with no avenue for discretion. *Schmidt v. City of Richmond*, 206 Va. 211, 142 S.E.2d 573 (1965).

Although there is no provision for enforcement, it is clearly the duty of each employer to ensure that those employees covered by the Commission's mandate meet its minimum training standards within the time limits specified.

Courthouse and courtroom security is the responsibility of the sheriff under § 53-168.1(a). Deputies may be designated by the sheriff for that purpose under § 53-168.1(b), and a list of such designations is to be forwarded to the Commission. The Commission has the authority under § 9-109.1 to establish compulsory minimum training standards, with time limitations for completion, for courthouse and courtroom security officers. Again, though there is no provision for the enforcement, these standards are mandatory.

Jailers are also subject to minimum training standards. Section 9-109.2 provides that the Commission "shall have power to establish compulsory minimum training standards for . . . jailers or custodial officers . . ., and to establish the time required for completion of such training." (Emphasis added.) A jailer may be summarily fined fifty dollars ($50.00) by the proper court of record under § 53-161 if he fails to perform his duties "in any respect."

Sections 53-168 and 53-173 should also be considered. Section 53-168 provides that the sheriff is the keeper of the jail. Section 53-173 states:

"If any sheriff . . . through his default or neglect fails to comply with the requirements of the State Board of Corrections in the operation and
management of any jail or jails under his control or management, the Board shall file a complaint with the judge of the circuit court of the county or city in which such jail is located giving ten days' notice to the sheriff . . . that on a date fixed in the notice, or so soon thereafter as convenient to the court a hearing on the complaint will be had. If after hearing the evidence the court is of the opinion that the complaint is justified it shall enter an order directing the State Compensation Board to withhold approval of the payment of any further salary to such sheriff . . . until there has been compliance with the requirements of the State Board of Corrections. If the court is of the opinion that the charges are unfounded, the complaint shall be dismissed."

Section 53-19.35 provides that the State Board of Corrections "shall establish minimum entrance and performance standards for . . . personnel employed by local agencies" subject to its standards. Therefore, the Commission's minimum training requirements for jailers may be enforced through the Board as one of the latter's prerequisites for continued employment.

"Correctional officer" is defined by § 53-19.18:1 as:

"... an employee of the Department of Corrections whose normal duties relate to maintaining immediate control, supervision and custody of prisoners confined in any penitentiary, prison camp, prison farm, or correctional field unit, owned or operated by the Department of Corrections, and who has taken an oath that he will faithfully and impartially discharge and perform all duties incumbent upon him as a correctional officer."

Under § 19.2-81.2 only a correctional officer who has completed the Commission's minimum training standards can detain any prisoner, whom he has reasonable grounds to believe has committed certain offenses, in order that a law-enforcement officer may be summoned to effect his arrest. Therefore, it is my opinion that any such person who is so assigned, or who is acting in that capacity, without meeting those minimum training standards is in violation of the statute. Again, the Commission's minimum training standards may be enforced through the Board of Corrections as one of its prerequisites for retention in employment.

Fire marshals and assistants are appointed by the governing body of the municipality pursuant to §§ 27-30 and 27-36. Sections 27-34.2 and 27-34.2:1 provide that the fire marshal or assistant "shall not" exercise the power of arrest, procure and serve warrants, issue summons, or exercise any police powers until he has satisfactorily completed the training course approved by the Commission. For failing to discharge "any duty required of him by law" the fire marshal is liable, under § 27-35, for a fine not exceeding one hundred dollars ($100.00) on each offense. It is my opinion that any fire marshal or assistant exercising these powers who is not in compliance with the Commission's minimum training standards is doing so without lawful authority.

In my opinion, it is not the authority, but rather the specific means to enforce that authority which the Commission lacks. As I have noted, the use of the word "shall" in these provisions indicates their mandatory character. For the present, courthouse and courtroom security and jails are those areas which can be directly affected by the Commission. The sheriff may designate deputies for both tasks. Under § 14.1-79 the Commonwealth pays two-thirds of the salaries of sheriffs and their full-time deputies. In fixing the salaries of sheriffs and full-time deputies under § 14.1-73, the Compensation Board may consider, in ad-
dition to certain set criteria, "such other factors as [it] deems proper." (Emphasis added.) The officer's successful completion or failure of the Commission's minimum training program is certainly a proper factor for the Compensation Board's consideration. This policy is reflected in §§ 14.1-73.1 and 14.1-73.2, the latter of which provides for higher salaries for those deputies who have successfully completed these minimum requirements.

As I have noted, most of the statutory authority for these positions mandates compliance with the Commission's training standards. Where compliance is not begun after proper notice, more direct methods are necessary, either against the individual or his employer.

An objective reading of that definition of law-enforcement officer found in § 9-108.1H encompasses most of the positions discussed herein. Read with § 9-111.1, there can be no doubt but that the clear legislative intent was that any person so employed must comply with the Commission's minimum training standards within the time specified by its rules and regulations. Since there is no provision for discretion, each employer is bound to those standards in maintaining its personnel.

CRIMINAL JUSTICE SERVICES COMMISSION—Minimum Training
Standards—Retraining for subsequent employment classification—Alcohol
Beverage Control Commission, Enforcement and Inspection Divisions.

ALCOHOLIC BEVERAGE CONTROL LAWS—Enforcement And Inspection
Divisions; Minimum Training Standards; Law-enforcement Officers.

DEFINITIONS—Law-enforcement Officers—Any member of Enforcement or
Inspection Division of Alcohol Beverage Control Commission vested with
police authority.

LAW ENFORCEMENT OFFICERS—"Grandfather Clause"—Minimum
training standards as applied to any member of Enforcement or Inspection
Division of Alcohol Beverage Control Commission vested with police
authority.

POLICE OFFICERS—Training—May secure compulsory minimum training
prior to employment.

December 6, 1977

THE HONORABLE R. H. GEISEN
Criminal Justice Services Commission

I am in receipt of your letter regarding certain minimum training standards as
promulgated by the Criminal Justice Services Commission. Since your inquiry
deals with several personnel areas regulated by the Commission, I will answer
each in turn.

"1. On various occasions, individuals employed by agencies who are not
required to send their personnel to mandated training, attend and
satisfactorily complete Commission approved schools. These individuals
later terminate their employment, and still later, are employed by an agency
whose personnel must comply with the training requirements as
promulgated by the Commission. The specific question is, since these in-
individuals received their classroom and field training while employed by an agency whose personnel are not required to attend mandatory training, must they be re-trained upon their employment by an agency whose personnel are required to attend mandated training?"

Section 9-109(2), Code of Virginia (1950), as amended, provides, in pertinent part, that the Commission has the power to establish compulsory minimum training standards subsequent to employment as a law-enforcement officer and to establish a minimum time for completion of requirements. In an Opinion to the Honorable C. W. Woodson, Jr., Director of the Law Enforcement Officers Training Standards Commission, dated October 20, 1971, and found in the Report of the Attorney General (1971-1972) at 306, it was determined that the section permitted immediate qualification if, prior to employment, the person had satisfactorily completed the training necessary to meet the Commission's minimum standards. This interpretation was reaffirmed in a subsequent Opinion to Mr. Woodson found in the Report of the Attorney General (1972-1973) at 248. I am enclosing a copy of each Opinion for your information.

It is my opinion that the same reasoning applies to your inquiry. Nothing in § 9-102 requires that the minimum training be attained only after employment. On the contrary, it would seem desirable to hire those persons who are already qualified. The most obvious benefits are the individual's immediate availability for duty and the substantial savings in training costs. Those persons who are employed without this prior training must comply within the time prescribed.

The underlying purpose of the statutes establishing the Commission is to provide a minimum standard of training for all Virginia law-enforcement officers. The fact that a person has obtained the necessary training prior to employment would not be violative of that legislative intent. Such an individual who already has met the minimum training standards, whether he had been required to or not, would not have to attend another basic school unless he had not been employed as a law-enforcement officer for over twenty-four (24) months. In the latter situation, new training would be required by the Commission's Rules and Regulations. If doubt exists in any particular case, the individual should apply to the Director for a waiver under the provisions of § 9-109.3.

"2. The Commission has promulgated separate training requirements for local jailers and Department of Corrections, Adult Services officers. However, we have experienced situations where these personnel terminate from the Department of Corrections, Adult Services and are later employed by a local sheriff's department as a jailer, or vice-versa. The question then, after satisfactorily completing the training for one program, must they be re-trained in the other program when employed by the other agency?"

Referring you to my response to your initial question, it is my opinion that no retraining is necessary where requirements overlap. Compliance is necessary with those training requirements that are peculiar to the particular position.

"3. The 1977 General Assembly amended Section 9-108.1, Code of Virginia (1950), as amended, by enacting House Bill 1821. Specifically, does this imply that all Inspection Division personnel (excluding clerical, etc.) of the Alcoholic Beverage Control Commission, notwithstanding their limited police powers, comply with all mandated training requirements for full-time law-enforcement officers as promulgated by the Commission? Also, if the answer to the above is affirmative, do these personnel come within the purview of a grandfather clause?"
The legislation to which you refer added "any member of the Enforcement or Inspection Division of the Alcoholic Beverage Control Commission vested with police authority" to the definition of "law-enforcement officer" found in § 9-108.1H.

In answer to the initial inquiry, it is my opinion that such individuals are clearly within the scope of § 9-109(2), which authorize the Commission to establish minimum training standards for law-enforcement officers. Therefore, those individuals must comply with the Commission's minimum standards. My interpretation is based upon two considerations: First, there is no separate provision granting the Commission authority to promulgate particular, and perhaps less extensive, training standards for Enforcement and Inspection Division personnel of the Alcoholic Beverage Control Commission. Such separate statutory authority does exist, for example, for jailers and custodial officers in § 9-109.2 and for private security services personnel in § 9-111.2. Second, the plain, obvious and rational meaning of a statute is to be preferred over any narrow or strained construction. Vollin v. Arlington County Electoral Board, 216 Va. 674, 222 S.E.2d 793 (1976). Therefore my answer to this question is in the affirmative.

Because of that response your last question must be addressed. The "grandfather clause" you mention is found in § 9-111.1 which provides, inter alia, that

"Every law-enforcement officer employed after July one, nineteen hundred seventy-one, shall . . . comply with the compulsory minimum training standards established by the Commission."

The effect of this provision, of course, is to exempt from the minimum training requirements those law-enforcement officers employed prior to July 1, 1971. See the Opinion to Mr. Woodson, Report of the Attorney General (1972-1973), noted above.

It is my opinion that those persons employed in the covered classification prior to July 1, 1971, who were performing the same duties and functions now executed by the Enforcement or Inspection Division of the Alcoholic Beverage Control vested with police authority, are exempt from the minimum training standards under § 9-111.1. All others now employed must meet those requirements within the period established by the Commission's Rules and Regulations. While this requirement may cause some initial individual difficulty, the intent of the General Assembly will be served and the Commission will not be hampered with monitoring varying exemption dates for different law-enforcement classifications. Again, as I have noted above, the Director, with the Commission's approval, may waive these requirements in appropriate cases under § 9-109.3.

CRIMINAL LAW—Alteration Of Serial Numbers—Section 18.2-215 makes alteration of on home or office electrical or electronic appliances or equipment a criminal offense.

STATUTES—Intention Of Legislature Expressed In Clear And Precise Terms—No need for interpretation.

STATUTES—Penal Statutes—Words used are to be given their natural and ordinary meaning.
This is in reply to your recent letter wherein you inquired whether § 18.2-215 of the Code of Virginia (1950), as amended, relates only to household electrical appliances. You stated that your question was based upon a recent experience involving alteration of serial numbers on products such as office equipment. Section 18.2-215, provides as follows:

"No person, firm, association or corporation, either individually or in association with one or more other persons, firms, associations or corporations shall remove, change or alter the serial number or other identification number stamped upon, cut into or attached as a permanent part of any household or electrical or electronic appliance where such number was stamped upon, cut into or attached to such appliance by the manufacturer thereof.

"No person, firm, association or corporation shall knowingly have in his or its possession for the purpose of resale or keep in his possession for a period in excess of forty-eight hours without reporting such possession to the appropriate law-enforcement agency in his county, town or city a household or electrical or electronic appliance, with knowledge that the serial number or other identification number has been removed, changed or altered.

"Any person, firm, association or corporation violating the provisions of the section shall be guilty of a Class 1 misdemeanor."

This section is clear and refers to a ""household or electrical or electronic appliance."" (Emphasis added.) The rule of construction of penal statutes is that they are to be construed strictly against the State and in favor of personal liberty and such statutes cannot be extended by implication or be made to include cases which are not within the letter and spirit of such statutes. Wade v. Commonwealth, 202 Va. 117, 116 S.E.2d 99 (1960). At the same time, however, it is also a well-settled rule that words used in a statute are to be given their natural and ordinary meaning, unless it plainly appears that they are used in some other sense and that when the intention of the legislature is expressed in clear and precise terms, there is no need for interpretation and effect should be given to their manifest meaning. Commonwealth v. Bailey, 124 Va. 800, 97 S.E. 774 (1919).

Webster's New International Dictionary (3d.ed. 1968) defines appliance as, inter alia, "a household or office utensil, apparatus, instrument, or machine that utilizes a power supply, especially electric current."

In my opinion, § 18.2-215 should be construed as including electrical or electronic office equipment such as an electric typewriter and other electrical or electronic appliances which although normally found in a home might also be found in an office, such as a refrigerator. If this statute were intended to apply only to household appliances, the Legislature would not have used the additional language "or electrical or electronic." This is especially so since this additional language is in the disjunctive. I therefore answer your inquiry in the negative.
CRIMINAL LAW—Forfeiture—Absent statutory authority the Commonwealth may not impose forfeiture on money used in attempt to bribe policeman.

CRIMINAL LAW—Bribery Money Must Be Returned To Individual Who Has Title Thereto—No forfeiture provision for money used in attempt to bribe policeman.

GENERAL ASSEMBLY—Forfeiture Specifically Provided In Some Cases—Where none provided by statute, no authority to impose.

November 22, 1977

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

This is in response to your request for my opinion as to the proper disposition of certain bribery funds that are in the custody of the Commonwealth. Your letter indicates that the money was paid to a law enforcement officer for the purpose of influencing the investigation of certain criminal matters. Your letter also indicates that the defendant pled guilty to bribery under § 18.2-438 of the Code of Virginia (1950), as amended, and that the money is now being held pending disposition.

In a previous opinion of this Office to the Honorable J. Wilton Hope, Jr., Commonwealth's Attorney, Elizabeth City County, dated April 18, 1950, and found in the Report of the Attorney General (1949-1950) at 79, it was opined that if the Commonwealth retained or destroyed traveler's checks that had been offered to a policeman as a bribe, it would for all intents and purposes be imposing a forfeiture of those checks on the defendant. This Office opined that since the legislature has seen fit to provide specifically for forfeiture in some cases, that where no forfeiture has been provided for by statute, there is no authority therefor. Further, this Office has likewise ruled on other more recent occasions that since the legislature has seen fit to provide specifically for forfeiture in some cases, there is no authority for forfeiture when there is no statute providing therefor. See Report of the Attorney General (1975-1976) at 254; Report of the Attorney General (1962-1963) at 187.

I am unaware of any forfeiture provision for money or other property used in attempts to bribe policemen. I am, therefore, of the opinion that the money must be returned to the individual who has title thereto.

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CRIMINAL LAW—Person Arrested For Traffic Infraction Chargeable With Escape Under § 18.2-479 If Leaves Before Summons Issued.

DEFINITIONS—Traffic Infractions—Violations of public order; not criminal in nature.

GENERAL ASSEMBLY—Traffic Infractions—Removed from classification of criminal offenses but intention evidenced that all consequences flowing from misdemeanor arrest also apply to traffic infractions.

March 31, 1978

COLONEL D. M. SLANE, SUPERINTENDENT
Department of State Police
You ask whether a person who has been arrested for a traffic infraction and who escapes custody of the arresting officer before he is released on a summons is guilty of unlawful escape.

Section 18.2-479 of the Code of Virginia (1950), as amended, provides that:

"If any person lawfully confined in jail or lawfully in the custody of any court or officer thereof or of any law-enforcement officer on a charge or conviction of a criminal offense escape, otherwise than by force or violence or by setting fire to the jail, he shall be guilty of a Class 2 misdemeanor."

By the terms of § 18.2-8 traffic infractions are violations of public order as defined in § 46.1-1(40) and not deemed to be criminal in nature. Section 46.1-1(40) defines traffic infraction as "any violation of any provision of this title [46.1], or of any ordinances, rules or regulations established thereunder, not expressly defined as a felony or misdemeanor, and otherwise not punishable by incarceration or by a fine of more than one hundred dollars."

This definition of traffic infraction found in § 18.2-8 was added by Chapter 585 [1977] Acts of Assembly 942, which also added § 46.1-178.01 to the Code, which provides:

"For purposes of arrest, traffic infractions shall be treated as misdemeanors. Except as otherwise provided by this title, the authority and duties of arresting officers shall be the same for traffic infractions as for misdemeanors."

Clearly while the General Assembly has removed traffic infractions from the general classification of criminal offenses, it has also provided that they shall be treated as misdemeanors for purposes of arrest and for purposes of the authority and duties of arresting officers.

By enacting the provisions of § 46.1-178.01 at the time it removed traffic infractions from the classification of criminal offenses, the General Assembly evidenced its intention that all consequences flowing from a misdemeanor arrest should also apply in cases of traffic infractions.

It is my opinion that a person arrested for a traffic infraction is in custody of a law-enforcement officer on a charge of a criminal offense, and an escape under these circumstances would be an unlawful escape under § 18.2-479.

CRIMINAL LAW—Switching Of Price Tags In Store By Customer—Obtaining property under false pretenses, violation of § 18.2-178.

CRIMINAL LAW—Altering Price Tags Is Violation Of § 18.2-103.

CRIMINAL LAW—Test For Establishing Proof Of Larceny By False Pretenses.

October 24, 1977

THE HONORABLE WM. ROSCOE REYNOLDS
Commonwealth's Attorney for Henry County

This is in response to your request for an official opinion regarding the applicability of § 18.2-103 of the Code of Virginia (1950), as amended, to the following set of facts: "... [A] person enters a store, removes the price tag from
an expensive item and replaces it with a price tag taken from a less expensive item, then takes the item to the checkout counter and pays the reduced price for the item. . ." You ask whether such an action constitutes a violation of § 18.2-103 or, instead, is properly chargeable under § 18.2-178, obtaining property under false pretenses.

Section 18.2-103 establishes criminal sanctions in the event that an individual "alters the price tag or other price marking on such goods or merchandise, or transfers the goods from one container to another" and then obtains possession without having paid the full purchase price. It is my opinion that the facts you postulate do not constitute a violation of this provision. The substitution of one price tag for another would not appear to be the equivalent of the requisite alteration of such tags. Normally, the word "alter" is defined as meaning "to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected." 3A C.J.S. Alter 261 (1973).

As you suggest, the more appropriate section for prohibiting the fraudulent switching of price tags would seem to be § 18.2-178. That section states in pertinent part: "If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof. . ." The Supreme Court of Virginia has propounded the following test for establishing proof of larceny by false pretenses:

". . . (1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses used for the purpose, that is, the false pretenses to some degree must have induced the owner to part with his property . . . Moreover, the false pretense must be a representation as to an existing fact or a past event." Bourgeois v. Commonwealth, 217 Va. 268, 272, 227 S.E.2d 714 (1976).

I am of the view that each of these elements is clearly present when a customer switches the price tags of various goods so as to induce the owner of such merchandise to sell them at a lower cost. Moreover, I note that the one case found with facts substantially identical to those you presently posit reached a similar conclusion. See State v. Hauck, 190 Neb. 534, 209 N.W.2d 580 (1973) (evidence held to demonstrate that customer was not guilty of the charged crime of larceny, but rather the obtaining of property by false pretenses). Cf. People v. Lorenzo, 64 Cal.App.3d Supp. 43, 135 Cal.Rptr. 337 (1976) (customer not guilty of theft by false pretenses due to store manager's observation of his actions prior to sale).

CRIMINAL PROCEDURE—Appeals—Different procedures from courts not-of-record and courts of record.

July 15, 1977

THE HONORABLE WILLIAM L. COWHIG
Commonwealth's Attorney for the City of Alexandria

This is in response to your inquiry whether a person convicted of a felony or a misdemeanor may appeal his conviction even though the court suspended im-
position of his sentence for reasons other than a presentence report. Because of the different procedures applicable to appeals from courts of record and courts not-of-record, it will be necessary to analyze separately the procedures applicable to each.

Rule 3A:26(b)(1) of the Rules of the Supreme Court of Virginia (1976), provides that an appeal from a court not-of-record may be taken "upon conviction." The Supreme Court of Virginia has never construed the term "conviction" within the context of Rule 3A:26(b)(1). Other courts, however, have construed "conviction" in a similar context to mean the determination of guilt alone. See, e.g., Whan v. State, 485 S.W.2d 275 (Tex. 1972), cert. denied, 411 U.S. 934 (1973). In its customary usage, "conviction" means a finding of guilt and not that a sentence has been pronounced. See Smith v. Commonwealth, 134 Va. 589, 595, 113 S.E. 707, 709 (1922). Accordingly, it is my opinion that an appeal from a court not-of-record may be taken after a finding of guilt.

Rule 5:6 of the Rules of the Supreme Court provides that an appeal from a court of record must be taken within thirty days after entry of final judgment. This Rule applies to both criminal and civil cases. The question, therefore, is whether a finding of guilt with a suspension of imposition of sentence constitutes a "final judgment" for the purposes of Rule 5:6.

As stated by the Supreme Court of Virginia in Fuller v. Commonwealth, 189 Va. 327, 330, 53 S.E.2d 26, 27 (1949).

"It is well settled that in the absence of statute the pronouncement of sentence is a prerequisite to the finality of a judgment. Consequently, where an appeal is limited to a final judgment, an order wherein the pronouncement of sentence is suspended is ordinarily not appealable. [Citations omitted.]

"But the legislature may, of course, by appropriate statute permit an appeal from, or a writ of error to, such a judgment or order. This may be done either by express language granting the right of review of such an order, or by giving the judgment or order the necessary characteristics of a final judgment so as to be reviewable under the general law."

In Fuller the Court reviewed § 1922b of the Code of Virginia (1942) and found that it did grant the right of review of a judgment by which the imposition of sentence is suspended. Section 1922b of the 1942 Code is now embodied, with amendments not relevant to your inquiry, in § 53-272 of the Code of Virginia (1950), as amended.

Section 53-272 provides, in pertinent part, that after a plea, verdict or judgment of guilty, the court, under certain circumstances, may suspend the execution of sentence, in whole or in part or may suspend the imposition of sentence or commitment. The court may also place the defendant on probation. Section 53-272, which should be liberally construed, Fuller, supra, at 332, 53 S.E.2d at 28, is an exception to the general rule that the imposition of sentence is a prerequisite to the finality of a judgment. Accordingly, I am of the opinion that if a court finds an individual guilty of a criminal offense, but suspends imposition of sentence pursuant to § 53-272, it constitutes a final judgment for the purposes of Rule 5:6. It should be noted, however, that if the court suspends imposition of sentence for the purpose of receiving a presentence report or for some other purpose which indicates that the court contemplates taking further action, the suspension of imposition of sentence does not constitute "a complete disposition of the case" from which an appeal may be taken. Fuller, supra, at 333, 53 S.E.2d at 28.
CRIMINAL PROCEDURE—Arraignment Must Be Held In Open Court, § 19.2-254—Cannot be held by videotape.

DEFINITIONS—“Arraignment”—Presence of accused is essential to valid arraignment.

DEFINITIONS—“Open Court.”

DEFINITIONS—“Taken Into Custody And Brought Before” Means Physically Appearing—Proceeding cannot be handled over phone.

STATUTES—Arraignment—Use of word “shall” indicates mandatory intent.

January 11, 1978

THE HONORABLE ROBERT M. HURST, CHIEF JUDGE
Nineteenth Judicial District
Fairfax County General District Court

This is in response to your request for my opinion regarding the legality of conducting arraignment proceedings by videotape. You indicate that the arrangement would be such that while the judge would be at the courthouse and the accused would be at the jail, they would see each other on screens and a tape recording would be made and preserved until the trial was completed and the final appeal period had lapsed.

Section 19.2-254 of the Code of Virginia (1950), as amended, requires that “[a]rraignment shall be conducted in open court.” A statute “by its use of the word ‘shall’ indicates a mandatory intent.” Report of the Attorney General (1965-1966) at 175. Accordingly, it is mandatory that arraignments be conducted in open court.

I am unable to find any definition of “open court” in the Code or in Virginia case law. “Open court” has been defined in other jurisdictions, however, as meaning, “a court which is freely open to the approach of all decent and orderly persons in the character of spectators.” Black's Law Dictionary 1242 (Rev. 4th ed. 1968). Similarly, arraignment has been defined by the Supreme Court of North Carolina as “nothing but the calling of the offender to the bar of the Court to answer the matter charged against him . . . .” State v. Ferrell, 205 N.C. 640, 172 S.E. 186, 187 (1934). It has also been held that code provisions which require that arraignments be conducted “before the court” “merely embody the immemorial usage of the common law.” Matter of Rudd v. Hazard, 266 N.Y. 302, 306, 194 N.E. 764 (1935). “Publicity, not secrecy, in arraignment, plea and judgment is part of our tradition. It is deemed necessary not only for individual security but also in the public interest.” Id. at 307. Accordingly, “[i]n general, the presence of accused is essential to a valid arraignment . . . .” 22 C.J.S. Criminal Law § 411(1)(1961).

In addition, I have recently opined that the analogous proceeding whereby juveniles are “taken into custody and brought before” a judge for a detention hearing under § 16.1-248A requires that these children physically appear before such judge, intake officer or authorized judicial officer, and such language would not permit the handling of this proceeding over the telephone. Opinion to the Honorable Von L. Piersall, Jr., Judge, Portsmouth Juvenile and Domestic Relations Court, dated September 26, 1977. Consequently, I am of the opinion that the requirement in § 19.2-254 that arraignments be conducted in “open court” makes it impermissible for arraignments to be conducted by videotape.
CRIMINAL PROCEDURE—Breath Test Certificate Prescribed In § 18.2-268(rl)—Defendant’s copy need not be notarized.

August 29, 1977

COLONEL D. M. SLANE, SUPERINTENDENT
Department of State Police

This is in response to your recent letter, concerning the 1977 amendment to paragraph (rl) of § 18.2-268 of the Code of Virginia (1950), as amended. Section 18.2-268 provides for the use of chemical tests to determine the alcoholic content of the blood of persons operating motor vehicles on Virginia highways. Paragraph (rl) thereof now provides in relevant part:

"Any individual conducting a breath test under the provisions of this section and as authorized by the State Health Commissioner shall issue a certificate which will indicate that the test was conducted in accordance with the manufacturer's specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, the date, the time the sample was taken from the accused, the alcoholic content of the sample, and by whom the sample was examined. The certificate, as provided for in this section, when duly attested by the authorized individual conducting the breath test, shall be admissible in any court in any criminal proceeding as evidence of the alcoholic content of the blood of the accused. . . . A copy of such certificate shall be forthwith delivered to the accused." (Emphasis added.)

With reference to the underscored portion of § 18.2-268(rl) quoted herein-above, which underscored portion was added by Chapter 638, [1977] Acts of Assembly 1258, you inquire whether the "copy for the accused is required to be notarized." While the original certificate of breath alcohol analysis must be duly attested before it may be admitted into evidence, § 18.2-268 imposes no additional requirements with respect to the defendant's copy of the certificate other than that it be forthwith delivered. I am, therefore, of the opinion that the defendant's copy of the certificate may be a xeroxed, or similarly produced, copy of the original certificate and the copy itself need not be notarized. In an Opinion to the Honorable Martin Eugene Morris, Judge, 19th Judicial District of Virginia, dated August 29, 1977, a copy of which is enclosed, I noted that, though not legally required, the administrative practice is to require that the original certificate of breath alcohol analysis be sworn. I am also of the opinion that the defendant's copy of the certificate should be a copy of the complete original certificate, including, if applicable, its notarization.

CRIMINAL PROCEDURE—Breath Test Certificate Prescribed In § 18.2-268(rl)—Need not be sworn.

August 29, 1977

THE HONORABLE MARTIN EUGENE MORRIS, JUDGE
Nineteenth Judicial District of Virginia
Fairfax County General District Court
This is in reply to your letter in which you inquire whether paragraph (rl) of § 18.2-268 of the Code of Virginia (1950), as amended, requires that the certificate of breath alcohol analysis provided for in that paragraph "be sworn to by the individual executing the certificate before the certificate may be admitted into evidence."

Section 18.2-268 provides for the use of chemical tests to determine the alcoholic content of the blood of persons operating motor vehicles on Virginia highways. Paragraph (rl) thereof, provides in relevant part that

"Any individual conducting a breath test under the provisions of this section and as authorized by the State Health Commissioner shall issue a certificate which will indicate that the test was conducted in accordance with the manufacturer's specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, the date, the time the sample was taken from the accused, the alcoholic content of the sample, and by whom the sample was examined. The certificate, as provided for in this section, when duly attested by the authorized individual conducting the breath test, shall be admissible in any court in any criminal proceeding as evidence of the alcoholic content of the blood of the accused." (Emphasis added.)

Except for the requirement of attestation by the individual conducting the breath test, § 18.2-268 imposes no prerequisite to admission into evidence of the certificate of that individual. In addition, § 18.2-268 prescribes no particular method of attestation. Black's Law Dictionary (rev. 4th ed. 1968) at 163 defines "Attest" as, inter alia, "to bear witness to a fact," "to affirm to be true or genuine," "to certify," and "to make solemn declaration in words or writing to support a fact." I am of the opinion, therefore, that the certificate is duly attested by certification or affirmation without the administration of an oath. Accordingly, I answer your question in the negative.

This Office has previously indicated, however, that a certificate of breath alcohol analysis may be notarized. Report of the Attorney General (1972-1973) at 145. In addition, the forms prepared by the Department of Health for use as certificates under § 18.2-268(rl) have always provided for the administration of an oath and the execution of a jurat. I further understand that all certificates of analysis issued by the Bureau of Forensic Science for use in court as evidence are, in fact, sworn. Notwithstanding that a certificate of breath alcohol analysis is duly attested without the administration of an oath, administrative practice required by the various certificate forms, that the attestation be under oath, clearly encompasses statutory legal requirements.
This is in response to your inquiry in which you asked under what, if any, circumstances a General District Court can try a defendant in his absence on a misdemeanor (other than a traffic infraction) where the defendant fails to appear pursuant to a summons, self-recognizance bond or bond.

Section 19.2-237 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"If, being summoned in any case not requiring the appointment of counsel, he [the accused] fail to appear and plead, after the summons has been executed ten days the court may either award a capias or proceed to trial in the same manner as if the accused had appeared, plead not guilty and waived trial by jury. And any warrant charging any misdemeanor not requiring the appointment of counsel and returnable before a judge elected under Chapter 4.1 of Title 16.1 upon which the accused has been summoned or recognized to appear before such judge and shall fail to appear in response to such summons or recognizance, may be tried by such judge as if accused had appeared and plead not guilty. The court may proceed to judgment in the absence of the accused and may make such order as may be necessary for the execution of such judgment."

Since this section deals with cases "not requiring the appointment of counsel," it is necessary to distinguish such situations.

The United States Supreme Court, in Argersinger v. Hamlin, 407 U.S. 25 (1972), held that no imprisonment may be imposed at the trial of a misdemeanor unless the accused is represented by counsel. The General Assembly of Virginia, subsequent to that decision, enacted § 19.1-241.7, now § 19.2-157. Section 19.2-157 states, in part, as follows:

"... whenever a person charged with a criminal offense the penalty for which may be death or confinement in the penitentiary or jail, including charges for revocation of suspension of imposition or execution of sentence or probation, appears before any court without being represented by counsel, the court shall inform him of his right to counsel."

In an opinion to the Honorable Donald H. Sandie, Judge, Municipal Court of the City of Portsmouth, dated May 15, 1973, and found in the Report of the Attorney General (1972-1973) at 18, it was held that the word "penalty," as it appears in § 19.2-157, refers to a statutory penalty and thus, in cases where a person is charged with a crime for which the statutory penalty may constitute confinement, counsel must be appointed.

Based on the foregoing, it is my opinion that § 19.2-237 would allow a General District Court to try a defendant, accused of a misdemeanor violation, in his absence where the defendant fails to appear only when there is no possibility of imprisonment (violations punishable as Class 3 and 4 misdemeanors).
CRIMINAL PROCEDURE—Issuance Of Summons In Lieu Of Warrant Under § 19.2-74 For Past Misdemeanor.

ARREST—Officer Has Wide Discretion As To Issuing Summons Or Obtaining Warrant In Misdemeanor Case.

DEFINITIONS—“Whenever”—Adverb of time meaning “at whatever time”—Not equivalent of “in any case.”

September 26, 1977

THE HONORABLE JOHN N. LAMPROS
Commonwealth’s Attorney for Roanoke County

This is in response to your request for an official opinion regarding the applicability of § 19.2-74 of the Code of Virginia (1950), as amended, to the following set of facts:

“Hypothetically, a law enforcement officer, while patrolling a park, sees two men. After 9:00 p.m. it is a misdemeanor, trespassing, to be in the park. He recognizes both men and calls for them to stop. One does, the other runs. After issuing a summons for the man who remained, the officer leaves the park—approximately ten (10) minutes have elapsed—and sees the man who ran, outside of the park. At this point in time, can the officer issue a summons for this past misdemeanor which was committed in his presence?”

Section 19.2-81 states in part that a law enforcement officer, who is in uniform or displaying a badge of office, “may arrest, without a warrant, any person who commits any crime in the presence of such officer.” See McMillon v. Commonwealth, 212 Va. 505, 184 S.E.2d 773 (1971); Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387 (1948). An offense occurs “within the presence” of an officer “when he has direct personal knowledge, through his sight, hearing, or other senses that it is then and there being committed.” Gallihier v. Commonwealth, 161 Va. 1014, 1021, 170 S.E. 734 (1933).

Section 19.2-74 provides in pertinent part:

“Whenever any person is detained by or in the custody of an arresting officer for a violation of any county, city or town ordinance or of any provision of this Code punishable as a misdemeanor . . ., the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.”

I find nothing in this or any other section of the Code which limits the issuance of a summons in the case of a misdemeanor committed in an officer’s presence to instances in which the offense and the issuance of the summons are coterminous. On the contrary, § 19.2-74 states that “Whenever any person is detained,” a summons “shall” be issued (emphasis added). “Whenever” is an adverb of time. It is not the equivalent of ‘in any case.’ Its meaning, and the only meaning given to it by lexicographers, is ‘at whatever time.’” Funkhouser v. Spahr, 102 Va. 306, 310, 46 S.E. 378 (1904).

Thus, I am of the opinion that § 19.2-74 does not prohibit the issuance of a summons in lieu of a warrant simply because a period of time elapsed between the officer’s cognizance of the offense and the subsequent detention of the accused.
Whether a summons should issue must be determined by the officer. I direct your attention to the penultimate paragraph of § 19.2-74, which states:

"Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this section, the arresting officer shall take such person forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons, who shall determine whether or not probable cause exists that such person is likely to disregard a summons, and may issue either a summons or warrant as he may determine proper."

This Office has stated in a previous Opinion that this provision affords an arresting officer wide discretion in deciding whether to issue a summons or obtain a warrant. See Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated July 2, 1976 (a copy of which is enclosed). The offender's flight from the park, while not necessarily dispositive of the question whether he is "likely" to disregard the summons, certainly is a significant factor to be considered by the arresting officer.

CRIMINAL PROCEDURE—Presentence Report Hearing—Recording required by § 19.2-165.

CRIMINAL PROCEDURE—Preliminary Hearing—Not an incident of trial but step preceding trial.

DEFINITIONS—"Incidents Of Trial"—As used in § 19.2-165 includes recording presentence report hearing; transcript.

EVIDENCE—Felony Cases—Recording verbatim of evidence and incidents of trial—Presentence report hearing.

November 1, 1977

THE HONORABLE JAMES A. CALES, JR.
Commonwealth's Attorney for the City of Portsmouth

You request my opinion whether there is a "requirement that a presentence report hearing be recorded by a court reporter in a criminal case."

The hearing to which you refer would result from the preparation of a presentence report under the terms of either § 19.2-299 of the Code of Virginia (1950), as amended, or Rule 3A:25 of the Rules of Court of the Supreme Court of Virginia (1972). Section 19.2-299 requires a presentence report upon direction of the court, or upon request of a defendant, after all felony convictions. Rule 3A:25 provides for the same report in all felony cases at the direction of the court or upon request of the defendant after he has pleaded guilty to, or been convicted in a trial without a jury, of a felony punishable by death or confinement for more than ten years.

Section 19.2-299 and Rule 3A:25 both establish a procedure for conducting a full hearing on such report in open court, in the presence of the accused, with right of cross-examination by defense counsel and full development of any additional facts which may be relevant. Section 19.2-299 additionally provides
that the report shall be filed as a part of the record in the case.

Section 19.2-165 of the Code, relating to the recording of evidence, states, in pertinent part: "In all felony cases, the court or judge trying the case shall by order entered of record provide for the recording verbatim of the evidence and incidents of trial."

At this point the question becomes: is the hearing in question an "incident of trial?" Previous Opinions have dealt with this phrase. It has been opined that a preliminary hearing is not an incident of trial, but is, instead, a step preceding trial. Reports of the Attorney General (1966-1967) at 96, (1964-1965) at 69, (1963-1964) at 101. In an Opinion to the Honorable John H. Powell, Clerk of the Circuit Court of Nansemond County, dated May 21, 1964, and found in the Report of the Attorney General (1963-1964) at 104, it was opined that all questions directed to the accused with respect to counsel and his answers thereto must be recorded, and it was said:

"The phrase 'incidents of the trial,' in my opinion, means all proceedings, such as examination of the jury, the reading of the indictment, the plea of the accused, motions of counsel, objections to the admittance of evidence, rulings of the court, and all other statements connected with the trial."

Additionally, in an Opinion to the Honorable Harry G. Lawson, Commonwealth's Attorney for Appomattox County, dated August 26, 1965, and found in the Report of the Attorney General (1965-1966) at 97, it was opined that the judicial hearing at which the revocation of a suspension of sentence is considered is an incident of the trial and that such hearing should be recorded.

Due to the nature of the hearing concerning the presentence report, I am of the opinion that it, when held, is an incident of the trial, if not, in fact, actually an extension thereof. In cases in which such hearing is held it is only after such hearing that sentence is pronounced and final judgment entered in the case; issues raised on direct appeal and in collateral attacks on the case may relate to the proceedings at this hearing.

Accordingly, it is my opinion that § 19.2-165 of the Code encompasses a presentence report hearing.

CRIMINAL PROCEDURE—Recognizances—Section 19.2-143 does not contemplate judgment against surety on forfeited recognizance bond unless thirty days have elapsed since finding that person failed to appear in accordance with the recognizance.

DISTRICT COURTS—Recognizances—Finding of default of appearance under § 19.2-143 should be recorded by court not of record on page of docket whereon case was docketed.

September 12, 1977

THE HONORABLE JAMES P. BRICE, JUDGE
General District Court, City of Roanoke

This is in response to your letter regarding § 19.2-143 of the Code of Virginia (1950), as amended. This statute provides the manner in which a recognizance would be forfeited.

In your letter you state as follows:
"I am frankly puzzled about the meaning of the . . . statute.

"I would appreciate an opinion from your office as to whether you think the legislative intent is to provide that there shall be no judgment on a forfeited recognizance bond unless thirty days have elapsed since a default of appearance in criminal court."

Section 19.2-143 provides, in part:

"When a person, under recognizance in a criminal case, either as party or witness, fails to perform the condition thereof, . . . a hearing shall be held upon reasonable notice to all parties affording them opportunity to show cause why said recognizance should not be forfeited. If the court finds the recognizance should be forfeited, the default shall be recorded therein, unless, the defendant be brought before the court within thirty days of the findings of default. After thirty days of the finding of default, his default shall be recorded therein, and if it be to appear before a court not of record, his default shall be entered by the judge of such court, on the page of his docket whereon the case is docketed unless the defendant has been delivered or appeared before the court. The process on any such forfeited recognizance shall be issued from the court before which the appearance was to be, and wherein such forfeiture was recorded or entered. Any such process issued by a judge when the penalty of the recognizance so forfeited is in excess of five thousand dollars shall be made returnable to the circuit court of his county or city, and when not in excess of five thousand dollars it shall be made returnable before, and tried by, such judge, who shall promptly transmit to the clerk of the circuit court of his county or city wherein deeds are recorded an abstract of such judgment as he may render thereon, which shall be forthwith docketed by the clerk of such court."

(Emphasis added.)

In 1973 the General Assembly amended § 19.1-137 of the Code, the precursor to § 19.2-143, to specifically add the aforementioned emphasized language. See Ch. 409 [1973] Acts of Assembly 594. It is, accordingly, my opinion that when the General Assembly specifically added the thirty-day requirement to this statute, it intended that there should be no judgment rendered against a surety on a forfeited recognizance unless thirty days have elapsed since a finding that a person has failed to appear in accordance with his recognizance.

Section 19.2-143 thus prescribes the following procedure when a person fails to perform the condition of a recognizance in a criminal case: (1) a hearing should be held to determine whether the recognizance should be forfeited; (2) if it is determined that the person recognized has defaulted, that the recognizance should be forfeited, and the person recognized is not brought before the court within thirty days to fulfill the condition of the recognizance, the court's adjudication of default should be recorded at the expiration of thirty days; (3) if the default of appearance was before a court not of record, the default should be recorded on the page of the docket whereon the case is docketed; (4) after the default is recorded, process may be issued against the parties who secured the recognizance, and judgment may be rendered on the security that they posted.

DEEDS—Deed Of Correction—Cannot serve to retrospectively change understanding of parties because of subsequent events.
DEFINITIONS—Deed Of Correction.

TAXATION—Recordation Tax—"Correction" occurred due to changed circumstances after original deed execution—Not deed of correction within meaning of § 58-61.

April 20, 1978

THE HONORABLE AUSTIN EMBREY, CLERK
Circuit Court of Nelson County

You have asked whether a deed constitutes a deed of correction, within the meaning of § 58-61 of the Code of Virginia (1950), as amended, when executed under the following circumstances. Certain property was originally requested to be conveyed to "John Doe, Trustee." The property was so conveyed on December 12, 1977, and the proper recordation tax was paid. Subsequently, bank financing could not be obtained in that name and the property was reconveyed in the name of "John Doe and Mary Doe, husband and wife."

Section 58-61 provides that "[n]o additional recordation tax shall be required for admitting to record any deed of confirmation or deed of correction." The statute does not define the term deed of correction. Therefore, it must be construed according to its ordinary and familiar meaning, within the context of the statute. Lawrence v. Craven Tire Co., 210 Va. 138, 140-141, 169 S.E.2d 440,441 (1969). This Office has previously defined a deed of correction as "an instrument which corrects clerical, typographical, and other errors in the original document which made the original document vary from the actual understanding of the parties at the time it was entered. A deed of correction cannot serve to retrospectively change the understanding of the parties because of subsequent events." Opinion to the Honorable H. P. Scott, Clerk of the Circuit Court of Bedford County, dated October 16, 1974, and found in the Report of the Attorney General (1974-1975) at 515-516. See also Opinion to the Honorable V. Elwood Mason, Clerk of the Circuit Court of King George County, dated May 29, 1974, and found in the Report of the Attorney General (1973-1974) at 405-406. I enclose copies of both Opinions.

In this case the "correction" occurred as a result of changed circumstances after the original deed was executed. It does not appear that the original deed varied from the understanding of the parties. Therefore, it is my opinion that the second deed is not a deed of correction within the meaning of § 58-61.

DEEDS—Notarized In Mexico By Mexican Notary May Be Recorded In Virginia If Requirements Of Uniform Recognition Of Acknowledgments Act Are Met.

NOTARIES PUBLIC—Acknowledgment In Spanish By Mexican Notary Should Be Given Same Effect As One Performed By Duly Qualified Virginia Notary Public If Requirements of §§ 55-118.3 And 55-118.4 Are Met—Deed authorized in Mexico.

August 4, 1977

THE HONORABLE C. RICHARD CRANWELL
Member, House of Delegates

This is to acknowledge your letter of July 15, 1977, in which you ask whether a
deed notarized in Mexico by a Mexican notary may be recorded in Virginia under the provisions of § 55-114, of the Code of Virginia (1950), as amended. Section 55-114 contains the following language:

"Such court or clerk shall also admit any such writing to record as to any person whose name is signed thereto upon the certificate under the official seal . . . of the proper officer of any court of record of such [foreign] country or the mayor or other chief magistrate of any city, town or corporation therein, that such writing was acknowledged by such person . . . before such court, mayor or chief magistrate."

The omitted language in the statute quoted above pertains to certain American officials appointed by the United States government to represent this country abroad. Since the situation posed involves a Mexican official (that is, a non-American government appointee), that language is clearly not applicable.

To fall within the ambit of § 55-114, the foreign official making the required acknowledgment must, in this case, be either the proper officer of any court of record in Mexico, or the mayor or chief magistrate of any city, town or corporation in Mexico. Section 55-114 makes no allowance for acknowledgments by foreign notaries, but rather requires that these specific officials be involved in certifying an acknowledgment.

It is not apparent from the deed in question that a proper officer of a Mexican court of record, or the mayor or chief magistrate of any Mexican city, town or corporation acknowledged the deed. Under these circumstances, I am unable to conclude that the requirements of § 55-114 have been met.

The Uniform Recognition of Acknowledgments Act (Uniform Act), and its provisions may, however, provide the relief desired. See §§ 55-118.1 to -118.9, (Article 2.1, Chapter 6, Title 55). Section 55-118.1 provides as follows:

"For the purposes of this article, 'notarial acts' means acts which the laws and regulations of this State authorize notaries public of this State to perform, including . . . taking proof of execution and acknowledgments of instruments, and attesting documents. Notarial acts may be performed outside this State for use in this State with the same effect as if performed by a notary public of this State by the following persons authorized pursuant to the laws and regulations of other governments: . . .:

"(1) A notary public authorized to perform notarial acts in the place in which the act is performed;

"(5) Any other person authorized to perform notarial acts in the place in which the act is performed."

Sections 55-118.2(b) and (b) (2) state that "[i]f the notarial act is performed by a person authorized by the laws or regulations of a foreign country to perform the act, there is sufficient proof of the authority of that person to act if: . . . [t]he official seal of the person performing the notarial act is affixed to the document. . . ."

It appears from the deed that an official who is a notary public or other person authorized to perform notarial acts in Mexico, did acknowledge the deed, and his official seals are affixed to the document. If the further requirements of §§ 55-118.3 and 55-118.4, pertaining to content and form, are met, then the acknowledgment in Spanish by the Mexican notary should be given the same effect as an acknowledgment performed by a duly qualified Virginia notary public.
Accordingly, the deed notarized in Mexico may be recorded, as long as the requirements of the Uniform Act are met.

DEEDS OF TRUST—Marginal Entry Release—Clerk must be convinced cancelled debt instrument presented is same debt instrument described in and secured by deed of trust.

April 7, 1978

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

You have asked whether you can refuse to make a marginal release of a deed of trust when the secured indebtedness is referred to as a “note” and the creditor has presented an indebtedness to you, entitled a “security agreement.” You say that the terms of the note described in the deed of trust coincide in all other respects with the terms of the security agreement which has been marked cancelled.

In order to effect a valid marginal entry release, either (1) the physical evidence of the debt secured by the lien, duly cancelled, must be produced before the clerk; or (2) an affidavit must be filed by the creditor or his agent to the effect that (a) the debt secured has been paid to the creditor, who was then entitled to receive the same, and (b) that such note or other evidence of the debt so secured by the lien has been cancelled and delivered to the person by whom it is paid. Section 55-66.3 of the Code of Virginia (1950), as amended.

This statute clearly intends that the clerk must be convinced when a cancelled debt instrument is presented by the creditor that it is the same debt instrument described in and secured by the deed of trust. Otherwise, a clerk is under no duty to effect a marginal entry release.

Therefore, it is my opinion that you may refuse to effect a marginal entry release of the deed of trust where doubt exists, as in this instance, that the evidence of indebtedness presented to you is in fact the same debt secured by the deed of trust. However, upon the proper filing by the creditor or his agent of an affidavit to the effect that the debt secured has been paid, as set forth above, you would then be under a duty to effect a marginal release.

DENTISTS—Advertising—May advertise routine dental services, subject to certain limitations.

ADVERTISING—Dentists And Lawyers—Bates case.

STATUTES—Advertising—Section 54-187(7) invalid insofar as it bars advertising of “routine dental services.”

November 16, 1977

THE HONORABLE GLENN B. MCCLANAN
Member, House of Delegates

This is in reply to your inquiry whether a dentist may lawfully advertise the
cost of "routine procedures" in the Commonwealth, and whether § 54-187(7) of
the Code of Virginia (1950), as amended, is constitutional.

Section 54-187(7) of the Code provides as follows:

"The Board may revoke or suspend the license of any person licensed
pursuant to article 3 (§ 54-168 et seq.) of this chapter for any one or more of
the following causes:

"7. Advertising professional services to the general public; . . ."

The United States Supreme Court recently addressed the issue of professional
advertising by attorneys in Bates v. The State Bar of Arizona, _ U.S. _, 96
S.Ct. 2691 (1977). It was held there that the right to freedom of speech granted
by the First Amendment of the United States Constitution includes the right of
an attorney to publish commercial newspaper advertisements which are truthful,
do not tend to deceive or mislead, do not contain claims of superiority or quality
of service, and relate solely to the availability, costs and terms of routine
professional services.

In my opinion, the principles expressed in the Bates decision are fully ap-
plicable to professional advertising by dentists. In response to your specific
inquiries, it is my opinion that § 54-187(7) is invalid insofar as it bars advertising
of "routine dental services," and that a dentist in the Commonwealth may
publish newspaper advertisements relating to "routine dental services" subject
to the limitations discussed above.

DISTRICT COURTS—Committee On District Courts May Not Adopt Policy
Separating Into Halves The Per Diem Paid To Substitute Judges Under §
16.1-69.44.

DEFINITIONS—“Per Diem”—Defined generally and in relation to § 16.1-
69.44.

JUDGES—Substitute Judges Must Be Paid Full Per Diem, Whether They
Provide Full Or Partial Day’s Service.

June 14, 1978

THE HONORABLE ROBERT N. BALDWIN
Executive Secretary
Supreme Court of Virginia

You ask whether the Committee on District Courts may adopt a policy which
separates into halves the per diem paid to substitute judges under § 16.1-69.44 of
the Code of Virginia (1950), as amended, and provide that the full time judge
determine and certify whether his substitute is entitled to a full per diem or a one-
half per diem depending on the amount of service rendered on a given day.

Section 16.1-69.44 provides, in part, as follows:

"Each substitute judge of a district court shall receive for his services a per
diem compensation equivalent to one twenty-fifth of the monthly salary
paid by the State to a full-time district judge except when such judge sits
pursuant to the provisions of Title 37.1 in which case compensation shall be
limited to that provided in § 37.1-89."
Generally, per diem is defined as "by the day" or as "an allowance of so much per day." *Black's Law Dictionary* 1293 (4th ed. 1968). There is nothing in the language of § 16.1-69.44 to indicate that the normal construction of per diem should not be effectuated. In fact, the legislative intent that a substitute judge should receive the full per diem rate regardless of the amount of services he provides on a given day is indicated by the exception set forth for situations involving Title 37.1. Section 37.1-89 allows a fee of twenty-five dollars plus necessary mileage for each preliminary hearing and each commitment hearing conducted by a substitute judge pursuant to the provisions of §§ 37.1-67.1 through 37.1-67.4. As this is the only time that the general compensatory portion of § 16.1-69.44 is not applicable, it seems clear that the legislature would have set forth other exceptions, such as the half-day limitation of which you inquire, if it had been so inclined.

Accordingly, it is my opinion that § 16.1-69.44 by its use of the mandatory "shall" requires a full per diem compensation to a substitute judge when he provides services to the court, whether he presides for an entire day or for merely one case.

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DIVORCE—Circuit Court May Transfer Spouses's Request For Lump Sum Payment To Appropriate Juvenile And Domestic Relations District Court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Divorce—Juvenile courts have no power to consider suits for divorce but may become involved in support matters.

MARRIAGE—Circuit Court Has Exclusive Jurisdiction Of Suits To Annul Marriages And For Divorces.

SUPPORT ACT—Authority Of Courts Over Support Matters In Divorce Cases.

SUPPORT ACT—Order Of Juvenile And Domestic Relations District Court On Support Matters, Subject To Appeal.

April 11, 1978

THE HONORABLE ROY B. WILLETT, JUDGE
Roanoke County Juvenile and Domestic Relations District Court
Twenty-third Judicial District

You have asked whether in a divorce case a circuit court may transfer a spouse's request for a lump sum payment to the appropriate juvenile and domestic relations district court, and if so, whether that request must be made in the original bill of complaint. It is my opinion that the circuit court has authority to make such a transfer. Further, the request may be made at any time before or, under some circumstances, after the entry of a final divorce decree.

*Authority of Courts Over Support Matters in Divorce Cases*

The circuit court has exclusive jurisdiction of suits to annul marriages and for divorces. See § 20-96 of the Code of Virginia (1950), as amended. It has the power to enter decrees concerning spousal support and maintenance, and is expressly authorized to award, among other things, a lump sum payment. See § 20-107.
Though the juvenile courts have no power to consider suits for divorce, they may become involved in spousal support and maintenance matters during the pendency of such suit, and after the circuit court has entered its final decree of divorce. See § 20-79(c). These courts are “particularly well equipped to deal with such support matters.” See Werner v. Commonwealth and Werner, 212 Va. 623, 186 S.E.2d 76 (1972).

During the Pendency of the Divorce Proceeding

Section 20-79(c) provides that, in any suit for divorce or separate maintenance, the circuit court may, on joint motion of the parties, transfer to the juvenile court its power to enter an order settling respective marital property interests. The juvenile court may order periodic payments, or a lump sum payment, or both.

After the Final Decree in the Divorce Proceeding

Section 20-79(c) provides that after the entry of a final divorce decree the court may transfer to the juvenile and domestic relations district court any other matters pertaining to support and maintenance for the spouse. Among the matters that may be transferred are those specified in § 20-109, i.e., whether support and maintenance should increase, decrease, or cease, as circumstances may make proper. It is my opinion that the juvenile court has the authority, if it finds that circumstances have changed, to award a lump sum payment in addition to, or in lieu of, periodic payments for maintenance and support previously awarded. See generally Thomas v. Thomas, 217 Va. 502, 229 S.E.2d 887 (1976); Report of the Attorney General (1972-1973) at 79.

Any order of the juvenile and domestic relations district court relating to matters of support and maintenance of the spouse would of course be subject to appeal. See §§ 20-74 and 20-79(c).

DIVORCE—Order Granting Temporary Alimony And Support Money Should Be Docketed In Judgment Lien Docket Book.

CLERKS—Orders For Temporary Maintenance And Support Should Be Docketed Automatically.

LIENS—Court’s Designation Will Control Whether And When Order Granting Temporary Alimony And Support Is Lien Upon Obligor’s Real Estate.

May 17, 1978

THE HONORABLE ELIZABETH W. STOKES, CLERK
Circuit Court of Roanoke County

You have asked several questions about docketing orders for temporary support and maintenance entered in divorce matters.

1. You first ask whether the recodification of § 8-343 of the Code of Virginia (1950), as amended, to § 8.01-460 affects a previous opinion to The Honorable Robert C. Wrenn, dated August 6, 1976, and found in the Report of the Attorney General (1976-77) at page 64. In that opinion Mr. Wrenn asked whether an order entered in a divorce suit granting temporary alimony and support money should be docketed, or whether only the final order should be docketed. The answer was that the order granting temporary alimony and support should
be docketed. The opinion referred to § 8-343, which provided that a decree requiring the payment of money had the effect of a judgment, and to § 8-386, which provided that a judgment imposed a lien on real estate from the time the judgment was recorded. The opinion also referred to the case of Isaacs v. Isaacs, 117 Va. 730, 86 S.E. 105 (1915), which held that a temporary decree for alimony may establish a lien from the date of the temporary decree, when it is subsequently made permanent.

Section 8-343 and § 8-386 have been recodified as § 8.01-426 and § 8.01-458, respectively, without modification. Section 8.01-460 is a recodification of § 8-388, not § 8-343, and does include some modifications. Section 8.01-460 omits language in § 8-388 which stated that "the court may provide that such payments shall not be a lien on the real estate of the person required to make such payments." Section 8.01-460 also provides for an additional lien which may arise from a subsequent order adjudicating the obligor delinquent in his payment of maintenance and support.

The revisers' note to § 8.01-460 indicates that the lien for maintenance and support arises only after the docketing of an order adjudicating the obligor delinquent in his payments. Nevertheless, the language of the statute is clear and unambiguous, leaving no room for such interpretation. Therefore, the revisers' note should be given no weight in construing the statute. The statute provides for two liens; one which will arise from the initial order granting maintenance and support, and another which may arise from an order adjudicating the obligor delinquent. Nevertheless, neither of the above changes to § 8-388 affects the previous opinion to Mr. Wrenn. An order entered in a divorce matter granting temporary maintenance and support should still be docketed.

2. You next ask whether such orders should be docketed automatically or only those designated by order or decree to be a lien upon real estate. Section 8.01-446 provides that "[t]he clerk of each court of every circuit, ... shall keep in his office, in a well-bound book, a judgment docket, in which he shall docket, without delay, any judgment for money rendered in his court." It is, therefore, my opinion that all orders for temporary maintenance and support should be docketed automatically.

3. You further ask whether such an order automatically becomes a lien when docketed, or whether it must be so designated by the court. Section 8.01-460 provides that such an order "shall be a lien upon such real estate of the obligor as the court shall, from time to time, designate by order or decree." (Emphasis added.) The court's designation, then, will control whether and when the order is a lien upon the obligor's real estate.

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DOG LAWS—Enacted In One Locality Not Effective Within Boundaries Of Another Jurisdiction—Dog owner who resides in town not required to purchase county license.

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1 In Shenandoah Lime Co. et al. v. Governor of Virginia et al., 115 Va. 865, 870, 80 S.E. 753, 754, (1915), it was stated: "It is only where the true meaning of the language used in a statute is doubtful or so obscure that the meaning of the legislature cannot be determined by giving the words used their ordinary and natural signification, that resort can be had to the journals or other extraneous sources of information for aid in arriving at the true meaning of the language used in the statute."
COUNTIES, CITIES AND TOWNS — Authority — Statute permits joint exercise of powers by political subdivisions — Dog laws.

COUNTIES, CITIES AND TOWNS — County Dog Ordinance Not Effective Within Incorporated Town Without Regard To Whether Agreement Has Been Consummated To Exercise Powers Jointly.

COUNTIES, CITIES AND TOWNS — Dog Laws — Town and county agree to exercise their powers jointly; must enact concurrent ordinances.

COUNTIES, CITIES AND TOWNS — Dog Ordinance — Each local jurisdiction shall appoint dog warden (duties assigned by statute); impose annual license tax on ownership of dogs.

DEFINITIONS — “Local Jurisdiction” As Used In Dog Laws — Counties, cities and towns.

DEFINITIONS — “Local Jurisdiction” Synonymous With “Local Political Subdivisions” — Counties, cities and towns.

ORDINANCES — Dog Laws — Dog warden; license tax — If town and county agree to exercise their powers jointly, they must enact concurrent ordinances.

TOWNS — Dog Warden Must Be Appointed And License Tax Imposed Without Regard To Whether County May Have Enacted Such Ordinance.

TOWNS — Dog Warden Of Another Jurisdiction May Be Employed To Enforce Town’s Dog Laws.

TOWNS — Political Subdivisions Of Commonwealth; Local Jurisdictions Within Meaning Of Dog Laws — Not territorially exclusive of counties in which located.

TREASURERS — Town Within County Cannot Contract With County Treasurer For Collection Of Town’s Dog License Taxes Except Under Agreement To Exercise Powers Jointly.

September 13, 1977

THE HONORABLE EARL E. BELL
Member, House of Delegates

This is in reply to your letter regarding the “Virginia Dog Laws of 1976” codified as Title 29, Chapter 9.2, of the Code of Virginia (1950), as amended. You request my opinion in regard to the following questions:

“1. What is a ‘local jurisdiction’ as used in § 29-213.8 and elsewhere in this Chapter?
“2. Must towns appoint a dog warden and impose a license tax as described in §§ 29-213.8 and -213.11?
“3. If a county has adopted a dog ordinance based on Chapter 9.2 and a town within the county has not done so, is the county ordinance effective within the town?
“4. If a town within a county which has imposed a license tax, also imposes a license tax on dogs, can it contract with the county treasurer for the collection of its license taxes?
5. If a county and town within it have imposed the license tax, must owners of dogs who reside in towns purchase both town and county dog licenses?

I will respond to your questions seriatim.

1. Section 29-213.8 provides that the governing body of "each local jurisdiction" shall appoint a dog warden whose duties are assigned by that statute. Section 29-213.11 provides that the governing body of "each local jurisdiction" shall impose by ordinance an annual license tax on the ownership of dogs within that jurisdiction. I am of the opinion that the term "local jurisdiction" is synonymous with the term local political subdivision. The local political subdivisions of the Commonwealth of Virginia are her counties, cities, and towns, which are created by general law and special acts of the General Assembly. See Article VII, Section 2, of the Constitution of Virginia (1971). Therefore, I am of the opinion that the term "local jurisdiction," of the "Virginia Dog Laws of 1976" refers to the counties, cities and towns of the Commonwealth.

2. Towns are political subdivisions of the Commonwealth, and thus are local jurisdictions within the meaning of §§ 29-213.8 and -213.11. Towns are not, however, territorially exclusive of the counties in which they are located. For county-wide purposes, towns are an integral part of a county, subject to the jurisdiction of county authorities and to taxation for county purposes. See Nexsen v. Board of Supervisors, 142 Va. 313, 128 S.E. 570 (1925). For example, county jurisdiction applies to all county-wide functions such as elections. Towns are given priority in such matters as levying consumer utility taxes, business license taxes, and selling automobile license tags within their boundaries. See Virginia Municipal League, Virginia Association of Counties and the Institute of Government, The Virginia Local Legislator 23 (1972). The nature of a governmental service as a county-wide function must be determined by the General Assembly in the general law or special act which authorizes a local jurisdiction to perform that service. Such legislation, delegating power to a local jurisdiction to perform a governmental service, will designate which localities may exercise that power. The Virginia Dog Laws of 1976 state that each local jurisdiction shall create the position of dog warden and impose an annual license tax on the ownership of dogs. See §§ 29-213.8 and -213.11. This statutory language indicates that regulations governing the ownership of dogs do not serve a county-wide purpose but rather serve only the purposes of each separate political subdivision within which they are enacted. I therefore conclude that towns must appoint a dog warden and impose a license tax without regard to whether a county may have enacted such an ordinance.

Section 29-213.8 provides, however, that the governing body of a local jurisdiction in which a dog warden has been appointed may contract with another local jurisdiction for enforcement of the dog laws. This statute would permit a town to employ the dog warden of another jurisdiction to enforce its dog laws.

In addition, § 15.1-21(a) provides:

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

This statute permits the joint exercise of powers by political subdivisions. If each political subdivision has the authority to exercise certain powers independently, they may jointly conduct such activities. See Opinions to the
Honorble Thomas B. Inge, Jr., Commonwealth’s Attorney for Lunenburg County, dated September 21, 1973, and found in Report of the Attorney General (1973-1974) at 91; the Honorble John Alexander, Commonwealth’s Attorney for Fauquier County, dated May 25, 1973, and found in Report of the Attorney General (1972-1973) at 126; and the Honorble Curtis A. Sumpter, Commonwealth’s Attorney for Floyd County, dated April 18, 1972, and found in Report of the Attorney General (1971-1972) at 108. Since each local jurisdiction is authorized to enact regulations and each possesses the power to appoint a dog warden and impose a license tax on the ownership of dogs, I am of the opinion that a locality may enter into an agreement with another jurisdiction or jurisdictions to conduct these activities jointly.

Should such an agreement be consummated, the jurisdictions must follow the procedures established by §15.1-21(b), (c) and (d). The local jurisdictions which have entered into an agreement to exercise their powers jointly may provide that one individual be appointed dog warden to serve both jurisdictions, and that the treasurer of one local jurisdiction would possess authority to collect license taxes. See §15.1-21(d) (1).

3. The dog laws enacted in one locality are not effective within the boundaries of another jurisdiction. Each local jurisdiction possesses independent authority to enact ordinances to govern the ownership of dogs. One political subdivision may not surrender its authority to enact legislation to another, and no local political subdivision may require, without approval by the General Assembly, that its ordinance be effective beyond its boundaries. Only the General Assembly may enact legislation to permit the ordinance of one local jurisdiction to be effective within the boundaries of another.

If a town and county agree to exercise their powers jointly, they must enact concurrent ordinances and administer a joint program regulating the ownership of dogs.

4. I am of the opinion that a town may not contract with a county treasurer for the collection of license taxes, except under an agreement to exercise powers jointly. As indicated in my response to your second question, such an agreement could specify that all license taxes would be collected by the county treasurer.

5. Since a county dog ordinance may not be effective within an incorporated town, a dog owner who resides in such a town is not required to purchase a license from the county. This conclusion is applicable without regard to whether an agreement has been consummated between the town and county.

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DOG LAWS—License Tax Funds—Kept in separate account means appropriate bookkeeping entry, not separate bank account.

TAXATION—Dog License Tax Funds—Separate account maintained within general fund meets requirement of §29-213.31.

September 13, 1977

The Honorable Roy W. Collins
Treasurer of Louisa County

This is in response to your inquiry pertaining to the meaning of certain language used in the recently enacted Virginia Dog Laws Act. The terminology in question is found in §29-213.31 of the Code of Virginia (1950), as amended in the 1977 Session of the General Assembly:
"The treasurer of each local jurisdiction shall keep all money collected by him for dog license taxes in a separate account from all other funds collected by him." [Emphasis added.]

You ask whether the Act requires each jurisdiction to maintain a separate bank account for this tax money or whether a separate account maintained within the general fund itself will meet the requirements of the above-quoted section.

Construction of the statute must proceed by giving the words used their plain and ordinary meaning. The language used is "separate account," not "separate bank account." Use of the latter terminology would require the establishment of a separate bank account for the deposit of monies collected in payment of dog license taxes. The absence of the word "bank" indicates that the General Assembly intended to require only separate bookkeeping entries be made by the Treasurer, so that the manner in which such funds were used would be traceable in case an audit or similar function had to be performed. The purpose of the separate account requirement is to guarantee that the State can apprise itself whether tax monies collected are used as § 29-213.31 specifies. This purpose is met as adequately by an appropriate bookkeeping entry as by establishing a separate bank account.

Accordingly, a separate account maintained within the general fund meets, in my opinion, the requirement of § 29-213.31.

DRUGS—License To Receive, Possess And Test Illegal Drugs—Issued to Bureau of Forensic Science, may not be used by another section.

CONSOLIDATED LABORATORY SERVICES—Application To Court To Obtain Controlled Substances For Research And Training.

CONSOLIDATED LABORATORY SERVICES—Marijuana—Not authorized to receive and analyze samples submitted by private individuals.

CONSOLIDATED LABORATORY SERVICES—Testing Of Non-evidentiary Marijuana For Paraquat At Request Of Health Department.

DRUGS—Commonwealth Cannot Provide With Tax Funds A Quality Assurance Program For Distributors And Users Of Controlled Substances.

EVIDENCE—Examination Of Marijuana For Paraquat At Time Evidence Submitted For Normal Scientific Analysis.

HEALTH DEPARTMENT—Testing By Consolidated Laboratory Services Of Non-evidentiary Marijuana For Paraquat—To apprise public in general of inherent danger attributed to Paraquat-contaminated marijuana.

June 20, 1978

THE HONORABLE A. W. TIEDEMANN, JR., PhD.
Director, Division of Consolidated Laboratory Services

You have asked whether the license from the Drug Enforcement Administration allows another section of the Division of Consolidated Laboratory Services, besides the Bureau of Forensic Science, to receive, possess and test illegal drugs.
Section 54-524.47:2(b) of the Code of Virginia (1950), as amended, and federal regulations restrict the possession of controlled substances to the enumerated registrant. The controlled substances registration certificates from the Virginia Board of Pharmacy and the Drug Enforcement Administration, which you enclosed in your letter, are issued only to the Bureau of Forensic Science. Therefore, at this time, the Bureau of Forensic Science is the only laboratory registered to handle controlled substances. This does not preclude another section in the Division of Consolidated Laboratory Services from applying for and obtaining registrations from the Board of Pharmacy and the Drug Enforcement Administration.

You also inquired whether § 18.2-253 permits the Division of Consolidated Laboratory Services to obtain and test non-evidentiary marijuana for Paraquat at the request of the Health Department.

Section 2.1-426 provides for "laboratory services, research and scientific investigations for agencies of the Commonwealth." Further, § 18.2-253 establishes a mechanism for the Division of Consolidated Laboratory Services, upon written application to the court, to obtain controlled substances for research and training. Another agency of the Commonwealth could request that you make an application to the court and obtain the non-evidentiary marijuana for research in determining the presence of Paraquat. There is no statutory prohibition from inquiring of State and local law enforcement agencies as to the existence of such materials. In the interest of security and accountability of the controlled substances, a separate court order for every unit of marijuana would be required from each locality, which granted the request for such materials. The primary function of the Bureau of Forensic Science, mandated by § 2.1-429.1, however, is the responsibility of providing forensic laboratory services to law enforcement agencies throughout the Commonwealth.

Your next inquiry proposes an examination for Paraquat at the time the evidence is submitted for normal scientific analysis. The Paraquat test would be completed before returning the marijuana to the various jurisdictions. This procedure is feasible, if the sample analyzed is sufficiently large so as not to be depleted in the Paraquat analysis. Since some evidence will be consumed in this additional scientific testing, the permission of the submitting jurisdiction should be secured.

Lastly, you ask whether the Commonwealth can provide with tax funds a Quality Assurance Program for distributors and users of controlled substances. Section 2.1-426 limits the Division of Consolidated Laboratory Services to providing services to agencies of the Commonwealth. Accordingly, the Division of Consolidated Laboratory Services is not authorized to receive and analyze samples submitted by private individuals. The purpose in testing for Paraquat would be to apprise the public in general, through the Department of Health, of the inherent danger attributed to Paraquat-contaminated marijuana.

DRUGS—Physician—May dispense drugs under certain circumstances without license to do so issued by Board of Pharmacy.

PHARMACY—Board May Grant Physician License To Dispense Drugs Only If Physician Will Serve Persons To Whom Pharmaceutical Service Is Not Otherwise Reasonably Available.

STATUTES—In Pari Materia Statutes Must Be Construed Together.
This is in reply to your request for my opinion whether a licensed physician may dispense drugs without a license issued by the State Board of Pharmacy.

The Drug Control Act, which is codified as Chapter 15.1 of Title 54 of the Code of Virginia (1950), as amended, is a comprehensive regulatory program concerning the manufacture, sale, and distribution of controlled substances. That Act provides for, among other things, licensure requirements, and registration and reporting requirements on controlled substances.

Two statutes are applicable to your inquiry. Section 54-524.34:1 provides, in pertinent part, as follows:

"For good cause shown, the Board may grant a license to any physician licensed under the laws of Virginia which license shall authorize such physician to dispense drugs to persons to whom a pharmaceutical service is not reasonably available . . . ."

Section 54-524.53 provides, in pertinent part, as follows:

"This chapter shall not be construed to interfere with any legally qualified practitioner of medicine . . . who is not the proprietor of a store for the dispensing or retailing of drugs, or who is not in the employ of such a proprietor in the compounding of his own prescriptions or the purchase and possession of such drugs and medicines as he may require, or to prevent him from administering or supplying to his patients such medicines as he may deem proper, or from making a charge for such medicines as are not sold to his patients for his own convenience or for the purpose of supplementing his income . . . provided that nothing herein shall be construed to exempt any such person from the registration requirements of §§ 54-524.47:2 or 54-524.47:3 or the record requirement of § 54-524.56."

When the foregoing statutes are construed together, as statutes in pari materia must be, it becomes evident that a physician may dispense drugs under certain circumstances without a license to do so issued by the Board of Pharmacy. He may supply his patients with such medicines as he may deem proper. If he is not licensed by the Board, however, he may not charge for such drugs if they are sold for his convenience or for the purpose of supplementing his income. If the physician intends to sell drugs for his convenience or to supplement his income, he may do so only if he receives a license from the Board to do so, and the Board may grant him a license only upon a determination by it that the physician will serve persons to whom a pharmaceutical service is not otherwise reasonably available.

ELECTIONS—City Council—Proper time for holding election for vacancy in Council.

CHARTERS—Elections—Charter section setting time election for City Council held—General law, § 24.1-76, prevails.

ELECTIONS—Vacancy Occurred Within 120 Days Of May 2, 1978 Election—
Individual appointed by City Council should serve remainder of unexpired term.

March 1, 1978

The Honorable Alson H. Smith, Jr.
Member, House of Delegates

This is in reply to your letter of February 27, 1978, concerning the proper time for the holding of an election for a vacancy in the Council of the City of Winchester. I understand that the vacancy occurred on February 15, 1978, and the next general election for Council members is May 2, 1978.

The Charter of the City of Winchester, Chapter 39 [1932] Acts of Assembly 23, provides that:

"Vacancies in the council shall be filled within thirty days from the unexpired term, by a majority vote of the remaining members, provided, however, that if the term of office to be filled does not expire for two years or more after the next regular election following such vacancy and such vacancy occurs in time to permit it, a qualified person shall be elected by the qualified voters of the ward in which the vacancy occurs, and shall from and after the date of the his qualification succeed such appointee and serve the unexpired term."


"Notwithstanding any provision of law or charter to the contrary, no such election shall be held if the general election at which it is to be called is scheduled within sixty days of the end of the term of the office to be filled. No election previously required to be held subsequent to January one, nineteen hundred seventy-seven, to fill an unexpired term which ends less than sixty days following such election shall be held. When the vacancy has been filled by an appointment by a city or town council, such election shall be held at the next ensuing regularly scheduled general election for that office, or, if the vacancy occurred within one hundred twenty days of such regularly scheduled general election, at the second such ensuing election; and, when a vacancy in any governing body has been filled by the remaining members thereof, no such election shall be held if the general election at which it is to be called is scheduled in the year in which the term expires."

(Emphasis added.)

I am of the opinion that § 24.1-76 is controlling in this situation. I am also enclosing a prior opinion of this Office to the Honorable William T. Parker, Member, House of Delegates, dated March 31, 1977, and found in Report of the Attorney General (1976-1977) at 66, which reached the same result.

Section 24.1-76 provides that elections for vacancies in a position on a governing body may only be held at the next ensuing regularly scheduled general election for the office in which the vacancy occurred, unless the vacancy occurred within 120 days of such regularly scheduled general election. In the case of a vacancy occurring within 120 days of the next regularly scheduled general election for that office, the earliest an election can be held is the second ensuing election for that office.

The next ensuing regularly scheduled general election for City Council election for Winchester is scheduled for May 2, 1978; the second ensuing election to fill
that office is scheduled for May 6, 1980. Since the vacancy has occurred within 120 days of the May 2, 1978 election, an election to fill that vacancy cannot be held until 1980. Since § 24.1-76, however, further provides that "no such election shall be held if the general election [to fill that office] . . . is scheduled in the year in which the term expires," an election to fill the vacancy cannot be held in 1980, since the successor of the appointee will also be elected. I am thus of the opinion that the individual appointed by the City Council should serve the remainder of the unexpired term for which he is being appointed. He will serve until a successor is elected in the May 6, 1980 election, duly qualified and sworn into office on July 1, 1980, as provided by the City Charter.

ELECTIONS—Political Party Committee May Select A Nominee For Office Of Commonwealth's Attorney—Method of nomination—Special election.

ELECTIONS—State Law Does Not Strictly Control A Political Party.

August 2, 1977

THE HONORABLE ROBISON B. JAMES
Member, House of Delegates

This is in response to your recent request for an official opinion regarding the ability of a political party committee to make a nomination for a special election to fill a vacancy in the office of Commonwealth's Attorney of Henrico County. On July 1, 1977, the office became vacant by the resignation of the Commonwealth's Attorney. The vacancy will be filled by a special election to be held in November, 1977. An individual appointed by the Circuit Court now holds office pending such special election. Specifically, you have requested my opinion on two questions. First, whether the Henrico County Democratic Committee may select a nominee for the office of Commonwealth's Attorney. Second, if the party may nominate, whether there are any restrictions on the manner in which the party may make its nomination.

Your first inquiry is answered in the affirmative. Section 24.1-172 of the Code of Virginia (1950), as amended, provides, in pertinent part:

"Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy . . . ."

The party nominee for a special election should be certified to the State Board of Elections "at least sixty days before the election when it is a special election to be held at the same time as the general . . . election." See §§ 24.1-166 and 24.1-169. The special election for Commonwealth's Attorney of Henrico will be held at the same time as the general election, November 8, 1977. Accordingly, notice of the party's nominee must be certified to the State Board of Elections no later than September 9, 1977.

In response to your second inquiry, § 24.1-172 provides, in pertinent part:

"Each party shall have the power to make its own rules and regulations, call conventions to proclaim a platform or ratify a nomination, or for any other purpose, and perform all functions inherent in such organizations."
"Each party shall have the power to provide for the nomination of its candidates, and the nomination and election of its candidates for office in case of any vacancy, and the nomination and election of its State, county or city committee . . . ."

State law does not strictly control a political party. There is no statutory prohibition for a political party to use varying methods of nomination in the selection of its candidates. See Report of the Attorney General (1970-1971) at 126. A party can use any method available to it by law and by its party plan to select its nominees.

The only statutory restriction on the political party would be if it desired to make its nomination by the primary method. If this was the course it chose to nominate, then the expenses of the primary would be borne by the party committee and not by the local county or city, which is not required to pay the expenses of more than one primary and then only if such primary, for the general election in November, is held on the second Tuesday in June next proceeding such election. See §§ 24.1-174(a) and 24.1-181; H.Doc. 14 [1969] Acts of Assembly 88.

In summary, I am of the opinion that the manner in which a political party may make a nomination to fill a vacancy in a special election is to be determined by the rules and regulations of that party.

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**ELECTIONS—Proxy Votes Of Members Of Private, Nonstock Club.**

**CORPORATIONS—Nonstock—Proxy votes of members of Belle Haven Country Club, a private club.**

August 2, 1977

**HONORABLE JAMES M. THOMSON**

Member, House of Delegates

You have asked for my official opinion whether the articles of incorporation of the Belle Haven Country Club, a private club, were validly amended to provide that members may vote by proxy, where the amendment was itself passed by the proxy votes of several of the members.

According to the material which you have supplied relating to this question, it appears that the Belle Haven Country Club (hereafter referred to as "Club") is organized under the provisions of the Virginia Nonstock Corporation Act. §§ 13.1-201 to -296 of the Code of Virginia (1950), as amended. The original certificate of incorporation for the Club was issued by the State Corporation Commission on May 24, 1924. The original articles of incorporation were silent with respect to the manner in which a membership vote should be taken and there is no information as to what provisions relating to this question existed in the original bylaws. You have advised that in the early 1950's the Club's bylaws restricted voting to qualified members present in person. The 1975 bylaws provide that "voting shall be in person or by mail ballot as determined by the Board." For the purpose of this Opinion, it is assumed that the 1975 bylaws are current since none of a more recent date were submitted. Nothing in these bylaws explicitly proscribed the exercise of voting by proxy.

Section 13.1-217 of the Code, which has been in effect since 1956, provides in pertinent part:
"Members shall not be entitled to vote except as the right to vote shall be conferred by the articles of incorporation.

"A member entitled to vote may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact." Emphasis added.

Simply stated, the members of a nonstock corporation have the right to vote by proxy, unless the corporation's articles or bylaws provide otherwise. See Blue Ridge Property Owners v. Miller, 216 Va. 611, 221 S.E.2d 163 (1975); Oleck, Proxy Voting Power in Nonprofit Organizations, 14 Clev. Mar. L.Rev. 273 (1965).

In the instant case the Club’s members possessed by statute the right to vote by proxy, because neither the articles of incorporation nor the bylaws prohibited voting by proxy. Accordingly, it was not necessary for the Club’s articles to be amended to specifically provide for voting by proxy in order to give the members that right.

For these reasons, it is my opinion that proxy votes validly may be counted in determining whether the articles of incorporation of the Belle Haven Country Club may be amended to explicitly provide for proxy voting by the members.

ELECTIONS—Referendum—Return of county government to traditional form—When transition would take place; effect on terms of incumbent elected county officers.

CONFLICT OF LAWS—Constitutional Conflict—May be avoided if transition to traditional form of government takes place in a year in which current terms of office of all officers incumbent at time of referendum have expired.

CONSTITUTIONAL OFFICERS—Local Government May Alter Its Form Of Government, But Change May Not Reduce Term Of Office Of Incumbent Officeholder.

ELECTIONS—Change In Form Of Government—All officers whose election is provided for by general law stand for election following referendum.

COMMISSIONERS OF REVENUE—Office Implicitly Abolished By Adoption Of County Executive Form Of Government—Reestablished if county returns to traditional form of government.

TREASURERS—Office Implicitly Abolished By Adoption Of County Executive Form Of Government—Reestablished if county returns to traditional form of government.

October 26, 1977

THE HONORABLE JOHN N. LAMPROS
Commonwealth's Attorney for Roanoke County

This is in reply to your recent letter concerning a proposed change in the form of government of Roanoke County. The County is currently organized and
governed under the county executive form of government. Sections 15.1-588 to -621 of the Code of Virginia (1950), as amended. I am informed that a referendum will be placed upon the ballot at the November 8, 1977, general election seeking a return of the county government to the organizational structure known as the "traditional form." See §§ 15.1-37.4 to -130 and §§ 15.1-527 to -558. You inquire when the transition in the form of government from the county executive form to the traditional form would take place, and what effect the transition would have upon the terms of office of incumbent elected county officers, if the referendum question is approved.

Article VII, Section 4, of the Constitution of Virginia (1971), provides:

"There shall be elected by the qualified voters of each county and city a treasurer, a sheriff, an attorney for the Commonwealth, a clerk, who shall be clerk of the court in the office of which deeds are recorded, and a commissioner of revenue. The duties and compensation of such officers shall be prescribed by general law or special act.

"Regular elections for such officers shall be held on Tuesday after the first Monday in November. Such officers shall take office on the first day of the following January unless otherwise provided by law and shall hold their respective offices for the term of four years, except that the clerk shall hold office for eight years.

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

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

The third paragraph of Section 4 provides that a local government may alter its form of organization and government, but no such change may reduce the term of office of a person holding an office at the time of the election. This provision "is intended to protect an incumbent officeholder during his current term of office." II A. Howard Commentaries on the Constitution of Virginia 831 (1974).

This Office has previously held that this provision is applicable to county and city officers, including constitutional officers and members of local governing bodies. See Opinions to the Honorable Charles B. Phillips, Commonwealth's Attorney for the City of Salem, dated May 28, 1974, and to the Honorable C. Richard Cranwell, Member, House of Delegates, dated May 31, 1974, and found in Report of the Attorney General (1973-1974) at 146 and 160, respectively.

Section 15.1-664 permits a county which has enacted the county executive form of government to change to "some other form of county organization and government provided for by the general law of the State," including the traditional form, if the procedures required by §§ 15.1-582 to -587, insofar as
applicable, are followed. Section 15.1-667 provides:

“If in accordance with the provisions of § 15.1-664 the form of the county organization and government be changed from either the county executive form or the county manager form to some other form of county organization and government provided for by the provisions of general law, all officers of the county and the district whose election is provided for by general law shall be elected at the next succeeding regular November election, held at least sixty days after such change shall have been voted upon; all appointive officers shall be appointed by the appointing power provided for by general law; the terms of the officers so elected or appointed shall begin on the first day of January next succeeding, at which time the change of county organization and government shall become effective, and such officers shall hold office until their successors have been elected at the next regular election provided for such officers or have been appointed, as provided by general law, and have qualified.” (Emphasis added.)

The above-quoted statute would require that all officers whose election is provided for by general law stand for election following the referendum. No exception is made for any incumbent officers.

The terms of office of members of county boards of supervisors and constitutional officers are set by general law. Section 24.1-86 provides that a county sheriff, Commonwealth's attorney, treasurer, and a commissioner of the revenue shall be elected, to a four-year term beginning in January, at the general election in November, 1971, and every four years thereafter. The terms of office of the incumbent officers will expire in January, 1980. Section 24.1-87 provides that a clerk of the court of record for the county shall be elected to a term of office in November, 1975, and every eight years thereafter. The term of office of the incumbent clerk of the Circuit Court of Roanoke County will expire in January, 1984. Due to the realignment of magisterial districts after the 1976 annexation by the City of Roanoke of a portion of Roanoke County, the terms of office of the incumbent members of the board of supervisors will expire in January, 1978. See §§ 15.1-571.1 and 24.1-88(b)(iii).

This Office has previously ruled that any change in the form of a local government under the procedures required by §§ 15.1-582 to -587 which would conflict with the requirements of Article VII, Section 4, are either invalidated or amended mutatis mutandis by that constitutional provision. See Opinion to the Honorable Alfred C. Anderson, Treasurer of Roanoke County, and the Honorable Billy K. Muse, Commissioner of Revenue of Roanoke County, dated December 18, 1973, and found in Report of the Attorney General (1973-1974) at 98.

A constitutional conflict arises if the provisions of § 15.1-667, which require that an election of all officers whose election is provided for by general law be held at the next succeeding regular election after the referendum, would result in the reduction of the term of office of an incumbent officer. I am of the opinion that this conflict may only be avoided if the transition to the traditional form of government takes place in a year in which the current terms of office of all officers incumbent at the time of the referendum have expired.

The terms of office of members of the board of supervisors incumbent at the time of the referendum expire, as noted above, in January, 1978. Since the referendum will be held on November 8, 1977, the terms of office of these incumbent officers will not be reduced by the change of form of government. The terms of office of the sheriff and Commonwealth's attorney will expire in January, 1980. (The offices of commissioner of the revenue and treasurer were
explicitly abolished by the adoption of the county executive form of government. They will be reestablished if the county returns to the traditional form of government. See Opinions to Anderson and Muse, supra.) The term of office of the incumbent clerk of the Circuit Court of Roanoke County will not, however, expire until January, 1984. Therefore, should the voters of Roanoke County vote in the November, 1977, referendum to return the County to the traditional form of government, the election of county officers required by § 15.1-667 may not take place until November, 1983, in order to avoid reducing the term of office of any of these incumbent elected officers. Although a delay in the transition will result in a temporary frustration of the public will, this Office has held that such a delay is justified if necessary to satisfy the requirements of Article VII, Section 4. See Opinions to Anderson and Muse, supra. Elections may be held at that time for the board of supervisors, and all those constitutional officers required by Article VII, Section 4. The officers elected in November, 1983, may take office on January 1, 1984, and the transition to the traditional form of government may be made on that date.

ELECTIONS—Special Election—Residents of city of second class not entitled to vote for removal of county courthouse.

COUNTIES AND CITIES—Relationship Of In Commonwealth—Cities of first class completely independent of county; cities of second class, although essentially independent, share with adjoining county same circuit court and certain officers.

ELECTIONS—Procedures To Be Followed For Removal Of County Courthouse.

November 7, 1977

THE HONORABLE PAUL E. EBERT
Commonwealth's Attorney for Prince William County

This is in reply to your inquiry requesting my opinion whether residents of a city of the second class are entitled to vote in a special election for the removal of the county courthouse.

Section 15.1-559 of the Code of Virginia (1950), as amended, establishes the procedures to be followed for such a removal. That statute provides in pertinent part:

"Whenever one third of the qualified voters of any county shall petition the circuit court of such county, or whenever the governing body of any county by resolution duly adopted request the circuit court of such county for an election in such county on the question of the removal of the courthouse to one or more places specified in the petition or resolution which shall also state the amount to be appropriated by the board of supervisors for the purchase of land, unless the same shall be donated, and for the erection of the necessary buildings and improvements at the new location, such court shall issue a writ of election in accordance with § 24.1-165, which shall fix the day of holding such election directed to the sheriff of the county whose duty it shall be forthwith to post a notice of the election at each voting precinct in the county. He shall also give notice to the officers
charged with the duty of conducting other elections in the county." (Emphasis added.)

Note that § 15.1-559 authorizes only county voters to petition for a referendum to remove the courthouse. Thus the determination of an answer to your inquiry requires that I review the relationship of counties and cities in the Commonwealth.

A fundamental feature of Virginia local government is city-county separation. Virginia cities are autonomous political subdivisions, governmentally independent of the county, or counties, in which they are geographically located. Cities of the first class are completely independent of any county, but cities of the second class, although essentially independent, share with the adjoining county the same circuit court and may share certain attendant officers. C. Bain A Body Incorporate: The Evolution of City-County Separation in Virginia 26 (1967).

When a town reaches a population of at least 5,000 persons, it may be declared a city of the second class by the circuit court of the county in which it is situated. See § 15.1-982. Status as a city of the second class indicates that the municipality has met the minimum requirements for independent city status. Should the city reach a population of 10,000 it may be declared a city of the first class. See § 15.1-1011. Because of its limited population, a city of the second class would find it difficult to assume all the responsibilities of an independent city. For that reason, the Code of Virginia permits independent cities of the second class to share certain officers and services with the county in which they are located. An example may be found in § 15.1-997. That statute provides that when a municipality is declared to be a city of the second class,

"... such city shall at once be, become and continue in every respect within the jurisdiction of the circuit court of the county wherein it is situated and there shall be one and the same circuit court for such county and city. There shall be for such county and city but one courthouse and county clerk's office and the county clerk of the county shall continue in all respects as the clerk of such circuit court. Such court shall continue to be known as the circuit court of the county wherein such city is located; and such court shall have the same jurisdiction in such cities, in all respects, as corporation courts have in other cities, insofar as such jurisdiction is applicable to cities of the second class."

Pursuant to § 15.1-997, the city and county utilize the services of the same judge, clerk of the court and attorney for the Commonwealth, and share in the expenses of providing this service. Residents of both the city and county vote for the clerk of the circuit court and the attorney for the Commonwealth. In all other respects, however, cities of the second class are as independent of other county controls as is a city of the first class. Except for the sharing of the court, they too are autonomous political subdivisions of the State. C. Bain, supra, at 27.

Although residents of the second-class city are subject to the jurisdiction of the circuit court, and share the courthouse facility with the county, they are not county residents. There remain activities in the courthouse, such as meetings of the board of supervisors, for which city residents are not subject to county jurisdiction. Thus, the courthouse remains essentially a county facility, except for those specific activities in which both the county and city may participate.

Since § 15.1-559 provides that only qualified voters of the county may petition for removal of the courthouse, the signatures of residents of an independent city
may not properly be counted on a petition seeking a referendum on the issue. In addition, notice of the election is required to be posted in each voting precinct of the county and the appropriate county officers notified of the election. No similar notice need be provided to residents of an adjacent independent city. The election held pursuant to § 15.1-559 is conducted at county voting precincts. Polling places within the boundaries of an independent city are not considered to be within a county.

I am therefore of the opinion that residents of a second class city are not county residents by virtue of their being subject to the jurisdiction of the county circuit court. They are thus not qualified to vote in a special election held pursuant to § 15.1-559 for the removal of a courthouse.

ELECTIONS—Spouse Of Candidate May Serve As Officer Of Election When Candidate’s Name Will Be On Ballot.

September 29, 1977

THE HONORABLE VIRGIL HAYWOOD, SECRETARY
Chesapeake Electoral Board

This is in reply to your letter of September 20, 1977, requesting my opinion on the following question:

"[W]hether or not the spouse of a candidate may serve as an officer of the election at a time when the candidate’s name will be on the ballot."

I know of no provisions of the Code of Virginia which would prohibit a candidate’s spouse from serving as an officer of election provided the provisions of §§ 24.1-105 and -106 of the Code of Virginia (1950), as amended, are met, regarding appointment and qualification. The officer of election cannot, of course, use the office in any manner to favor the spouse who is a candidate. As an example, it is the duty of an officer of election to assist physically or educationally handicapped voters in the preparation of the ballot. See Va. Code § 24.1-132. Section 24.1-267 deems it a misdemeanor for any person to directly or indirectly advise, counsel or assist any elector as to how he should vote. Such prohibition is applicable to any officer of election, regardless of whether the candidate’s spouse is such an officer. See also Opinion to the Honorable John N. Dalton, Member, House of Delegates, dated August 31, 1971, and found in Report of the Attorney General (1971-1972) at 462, where this Office responded in like manner to a similar inquiry regarding an individual running for elective office whose spouse was secretary of the local electoral board.

Though, as indicated, there is not a conflict of interest, nor does the fact that the spouse of the candidate is an officer of election make such situation per se incompatible, the individuals involved should take all precautions to ensure that their actions are beyond question and reproach.

ELECTIONS—Validity Of Petition In Request For Referendum On Change In Form Of Government—Not in exact language of statute—Substantial compliance.
COUNTIES—Statutory Provisions For Organizational Structure Of Traditional Form Of County Government.

ELECTIONS—Special Election—Procedure for referendum on whether to change form of government of Roanoke County.

REFERENDUM—Petition Seeking Referendum On Whether Roanoke County Should Change From County Executive To Traditional Form Of Government—Wording on petition; substantial compliance with statute is sufficient.

October 26, 1977

THE HONORABLE C. RICHARD CRANWELL
Member, House of Delegates

This is in reply to your recent letter concerning a petition seeking a referendum on the question whether the form of government of Roanoke County should be changed to the "traditional form" of government.

The petition in question requests that a referendum be held:

"... on the question of changing the form of government for Roanoke County from the County Executive form back to the traditional form of government which existed in Roanoke County prior to the adoption of the County Executive form of government." (Emphasis added.)

Roanoke County is currently organized under the form of government known as the "county executive form," which is codified at §§ 15.1-588 to -621 of the Code of Virginia (1950), as amended. In 1973, however, the County appointed a county administrator. Your inquiry notes that "Roanoke County adopted the County Administrator Form of government by a resolution adopted by the County Board of Supervisors on June 12, 1973, and the position of County Administrator was filled by an additional resolution at the same meeting." You request my opinion whether this fact renders the language of the petition erroneous, and if so, what effect, if any, the erroneous wording would have on the validity of a referendum ordered pursuant thereto.

Section 15.1-664 provides that any county which adopts the county executive form of government may change to another form of county organization and government provided for by general law. The procedures for changing from one form of government to another are set forth in §§ 15.1-582 to -587. Section 15.1-583 provides, in pertinent part, that a referendum shall be held on this issue upon order entered by the circuit court of the county after receipt of a petition signed by ten percent of the qualified voters of the county.

The circuit court shall review the petition requesting a referendum on changing the form of county government to determine (1) if the petition is signed by ten percent of the qualified voters of the county, and (2) if the language of the petition requests a change in the form of county government as authorized by § 15.1-664. The Court, by entering its order of September 6, 1977, evidenced its satisfaction that the petition was signed by a sufficient number of voters. With respect to the second criterion above, it is not essential that the petition be couched in the exact language of the statute; a substantial compliance is sufficient. 26 Am.Jur.2d Elections § 189 at 17 (1966); Opinion to the Honorable Rhea F. Moore, Jr., Clerk, Circuit Court of Tazewell County, dated August 7, 1975, and found in Report of the Attorney General (1975-1976) at 124; Opinion to the Honorable Lawrence R. Ambrogi, Commonwealth's Attorney for
Frederick County, dated July 28, 1977, a copy of which is enclosed.

Six forms of county government and organization are authorized by the general law of Virginia. The oldest and most prevalent is that known as the "traditional form." Statutory provisions relating to the organizational structure of the traditional form of county government are found primarily in §§ 15.1-37.4 through -130 and §§ 15.1-527 through -558. Under the traditional form, the board of supervisors may, at its option, establish the position of county administrator. See § 15.1-115, et seq. Creation of the office of county administrator merely modifies the traditional form of county government; it does not change the county's form of government. I therefore conclude that the petition accurately reflects the facts upon which the request for a referendum is based.

Since the language of the petition to change Roanoke County's form of government back to the traditional form complies with the requirements imposed by § 15.1-583, I am of the opinion that the referendum question, as presented, is valid and your inquiry is thus answered in the negative.

ELECTIONS—Validity Of Petition Omitting Words "School Trustee" In Request For Referendum On Whether To Change Method Of Selecting County School Boards—Substantial compliance.

DEFINITIONS—"Special" Election.

ELECTIONS—Special Election—Procedure for referendum on whether to change method of selecting county school boards.

REFERENDUM—Petition To Circuit Court Requesting Referendum On Whether To Change Method Of Selecting County School Boards—Wording of ballots expressly provided, but not wording of petition.

July 28, 1977

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

This is in response to your recent inquiry regarding a petition filed with the Circuit Court of Frederick County requesting that a referendum be held to determine whether to change the method of selecting the County School Board. The petition requests that a "referendum be held at a Special Election on the following question:"

"Shall the present method of selecting the members of the County School Board be changed from appointment by the Electoral Board to appointment by the governing body of the County."

You have requested my opinion on the following question:

"May such a referendum be held on what the petitioners have asked for in the Petition in question and, if so, would such a referendum, in view of the wording of said Petition asking for a Special Election, have to be held at a Special Election or could it be submitted at a regular or Special Election as provided for by § 24.1-165 of the Code?"
Section 22-79.4 of the Code of Virginia (1950), as amended, provides, in pertinent part:

"Upon a petition filed with the circuit court of the county signed by a number of qualified voters of the county equal to fifteen per centum of the number of votes cast in the county in the preceding presidential election, asking that a referendum be held on the question of changing the method of selection of members of the county school board, the court shall, by order entered of record in accordance with § 24.1-165, require the regular election officials on the day fixed in such order, to open the polls and take the sense of the qualified voters of the county on the question submitted as herein provided. . . . The ballots used shall be printed as follows:

"‘Shall the present method of selecting the members of the county school board be changed from appointment by the School Trustee Electoral Board to appointment by the governing body of the county?’"

In response to your inquiry, § 22-79.4 provides that a petition requesting a referendum on changing the method of selecting county school boards should be submitted to the circuit court of the county. The circuit court, in turn, shall determine: (1) if the petition is signed by a number of qualified voters equal to 15% of the number of votes cast in the county in the preceding presidential election, and (2) if the petition asks that a referendum be held on the question of changing the method of selecting members to the county school board. If these conditions are met, the circuit court in accordance with § 24.1-165 shall require the holding of a special election. While there is no requirement in the statute regarding the precise wording of the petition, the statute, however, expressly provides that the ballots used shall be printed with the following question:

"‘Shall the present method of selecting the members of the county school board be changed from appointment by the School Trustee Electoral Board to appointment by the governing body of the county?’"

The petition submitted to the Circuit Court has failed to include the words "School Trustee." As this Office has previously ruled, however, the precise wording of the petition would not defeat a request for a referendum to change the method of selecting county school boards, provided: (1) the necessary signatures of qualified voters are submitted with the petition, and (2) it is clear that the intent of the petition is to ask for a referendum to be held on the question of changing the method of county school board selection. See Report of the Attorney General (1975-1976) at 124.

The Circuit Court must call a special election to be held within a reasonable period of time subsequent to the receipt of the request for the special election if the petition is found to be in proper order. Section 24.1-165 further provides, however:

"... No such special election shall be held unless it shall have been ordered at least sixty days prior to the date for which it is called. No such special election shall be held within the sixty days prior to a general or primary election."

A special election is defined in § 24.1-1(5)(c) to mean:

"... any election, other than a general or primary election, which is held pursuant to law to fill a vacancy in office or to submit to the qualified voters a measure or proposition for adoption or rejection, provided that a special
Accordingly, the Circuit Court may order the referendum to be placed on the ballot at a special election to be held on November 8th. The Court's order must be entered on or before September 9, 1977, since no election may be held unless ordered at least sixty days prior to the date for which it is called. No special election may be held within sixty days prior to the general election.

ELECTORAL BOARD—Compensation And Expenses For Secretary And Members Of Franklin County Electoral Board.

SALARIES—Secretary Of Electoral Board—If full-time employee, governing body may pay additional compensation but cannot be reimbursed from State treasury.

SALARIES—Statute By Use Of “Shall” Indicates Mandatory Intent.

August 5, 1977

THE HONORABLE WILLIAM NELSON ALEXANDER, II
Commonwealth's Attorney for Franklin County

This is in response to your recent inquiry regarding compensation and expenses for the Secretary and members of the Franklin County Electoral Board. You state that Franklin County has a population between twenty-five thousand and fifty thousand.

Section 24.1-31 of the Code of Virginia (1950), as amended, as it relates to a local electoral board provides, in pertinent part:

"The members of the electoral board, excluding the secretary, shall receive as annual compensation for their services a sum based on the population of the city or county in which they serve, which compensation shall be not more than the sum hereinafter prescribed.

* * *

"In counties or cities having a population of more than twenty-five thousand but not more than fifty thousand inhabitants, such compensation shall be seven hundred dollars." (Emphasis added.)

Regarding the compensation for a secretary of the electoral board, § 24.1-31 provides:

"The secretaries of the electoral boards shall receive as annual compensation for their services a sum based on the population of the city or county in which they serve, which compensation shall be not more than the sum hereinafter prescribed.

* * *

"In counties or cities having a population of more than twenty-five thousand but not more than fifty thousand inhabitants, such compensation shall be one thousand four hundred dollars." (Emphasis added.)
Additionally, § 24.1-31 provides for the following expenses for the secretary and members of an electoral board:

"The secretary of the board shall in addition to the compensation set forth herein be allowed his expenses not to exceed three hundred dollars in any one year. The counties and cities shall furnish the necessary postage and stationery, including a bound book for the minutes of its proceedings, for the use of the board.

"Each member of the electoral board shall receive from the county or city, respectively, the same mileage as is now paid to members of the General Assembly.

"Each member of the electoral board, including the secretary, before he is entitled to receive any amount hereunder shall make out a statement under oath of his claim for mileage, expenses and compensation and the statements, when so made out and found correct, shall be paid by the governing body of the county or city for which the board was appointed and for which the service was rendered or expense incurred. Such governing bodies shall be reimbursed annually for such sums from the State treasury.

"The governing body of any county or city may determine and pay to the secretary of the electoral board such additional allowance for expenses as it deems appropriate, and may determine and pay to the full-time secretary of the electoral board such additional compensation as they deem necessary, which additional expenses and compensation shall not be reimbursed from the State treasury."

Section 24.1-31, by the use of the phrase the "compensation shall be not more than the sum hereinafter prescribed," establishes the maximum compensation for members of the electoral board. The maximum compensation for a secretary of the board is also established by this section with two exceptions. In an opinion to the Honorable Ray L. Garland, Member, House of Delegates, dated July 19, 1974, and found in the Report of the Attorney General (1974-1975) at 167, this Office stated:

"The statute does allow a governing body of any county or city to supplement 1) the expenses of secretaries of the local electoral boards or 2) the compensation of a secretary of a local electoral board if such secretary is full time. Other than the above two exceptions, there is no authority for the county or city to supplement compensation of the members or part-time secretaries."

Section 24.1-31, in setting forth the specific compensation for secretaries and members of the electoral boards, also sets the minimum compensation. In counties and cities with a population of more than twenty-five but less than fifty thousand, such as Franklin County, the compensation for members of the electoral board "shall be seven hundred dollars." The compensation for the board secretary "shall be one thousand four hundred dollars." In the Garland Opinion, supra, this Office concluded that "Section 24.1-31 sets forth what the General Assembly feels should be the compensation for the duties that must be performed."

Thus, it is my opinion that the County of Franklin must compensate members of the Electoral Board seven hundred dollars for their services, plus expenses for mileage, provided the appropriate reports required by § 24.1-31 are submitted. There is no authority for the County to supplement or reduce the compensation of the Board members. I am also of the opinion that the Secretary of the Elec-
toral Board for Franklin County shall receive one thousand four hundred dollars as compensation, plus expenses not to exceed three hundred dollars. The governing body of Franklin County, however, may pay the Secretary of the Electoral Board such additional allowances for expenses as it deems appropriate. If the Secretary of the Electoral Board is a full-time employee, the governing body may also pay such additional compensation as they deem necessary. Section 24.1-31, however, provides that the additional expenses and compensation cannot be reimbursed from the State treasury.

EMPLOYEES—Aliens Who Cannot Document Their Eligibility For Employment In United States.

AMENDMENTS—Alien Employees—Effective date of § 40.1-11.1 is July 1, 1977, although certain of its provisions not operative until January 1, 1978.


COUNTIES, CITIES AND TOWNS—Alien Employees—Applicability of amended § 40.1-11.1 to Commonwealth and her political subdivisions.

DEFINITIONS—“Knowingly” Is Equivalent To “Wilfully.”

EMPLOYERS—Alien Employees—Statute places duty on those employing or referring aliens for employment to ensure that alien can provide required documentation—Applies to aliens seeking employment and those currently employed.

STATUTES—State Not Bound By Any Statute Unless In Express Terms Made To Extend To The State.

October 24, 1977

THE HONORABLE ROBERT F. BEARD, JR.
Acting Commissioner
Department of Labor and Industry

This is in response to your recent inquiries concerning § 40.1-11.1 of the Code of Virginia (1950), as amended, which, inter alia, prohibits the employment, continued employment and referral for employment of aliens who cannot document their eligibility for employment in the United States. Your questions are:

1. "Since the prohibitions of the law relate to employers who 'knowingly' employ illegal aliens and the applications that would reveal such information are not required before January 1, 1978, can enforcement action be taken prior to the January 1, 1978 date?

2. "Although the third paragraph of the bill . . . does specifically require State and local governments, when application forms are used, to include on their application a question asking prospective employees if they are legally eligible for employment, we cannot determine if the prohibitions and penalties of the bill apply to public employees and request your opinion of this matter."
3. "[D]oes the employer have the responsibility to question present employees to determine eligibility for continued employment?"

Section 40.1-11.1 provides as follows:

"It shall be unlawful and constitute a Class I misdemeanor for any employer or any person acting as an agent for an employer, or any person who, for a fee, refers an alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States for employment to an employer, or an officer, agent or representative of a labor organization to knowingly employ, continue to employ, or refer for employment any alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States.

"Permits issued by the United States Department of Justice or the United States Department of Labor authorizing an alien to work in the United States shall constitute proof of eligibility for employment.

"All employment application forms used by State and local governments and privately owned businesses operating in the Commonwealth on and after January one, nineteen hundred seventy-eight, shall ask prospective employees if they are legally eligible for employment in the United States.

"The provisions of this section shall not be deemed to require any employer to use employment application forms."

In essence, your first question asks for a determination of the effective date of § 40.1-11.1. The statute contains two basic provisions: (1) it shall be a Class I misdemeanor for certain persons to knowingly employ, continue to employ or refer for employment any alien who cannot provide documentation of eligibility for employment in the United States; and (2) employment application forms of employers on and after January 1, 1978, must ask prospective employees if they are legally eligible for employment in the United States. A statute becomes effective on the first day of the fourth month following the month of adjournment of the session of the General Assembly at which it was enacted, unless it is a general appropriation law, emergency legislation or unless a subsequent date has been specified. Article IV, Section 13, of the Constitution of Virginia (1971). It is clear that January 1, 1978, the date specified in § 40.1-11.1, refers only to the date on which application forms must contain the required question. The prohibition of the employment of illegal aliens is not dependent on the existence of certain application forms which, in fact, are not mandatory. Accordingly, I am of the opinion that § 40.1-11.1 became effective July 1, 1977 (the first day of the fourth month after adjournment of the 1977 General Assembly which adjourned sine die on March 4, 1977), although certain of its provisions do not become operative until January 1, 1978.

Your second inquiry concerns the applicability of § 40.1-11.1 to the Commonwealth and her political subdivisions. The Commonwealth is not bound by any statute unless the same is in express terms made to extend to the Commonwealth. See Reports of the Attorney General (1975-1976) at 400 and (1971-1972) at 103 and 106. Moreover, § 40.1-2.1 expressly provides that the provisions of Title 40.1 and any regulations adopted thereunder shall not apply to the State or any of her political subdivisions unless, and to the extent, coverage is so extended by specific regulation of the Commissioner of the Department of Labor and Industry or the Safety and Health Codes Commission.

In this instance only the third paragraph of § 40.1-11.1, which requires that application forms ask prospective employees whether they are legally eligible for employment, is made expressly applicable to the State and her political sub-
divisions. Therefore, that portion of § 40.1-11.1 is in conflict with the provisions of § 40.1-2.1 and is in derogation of established rules of statutory construction. Accordingly, I am of the opinion that the third paragraph of § 40.1-11.1 is applicable to the State and her political subdivisions. The remaining portion of § 40.1-11.1 prohibiting the employment and the referring for employment of aliens, however, will not be applicable to the State and her political subdivisions unless, and to the extent, it is made to so apply by a specific regulation of the Commissioner of Labor and Industry or the Safety and Health Codes Commission. See § 40.1-2.1.

Your final inquiry is whether employers have an affirmative duty to question employees regarding their eligibility for employment in the United States. Section 40.1-11.1 makes it unlawful to "knowingly" employ, continue to employ, or refer for employment an alien who cannot provide documentation that he or she is eligible for employment in the United States. "The word 'knowingly' is equivalent to the word 'wilfully.'" Good v. Commonwealth, 155 Va. 996, 1002, 154 S.E. 477, 479 (1930) (citation omitted). In Good, the Supreme Court of Virginia stated as follows:

"'The word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of the penal code. It does not require any knowledge of the unlawfulness of such act or omission.' "Id. at 1003, 154 S.E. at 479.

In order for an individual to be convicted of violating § 40.1-11.1 he must have knowledge that he has employed, continues to employ, or has referred for employment an "alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States." The statute, therefore, imposes a requirement on the persons affected thereby to ensure that any alien employed or referred for employment can provide such documentation. In this regard the statute provides that permits issued by the United States Department of Justice or Department of Labor shall satisfy the documentation requirement. Accordingly, I am of the opinion that § 40.1-11.1 places a duty upon those employing aliens or referring aliens for employment to ensure that the alien can provide the required documentation. This duty applies to aliens seeking employment as well as those currently employed.

EQUAL RIGHTS AMENDMENT—General Assembly Does Not Have Authority To Make Holding Of Statewide Referendum A Precondition To Its Voting On.

CONSTITUTION—Amendments—Mode of amending United States Constitution set forth in Article V.

CONSTITUTION—Equal Rights Amendment—If amendment passes, no legislation could be enacted or enforced by either legislative body that would violate amendment—Supremacy Clause.

CONSTITUTION—Equal Rights Provision Of Virginia Constitution—Refers to sex as gender, not to sexual preference.

CONSTITUTION—Homosexual Marriage—Section 20-45.2 does not violate Article I, Section 11, of Virginia Constitution—Ratification of Federal Equal Rights Amendment would not invalidate section.
DEFINITIONS—"Legislature"—As used in Article V of United States Constitution.

GENERAL ASSEMBLY—Federal Equal Rights Amendment—Would not usurp state legislative authority in area of family law.

GENERAL ASSEMBLY—Equal Rights Amendment—General Assembly does not have authority to make holding of statewide referendum a precondition to its voting on amendment in State legislature.

MARRIAGE—Homosexual—Ratification of Federal Equal Rights Amendment would not invalidate Virginia Code § 20-45.2; would not make homosexual marriage legal.

REFERENDUM—General Assembly May Authorize Holding Of Referendum If It Is Purely Advisory And Not A Precondition To Voting On Amendment To United States Constitution.

December 16, 1977

THE HONORABLE THOMAS J. Michie, JR.
Member, House of Delegates

This is in reply to your inquiry concerning the proposed Equal Rights Amendment to the United States Constitution which states as follows:

"Section 1 Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

"Section 2 The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

"Section 3 This amendment shall take effect two years after the date of ratification."

You asked the following questions regarding the proposed amendment.

"(1) Would Section 2 of the Federal Equal Rights Amendment usurp state legislative authority in the area of family law?

"(2) a. Would ratification of the Federal Equal Rights Amendment invalidate Virginia Code § 20-45.2 and make homosexual marriage legal?

b. Does the Equal Rights provision of Virginia Constitution, Article I, Section 11, have such an effect?

"(3) Does the Virginia General Assembly have the authority to make the holding of a statewide referendum on the Federal Equal Rights Amendment a precondition to its voting on the amendment in the State legislature?"

In response to your first question, I am of the opinion that the General Assembly's authority in the area of family law would not be usurped by Section 2 of the proposed amendment. That section would allow Congress to enact legislation to enforce the proposed amendment, but that general authority would not preclude the General Assembly from enacting laws in this area as well. The rule is established beyond cavil that in construing the Constitution of the United
States, a provision should receive a fair and liberal construction, not only according to its letter, but also to its true spirit and the general purpose of its enactment. See 16 Am. Jur. 2d Constitutional Law § 71 (1964). The Virginia General Assembly would therefore continue to retain legislative authority in this area. If, however, the amendment passes, no legislation could be enforced or enacted by either legislative body that would violate the amendment. See Article VI, Section 2, of the Constitution of the United States (the Supremacy Clause).

Regarding your second question, the General Assembly, in enacting § 20-45.2 of the Code of Virginia (1950), as amended, avoided any reference to a particular sex and made the statute applicable to all women and men equally. Similar state statutes have been found to be constitutionally sound. See Baker v. Nelson, 291 Minn. 310, 191 N.W. 2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972); Singer v. Hara, 11 Wash. App. 247, 522 P. 2d 1187 (1974); Jones v. Hallahan, Ky., 501 S.W. 2d 588 (1973). See also Sullivan, Same Sex Marriage and the Constitution, 6 U.C.D. L. Rev. 275 (1973); Constitutional Aspects of the Homosexual's Rights to a Marriage License, 12 J. Fam. L. 607 (1973). The fundamental principle of the proposed amendment is that the federal government and all state and local governments must treat both men and women as individual persons; government may not discriminate between men and women solely on the basis of sex. The amendment refers to sex as a gender, not to sex as sexual preference. This principle, however, would not preclude legislation (or other official action) which regulates, takes into account, or otherwise deals with a physical characteristic unique to one sex. See Brown, Emerson, Falk and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871 (1971). Examples of permissible laws under this principle include "laws dealing with forcible rape, paternity and homosexual relations." Ferrell, The Equal Rights Amendment to the United States Constitution — Areas of Controversy, 6 Urb. Law., 853, 867 (1974) (emphasis added). I am therefore of the opinion that ratification of the proposed amendment would not invalidate § 20-45.2 of the Code. I am also of the opinion that § 20-45.2 does not violate Article I, Section 11, of the Constitution of Virginia (1971) for the same reasons.

In response to your third question, I am of the opinion that the General Assembly may not make the holding of a statewide referendum on the proposed Equal Rights Amendment to the United States Constitution a precondition to its voting on the amendment. The mode of amending the United States Constitution is set forth in Article V of that instrument, which provides in pertinent part:

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution . . . [which] shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states . . . ."

(Emphasis added.)

The term "legislature" as used in Article V has been held by the United States Supreme Court to mean deliberative, representative bodies of the type which in 1789, exercised legislative power in the several states. These cases held that by virtue of the Supremacy Clause of the United States Constitution, Article VI, the legislature's ratifying function may not be conditioned on the holding of a referendum. Leser v. Garnett, 258 U.S. 130 (1922); Hawke v. Smith, 253 U.S. 221 (1920); Dyer v. Blair, 390 F. Supp. 1291 (N.D. Ill. 1975) (a three-judge court holding that the Illinois General Assembly's function with respect to ratifying the Equal Rights Amendment may not be abridged); and Trombetta v. Florida, 333 F. Supp. 575 (M.D. Fla. 1973). Accordingly, Article V does not comprehend

In *Hawke v. Smith*, supra, the Court reversed lower courts’ holdings that the Secretary of State of Ohio could spend public money to prepare and print ballots for submission of a referendum on the question of the ratification of the Eighteenth Amendment to the United States Constitution. In holding that referendum provisions of state constitutions and statutes cannot be applied in the ratification or rejection of amendments to the federal Constitution without violating Article V, Mr. Justice Day declared:

"The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by 'legislatures'? 253 U.S. at 277."

* * *

"There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. *Id.* at 228.

* * *

"The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the federal Constitution through the medium of a referendum rests upon the proposition that the federal Constitution requires ratification by the legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this — ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment. *Id.* at 229.

* * *

"It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented." *Id.* at 230.

Similarly, in *Leser v. Garnett*, supra, Mr. Justice Brandeis, in considering the ratification of the Nineteenth Amendment to the federal Constitution, stated:

"[T]he function of a state legislature in ratifying a proposed amendment to the federal Constitution, like the function of Congress in proposing the amendment, is a federal function derived from the federal Constitution; and it transcends any limitations sought to be imposed by the people of a state." *Supra* at 137.

Thus, I am of the opinion that the General Assembly is bound by these decisions and may not direct the holding of a referendum as a precondition to voting on the proposed Equal Rights Amendment. The General Assembly may, however, authorize the holding of a referendum if it is purely advisory and not a
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precondition to voting on the amendments.

ESTATES—Right Of A Woman To Hold Her Real Estate In Her Sole And Separate Equitable Estate—Sections 64.1-19.1 and -21.

DEFINITIONS—“Curtesy” And “Dower.”

REAL ESTATE—Right Of A Woman To Hold In Her Sole And Separate Equitable Estate—Husband not necessary party in conveyance of property.

STATUTES—Gender-based Governmental Classifications—Reasonable classification bearing rational relationship to State objective.

STATUTES—Presumption In Favor Of Constitutionality.

January 11, 1978

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

You request my opinion concerning the effect of new § 64.1-19.1 and the constitutionality of § 64.1-21. I shall answer your questions seriatim.

1. “What effect, if any, does § 64.1-19.1 have on the right of a woman to hold her real estate in her sole and separate equitable estate, i.e., will her husband be required to join in a conveyance when property is held in her sole and separate equitable estate?”

Section 64.1-19.1, Code of Virginia (1950), as amended, enacted during the 1977 Session of the General Assembly, provides:

“Where the word ‘curtesy’ appears in this chapter of the Code, it shall be taken to be synonymous with the word ‘dower’ as the same appears in this chapter or this Code, and shall be so construed for all purposes.”

Section 64.1-21 of the Code provides:

“A surviving husband shall not be entitled to curtesy in the equitable separate estate of the deceased wife if such right thereto has been expressly excluded by the instrument creating the same.”

Substituting the word “dower” for the word “curtesy” in § 64.1-21 renders the statute meaningless. Application of a fundamental rule of statutory construction, however, renders the statutes harmonious.

A statute applicable to a special or particular state of facts, such as § 64.1-21, must be treated as an exception to a general statute, such as § 64.1-19.1, which is comprehensive or general in its language. Southern Ry. Co. v. Commonwealth, 124 Va. 36, 39, 97 S.E. 343, 349 (1918); accord, Scott v. Litchford, 164 Va. 419, 180 S.E. 393 (1935); 2 Horack, Sutherland Statutory Construction, § 5204 (3rd ed. 1943). Viewed in this light, no inference arises that any right conferred by § 64.1-21 has been limited or modified by the passage of § 64.1-19.1. This result is bolstered by the fact that neither §§ 55-35 and 55-47, which grant the authority
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to create sole and equitable separate estates in married women, nor § 64.1-21, supra, were amended or repealed when § 64.1-19.1 was enacted in 1977.

Based upon the foregoing, it is my opinion that the passage of § 64.1-19.1 has not limited in any way the right of a married woman to hold property in her sole and equitable separate estate free of her husband's curtesy right if such estate is acquired pursuant to § 64.1-21. Consequently, it is also my opinion that a husband is not a necessary party in the conveyance of property so acquired.

2. Whether § 64.1-21 is unconstitutional in light of Article I, Section 11, of the Constitution of Virginia (1971)?

Article I, Section 11, of the Constitution of Virginia (1971), provides, in pertinent part

"that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination." (Emphasis added.)

Section 64.1-21 of the Code is quoted in full in my response to your first inquiry. Every presumption is to be made in favor of the constitutionality of a statute, and it can never be declared unconstitutional except when it is clearly and plainly so. Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 239, 183 S.E.2d 170, 171-172 (1971).

In Archer v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973), the Supreme Court of Virginia (hereinafter Virginia Court) had occasion to interpret Article I, Section 11, of the Constitution of Virginia (1971), as that section applies to unlawful governmental discrimination based upon sex. In Archer, the Virginia Court held that the rights accorded under Article I, Section 11, are no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. 213 Va. at 638, 194 S.E.2d at 711. Relying on the United States Supreme Court's (hereinafter Supreme Court) decision in Reed v. Reed, 404 U.S. 71 (1971), wherein classifications based merely on sex were held not to automatically trigger "strict" judicial scrutiny, the Virginia Court applied the "traditional" standard adopted by the Supreme Court in equal protection clause controversies, and held that, "[w]here a statute is based on a reasonable classification that bears a rational relationship to the objective of the State . . ., there is no impermissible discrimination under the Constitution of Virginia." 213 Va. at 638, 194 S.E.2d at 711. Since the Reed decision, the Supreme Court has resisted the opportunity to hold that governmental classifications based upon sex automatically invoke "strict" judicial scrutiny. See Frontiero v. Richardson, 411 U.S. 677 (1973). Conversely, since Reed the Supreme Court has clearly abandoned the "traditional" approach in favor of an "intermediate" scope of judicial review in resolving issues of gender-based governmental classifications. See Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring). In Craig, the Supreme Court enunciated the "intermediate" scope of judicial review as follows:

"To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" 429 U.S. at 197.

In deciding cases under the "intermediate" scope of review, the Supreme Court has considered many factors in determining the constitutionality of the
A determination of the validity of § 64.1-21 would have to be based on the factual justifications to be put forth.

EXTRADITION—No Credit For Time Spent In Jail In Another State Awaiting Extradition After Escape From Virginia Penitentiary.

May 3, 1978

THE HONORABLE J. RANDOLPH TUCKER, JR.
Judge, Circuit Court of the City of Richmond

You have asked whether a person is entitled to credit for time spent in jail in another state awaiting extradition to Virginia after an escape from the Virginia State Penitentiary.

Section 53-208 of the Code of Virginia (1950), as amended, provides credit for jail time for a prisoner who was awaiting trial or appeal.1

The Supreme Court of Virginia affirmed, without a written opinion, the judgment in a habeas corpus case of the Circuit Court of the City of Newport News, which denied credit for time served while awaiting extradition to Virginia as an escaped convict. Richard Allen Posey v. R. M. Oliver, Superintendent, Virginia State Farm, 214 Va. xc (1973). The facts in Posey were identical to the situation that was posed in your letter.

This decision is consistent with the general rule that an escaped prisoner is not entitled to credit for time spent in the prison of another state while awaiting extradition to the state wherein he has been convicted. 24B C.J.S. Criminal Law § 1995(4) (1962).

An escapee from the Virginia State Penitentiary, awaiting extradition back to Virginia to complete his sentence, is neither "awaiting trial" nor "pending an appeal." Therefore, he is not entitled to any credit towards his Virginia sentence under § 53-208.

1"Any person who may be sentenced by any court to a term of confinement in the penitentiary, . . . shall have deducted from any such term all time actually spent by such person . . . in jail or the penitentiary awaiting trial, or pending an appeal, and it shall be the duty of the court or judge, when entering the final order in any such case, to provide that such person so convicted be given credit for the time so spent. . . . No such credit, however, shall be given to any person who shall break jail or make an escape . . . ." (Emphasis added.)
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FEES—Blood Sample—Use of hospital emergency room to withdraw blood to determine alcoholic content—Not paid by Commonwealth.

MOTOR VEHICLES—Blood Sample—No fee other than for withdrawing blood provided by statute—Use of emergency room.

February 7, 1978

The Honorable Harry B. Wright, Clerk
Circuit Court of Rockbridge County

This is in reply to your letter of January 18, 1978, in which you request my advice whether payment for the use of the emergency room at a local hospital for the purpose of withdrawing blood to determine its alcoholic content is a proper expense to be paid by the Commonwealth. In my opinion it is not.

The procedure relating to the taking, handling, identification and disposition of blood or breath samples where a person is arrested for a violation of § 18.2-266 of the Code of Virginia (1950), as amended, or of a similar ordinance of any county, city or town making it unlawful to operate a motor vehicle under the influence of any narcotic drug or other self-administered intoxicant or drug is established in § 18.2-268. That section contains the following:

"(h) A fee not exceeding ten dollars shall be allowed the person withdrawing a blood sample in accordance with this section, which fee shall be paid out of the appropriation for criminal charges. If the person whose blood sample was withdrawn is subsequently convicted for violation of § 18.2-266 or of a similar ordinance of any county, city or town, the amount charged by the person withdrawing the sample shall be taxed as part of the costs of the criminal case and shall be paid into the general fund of the State treasury." (Emphasis added.)

There is no other provision in § 18.2-268 for the payment of any fee in connection with the withdrawal of blood. The only other reference to a fee in this statute is in paragraph (d3) which allows a fee not to exceed fifteen dollars to an "approved laboratory for making the analysis of the second blood sample," but this has no application to fees for withdrawing blood. I find no other statute authorizing payment of the fee in question. In my opinion, no fee other than the fee authorized in paragraph (h) of § 18.2-268 has been provided for the withdrawal of blood in such cases.

FEES—Magistrate's Fee Collected By Magistrate Or Party Other Than Those Enumerated In § 16.1-69.48(a)—Different from collection of fee under § 14.1-128.1 by district court clerk.

BAIL—Fee Collected By District Court Clerk Under § 14.1-128.1 Is Fee To Which § 16.1-69.48 Is Applicable.

October 14, 1977

The Honorable George E. Holt, Jr.
Clerk, Circuit Court of Botetourt County

I have received your recent letter, in which you inquire whether the collection
by the clerk of the district court of a fee authorized pursuant to § 14.1-128.1 of the Code of Virginia (1950), as amended, is a fee to which § 16.1-69.48 is applicable? You also inquire whether my Opinion rendered to the Honorable Charles B. Walker, Comptroller, Commonwealth of Virginia, dated June 23, 1977, is controlling in this instance?

Section 14.1-128.1 of the Code provides that:

"The fee of any official authorized to grant bail for admitting a person to bail or releasing a person on his own recognizance without security, shall be three dollars. Such fee shall not be collected from the accused at the time bail is granted but shall be paid out of the State treasury and shall be taxable to the defendant as costs in the event that the court awards costs to the Commonwealth."

Section 16.1-69.48 of the Code provides, in pertinent part, that:

"(a) All fees collected by the judge, substitute judge, clerk or employees, but not including fees belonging to officers other than the judge, clerk or employees, of the general district court or juvenile and domestic relations district court of any county, except any county having a density of population in excess of five thousand per square mile, shall be paid promptly to the clerk of the circuit court who shall pay the same into the State treasury . . . .

"(c) The word 'fees' as used in this section shall include all moneys from every source, . . . including by way of illustration, but not limited to, the fees collected pursuant to . . . § 14.1-128.1 . . . ."

In response to your inquiry, § 16.1-69.48(c) clearly states that the fee authorized in § 14.1-128.1 is a "fee" within the context of § 16.1-69.48(a).

I am advised that the fee authorized in § 14.1-128.1 is collected by the clerk of the district court, a party enumerated in § 16.1-69.48(a). Accordingly, it is my opinion that such fee should be paid promptly to the clerk of the circuit court for deposit into the State treasury pursuant to § 16.1-69.48(a).

My Opinion rendered to the Honorable Charles B. Walker, Comptroller of the Commonwealth of Virginia, dated June 23, 1977, is not controlling in this instance because it was premised upon the assumption that the magistrate fee in question was collected by the magistrate or a party other than those enumerated in § 16.1-69.48(a). In this instance, the fee is collected by the clerk of the district court, a party enumerated in § 16.1-69.48(a).

FINES AND COSTS—All Fines Collected For Offenses Against The Commonwealth Are Appropriated To State Literary Fund—Civil penalties.
DEFINITIONS—Civil Penalties—Distinction between fines and civil penalties.
DEFINITIONS—Distinction Between Criminal And Civil Monetary Sanctions.
DEFINITIONS—"Offense"—Usually denotes crime but, standing alone, does not necessarily indicate criminal offense.
GENERAL ASSEMBLY—Authority—To appropriate civil penalties elsewhere than to Literary Fund—Absent express legislative designation to another purpose, must be paid to Fund.
LITERARY FUND—Fines And Penalties—Absent express legislative designation to another purpose, must be paid to Fund.

STATE WATER CONTROL BOARD—Civil And Criminal Penalty Provisions Of State Water Control Law—Fines collected are appropriated to State Literary Fund.

January 25, 1978

THE HONORABLE ROBERT V. DAVIS
Executive Secretary
State Water Control Board

This is in response to your request for my opinion concerning the application of Article VIII, Section 8, of the Constitution of Virginia (1971), and § 22-101 of the Code of Virginia (1950), as amended, to the civil penalty provision of the State Water Control Law contained in § 62.1-44.32(a) of the Code. Article VIII, Section 8, of the Constitution provides that "all fines collected for offenses against the Commonwealth" are appropriated to the State Literary Fund. Section 22-101 of the Code directs that:

"The proceeds of all fines collected for offenses committed against the State and directed by Article VIII, § 8, of the Constitution of Virginia, to be set apart as part of a perpetual and permanent Literary Fund shall be paid into the treasury and . . . transferred to the credit of the Literary Fund, and shall be used for no other purpose whatsoever."

Section 62.1-44.32(a) of the Code provides that owners who violate any provision of the State Water Control Law, or who fail, neglect or refuse to comply with State Water Control Board or court orders, may be subject to a civil penalty not to exceed ten thousand dollars per day of violation, within the discretion of the court.

Your inquiry, then, is as follows:

"Both the Constitution and the statute refer specifically to 'fines' and do not mention civil penalties. Thus, my question is, do the Constitution and statute apply only to fines . . . and therefore permit civil penalties to be directed to purposes other than the Literary Fund, or do they apply generally to all penalties, even though only fines are specified?"

The question you have raised requires an examination of the long-recognized distinctions between fines and civil penalties, as well as of the applicable constitutional and Code provisions.

Fines are statutory monetary penalties levied upon persons convicted of criminal offenses. Southern Express Co. v. Walker, 92 Va. 59, 22 S.E. 809 (1895), aff'd. 168 U.S. 705 (1897). They may be, and often are, imposed in conjunction with such other criminal sanctions as imprisonment and forfeiture, and serve the aims of retribution and deterrence.

While all fines are penalties, however, not all monetary penalties are fines. The legislature may authorize civil penalties which attach to conduct that is not necessarily criminal in nature, but that is contrary to a regulatory scheme established by statute. Such penalties are imposed by civil, not criminal, tribunals. The distinction between criminal and civil monetary sanctions is substantial. The necessary elements and standards of proof, applicable procedures, constitutional safeguards and forums of each are wholly different. Kennedy v. Mendoza-Martinez, 372 U.S.144 (1963); United States v. General
While imposition of any monetary penalty will have an unavoidable punitive effect, the principal purpose of a civil penalty is not punitive. Rather, it serves to strengthen the credibility and effectiveness of the regulatory scheme of which it is a part, and to provide a remedy for conduct in violation of the regulatory requirements. Thus, although civil monetary penalties may have some of the punitive aspects of criminal fines, they have nonetheless long been distinguished from fines, and where the legislature has designated a penalty as "civil," the courts will treat it as such in the absence of a compelling reason to the contrary. United States v. LeBeouf Bros. Towing Co., Inc., 537 F.2d 149 (5th Cir., 1976).

The governing constitutional provision requires that "fines collected for offenses against the Commonwealth" be directed to the Literary Fund. Similarly, the implementing statute, § 22-101 of the Code, refers to "all fines for offenses committed against the State." (Emphasis added.) The word "offense" has traditionally been used to denote a crime. In its usual sense it means a breach of the criminal law. 22 C.J.S. Criminal Law § 1(c). See Meade v. Commonwealth, 186 Va. 775, 43 S.E.2d 858 (1947).

The term "offense" may also be used, however, to connote any act or omission, transgressing a law prohibiting or requiring it, for which a penalty is imposed or punishment inflicted by judicial proceeding. 22 C.J.S. Criminal Law § 1(c). Thus the word "offense," standing alone, does not necessarily indicate a criminal offense, although the prevailing usage is still in the context of criminal acts. Read together with the term "fines," however, which are criminal sanctions, the word "offenses," for the purpose of the referenced constitutional and Code provisions, means criminal offenses. In Southern Express Co. v. Walker, supra., the Supreme Court interpreted the constitutional provision thus:

"What 'fines' are here intended or comprehended? The answer is found in the language of the Constitution itself. They are 'fines collected for offences against the State,' that is fines imposed by law as punishment for a crime. Fines constitute in whole or in part the punishment for many of the smaller offences at common law, and also for many offences created by statute, and those are the 'fines' which the constitutional provision was designed to cover. It comprehends only those fines which are affixed as penalties for crime and are recoverable upon conviction of the offender, and does not embrace those pecuniary penalties or forfeitures provided by statute, that a popular or qui tam action (which is a civil action) may be brought to recover." 92 Va. 59, 62, 22 S.E. 2d 809 (Emphasis added.)

Employing this reasoning, the Court held that, where the legislature had created a statutory scheme prohibiting overcharges by railroads, and established a means of enforcement based in part on (civil) qui tam actions by complainants, no conflict with Article VIII, Section 8, resulted because the latter provision applied only to criminal fines. The legislature was acting within the scope of its authority in employing non-criminal measures to enforce a statutory plan of regulation.

Under the ruling in Southern Express Co. v. Walker, then, monetary penalties for statutory and common law crimes are payable to the Literary Fund as fines; pecuniary sanctions for acts that are prohibited by law but not classified as crimes may be diverted elsewhere as the legislature sees fit.

The criminal/civil distinction is apparent in the penalty provisions of the State Water Control Law. See § 62.1-44.32 (a) and (b) of the Code. Until recently, violations of the Water Control Law were punishable only by criminal
proceedings. In 1974, the General Assembly enacted the present civil penalties provision. At the same time, the criminal provision was reenacted as Subsection (b), and the maximum fine was increased to $25,000 per day. Chapter 237, 1974 Acts of Assembly. Consequently, there is a civil penalty provided for in Subsection (a) for any violation of the Law, and a criminal fine in Subsection (b) for willful or negligent violations. Applying the rationale of *Southern Express*, fines collected under Subsection (b) are appropriated to the Literary Fund; civil penalties imposed pursuant to Subsection (a) *may* be disposed of otherwise according to the direction of the General Assembly.

In practice, however, civil penalties as well as fines have always been placed in the Literary Fund, absent some contrary legislative direction, as in the statute referenced in *Southern Express*.

Thus, I am of the opinion that, although the General Assembly has the authority to appropriate civil penalties elsewhere than to the Literary Fund, in the absence of an express legislative designation to another purpose, all penalties must be paid to the Fund.

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**GAMBLING—Backgammon Tournament Where Contestants Compete For Another's Entry Fee Is Illegal Gambling.**

**GAMBLING—Bet Or Wager Distinguished From Prize, Purse, Stake Or Premium.**

**GAMBLING—Whether Game Of Skill Is Illegal Gambling—Backgammon tournament.**

November 14, 1977

**THE HONORABLE WILLIAM ROSCOE REYNOLDS**
Commonwealth’s Attorney for Henry County

You have requested my opinion whether a certain activity would constitute a violation of Virginia’s gambling laws. See §§ 18.2-325 through 18.2-340, Code of Virginia (1950), as amended. The activity is a backgammon tournament. Participants would be required to pay an entry fee and prizes would be awarded to the winner and runners-up out of the pool of entry fees.

Section 18.2-325 of the Code defines illegal gambling as:

"The making, placing or receipt, of any bet or wager in this State of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling."

Section 18.2-333, however, exempts certain activities as follows:

"Nothing in this article shall be construed to prevent any contest of speed or skill between men, animals, fowl or vehicles, where participants may receive prizes or different percentages of a purse, stake or premium dependent upon whether they win or lose or dependent upon their position or score at the end of such contest."
It should be observed that § 18.2-333 exempts certain activities involving skill or speed from the general prohibition against gambling where the participants compete for a prize, purse, stake or premium. Anyone, however, who places a bet or wager on the outcome of any such activity, whether a participant or a spectator, would be in violation of § 18.2-325.

In your inquiry, the authorities you cite, 38 Am.Jur.2d Gambling § 40 (1968) and Wetmore v. State, 55 Ala. 198 (1876), indicate that backgammon is a game of skill or at least a game where skill and chance combine, skill being predominant. I find it unnecessary to decide whether backgammon is a game of skill because I do not feel that the participants in the tournament you have outlined would be competing for a prize, purse, stake or premium as enumerated in § 18.2-333.

In 38 C.J.S. Gaming § 1 (1943), the following definitions are given:

"Premium, prize, and purse. The three words have been defined in the same terms as meaning ordinarily some valuable thing offered to the winner of a contest, for which the person offering it does not compete, and stands no chance of gaining back the thing offered or any part thereof; some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter . . . ."

"'Purse' has been held synonymous with 'reward or premium;' and it has been said that a 'purse, prize or premium' differs from a bet or wager in that in the former the person offering has no chance of gaining the thing offered but, if he abides by his offer, must lose it, whereas in the latter each party has a chance of gain and a risk of loss; . . . ."

Although the word "stake" normally has the connotation of bet or wager, applying the maxim of ejusdem generis, it is my opinion that "stake" as used in § 18.2-333 is synonymous with purse, prize or premium.

The fact that each participant is required to pay an entrance fee does not necessarily make the transaction a bet or gaming transaction, where the fee is paid solely for the privilege of participating; but if the fee is contributed by the participants alone, and the successful contestant(s) is to have the fund thus created, this does constitute a bet or wager. See 38 C.J.S. Gaming § 88 (1943).

In Creash v. State, 179 S.149 (Fla. 1938), a question similar to that which you pose was answered by the Court:

"'It is also banned as gambling if [purse, prize or premium] created . . . by paying admissions to the game, . . . or otherwise contributing to a fund from which the 'purse, prize or premium' contested for is paid, and wherein the winner gains, and the other contestants lose all.' 179 S. at 152.

In Toomey v. Penwell, 245 P. 943 (Mont. 1926), the Court held:

"'. . . [T]he so-called entrance fee is an amount of money actually paid unconditionally and in good faith for the privilege of entering the contest, and for no other purpose. If in fact the fee is not paid for such purpose, but is merely posted upon the outcome of the contest, no amount of dissembling can save the transaction from the condemnation of our anti-gambling statute.' 245 P. at 945.

Where the sponsor of a contest of skill or speed does more than simply hold the entry fees and distribute them to the winner, such as, furnish a premises in which to play, offer from his own funds a purse, prize or premium, establish
rules of conduct and play, and the like, then the enterprise may fall into the exceptions authorized by § 18.2-333. In your inquiry, the sponsor of the backgammon tournament does not offer the "purse, prize or premium" contested for, but rather, each contestant is offering a fee for the chance to win the fee of another. It is my opinion, therefore, that the entry fees are more in the nature of a bet or wager and thus such a contest would be in violation of the gambling statutes. The sponsor would be no more than the holder of the "bets" of those participating in the tournament since the prizes are paid from the pool of entry fees.

GARNISHMENTS—Payments May Be Made To Court By Mail—Clerk of court has no right to insist payment be delivered in person by garnishee or representative.

COURTS—District And Circuit Courts—Authority to prescribe rules for convenient and efficient use of courthouses and clerks' offices—Garnishment payments by mail could not be refused.

February 3, 1978

THE HONORABLE ELMO G. CROSS, JR.
Member, Senate of Virginia

This is in reply to your letter of January 26, 1978, in which you inquire as to whether the clerks of the courts, after issuing garnishment summonses, have the right to insist that payment by the garnishee be delivered in person by the garnishee or his representative, rather than to permit such payments to be made to the court by mail.

Section 8.01-520 of the Code of Virginia (1950), as amended, states that the garnishee "may pay what he is liable for to the clerk of the court issuing the summons and such clerk shall give a receipt for what is so paid."

If the garnishee is unable to make payment in response to the summons, his answer is governed by § 8.01-515, which gives the garnishee the option of appearing in person or filing a statement verified by affidavit. However, there is no requirement that the garnishee make payment in person. Moreover, it is common practice for litigants to tender other payments, as well as pleadings, to the court by mail.

Section 8.01-4 gives to the district courts and circuit courts the authority to "prescribe for their respective districts and circuits such rules as may be reasonably appropriate to promote proper order and decorum, and the convenient and efficient use of courthouses and clerks' offices . . . ." However, I am aware of no authority by which garnishment payments by mail could be refused.

I am, therefore, of the opinion that the clerk has no right to insist that payment by a garnishee, in response to a summons, be delivered to the court in person. Rather, such payment may be made by mail.

GENERAL ASSEMBLY—Compatibility—Member may continue to serve while assuming position of project director of study by nonprofit group applying for federal funds from HEW.
FEDERAL EMPLOYEES—Project Manager Of Study By Nonprofit Group Applying For Federal Funds From HEW Is Not Employee Of United States Government—Member of General Assembly may be hired as.

GENERAL ASSEMBLY—No Person Holding Any Office Or Post Of Profit Or Emolument Under United States Government Or In Its Employment Shall Be Eligible To Either House.

PUBLIC OFFICERS—Conflict Of Interests—Position of project director of study is not "office"—Hired by nonprofit citizens group to determine feasibility of operating Health Maintenance Organization.

PUBLIC OFFICERS—Defined.

May 5, 1978

THE HONORABLE JAMES B. MURRAY
Member, House of Delegates

You ask whether you may be hired by a nonprofit citizens group as project director of a study to determine the feasibility of operating a Health Maintenance Organization (HMO) in the Charlottesville area without resigning your membership in the House of Delegates. I am of the opinion that you may assume this position while continuing to serve in the General Assembly.

You state that the nonprofit group may be formed to apply for a federal grant from the United States Department of Health, Education and Welfare. If that group hires you as project director, you would conduct the feasibility study and would be supervised by the citizens group. HEW would oversee the study in order to determine if grant conditions were satisfied, and would review the final work product. That agency would not, however, supervise or control the daily conduct of the work.

Article IV, Section 4, of the Constitution of Virginia (1971), provides, in pertinent part, that “[n]o 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.”


I am of the opinion that the position of project director is not an “office” since it has no duties established by law and is not held for a fixed term. See Opinion to the Honorable Ralph E. Turpin, Jr., Commonwealth’s Attorney for Nelson County, dated November 15, 1976, and found in Report of the Attorney General (1976-1977) at 110. Furthermore, a basic characteristic of “employment” is the right of one person, the employer, to order and control another, the employee, in the performance of his work and to direct the manner in which the work shall be done. 53 Am.Jur.2d Master and Servant § 2 (1970).

Since your duties would be subject to the control and supervision of the citizens group (and not HEW), I am of the opinion that, should you assume this position, you would not be in the employment of the United States government. Thus, whatever emolument or compensation for services you receive would be from the citizens group since it, as your employer, has authority to compensate
you for your services.
I therefore conclude that the position of project director for this study is not an office or post of profit or emolument under the United States government. In addition, this position does not result in employment with that government. If you are hired as project director for the study, you may continue to serve in the House of Delegates without violating the provisions of Article IV, Section 4.

GENERAL ASSEMBLY—Compatibility—Member may not also serve on boards and commissions within executive branch which are responsible for administering programs established by General Assembly.

PUBLIC OFFICERS—Incompatibility—Member of Board of Visitors of Virginia Schools for Deaf and Blind vacates that office when elected and qualifies as member of General Assembly.

PUBLIC OFFICERS—Incompatibility Of Offices—Acceptance of one operates as surrender of other.

STATE AGENCIES—Virginia Schools For Deaf And Blind Are Among Agencies For Which Secretary Of Education Is Responsible To Governor—In executive branch.

December 20, 1977

THE HONORABLE ROBERT C. SCOTT
Member-elect, House of Delegates

You inquire whether you may remain a member of the Board of Visitors of the Virginia Schools for the Deaf and the Blind after taking the seat in the House of Delegates of the General Assembly of Virginia to which you were elected in November, 1977.

Section 9-6.23 of the Code of Virginia (1950), as amended, which was enacted at the 1977 Session of the General Assembly, provides:

"Members of the General Assembly shall be ineligible to serve on boards and commissions within the executive branch which are responsible for administering programs established by the General Assembly. Such prohibition shall not extend to boards and commissions engaged solely in policy studies or commemorative activities. If any law directs the appointment of any member of the General Assembly to a board or commission in the executive branch which is responsible for administering programs established by the General Assembly, such portion of such law shall be null and void and the Governor shall appoint another person from the State at large to fill such a position."

The Virginia Schools for the Deaf and the Blind administer programs of educational services as directed by the General Assembly. See § 23-259 of the Code. The Virginia Schools are among the agencies for which the Secretary of Education is responsible to the Governor, see § 2.1-51.21 of the Code, and are thus clearly in the executive branch.

I am of the opinion that, as a result of § 9-6.23 of the Code, the position of visitor of the Virginia Schools for the Deaf and Blind is incompatible with the office of Delegate. The prohibition of § 9-6.23 relates not only to eligibility for
appointment to a commission or board but also to "serv[ing]" on such com-
misions or boards. In view of the provisions of § 9-6.23, there is no need to
consider the provisions of Article IV, Section 4, of the Constitution of Virginia
(1971.) Cf. Opinion to the Honorable William T. Parker, Delegate-elect, dated
December 8, 1975, and found in Report of the Attorney General (1975-1976) at
144. The acceptance and qualification for the second office vacates the first, and
a successor may be thereafter appointed for the unexpired term. See Dean v.
Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952).

GOVERNOR—Power Of—May not pardon person convicted of crime in state
other than Virginia.

ELECTIONS—Voting—Governor may remove political disability where person
convicted under laws of another state.

PARDON, PROBATION AND PAROLE—Full Faith And Credit That
Commonwealth Gives To Pardons From Other Jurisdictions—Civil
disabilities.

November 22, 1977

THE HONORABLE PAT PERKINSON
Secretary of the Commonwealth

This is in response to your inquiry whether it is within the Governor's power to
grant a pardon to someone convicted of a crime in a state other than Virginia. I
assume that you have reference to persons who are now residents of Virginia.

Article V, Section 12, Constitution of Virginia (1971) states, in part:

"The Governor shall have power to remit fines and penalties under such
rules and regulations as may be prescribed by law; to grant reprieves and
pardons after conviction except when the prosecution has been carried on by
the House of Delegates; to remove political disabilities consequent upon
conviction for offenses committed prior or subsequent to the adoption of
this Constitution; and to commute capital punishment."

You are correct in noting that prior Opinions of this Office have held that the
Governor's power to remove political disabilities extends to removing the same
for someone convicted of a crime outside of Virginia. In a previous Opinion to
you, dated July 8, 1974, and found in the Report of the Attorney General (1974-
1975) at 197 it was stated: "The Governor may remove political disabilities
consequent upon conviction for felonies committed within and without this

These Opinions are based on the fact that the disabilities arise under Virginia
law, as opposed to arising under the laws of the convicting sovereign. For in-
stance, disfranchisement for conviction of a felony is by virtue of Article II,
Section 1, of the Constitution of Virginia (1971) and § 24.1-42 of the Code of
Virginia (1950), as amended. This and other political disabilities for convictions
of felonies are imposed pursuant to conviction in other states as well as Virginia,
even if similar disabilities are not imposed in the convicting state. Accordingly,
the act of the Governor in restoring such rights would pertain to a purely local
question. Such was the holding in Arnett v. Stumbo, 287 Ky. 433, 153 S.W.2d
889 (1941).
The same would not hold true for pardons of persons convicted in other states, however, since a pardon would relate not only to a local question but would be in conflict with and in derogation of actions taken by a foreign sovereignty. Moreover, such action would be contrary to the principles underlying the full faith and credit clause of the United States Constitution.

The authority is uniformly to the effect that the pardoning power of a governor extends only to violations of the laws of his state. At 67 C.J.S. Pardons § 4 (1950) it is said that "the constitutional pardoning power of a governor, however, extends only to offenses in violations of state laws." Additionally, at 24 Am. & Eng. Encyc. of Law at 569 (1903) it is said: "The pardoning power of a governor of a state or territory is confined in its operation to offenses against the laws of that state or territory." In United States v. Donofrio, 450 F.2d 1054 (5th Cir. 1971), the court states "the Pardon Board of Florida could not pardon the appellant for his New York conviction. . . . In fact, that Pardon Board only purported to relieve appellant of any Florida disabilities visited upon him because of the New York conviction."

I am, therefore, of the opinion that the pardoning power of the Governor does not extend to convictions in states other than Virginia.

Though Article II, Section 1, states that a felon will be qualified to vote if "his civil rights have been restored by the Governor or other appropriate authority" (emphasis added) this provision relates not to the jurisdictional power of the Governor to issue a pardon, but rather to the full faith and credit that the Commonwealth will give to pardons from other jurisdictions, including the effect, if any, of those pardons on civil disabilities. See Report of the Attorney General (1974-1975) at 198; I Howard's Commentaries at 345, 346 (1974).

GRIEVANCE PROCEDURE—Absent Express Statutory Authority, Committee On District Courts Does Not Have Authority To Adopt Grievance And Appeal Procedure For District Court Personnel.

COURTS—Committee On District Courts—Authority to regulate classification of court personnel.

JUDGES—Personnel—Wide discretion of judge in employment practices.

PERSONNEL ACT—District Court Personnel Statutorily Excluded From Act And From Appeal And Grievance Procedures.

January 13, 1978

THE HONORABLE VERNON D. HITCHINGS, JR., JUDGE
Norfolk General District Court, Traffic Division

This is in response to your letter requesting my opinion regarding the legal authority of the Committee on District Courts to adopt a grievance procedure for permanent employees of district courts who question either application of policies or disciplinary actions, including removal. The Committee on District Courts has drafted such a grievance procedure "... to insure that the authority to appoint, remove, grant or deny merit increases, take disciplinary actions in directing employees' activities is exercised in a responsible, reasonable and fair manner, and ... to insure that employment practices do not discriminate on the basis of race, color, sex, religion or national origin."
Section 16.1-69.33 of the Code of Virginia (1950), as amended, establishes the Committee on District Courts and provides that Committee has the power to authorize "the appointment of personnel for the district courts pursuant to Article 4 (§ 16.1-69.37 et seq.) of this chapter." Section 16.1-69.38 of the Code, which is found in Chapter 4.1, Article 4, of Title 16.1 of the Code, provides, in pertinent part, that the "Committee on District Courts established in § 16.1-69.33 shall, subject to the provisions of § 16.1-69.37, establish guidelines and determine the necessity for the employment of substitute judges, clerks, deputy clerks and all other personnel of the district courts and authorize the appointment of such personnel by the courts."

This Office has previously opined, in an Opinion to the Honorable A. Victor Thomas, Member, House of Delegates, dated March 29, 1974, and found in the Report of the Attorney General (1973-1974) at 111, that § 16.1-69.38 contemplates the power of the Committee on District Courts to establish guidelines for the employment of district court personnel.

The grievance procedures drafted by the Committee on District Courts, however, go beyond establishing guidelines for employment and set up a step-by-step procedure for persons already permanently employed to grieve certain disciplinary actions taken by a district court judge. Thus, the language of § 16.1-69.39 of the Code becomes important. This statute provides, in pertinent part, as follows:

"All personnel (in district courts) shall be appointed by, serve at the pleasure of, and be subject to removal by the chief judge of the district court in which they serve . . . . Personnel subject to the provisions of this article shall not be subject to the Virginia Personnel Act." (Emphasis added.)

The exclusion of district court personnel appointed pursuant to the above-quoted statutes from the ambit of the Virginia Personnel Act clearly shows the intent of the General Assembly to remove these employees from policies whose stated purpose is to "ensure for the Commonwealth a system of personnel administration based on . . . objective methods of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of State employment." See § 2.1-110 of the Code. The exclusion further removes them from the ability to utilize the procedures authorized by § 2.1-114.5 of the Code, pertaining to appeal and grievance procedures.

One reason for the court employees' service "at the pleasure of, and . . . subject to removal by the chief judge of the district court . . . ." and exemption from the Virginia Personnel Act was stated by the United States District Court for the Eastern District of Virginia, in Jones v. Kelly, 347 F.Supp. 1260 (E.D. Va. 1972). In Jones, a full-time employee of a juvenile court was dismissed and sought legal and equitable relief under 42 U.S.C. § 1983. In entering judgment for the defendant-judge and court administrators, the Court noted that former § 16.1-145 of the Code (now repealed), which provided that court “officers and employees shall serve at the pleasure of the judge,” was designed to grant wide discretion to the judge in his employment practices. 347 F.Supp. at 1262.

The Jones Court continued, as follows:

"The uniqueness of court operations, and especially juvenile courts whose very purpose is to foster the welfare of children who come before it to the end that the humane purposes of the remedial legislation which created the special courts is fully effectuated, requires the exercise of wide discretion. The Virginia legislature’s desire and efforts to afford this discretion to the Juvenile Court Judges in the employment practices utilized
in the operation of the courts, creates a rational basis for the distinction in the practices utilized in hiring and discharging of court employees vis a vis other municipal employees." Id. at 1262-63.

For the reasons expressed in Jones v. Kelly, supra, and in the absence of express statutory authority to do so, I am of the opinion that the Committee on District Courts does not have the authority to adopt the grievance and appeal procedures outlined herein for district court personnel.

GRIEVANCE PROCEDURE—Binding Arbitration For Other Public Employee Groups—Parham decision holds State Board of Education and General Assembly may not require of local school boards.

COUNTIES, CITIES AND TOWNS—Absent Constitutional Provision, General Assembly Has Ultimate Authority To Delegate Authority Within State Government—Parham decision does not prohibit binding grievance arbitration for State and local non-school employees.

GENERAL ASSEMBLY—Supreme Law Making Body Of Commonwealth—Lack of constitutional grant of authority to local or State agencies comparable to that given local school boards—Binding arbitration.

June 6, 1978

THE HONORABLE ELLIOT S. SCHEWEL
Member, Senate of Virginia

You ask what effect the recent Virginia Supreme Court decision in Parham v. School Board of the City of Richmond, which held that the State Board of Education and General Assembly may not require binding grievance arbitration of local school boards, has on certain statutes enacted by the 1978 General Assembly mandating binding grievance arbitration for other public employee groups.1

Article VIII, Section 7, of the Constitution of Virginia (1971), which was the basis for the Court's decision in Parham, vests the supervision of the schools in local school boards.2 Local governments, however, have no comparable constitutional status, nor do State agencies. In the absence of a constitutional provision, the General Assembly has the ultimate authority to delegate authority within State government. In Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977), the Supreme Court stated:

"The legislature functions under no grant of power. It is the supreme law making body of the Commonwealth, and has the inherent power to enact any law not in conflict with, or prohibited by, the State or Federal Constitutions."

1 Senate Bill 135, adding § 2.1-114.5:1 to the Code of Virginia (1950), as amended, and amending § 15.1-7.1 of the Code, mandates binding grievance arbitration for most state and local governmental employees other than school board employees.

2 I am enclosing a copy of an Opinion dated May 11, 1978, to the Honorable James T. Edmunds, Member, Senate of Virginia, to the effect that, following Parham, a local school board can adopt voluntarily a grievance procedure with a binding arbitration component.
Consequently, owing to the lack of a constitutional grant of authority to local or State agencies comparable to that given to local school boards, it is my opinion that the Parham decision does not prohibit the binding arbitration of grievances for State and local non-school employees required by Senate Bill 135.

GRIEVANCE PROCEDURE—Local School Board May Voluntarily Adopt A Grievance Procedure Including Binding Arbitration Following Parham Decision If Approved By State Board Of Education.

SCHOOLS—Grievance Procedure—Following Parham decision, constitutional amendment required for school board employees to be afforded State-mandated binding grievance arbitration to same extent as other local and State employees.

May 11, 1978

THE HONORABLE JAMES T. EDMUNDS
Member, Senate of Virginia

You have asked whether a local school board may adopt a grievance procedure including binding arbitration in light of the recent Virginia Supreme Court decision in Parham v. School Board of the City of Richmond.

The Parham decision held that Article VIII, Section 7, of the Constitution of Virginia (1971) prevents the State Board of Education and General Assembly from requiring binding grievance arbitration of local school boards, but did not prohibit the General Assembly and State Board of Education from requiring that local school boards adopt a grievance procedure in a form specified by the State Board.

The issue of whether a local school board itself may voluntarily adopt such a procedure was not decided in Parham. However, in McKennie v. Charlottesville and Albemarle Railroad, 110 Va. 70, 65 S.E. 503 (1909), the Supreme Court previously upheld the authority of a governmental body to voluntarily enter into binding arbitration in a dispute arising over the interpretation of a contractual provision. See Report of the Attorney General (1972-1973) at 337.

At present, Section 8 of the State Board of Education's "Procedure for Adjusting Grievances" allows a local school board to adopt an "equivalent procedure" in lieu of the State Board's grievance policy. Such equivalent procedure must, however, be approved by the State Board prior to its becoming effective.

Thus, it is my opinion that, subject to Board of Education approval, a local school board may voluntarily adopt a grievance procedure with a binding arbitration component, although under the Parham decision the State could not mandate such a delegation.

It is also my opinion that, following Parham, a constitutional amendment would be required in order for school board employees to be afforded the opportunity for State-mandated binding grievance arbitration to the same extent as other local and State employees.
You have asked whether complaints of two Arlington County employees can be resolved by the grievance procedure established by law. You say that one employee wants the Fire Department to withdraw its regulation on hair length, and the other wants the Department to drop part of its promotional examination.

Section 15.1-7.1 of the Code of Virginia (1950), as amended, provides that a local governing body employing more than fifteen employees have a grievance procedure for its employees in order to afford them "an immediate and fair method for the resolution of disputes." It further provides that the procedure shall "conform to like procedures established by the Governor."

The Governor has established a procedure for handling State employee grievances, to which he last approved revisions on March 15, 1977. The procedure defines a grievance as "a complaint or dispute of an employee or employees regarding the application, meaning, or interpretation of personnel policies or procedures as they affect the work activity of such employee or employees."

The grievance is considered at a number of different levels, or "steps." The various steps differ primarily in the degree of formality. The first step, for instance, is a conference between the employee and the immediate supervisor. The fourth step is a hearing before a panel of three or five persons who are authorized to make a final decision upon certain conditions. The terms of the grievance procedure established by the Governor allow the Fourth Step Panel "to interpret the application of appropriate agency policies and procedures in the case" but not "to formulate or to change policies or procedures," the latter being a prerogative reserved specifically to the agency.

In my opinion, the employees are asking that an established management policy be changed in both cases. A grievance panel does not have authority to make such changes. To allow a panel to exercise such authority would be inconsistent with the State Grievance Procedure established by the Governor. Thus, a grievance panel would not have jurisdiction to hear and decide either of the grievances which you have described.

It is recognized that, as in the instances cited in your letter, an employee may have legitimate concerns which are nongrievable under the State Grievance Procedure. This does not mean that the employee is thereby denied an op-
portunity to express those concerns. The classification of a complaint as not grievable does not mean that it is in any way undesirable for an agency to provide customary administrative review by a means other than the grievance procedure.

HIGHWAYS—Revenue Sharing Funds For Secondary Roads Under Control Of State Highway Department.

COUNTIES, CITIES AND TOWNS—Use Of Revenue Sharing Funds—Roads not yet accepted into secondary system of State highways not eligible for funds under § 33.1-75.1.

June 5, 1978

THE HONORABLE CECIL G. MOORE
County Attorney for York County

This is in response to your recent letter in which you inquire as to whether, under § 33.1-75.1 of the Code of Virginia (1950), as amended, the Department of Highways and Transportation may allocate State highway revenues to the counties for use to repair and improve county streets which have not yet been accepted into the State secondary system. The statute referred to directs that the State Highway and Transportation Commission

"make an equivalent matching allocation to any county for designations by the governing body of up to fifteen per centum of funds received by it during the current fiscal year pursuant to . . . 'revenue sharing funds,' for use by the State Highway and Transportation Commission to construct, maintain or improve the secondary highway system within such county. Such funds appropriated by the State Highway and Transportation Commission and such federal revenue sharing funds shall be placed in a special fund, to be known as the ' . . . . . . County secondary road fund,' and shall be used solely for the purpose of maintaining, improving or constructing the secondary highway system within such county."

This statute has previously been construed in an opinion to the Honorable William F. Watkins, Commonwealth's Attorney for Prince Edward County, dated May 9, 1974, and found in the Report of the Attorney General (1973-74) at 176. In that opinion it was determined that if a county designates funds under § 33.1-75.1, such funds must be "used for the maintenance, improvement and construction of the State secondary road system." I concur in this opinion because the specific language of the statute manifests that such funds shall be used solely for that purpose.

Thus, since the roads about which you have inquired are specified to be not yet accepted into the State secondary system, it is my opinion that such roads are not eligible for funds under the subject section.

HIGHWAYS—Speed Limit Now Established By Statute.

AMENDMENTS—Reckless Driving—Maximum statutory speed limit—
General Assembly amended § 46.1-193(1)(a) and (b) so that § 46.1-190(i) applies.

DEFINITIONS—Highways—“All State primary highways” as used in § 46.1-193(1)(b).

HIGHWAYS—Specific Designation Of Primary Roads Found On Map Kept On File In State Highway And Transportation Commissioner’s Office.

HIGHWAYS—Speed Limits—Procedure for lowering.

MOTOR VEHICLES—Reckless Driving Under § 46.1-190(i)—Exceeding limit set by Governor’s Executive Order by over twenty miles not reckless driving—Driving in excess of eighty miles per hour is reckless driving—Amendment to statute.

August 26, 1977

THE HONORABLE ANDREW G. CONLYN, JUDGE
General District Courts of Lancaster, Northumberland, Richmond, Westmoreland and Essex Counties

This is in response to your recent request for my opinion on certain legislation enacted by the 1977 Session of the General Assembly. You first inquire as to the definition of “all State primary highways” in § 46.1-193(1)(b), Code of Virginia (1950), as amended. Secondly, you refer to the Opinion of the Attorney General to the Honorable John F. Atwood, Sheriff of Prince George County, dated December 12, 1973, and found in the Report of the Attorney General (1973-1974) at 254 and ask:

“Now that the legislature has by statute established the maximum speed limit on the Interstate System [Section 46.1-193(1)(a)] and on nonlimited access highways having four or more lanes and on all State Primary Highways at fifty-five miles per hour, what if any effect does this have on the opinion of the Attorney General?”

In addition, you suggest that on certain primary highways within your District, speed limits lower than fifty-five miles per hour might be advisable and by implication seek an opinion on how such limits might be lowered.

In response to your first inquiry, § 46.1-193(1)(b) sets a maximum speed limit of fifty-five miles per hour on nonlimited access highways having four or more lanes and on all State primary highways. As you have pointed out, Title 46.1 does not define the term “State primary highway”; however, § 33.1-25 defines the terms “State Highway System” and “primary system of State highways” as having the same meaning and explicitly provides that the definition set out therein shall apply when those terms are “used elsewhere in this Code or in any other act or statute.” “State primary highways” is simply a descriptive term for roads within the “State Highway System” or “primary system of State highways.” At least one provision of the Code and opinions of this Office have so used the term “primary highway” or “primary road.” See § 33.1-41 of the Code; Report of the Attorney General (1975-1976) at 155; Report of the Attorney General (1954-1955) at 126.

Specific designation of primary roads may be found on a map of the State Highway System which is required by statute to be kept on file in the State Highway and Transportation Commissioner’s office for public inspection. See § 33.1-36 of the Code.
Your second question refers to the opinion of the Attorney General which ruled that driving at twenty miles per hour over the fifty-five mile speed limit would not constitute a specific instance of reckless driving under § 46.1-190(i). See Report of the Attorney General (1973-1974) at 254. Section 46.1-190 provides:

“A person shall be guilty of reckless driving who shall: . . . (i) Drive a motor vehicle upon the highways of this State at a speed of twenty or more miles per hour in excess of the applicable maximum speed limits prescribed in § 46.1-193, paragraphs (1) (a) (b) (c) (e) of this title, or in excess of eighty miles per hour regardless of the posted speed limit;”’ (Emphasis added.)

Since the fifty-five mile per hour maximum speed limit, in force at the time of that opinion, was not prescribed in § 46.1-193, but was required by the Governor’s Executive Order Number Thirty-six, issued on November 26, 1973, the clause defining driving at twenty miles per hour in excess of the maximum set out in § 46.1-193 to be reckless driving did not apply to speeds in excess of the limits imposed by the Governor’s Order. See Report of the Attorney General (1973-1974) at 254. Now, however, the General Assembly has amended § 46.1-193(1)(a) and (b) so that the maximum statutory speed limit is fifty-five on the Interstate System, limited access highways, nonlimited access highways having four or more lanes, and all State primary highways. Section 46.1-190(i) therefore applies to that speed limit. Accordingly, a speed of twenty or more miles per hour in excess of the fifty-five mile limit on these highways would now, in my opinion, constitute reckless driving.

The final question you pose with regard to lowering speed limits on certain primary highways may be answered by reference to the applicable statutory and Virginia Department of Highways and Transportation (VDH&T) procedures. Members of the public, State Police and local enforcement officials may request VDH&T review of speed limits on primary and other highways. Section 46.1-193(3) allows the State Highway and Transportation Commissioner to decrease the speed limit on highways under his jurisdiction “when prescribed after a traffic engineering and traffic investigation and when indicated upon the highway by signs.”

HIGHWAYS—Statutory Definition Of Public Or Private Roads; Streets Of Restricted Access In Residential Subdivision.

CONSERVATORS OF THE PEACE—Security Force Members At Subdivision Have Qualified As—Traffic infractions.

COUNTIES, CITIES AND TOWNS—Ordinances—Operation of motor vehicles on subdivision streets—Limited access to residential subdivision.

DISTRICT COURTS—Violators Of Title 46.1 Subject To Jurisdiction Of General District Court Of County Where Subdivision Located.

MOTOR VEHICLES—Traffic Infractions—Reference in Title 46.1 has no applicability to roads not within statutory definition of highways—Streets of restricted access in residential subdivision—Request or consent of owners.

ORDINANCES—Streets—County may not set speed limits in subdivision for
streets not part of State secondary system.

POLICE OFFICERS—Private Security Guards—Violations of traffic regulations on subdivision streets.

STREETS—Subdivision Streets—If dedicated to County or State as public roads cannot be subjected to access control by private security force.

May 19, 1978

THE HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

You have asked about how certain traffic laws apply to the roads in a subdivision in a county owned either by the developer or a property owners' association. As you describe it, access to the roads is controlled by security guards at a gatehouse and all persons other than residents of the subdivision are required to secure a pass at the gatehouse before entering the subdivision. The developer has established speed limits for vehicles using the roads in the subdivision. I shall answer your questions in order.

1. You ask whether anyone driving on these roads may be charged by a member of a public law enforcement agency with exceeding the posted speed limit or driving in a careless or reckless manner and if so whether he would be subject to jurisdiction of the General District Court of the County where the subdivision is located.

A highway is defined in § 46.1-1(10), Code of Virginia (1950), as amended, as

"The entire width between the boundary lines of every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets, alleys and publicly maintained parking lots in counties, cities and towns." [Emphasis added.]

Based on your description of the restricted access to the streets in this residential subdivision, it is my opinion that the definition of highways in § 46.1-1(10) does not encompass the subject roads. See Opinion to the Honorable Nathan H. Miller, Member, House of Delegates, dated March 11, 1974, found in the Report of the Attorney General (1973-1974) at pages 177-178. See also Prillaman v. Commonwealth, 199 Va. 401, 100 S.E.2d 4 (1957).

Any reference in Title 46.1 to traffic infractions committed on highways has no applicability to roads not falling within the definition of highways. However, § 46.1-6 provides an exception that a peace or police officer or sheriff or deputy "may patrol the streets and roads within the subdivisions of real property . . . which streets and roads are maintained by the owners of the lots or parcels of land within any such subdivision . . . upon the request or with the consent of such owners or association of such owners, to enforce the provisions of Chapters 1 through 4 (§§ 46.1-1 through -347) of this Title." This section expands the geographical area of enforcement so that those charged with the enforcement of the law have the authority to enforce the provisions of Chapters 1 through 4 of Title 46.1 within a residential subdivision where there has been a request or consent of the owners or association of owners.

The authority of the aforementioned law enforcement officers is limited, however, to the enforcement of the enumerated provisions of Title 46.1; thus, speed limits established by the developer would have no force of law and en-
Enforcement would be limited to those speed limits established under § 46.1-193(g). The provisions for reckless driving are found in §§ 46.1-189 through -192.2 and would be enforceable by the same officers. Finally, all violators of Title 46.1 would, in my opinion, be subject to the jurisdiction of the General District Court of the county where the subdivision is located.

2. You ask whether anyone driving on the subdivision roads may be charged with a violation of speed limits, reckless driving or other traffic laws by the private security force on the property employed by the subdivider.

Violations of the traffic regulations set out in Chapter 4 of Title 46.1 are enforceable in accordance with § 46.1-6, by any "peace or police officer, sheriff or deputy," upon request or consent by the owners or association of owners of the subdivision.

You state in your letter that the members of the security force at this subdivision have qualified as conservators of the peace. The appointment, powers and duties of conservators of the peace are found in Articles 1 and 2, Chapter 2 of Title 19.2 (§§ 19.2-12 through -23). While these sections do not specifically authorize conservators of the peace to issue summons or make arrests for violations of the traffic laws in Title 46.1, they do grant such officers the authority to arrest in those situations set out in § 19.2-81. Section 19.2-81 provides them with the authority to "arrest, without a warrant, any person who commits any crime in the presence of such officer." Section 46.1-16.01 provides that violations of Chapters 1 through 4 "unless otherwise stated . . . shall constitute traffic infractions punishable by a fine of not more than one hundred dollars." This then presents the issue of whether traffic infractions are crimes within the meaning of § 19.2-81.

Clearly, violations of Title 46.1 which are misdemeanors or felonies may be enforced by conservators of the peace. Section 46.1-178.01 states that "[f]or purposes of arrest, traffic infractions shall be treated as misdemeanors." It further states that "[e]xcept as otherwise provided by this title [Title 46.1], the authority and duties of arresting officers shall be the same for traffic infractions as for misdemeanors." Consequently, I am of the opinion that conservators of the peace may enforce traffic regulations within their jurisdiction.

3. You further ask whether the County could pass an ordinance setting a speed limit in the subdivision if the streets have not been dedicated as public streets and have not become a part of the State secondary system.

Section 46.1-181.2 of the Code provides counties, cities or towns which have adopted ordinances under the provisions of Chapter 11 of Title 15.1 (§ 15.1-427, et seq.), with certain authority regarding the operation of motor vehicles on subdivision streets open to the public but not in public ownership. It must be noted that the determinative factor under the Code section in question is that the residential subdivision roads must be open to the public before enforceable traffic regulations may be adopted by ordinance. As long as there is limited

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1Under this section, the designated counties, cities or towns which have such subdivision streets within their jurisdiction may require "the posting and maintenance of signs or other appropriate markings regulating the operation and parking of motor vehicles and pedestrian traffic, and may adopt ordinances establishing and enforcing said regulations as to existing and future residential subdivisions."
access to this residential subdivision it is my opinion that enforceable ordinances could not be enacted.

4. You finally ask whether the streets in the development can be dedicated to the County or State but still allow access control to the streets by the private security force rather than being generally public thoroughfares, and if this can be done, whether public law enforcement officers could then issue summonses for traffic violations which would be enforceable in the General District Court.

If the streets in the development are dedicated to the County or State so that they become public thoroughfares, they cannot be subjected to access control by a private security force. Once such streets become public roads, the developer or individual property owners lose any rights of control they may have theretofore enjoyed. Depending on the circumstances and character of the roads, such roads are placed under the control of either the county or State. Once open to the public as public ways, the roads would fall within the definition of highways under § 46.1-1(10) and be subject to the provisions of Title 46.1 the same as any other highway. Accordingly, public enforcement officers would be authorized to enforce the provisions of Title 46.1 and the General District Court for that geographic area would have the same jurisdiction over these highways as it does for other highways within its jurisdiction.
This is in reply to your recent letter concerning the City of Charlottesville and the Charlottesville Redevelopment and Housing Authority, established pursuant to the Housing Authorities Law and codified as §§ 36-1 through -55.6 of the Code of Virginia (1950), as amended. You state that the City of Charlottesville is considering a proposed amendment to its charter (Ch. 384 [1946] Acts of Assembly 747) which would permit the City Council to terminate the terms of office of the commissioners of the Authority and designate itself as the Commission of the Charlottesville Redevelopment and Housing Authority. The proposed charter amendment would, furthermore, prohibit a councilman from continuing to serve as a commissioner after he ceases to be a member of the City Council. You inquire whether the proposed amendment would have the effect of merging the legal identities of the City of Charlottesville and the Charlottesville Redevelopment and Housing Authority, with the result that the restrictions of Article X, Section 10, of the Constitution of Virginia (1971), would be violated.

That constitutional provision states:

"Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority."

Article X, Section 10, forbids, *inter alia*, the Commonwealth and her local governments from lending their credit for any private purpose. This provision is applicable to all political subdivisions of the State, including a special purpose authority which the General Assembly authorized a local government to create. *Harrison v. Day*, 200 Va. 750, 107 S.E.2d 585 (1959). Therefore, the Commonwealth may not directly or indirectly aid a private purpose, and may not set up an authority to carry out such a purpose. *Button v. Day*, 208 Va. 494, 158 S.E.2d 735 (1968). If, on the other hand, the purpose for which an authority is created is a public purpose, there would be no violation of Article X, Section 10, even if such activities are directly performed by a municipal corporation or county. The question, therefore, is whether redevelopment and housing projects are public purposes.

The Supreme Court of Virginia has ruled that the eradication of inadequate housing is a matter of vital public interest and that the Housing Authorities Law, pursuant to which the Charlottesville Redevelopment and Housing Authority was created, furthers a public purpose. *Mumpower v. Housing Authority*, 176 Va. 426, 11 S.E.2d 732 (1940). A municipal housing authority created pursuant
REPORT OF THE ATTORNEY GENERAL

The goal of the Housing Authorities Law is to provide a mechanism by which substandard housing may be eliminated and adequate dwellings constructed. The Supreme Court of Virginia has ruled, however, that such a valid public purpose may not be achieved through the use of an improper method. *Button v. Day*, supra. The Housing Authorities Law seeks to foster its objectives through the issuance of bonds to finance the construction and operation of housing projects by housing authorities or by private interests. Public funds are not, however, directly or indirectly used to grant credit in aid of private interests.

Although private interests may incidentally benefit from the Law, the use of the credit of the Commonwealth to finance needed housing does not result in the creation of an unconstitutional means to achieve a meritorious public goal. Both the animating purpose of the Housing Authorities Law and the method by which it is to be achieved serve a proper governmental function. The use of public credit to help finance the construction of redevelopment and housing projects therefore does not result in the use of public funds to further a private purpose in violation of the principles of *Button v. Day*, supra. I am thus of the opinion that the proposed charter amendment does not violate the provisions of Article X, Section 10.

There are, however, other issues which must be resolved before the implications of the proposed charter amendment can be fully understood. The City of Charlottesville is a political subdivision of the Commonwealth of Virginia. The Charlottesville Redevelopment and Housing Authority is also a political subdivision. See § 36-4. As I have previously ruled, a political subdivision is a political division of the sovereignty of a state created by general law to aid in the administration of government. Such a subdivision is created by action of the legislature to exercise some portion of the sovereignty of the State in regard to one or more specific governmental functions. Such functions may be general, such as municipal government; other functions assigned may be specific, such as the provision of water and sewer service, or the provision of public transportation. As the recipient of sovereignty, a political subdivision is independent from other governmental bodies, and may act, subject to applicable constitutional principles, within its discretion, to exercise those powers conferred by law without seeking the approval of a superior authority. See Opinion to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated September 21, 1977, a copy of which is enclosed.

One reason for the creation of a special authority such as the Charlottesville Redevelopment and Housing Authority is to circumvent the restrictions on local debt imposed by Article VII, Section 10, of the Constitution of Virginia. By creating a special-purpose authority as an independent political subdivision, the purpose of which is to construct and maintain some needed public project, an entity is established which can issue bonds independent of the locality's indebtedness. II A. Howard *Commentaries on the Constitution of Virginia* 865 (1974).

If the Charlottesville City Council constitutes itself as the governing body of the Authority, there is a question whether the Authority remains independent of the constitutional debt limitations imposed on the City.

The Authority is authorized to issue revenue bonds for any of its corporate purposes. Section 36-29 provides that:

"The bonds and other obligations of an authority (and such bonds and
obligations shall so state on their face) shall not be a debt of the city, the county, the State or any political subdivision thereof (other than the authority) and neither the city or the county, nor the State or any political subdivision thereof (other than the authority) shall be liable thereon, nor in any event shall such bonds or obligations be payable out of any funds or properties other than those of the authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction."

The Supreme Court of Virginia has ruled in similar circumstances that such language will prevent the bonds of the Authority from becoming bonds of a locality, and that in their issuance no debt will be incurred by a local government. Farquhar v. Board of Supervisors, 196 Va. 54, 82 S.E.2d 577 (1954). The Authority and the City are independent legal entities, each created pursuant to action of the General Assembly. Both have the power to issue bonds independently of the other. I am of the opinion, therefore, that in view of the express statutory language of § 36-29, and the status of these entities as independent political subdivisions, the proposed charter amendment will not eliminate the identity of the Authority as an independent political subdivision such that its debt will become the City's debt, although the same persons may sit as both the commissioners of the Authority and members of the City Council. A final point should be made. Section 36-11 provides:

"When the need for an authority to be activated in a city or county has been determined in the manner prescribed by law, the governing body of the city or county shall appoint not more than seven or less than five persons as commissioners of the authority created for such city or county. The commissioners who are first appointed shall be designated to serve for terms of one, two, three, four and five years, respectively, from the date of their appointment, but thereafter commissioners shall be appointed as aforesaid for a term of office of four years except that all vacancies shall be filled for the unexpired term. Except as may be otherwise expressly provided in the charter of a city or town specifically pertaining to such authority, no commissioner of any authority may be an officer or employee of the city or county for which the authority is created. A commissioner shall hold office until his successor has been appointed and has qualified. A certificate of the appointment or reappointment of any commissioner shall be filed with the clerk and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his services, but he shall be entitled to the necessary expenses, including traveling expenses, incurred in the discharge of his duties."

The statute normally governs the appointment and terms of office of commissioners of housing authorities. See Opinion to the Honorable J. Harry Michael, Jr., Member, Senate of Virginia, dated November 9, 1970, and found in Report of the Attorney General (1970)-1971) at 205. Section 36-11.2, however, provides:

"Notwithstanding any other provision of law to the contrary, whenever the members of a council of any city have been authorized to act as commissioners of a redevelopment and housing authority created under § 36-4 for such city, the council of any such city is hereby authorized to adopt a resolution appointing other commissioners for such authority in accordance with § 36-11, to serve as such in lieu of the members of council so acting."
"The provisions of this section shall not affect the provisions of the charter of any such city authorizing the governing body thereof to provide for the activation of such authority." (Emphasis added.)

Based on the above-cited statutes, the Housing Authorities Law anticipates a situation in which a city council may seek to constitute itself as the commission of a housing authority. Since the general law does not itself authorize the commission to be constituted in this way, however, the power to do so would have to result from the passage of an amendment to the Housing Authorities Law or special legislation such as the proposed amendment to the charter of Charlottesville. No conflict, therefore, arises between the Code of Virginia and the proposed charter amendment. Should a conflict develop in regard to the appointment of commissioners, their term of office, removal or other similar matters, the provisions of the charter must, of course, control the general law. This Office has ruled consistently 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 Opinion to the Honorable C. W. Allison, Jr., Commonwealth's Attorney for the City of Covington and Alleghany County, dated October 2, 1975, and found in Report of the Attorney General (1975-1976) at 52. Furthermore, no constitutional or statutory provision prevents the termination of the term of office of an appointed official prior to its expiration date. The terms of office of incumbent constitutional officers and elected local officials may not be reduced as a result of a referendum to alter the form of government of a locality. See Opinion to the Honorable John N. Lampros, Commonwealth's Attorney for Roanoke County, dated October 26, 1977, a copy of which is enclosed. Such a rule is not applicable here, however, since no referendum on the charter amendment is necessary, and commissioners of the Authority are not elected officials.

INDUSTRIAL DEVELOPMENT—Advance Approval Of City Council For Each Individual Project It Proposes To Finance—Present ordinance does not require.

BONDS—Industrial Development Authority—Bond issue not conditioned on Council's approval of maximum aggregate principal amount of that issue—Approval or rejection of bond issue in toto; not "item veto."

COUNTIES, CITIES AND TOWNS—Industrial Development Authority—Statute grants local governing body authority to limit type and number of facilities Authority may finance.

ORDINANCES—Industrial Development Authority—Advance approval of City Council not required under present ordinance for each individual project Authority proposes to finance.

ORDINANCES—Industrial Development Authority Revenue Bond Issue—Amendment could require City Council's advance approval of each project or facility Authority proposes to finance.

December 19, 1977

THE HONORABLE WILEY F. MITCHELL, JR.
Member, Senate of Virginia
This is in reply to your recent letter which makes reference to my previous Opinion to you of August 16, 1977. That Opinion concerned an ordinance by which the City Council of Alexandria sought to limit the circumstances under which the Alexandria Industrial Development Authority can issue bonds. Section 5 of the Ordinance provides in part that:

". . . notwithstanding any other provisions of this Ordinance, the Authority may not issue any revenue bonds under said Act other than those described above unless the City Council shall by resolution approve the purpose for which such revenue bonds will be issued and the maximum aggregate principal amount of such bond issue." (Emphasis added.)

In my August 16th Opinion, I ruled that § 15.1-1376 (a) of the Code of Virginia (1950), as amended, grants to a local governing body the authority to limit the type and number of facilities which the Industrial Development Authority may finance. I further stated, however, that this authority,

". . . does not, in my opinion, expressly, or by necessary implication, authorize Council to condition bond issuance by the Authority upon Council's approval of the maximum aggregate principal amount of that issue. Council is authorized to limit the type and number of facilities, but it has no authority to dictate the terms of financial arrangements made by the Authority, which are, by statute within its province alone."

You now inquire whether the Industrial Development Authority must obtain, pursuant to Section 5 of the City Ordinance quoted above, the advance approval of the Alexandria City Council for each project or facility that it proposes to finance.

Section 5 of the City Ordinance, as it is presently written, prohibits the Authority from issuing bonds until the City Council shall have approved the purpose for which financing is sought. By approving the purpose of a bond issue, the City Council will, in effect, approving the type and number of individual project facilities which will be financed thereby. The Ordinance does not presently require, however, that each individual project be submitted to the Council for advance approval.

If the proposed bond issue will be used to finance only one facility, approval of the issue will result in approval of the purpose and type of the individual project. If, on the other hand, it is proposed to finance more than one facility, Council may not approve some of the individual projects while rejecting others. Approval or rejection must be limited to approval or rejection of the bond issue in toto. The City Ordinance, as now written, thus provides no authority for the exercise by the Council of an "item veto" over proposed industrial projects.

Therefore, when the Industrial Development Authority seeks to issue bonds to construct needed facilities, it should submit that proposed bond issue, with the projects to be funded thereby, to the City Council. The Council may approve or disapprove the purpose of the issuance of bonds, or make suggestions as to how the type and number of facilities should be altered in order that the general purpose of the financing may be ruled satisfactory. Note, however, that the Council may formally approve or disapprove only the general purpose of the bond issue as a whole, and not each constituent project.

Section 15.1-1376 (a) expressly permits, however, the adoption of an ordinance by a local governing body which will limit the type and number of specific facilities which will be financed under the Act, and not just the general purpose of a bond issue. Should the City Council of Alexandria adopt such an
ordinance, the Council would thereby have gained the authority to approve or disapprove specific projects, either prospectively or on an ad hoc basis as plans for an individual facility crystallize, or both.

Thus, I am of the opinion that while the Ordinance as currently written permits the Council to indirectly approve the number and type of facilities by approving the general purpose of a bond issue, the Ordinance may be amended to permit the approval of the purpose and type of individual facilities. If such an ordinance were adopted, the Industrial Development Authority could be required to obtain the advance approval of the Alexandria City Council for each project or facility that it proposes to finance.

INDUSTRIAL DEVELOPMENT—Authority Is Separate And Distinct Legal Entity Independent Of City.

BONDS—Revenue Bond Issue Of Industrial Development Authority Of Alexandria—Authority of City Council to require prior approval.

DILLON'S RULE—Limits Authority Of Local Governments To Power Expressly Authorized Or Necessarily Implied—Doubt as to existence of power must be resolved against City Council.

ORDINANCES—Industrial Development Authority Revenue Bond Issue—City Council may require prior approval of purpose of financing, but its review is limited by statute.

August 16, 1977

THE HONORABLE WILEY F. MITCHELL, JR.
Member, Senate of Virginia

This is in reply to your recent letter in which you request my opinion concerning the Industrial Development Authority of the City of Alexandria. You state that City Council has amended the ordinance by which it created the Authority, and that § 5 of that ordinance, as amended, provides as follows:

"The Authority is hereby authorized to exercise all of the powers granted by the Act, including the power to issue the revenue bonds of the Authority in accordance with the Authority's resolution of July 23, 1975, for the purpose of providing funds to pay the cost of certain pollution control facilities at Potomac Electric Power Company's Potomac River Generating Station in the City of Alexandria; provided, however, that notwithstanding any other provisions of this Ordinance, the Authority may not issue any revenue bonds under said Act other than those described above unless the City Council shall by resolution approve the purpose for which such revenue bonds will be issued and the maximum aggregate principal amount of such bond issue." (Emphasis added.)

You inquire whether City Council has the authority to require prior approval by it of the purpose and amount of any proposed bond issue of the Authority. A resolution of this question requires both an interpretation of the general law under which the Authority is created, and application of Dillon's Rule.

Authorization for the creation of industrial development authorities is found in the Industrial Development and Revenue Bond Act, which is codified as Title
15.1, Chapter 33, of the Code of Virginia (1950), as amended. The governing body of any county, city or town may create such an authority to promote industry and trade. See § 15.1-1376. Such an authority "is a separate and distinct legal entity established to perform the public purpose designated by the legislature. It is independent of the city in its operations, its incurrence of debt, and its ownership of property." Chesapeake Devel. Authority v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967).

The powers of an industrial development authority include:

"... (g) to issue its bonds for the purpose of carrying out any of its powers. ... (j) to exercise all powers expressly given the authority by the governing body of the municipality which established the authority and to establish by-laws and make all rules and regulations, not inconsistent with the provisions of this chapter, deemed expedient for the management of the authority's affairs..." (Emphasis added.) See § 15.1-1378.

Bonds are issued by an industrial development authority pursuant to § 15.1-1379. That section states:

"(a) The authority shall have the power to issue bonds from time to time in its discretion, for any of its purposes, including the payment of all or any part of the cost of authority facilities and including the payment or retirement of bonds previously issued by it.

* * *

"(d) . . . Bonds may be issued under the provision of this chapter without obtaining the consent of any department, division, commission, board, bureau or agency of the Commonwealth, and without any other proceedings or the happening of any other conditions or things other than those proceedings, conditions or things which are specifically required by this chapter; . . ."

The sole source of authority granted the local governing body to impose limits upon the activities of its industrial development authority is § 15.1-1376, which provides as follows:

"(a) The governing body of any municipality in this Commonwealth is hereby authorized to create by ordinance a political subdivision of the Commonwealth, with such public and corporate powers as are set forth in this chapter. Any such ordinance may limit the type and number of facilities which the authority may otherwise finance under this chapter, which ordinance of limitation may, from time to time, be amended. In the absence of any such limitation, an authority shall have all powers granted under this chapter." (Emphasis added.)

"Facilities" are defined by § 15.1-1374 of the Act as:

"... any or all medical (including, but not limited to, office and treatment facilities), pollution control, industrial facilities and facilities for the residence or care of the aged, and multi-state regional or national headquarters offices or operations centers, located within or without or partly within or without the municipality creating the authority, now existing or hereafter acquired, constructed or installed by or for the authority for lease or sale by the authority pursuant to the terms of this chapter. . . ."
The Authority thus has all powers granted to it under the Act, subject to one potential constraint; Council is authorized to limit, by its ordinance, the type and number of facilities which the Authority may finance. Whether Council has the power to enact the limitation to which you have referred depends upon a construction of § 15.1-1376(a) in light of Dillon's Rule or its corollary. See I J. Dillon Law of Municipal Corporations 448-50 (1911), Bd. of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). Under that Rule, such power must be expressly authorized or necessarily implied from expressly granted powers. Any doubt as to the existence of the power must be resolved against Council. 13 M.J. Municipal Corporations § 26 (1974).

The authority to limit the type and number of facilities does not, in my opinion, expressly, or by necessary implication, authorize Council to condition bond issuance by the Authority upon Council's approval of the maximum aggregate principal amount of that issue. Council is authorized to limit the type and number of facilities, but it has no authority to dictate the terms of financial arrangements made by the Authority, which are, by statute within its province alone.

I am of the further opinion that the authority expressly conferred by § 15.1-1376(a), i.e., the authority to limit the type and number of facilities to be financed, may be exercised prospectively, or on an ad hoc basis as plans for an individual facility crystallize, or both. The statute permits action by the governing body to amend its ordinance at any of these times. Therefore, Council has authority to enact, as part of its industrial development ordinance, a provision requiring prior approval of the purpose of financing. Council's review of that purpose must, however, be confined solely to considerations of the type and number of facilities, existing and proposed to be financed.

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INSURANCE—Self-funded Health Insurance Program For Employees Of Fairfax County—Not authorized.

COUNTIES, CITIES AND TOWNS—Creatures Of The Commonwealth—Powers of local governments can be no greater than General Assembly has conferred on them.

DEFINITIONS—“Person” Extends To Bodies Politic And Corporate As Well As Individuals.

HEALTH BENEFITS—Meaning Of “Related Service”—Plans for prepaid hospital, medical, surgical or prescription drugs.

HEALTH INSURANCE—Prepaid Hospital, Medical And Surgical Services—Distinct from a health insurance program.

INSURANCE—Purchase Of Insurance Statutorily Authorized—Self-funded health insurance involves appropriations of public funds.

INSURANCE—Sickness Insurance Defined—Different from risk insured against under health insurance programs.

STATUTES—Accepted Principle Of Statutory Interpretation That Mention Of One Thing Implies Exclusion Of Another.
This is in reply to your recent letter in which you inquire whether Fairfax County is authorized to establish a self-funded health insurance program for its employees. I am of the opinion that your inquiry must be answered in the negative.

Because they are creatures of the Commonwealth and thus subordinate, the powers of local governments can be no greater than those the General Assembly has conferred upon them. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967). A local governing body may take action of the type contemplated by your inquiry only if it has been granted the power to do so, or if that power can be implied necessarily from those expressly granted. Any doubt as to the existence of a power must be resolved against the locality. See I J. Dillon Law of Municipal Corporations (1911).

Because there is no express grant of authority which would empower a local government to enact a self-funded health insurance program, that power, if it is deemed to exist, must be implied necessarily from those powers expressly granted to counties, cities and towns. You suggest that §§ 51-112 and 32-195.3:1 of the Code of Virginia (1950), as amended, provide authority for the enactment of such a program. Section 51-112 provides in pertinent part:

"The governing body of each county, city and town may . . . through the purchase of insurance and annuities provide for such pensions, including death benefits, and for group life insurance covering the officers and employees of such county, city or town, and for group accident and sickness insurance covering the officers and employees of such county, city or town and their dependents. Such governing body may by such ordinance establish a fund for the payment of such pensions, including death benefits, and for the payment of such insurance and annuity premiums and charges by making appropriations out of the treasury of the county, city or town or by requiring contributions, payable from time to time through payroll deductions or otherwise, or by both, or by any other mode not prohibited by law." (Emphasis added.)


Section 51-112 expressly authorizes the purchase of insurance. The establishment of a system of self-insurance differs, however, from the purchase of insurance. The purchase of health insurance involves the payment of premiums by the county, the employee, or a combination thereof, to a private insurance company. Claims are paid by the insurance company. A self-funded insurance program, on the other hand, involves appropriations of public funds by the governing body sufficient to meet anticipated obligations. Contributions
may or may not be required of the employee to qualify him for coverage. Excess insurance is purchased from a private company to protect against very large losses.

Because § 51-112 specifically authorizes only the "purchase of insurance" and does not authorize the establishment of self-funded insurance programs, such authority may not be implied from the statute. Where the statute is express in specifying how a program shall be conducted, the statute must be strictly construed to bar the use of alternative methods.

You have also pointed out that the statute authorizes the payment of insurance premiums "by any other mode not prohibited by law." I am of the opinion, however, that this language is not applicable to the manner in which the health insurance program itself may be established; rather, it is concerned solely with the ways in which payments may be made to the fund.

The governing body of a political subdivision "may provide liability insurance, or may provide self-insurance" to its officers and employees to cover liability arising from the discharge of their duties. See § 15.1-506.1. The express inclusion of the self-insurance alternative there highlights the exclusion of that alternative from § 51-112. There are other differences which may have led the General Assembly to include the alternative in one program, and exclude it from the other. One reason might be that the liability of public officials arising out of the discharge of their duties is limited by the doctrine of sovereign immunity. The risk of personal liability may be relatively small. On the other hand, the health insurance program does not enjoy any such limitation; it must pay income support when employees are sick or injured. The latter risk is potentially much larger than that for injurious acts of public officials.

For all of these reasons, I am of the opinion that authority to establish a program of self-funded health insurance cannot be implied necessarily from § 51-112.

You have also suggested that authority might derive from § 32-195.3:1, which provides as follows:

"Any person, any group of persons or any nonstock corporation may conduct directly or through an agent, who may be either an individual or a nonstock corporation, a plan or plans for furnishing prepaid hospital or medical and surgical or related services, except dentistry exclusively; provided, however, dental services may be included in any plan or plans for furnishing prepaid hospital or medical and surgical or related services or any combination thereof." (Emphasis added.)

Section 1-13.19 defines "person" to include bodies corporate and politic as well as individuals. See Opinion to the Honorable Ira M. Lechner, Member, House of Delegates, dated December 2, 1974, and found in Report of the Attorney General (1974-1975) at 199. I am of the opinion that § 32-195.3:1 authorizes a local governing body to conduct a plan for furnishing prepaid hospital, medical and surgical services. Such services are distinct, however, from a health insurance program. The Supreme Court of Virginia has held that a hospital services plan created pursuant to § 32-195.1, et seq., is not an insurance program. Blue Cross v. Commonwealth, 211 Va. 180, 176 S.E.2d 439 (1970).

The statutes regulating insurance are codified in Title 38.1. Section 38.1-5 defines sickness insurance as "insurance against loss resulting from sickness, or from bodily injury." (Emphasis added.) A medical services plan would prepay only the anticipated costs of medical care services, whereas health insurance covers the risk of loss resulting from poor health. The risk insured against under health insurance programs is thus different from that covered by a prepaid
hospital services program. I am therefore of the opinion that the authorization in § 32-195.3:1 for a local governing body to conduct a health services plan does not imply necessarily the ability to enact a self-funded health insurance program.

In conclusion, I find no express or necessarily implicit authority to enact a self-funded health insurance program in the statutes of Virginia.

INTEREST—Lender Electing To Charge Interest At Amortized Rate Of Twelve Per Centum May Charge Additional Two Per Centum Service Charge.

BANKS—Service Charge Of Two Per Centum—Standard service fee generally applicable to bank loans, industrial loans and unregulated second mortgage loans—Amortized rate; add-on rate.

FEDERAL TRUTH-IN-LENDING LAWS—Formula For Computing Interest—Additional service charge of two per centum under § 6.1-330.16 added to amortized rate as well as add-on rate.

December 22, 1977

THE HONORABLE ADELARD L. BRAULT
Member, Senate of Virginia

This is in reply to your recent letter in which you inquired whether, under the provisions of § 6.1-330.16D of the Code of Virginia (1950) as amended, a lender who elects to charge interest at an amortized rate of twelve per centum may charge the additional two per centum service charge which is provided by § 6.1-330.16A of the Code to lenders charging interest at an add-on rate of eight per centum.

The provisions currently contained in § 6.1-330.16A, B, and C of the Code are substantially the same as those proposed in the Report of the Virginia Code Commission on the Revision of Chapter 7 of Title 6 [Senate Document No. 38 (1975)]. The portion currently set forth in § 6.1-330.16D of the Code providing that “(a)ny loan secured by a subordinate mortgage may be at an interest rate of twelve per centum per annum” was not proposed by the Virginia Code Commission and appears to have been added by the General Assembly to make it clear that a lender could employ an amortized rate rather than an add-on rate. There is no indication contained in the language of § 6.1-330.16 as enacted that the application of the two per centum service charge is permissible only when the eight per centum add-on interest rate is used.

In reviewing the Report of the Virginia Code Commission on the revision of Chapter 7 of Title 6, it appears that the Commission’s concern with respect to the two per centum service charge was to standardize the descriptions of the charge throughout Title 6. The Code Commission noted in its Report:

“'The bank, industrial loan, and unregulated second mortgage lender statutes refer to an investigation fee of 2 per centum whereas the savings and loan section refers to an initial service charge of 2 per centum. The Commission first rephrased 'investigation fee' as 'investigation and processing fee' because it was thought that the latter term was more properly descriptive, but later concluded that the words 'service charge' which are used in the savings and loan statutes were more descriptive.'” (S.Doc. No. 38, p.5)
Accordingly, it cannot be said that the General Assembly provided the two per centum service charge in § 6.1-330.16A because of any processing expenses peculiar to the add-on interest method. Rather, it appears that the Virginia Code Commission recognized the two per centum service charge as a standard service fee generally applicable to bank loans, industrial loans and unregulated second mortgage loans.

Further, as you have noted in your letter, it does not appear that the General Assembly could have intended the rate of twelve per centum per annum, as set forth in § 6.1-330.16D of the Code, by itself to be completely commensurate with the combined add-on interest and service charge provided by § 6.1-330.16A, because, when fully computed according to the formulas set forth by the Federal Truth-in-Lending laws (15 U.S.C. § 1606), the twelve per centum annual interest rate, even with an additional service charge of two per centum is less than the "annual percentage rate" for the add-on interest method.

Accordingly, it is my opinion that the two per centum service charge set forth in § 6.1-330.16A of the Code legally may be applied to loans made pursuant to § 6.1-330.16D of the Code.

October 12, 1977

THE HONORABLE HUNTER B. ANDREWS
Member, Senate of Virginia

This is in reply to your inquiry which reads in pertinent part as follows:

"... whether or not the State Compensation Board may authorize the Sheriff of the City of Hampton to appoint and compensate additional deputies to manage the City's jail receiving unit which is physically detached from the Hampton City Jail."

As you note in your request, the "receiving unit" is separate and apart from
the City Jail and is located in the General District Court building one block away. Persons who have been arrested are "processed" through this facility and are transferred by the sheriff to the jail. If a person held in the jail is to be released on bond, the sheriff transports such person back to the "receiving unit" for that purpose.

Section 15.1-796 of the Code of Virginia, (1950), as amended, confers the same duties upon the city sheriff that were exercised by the city sergeant prior to July 1, 1971. More specifically, §§ 53-168 and 14.1-84 provide that the "sheriff of each county and the sergeant of each city shall be keeper of the jail thereof," and that "the [city] sheriff shall have supervision and control of the jail and the custody of all prisoners confined therein." (Emphasis added.) Moreover, under § 53-175, the sheriff is responsible for food, clothing and medicine for jailed prisoners.

Section 15.1-138 provides that a member of the police force of a town or city "shall observe and enforce all . . . laws [of the Commonwealth and] ordinances and regulations [of the city or town; and] shall detect and arrest offenders against the same." (Emphasis added.)

As is apparent from these provisions, the sheriff is responsible for the longer term care of persons within his custody, while the policeman is concerned with brief custody, sufficient only to process persons in or out of the criminal justice system. In the latter regard, the city police manage and operate this transition station, generally known as the "lockup."

The function of a lockup is quite distinct from that of a jail. After his initial arrest, a person will remain in the lockup only so long as is necessary for processing. He is then transferred to the jail and the sheriff's custody or to a hearing, depending upon the time of his arrest. Persons who are held in the jail pending hearing are returned to the lockup shortly before that hearing. Food, clothing and medicines generally are not furnished in the lockup, although these may be made available through outside sources in an emergency. In conclusion, then, the lockup is not custodial in the sense of a jail, but is merely a conduit to and from the jail.

It is my opinion that the "receiving unit" in the City of Hampton is serving that function common to a "lockup" and not that of a jail. Therefore, the City Sheriff's authority to staff that facility must be found in the charter of the City of Hampton. My research, including the original pre-consolidation charter found in Chapter 230 [1920] Acts of Assembly 323, discloses no authority for the City Sheriff to so act. Indeed, that original, as well as subsequent amendments, is silent on the matter.

Cities, towns and counties may exercise only those powers expressly granted, necessarily implied, or essential to the governmental function. Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977). My research has disclosed nothing which would lead me to believe that it is either necessarily implied in the City's charter or essential to its governmental function that the receiving unit be staffed by the City Sheriff's deputies. On a similar question, I previously have held that, in the absence of a charter provision so permitting, a city could not designate a "lockup" as part of the jail. See my Opinion to the Honorable Fred G. Pollard, Chairman, State Compensation Board, dated June 2, 1977, a copy of which is enclosed.

You are correct in noting that § 53-168.1 requires the sheriff to provide for courtroom and courthouse security. There is no requirement, however, that such a facility as the "receiving unit" be physically within the court building for that purpose. It is my opinion that such an arrangement as exists in Hampton is for the convenience of personnel presenting an accused person to the court and not
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for courtroom or courthouse security. The General Assembly, in the legislation to which you refer, tacitly adopted this position when it provided that

"... notwithstanding the provisions of § 53-168.1 or any other section of the Code of Virginia, no expenditures shall be made ... [by the Compensation Board] to provide ... more than one deputy for criminal cases in a district court ..." (Emphasis added.) Chapter 685 [1977], § 46, Item 149, Acts of Assembly 1407.

Therefore, it is my opinion that the Compensation Board may not authorize compensation for the City Sheriff's deputies to staff the Hampton City Jail receiving unit.

JUDGES—Appointment—General Assembly may appoint to additional term of office in 1980, but must retire twenty days after convening of next General Assembly after he attains age of seventy.

DEFINITIONS—"Judge" Has Statutorily Defined Meaning.

GENERAL ASSEMBLY—Retirement—Intent that all judges retire at seventy.

JUDGES—Retirement Not Mandatory At Age Seventy If Appointed Prior To July 1, 1970.

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 was not mandatory for county judges and regional juvenile and domestic relations court judges at age seventy if appointed prior to July 1, 1970—Not applicable to judges of municipal courts who were not State employees prior to 1973.

RETIREMENT SYSTEM—Mandatory Retirement Of Member Of Judicial Retirement System.

STATUTES—Interpretation By Agency Charged With Its Administration Entitled To Great Weight.

February 7, 1978

THE HONORABLE JAMES G. MARTIN, IV, JUDGE
Norfolk Juvenile and Domestic Relations District Court
Fourth Judicial District

This letter is in reply to your inquiry whether you are eligible for reelection by the General Assembly for an additional six-year term as a Juvenile and Domestic Relations District Court Judge. You ask:

"[Whether] I would be eligible for reelection by the General Assembly as a Juvenile and Domestic Relations District Court Judge upon the culmination of my present term of office in such capacity, and, if so, whether I could serve out such entire additional six-year term."

You state the following facts: You were appointed as Presiding Judge of the
Juvenile and Domestic Relations Court of the City of Norfolk by the judges of the courts of record of the City for a six-year term beginning on May 1, 1968, and ending on April 30, 1974. You were elected by the General Assembly as Judge of the Juvenile and Domestic Relations District Court of the Fourth Judicial District to serve a six-year term from February 1, 1974, to January 31, 1980. You were born on April 27, 1911, and will be sixty-eight years of age at the expiration of your present term. If elected to an additional six-year term by the General Assembly you will be seventy-four years of age at the expiration of that term. You are presently a member of the Judicial Retirement System.

I can find no authority which would prevent the General Assembly from appointing you to an additional term of office in 1980. I am of the opinion, however, that § 51-167(a) of the Code of Virginia (1950), as amended, requires that you retire twenty days after the convening of the next General Assembly after you attain the age of seventy.

Section 51-167(a) provides that:

"Mandatory requirement.—Any member [of the Judicial Retirement System] 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."

The Virginia Supplemental Retirement System has interpreted the exception to the mandatory retirement age of seventy established in § 51-167(a) as applying only to those judges who were allowed to serve past the age of seventy under the provisions of the former State Retirement System. An interpretation of a statute by an agency charged with its administration is entitled to great weight. See Commonwealth v. Research Analysis Corp., 214 Va. 161, 198 S.E.2d 622 (1973). Moreover, it was the intent of the General Assembly that all judges retire at seventy, see Report of the Virginia Advisory Legislative Council for a Judicial Retirement System for Virginia (1970) at 7. Thus in my opinion the proviso in § 51-167(a) should be strictly construed to apply only to the State law in effect prior to July 1, 1970, which was applicable to judges who were members of the former State Retirement System.

The State law in effect immediately prior to July 1, 1970, allowed county judges, and regional juvenile and domestic relations court judges, who were members of the former State Retirement System, to serve as long as they wished to remain in judicial service. See Opinion to the Honorable Harold B. Singleton, Chief Judge, Juvenile and Domestic Relations District Court, dated February 18, 1976, and found in the Report of the Attorney General (1975-1976) at 180. No similar State law was applicable to judges of municipal courts, who were not State employees prior to 1973, and thus were not members of the former State Retirement System. Accordingly, in my opinion you are not excepted from the mandatory retirement age of seventy established in § 51-167(a).

JUDGES—Part-time Judge Not Prohibited From Continuing To Practice Law After Retirement.

JUDGES—Full-time Judges—Receiving retirement benefits from Judicial
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Retirement System, may not appear as counsel in any case in any court of the Commonwealth.

June 23, 1978

THE HONORABLE IRENE L. PANCOAST, JUDGE, RETIRED
Alexandria Juvenile and Domestic Relations District Court

You ask whether a retired part-time judge is prohibited from practicing law. Section 51-179 of the Code of Virginia (1950), as amended, prohibits persons who have served more than a single term as full-time judges of a court not of record of the Commonwealth and who are receiving retirement benefits from the Judicial Retirement System from appearing as counsel in any case in any court of the Commonwealth. It does not prohibit retired part-time judges from practicing law in Virginia courts. I note that under § 16.1-69.12 of the Code, part-time judges of courts not of record are not prohibited from practicing law while in office, with certain exceptions. Accordingly, I am of the opinion that part-time judges are not prohibited from continuing to practice law after retirement.

JUDGEMENTS—Default Decrees.

MARRIAGE—Default Decree Does Not Apply To Divorce—Court must have adequate proof before dissolving a marriage.

SUPREME COURT OF VIRGINIA—Rules Of Court—Default judgments and decrees—Rules before and after amendment August 1, 1977.

September 27, 1977

THE HONORABLE JAMES F. INGRAM, JUDGE
Circuit Court for the City of Danville
Twenty-second Judicial Circuit

This is in reply to your request for my opinion regarding the application of § 8-140.3 of the Code of Virginia (1950), as amended, to judgments and decrees of circuit courts and, specifically, with reference to decrees in divorce suits. Section 8-140.3 provides, in pertinent part, as follows:

“In any case in which there may be judgment or decree on default of any party required to respond to any motion or pleading, in any circuit court, no such judgment or decree shall be entered until after three days’ notice in writing by the party seeking such default is given to the party against whom such default is sought or his counsel.” (Emphasis added.)

Section 8-140.3 applies, by its express terms, only to those cases where a judgment or decree may be entered on account of default by any party required to respond to a motion or pleading. It is my opinion that that statute is intended to prevent the prejudice that would result where a judgment or decree is entered on the basis of unproven pleadings. That statute does not apply, by its terms, to a suit for divorce, where no default judgment can be entered and the allegations in the pleadings must be proven by full, clear and adequate evidence. See § 20-99 of the Code; Westfall v. Westfall, 196 Va. 97, 102, 82 S.E.2d 487, 490 (1954). Furthermore, the proof adduced in a divorce proceeding must be more than
uncorroborated testimony or admissions of either party. *Id.* The public policy of the Commonwealth requires that a court have adequate proof before dissolving a marriage. This procedure protects the party in default from having a decree entered against him without proof of the allegations in the pleadings, and is, therefore, more protection than § 8-140.3 would afford.

As to suits in equity generally, a decree may be entered on the basis of unproven allegations in the pleadings when a defendant fails to file a responsive pleading before he is in default. *See* Rules of Court 2:8 and 2:12. Section 8-140.3 would apply to such a case, and the notice it requires must be given before the court could enter the default decree. Where, on the other hand, the allegations of the bill have been proven by full, clear and adequate evidence, the court may enter a decree without further notice. This is because the decree is entered not on the basis of default, but because the party entitled to relief has proven his case.

Since a cross-bill in equity cannot be taken for confessed, the court has no power to enter a default decree where a party fails to respond to such a pleading. *See* Rule of Court 2:13. Accordingly, § 8-140.3 would not apply.

With respect to actions at law, Rules of Court 3:5 and 3:7 define those cases when a defendant is in default and, accordingly, those cases to which § 8-140.3 would apply. Notwithstanding the provisions of Rule 3:17 which authorize the entry of a judgment against the defendant in default on motion of the plaintiff without further proof of the allegations, no such judgment may be entered until the further notice required by § 8-140.3 has been given. Where, on the other hand, the court is satisfied that the plaintiff has adduced sufficient evidence to support the allegations in his motion for judgment, the pleadings may no longer be viewed as unproven, and the court may enter judgment without further notice. These same considerations apply to counterclaims and cross-claims. *See* Rule of Court 3:11.

It is noted that the import of this opinion applies in equal measure to the Rules of Court as they existed prior to their amendment August 1, 1977, and to the Rules as amended.

JUDGMENTS—Execution As To Defendant And Sureties Though Court's Judgment Recites Judgment Only Against Defendant.

September 7, 1977

**THE HONORABLE H. C. DEJARNETTE, CLERK**
Circuit Court of Orange County

This is in response to your letter in which you present the following factual situation: A judgment is obtained against the defendant in a general district court. The defendant appeals and gives bond with two sureties. On appeal the judgment is rendered in favor of the plaintiff as follows: "... [I]n the amount of $2,107.80, with interest thereon from February 1, 1977, until paid."

The attorney for the plaintiff now requests execution in accordance with § 16.1-113 of the Code of Virginia (1950), as amended, against the defendant and the sureties "plus interest and damages on the aggregate at the rate of 10% per annum." Your inquiry is whether the Clerk, by virtue of the authority of § 16.1-113, should issue the execution as to the defendant and the sureties when the judgment of the Court recites judgment only against the defendant.

Section 16.1-113 in relevant part reads as follows:
“If judgment be recovered by the appellee, execution shall issue against the principal and his surety, jointly or separately, for the amount of the judgment, including interests and cost, with damages on the aggregate at the rate of ten per centum per annum, from the date of that judgment until payment, and for the costs of the appeal; . . .”

This Office has previously interpreted this statute in an Opinion to the Honorable S. L. Farrar, Jr., Clerk of Circuit Court of Amelia County, dated October 22, 1964, and found in Report of the Attorney General (1964-1965) at 144, 145. In that case the Clerk had questioned whether in light of the language of § 16.1-113 the Court’s judgment should be against the surety as well as the principal-defendant. The Opinion noted that while there may be some doubt as to the validity of entering judgment against the surety since the statute does not authorize it in express terms, the statute was in substantially the same language as it existed in the Code of 1887 and that it appeared to be the practice elsewhere in the Commonwealth. An unarticulated premise for this answer is of course that it would be proper to issue execution against the principal and the surety pursuant to § 16.1-113 even absent a court order to that effect.

Based upon the language of the statute itself and the Opinion previously rendered by this Office, I am of the opinion that the execution should be issued against the principal-defendant and the sureties, plus interest and damages on the aggregate at the rate of 10% per annum, calculated from the date of judgment in the Circuit Court. See Nationwide Mutual Insurance Company v. Marie Tuttle, 208 Va. 28, 155 S.E.2d 358 (1967).

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Court-appointed Attorney May Claim Reasonable Expenses, In Addition To Maximum Amount Provided In § 19.2-163, For Representing Indigent Defendant—Not limited to courts of record.

December 20, 1977

THE HONORABLE ANDREW G. CONLYN, JUDGE
General District Courts for the Fifteenth Judicial District

This is in response to your inquiry whether an attorney appointed by a general district court to represent an indigent charged with a felony is entitled to be reimbursed for expenses over and above the maximum sum specified in § 19.2-163(1) of the Code of Virginia (1950), as amended. Specifically, you have indicated that you allowed a court-appointed attorney the sum of $75.00, as provided in § 19.2-163(1), for his representation in the general district court. The attorney has subsequently submitted a request for reimbursement of expenses, over and above the $75.00 allowance for his services, which he incurred in telephone costs and travel consulting with his client. You have further indicated that you find the telephone and travel costs to be reasonable.

Section 19.2-163 of the Code provides, in pertinent part, as follows:

“Counsel appointed to represent an indigent accused on a criminal charge shall be compensated for his services in an amount fixed by each of the courts in which he appears according to the time and effort expended by him in the particular case, not to exceed the amounts specified in the following schedule:
“(1) In a court not of record, a sum not to exceed seventy-five dollars;

   * * *

   “The court shall direct the payment of such reasonable expenses incurred by such court-appointed attorney as it deems appropriate under the circumstances of the case.” (Emphasis added.)

The emphasized portion of § 19.2-163, quoted above, makes it clear that the court appointing the counsel has the discretion to reimburse the appointed counsel for any “reasonable expenses” incurred in carrying out his duties. The applicability of the reimbursement provisions for “reasonable expenses” of § 19.2-163 of the Code is not limited to courts of record, but extends also to courts not of record in which attorneys are appointed. See Report of the Attorney General (1973-1974) at 23, 24.

Since you have determined that the travel and telephone expenses claimed by the attorney in question are reasonable ones, it is my opinion that such amount as is claimed may be reimbursed the appointed attorney. The attorney’s receipt of compensation in the maximum amount, for representing a defendant, was paid pursuant to § 19.2-163(1) of the Code and is applicable to his services, not expenses incurred. The inquiry is answered in the affirmative.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Detention Of “Child In Need Of Services”—“Habitual,” as used in § 16.1-228F.

CONFLICT OF LAWS—Statutes In Pari Materia Should Be Read And Construed Together—Where there is discrepancy, interpretation should be given so that all may, if possible, stand together.

DEFINITIONS—“Authorized Judicial Officers” As Used In Juvenile Code Defined In § 19.2-119.

DEFINITIONS—“Taken Into Custody And Brought Before” Means Physically Appearing—Proceeding cannot be handled over phone.

JUVENILES—“Child In Need Of Services” May Not Be Placed In Jail Pursuant To Warrant.

September 26, 1977

The Honorable Von L. Piersall, Jr., Judge
Portsmouth Juvenile and Domestic Relations District Court

This is in reply to your inquiries concerning the handling of the “child in need of services,” as defined by § 16.1-228F of the Code of Virginia (1950), as amended. This section defines “child in need of services” as follows:

1. A child who while subject to compulsory school attendance is habitually and without justification absent from school; or

2. A child who is habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, legal custodian or other person standing in loco parentis; or

3. A child who habitually deserts or abandons his or her family; or

4. A child who commits an act, which is otherwise lawful, but is designated a crime only if committed by a child.
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"Provided, however, to find that a child falls within any of classes 1, 2 or 3 above (i) the conduct complained of must present a clear and substantial danger to the child's life or health or (ii) the child or his or her family must be in need of treatment, rehabilitation or services not presently being received and (iii) the intervention of the court must be essential to provide the treatment, rehabilitation or services needed by the child or his or her family."

You first pose the situation when a parent seeks a petition for a child that is absent from home and whose whereabouts are unknown, and ask if it can be assumed that there is a "clear and substantial danger to the child's life or health" in order to satisfy § 16.1-228F. The proviso in § 16.1-228F to which you refer restricts the character of cases entering the juvenile justice system. Compare § 16.1-228F with former § 16.1-158(1) of the Code. Under the facts you have given, without more, I do not believe that it can be assumed that there is a "clear and substantial danger to the child's life or health."

You next ask if a detention order can be issued in the case where the child is absent from home and his whereabouts are unknown. For the reasons previously discussed and under the specific facts of your inquiry, a detention order should not be issued in such a case.

Your next question asks, "If it is the first time the child has been absent, how can the requirement that he 'habitually' deserts his family be satisfied?" The determination whether a child has "habitually" deserted or abandoned his family under § 16.1-228F, paragraph 3, is, of necessity, a question of fact for the trial court. The local juvenile court is aware of the circumstances surrounding a child's absence and, therefore, best able to make this determination. General guidelines as to the meaning of "habitual" in § 16.1-228 can, however, be formulated. The word "habitual" has been defined as "customary" or "usual." Black's Law Dictionary 839 (rev. ed. 1968). Since the previous statute dealing with runaway children did not contain the requirement for habitual desertion, the insertion of this language in present § 16.1-228F, paragraph 3, requires, in my opinion, that there must be more than a single, isolated incident to support any determination by the court. Compare § 16.1-158(1) (g) with § 16.1-228F, paragraph 3. Accord, In re Raymond O., 31 N.Y.2d 730, 731, 338 N.Y.S.2d 105, 106, 290 N.E.2d 145, 146 (1972).

Your next hypothetical situation deals with a child in need of services who has been taken into immediate custody by the police pursuant to § 16.1-246A of the Code. You are correct when you state that the child should be taken to court if the court is open. See § 16.1-247A. If the court is not open when the child is taken into immediate custody, the arresting officer may release the child on bail or place the child in shelter care. Section 16.1-247D provides that,

"A person taking a child into custody pursuant to the provisions of § 16.1-246A, during such hours as the court is not open, shall with all practicable speed and in accordance with the provisions of this law and the orders of court pursuant thereto:

"1. Release the child taken into custody pursuant to a warrant on bail or recognizance pursuant to chapter 9 (§ 19.2-119 et seq.) of Title 19.2; or

"2. Place the child in a detention home or in shelter care; . . ."

You next inquire whether § 16.1-249A, paragraph 3, restricts detention to those children who have been brought before a judge, intake officer or authorized judicial officer pursuant to § 16.1-248A of the Code. The pertinent portion of § 16.1-249 states as follows:
"If it is ordered that a child remain in detention or shelter care pursuant to § 16.1-248, such child may be detained, pending a court hearing, in the following places:" (Emphasis added.)

From the language in § 16.1-249A which has been emphasized, it is clear that the initial clause of this section of the Code concerns children who have been "taken into custody and brought before the judge, intake officer or authorized judicial officer pursuant to § 16.1-247." See § 16.1-248A of the Code.

Section 16.1-247D, paragraph 2, however, does provide for the placement of a child in need of services in a detention home, when that child is detained pursuant to § 16.1-246A, if the court is not open. In addition, the proviso found in § 16.1-249A, paragraph 3, dealing with places of confinement for children, states as follows:

"If a child is alleged to be delinquent, in a detention home or group home approved by the Department; provided, further, a child who is alleged to be in need of services may be detained in a detention home, for good cause, for a period not to exceed seventy-two hours prior to a detention hearing being held pursuant to § 16.1-250;"

I am, therefore, of the opinion that, in order to give § 16.1-247D, paragraph 2, substance, the legislature intended the proviso in § 16.1-249A, paragraph 3, to apply to situations where a child in need of services is taken into immediate custody pursuant to § 16.1-246A and the court is not open. All statutes in pari materia should be read and construed together and, where there is a discrepancy among them, and interpretation should be given so that all may, if possible, stand together. See 17 M.J. Statutes § 38 (1951).

You next inquire as to what an "authorized judicial officer" is. The term is used in § 16.1-247E, paragraphs 4 and 5, and in § 16.1-248A of the Code. In the first two sections, the Code speaks of "authorized judicial officers" entitled to issue warrants for children. The term "judicial officer" is defined in § 19.2-119 of the Code as follows:

"As used in this article the term 'judicial officer' means, unless otherwise indicated, any magistrate within his jurisdiction, any judge of a district court and the clerk or deputy clerk of any district court or circuit court within their respective cities and counties, any judge of a circuit court, and any justice of the Supreme Court of Virginia."

Although the initial portion of this statute attempts to limit its applicability to Chapter 9, Article 1, of Title 19.2 of the Code, I am aware of no other statute that defines the term. Since these words should be interpreted as consistently as possible throughout the laws of the Commonwealth, I am of the opinion that the term "authorized judicial officer" as used in the juvenile code is defined as in § 19.2-119.

You further inquire whether a judge, intake officer, or authorized judicial officer must be available twenty-four hours a day prior to detaining a child in need of services in a detention home, that is whether it is necessary to have a child appear before one of those persons listed prior to being detained in a detention home. On the basis of my prior explanation of your first hypothetical situation and under the facts you posed, such an appearance is not necessary prior to being detained in a detention home.

I am in agreement with your assumption that "taken into custody and brought before" in § 16.1-248A of the Code does require that the child physically appear
before the judge, intake officer, or authorized judicial officer and that this
would not permit the handling of a § 16.1-248A proceeding over the phone.

Your last hypothetical question asked what the police do when a child
(believed to be a child in need of services) is taken into immediate custody
pursuant to § 16.1-246B of the Code, when the court is not open. The alter-
 natives available to the police for the above-described child are listed in § 16.1-
247E, paragraphs 1 and 3, of the Code. You are correct when you state that if the
police feel this type of child should not be released and Court is not open, § 16.1-
247E, paragraph 3, would permit that placement of that child in shelter care
after the issuance of a detention order pursuant to § 16.1-255 of the Code. I find
no requirement in the Code, however, that a petition must be issued as a
prerequisite to the issuance of a detention order pursuant to § 16.1-255.
Therefore, it is not necessary at this time to answer your next inquiry whether
intake services are required 24 hours each day to issue petitions prior to issuing
detention orders. Finally, you are correct in your assumption that § 16.1-247E,
paragraph 5, of the Code does not permit placing this type of child in jail pur-
suant to a warrant.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Finding
Of Delinquency By Juvenile Court Is Not “Conviction” Within Meaning
Of § 19.2-305.1A.

JUVENILES—Juvenile And Domestic Relations District Court Law Does Not
Deal With Charges Involving Juveniles As Either “Felonies” Or
“Misdemeanors.”

JUVENILES—Proceedings Against Juveniles In Juvenile And Domestic
Relations Courts Are Not Criminal In Nature.

JUVENILES—Restitution To Aggrieved Party For Actual Damages Or Loss
Caused By The Delinquent Act.

February 13, 1978

THE HONORABLE JOHN N. LAMPROS
Commonwealth’s Attorney for Roanoke County

This is in response to your inquiry whether a finding of delinquency by a
juvenile and domestic relations district court is a “conviction,” within the
meaning of § 19.2-305.1A of the Code of Virginia (1950), as amended. This
statute provides, in pertinent part, as follows:

“Notwithstanding any other provision of law, no person convicted of a
crime in violation of any provision in Title 18.2, except the provisions of
article 2 of chapter 7 of Title 18.2 (§ 18.2-266, et seq.), on or after July one,
nineteen hundred seventy-seven, which resulted in property damage, shall
be placed on probation or have his sentence suspended unless such person
shall make at least partial restitution for such property damage or shall
submit a plan for doing that which appears to the court to be feasible under
the circumstances.”  (Emphasis added.)

A finding of delinquency by a juvenile court requires a determination that a
child has committed “... an act designated a crime under the law of this State,
or an ordinance of any city, county, town or service district, or under federal law, except an act, which is otherwise lawful, but is designated a crime only if committed by a child." Section 16.1-228H of the Code.

The rule in Virginia is clear, and this Office has consistently held, that proceedings in a juvenile court are civil, and not criminal, in nature. Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973); Opinion to the Honorable Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, dated December 5, 1977 (copy enclosed); Report of the Attorney General (1975-1976) at 187, 194, 195, 198, 199; Report of the Attorney General (1974-1975) at 227, 234, 235; Report of the Attorney General (1972-1973) at 241; Report of the Attorney General (1960-1961) at 175. Hence, a juvenile is not charged with a crime or convicted of a criminal offense. See, § 16.1-308 of the Code. 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 court on a petition stating facts which allegedly bring the child within the purview of the juvenile law. See, § 16.1-262, paragraph 4; Report of the Attorney General (1975-1976) at 198.

Accordingly, I am of the opinion that a finding of delinquency by a juvenile court is not a "conviction" of a crime under § 19.2-305.1A of the Code. As a result, the provisions of that section pertaining to restitution for property damage are inapplicable under the facts presented. I will point out, however, that § 16.1-279E, paragraph 7, does permit a judge to require a child to make restitution to an aggrieved party for actual damages or loss caused by the delinquent act.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Order Of Publication Required Under Juvenile Code To Terminate Parental Rights and Place Child For Foster Care Or Adoption—Confidentiality provision not violated when order sets forth name of child and parents.

JUVENILES—Disclosure Of Names—Authority of court to control.

PUBLICATIONS—Order Of Publication Required Under Juvenile Code To Terminate Parental Rights And Place Child For Foster Care Or Adoption—Not indiscriminate release of information, but made pursuant to Court order.

June 12, 1978

THE HONORABLE E. PRESTON GRISSOM, CHIEF JUDGE
THE HONORABLE JAMES A. LEFTWICH, JUDGE
City of Chesapeake Juvenile and Domestic Relations District Court
First Judicial District

'You have asked whether an order of publication required in a proceeding under the Juvenile Code1 to terminate residual parental rights and place a child for foster care or adoption would violate any confidentiality provision of that Code, when the order of publication sets forth the name of the child and his or her parents.

1Chap. 11 of Title 16.1 of the Code of Virginia (1950), as amended. Section 16.1-264 requires an order of publication when notice cannot be served personally.
**Requirements for Publication**

The juvenile and domestic relations district court may order service of process by order of publication if the individual cannot be found or his post office address cannot be ascertained. See §§ 16.1-263A and -264A. The latter section requires that any such publication give the abbreviated style of the suit, state briefly its object, and require the persons against whom it is entered to appear and protect their interests. See § 8.01-317. The Juvenile Code requires that the style of a juvenile petition shall contain the name of a child. See § 16.1-262. Therefore, the child's name will be stated in any such publication. The order of publication also must be sufficient to appraise the individual of the object of the suit. Watson v. Mose, 165 Va. 661, 183 S.E. 428 (1935). In order sufficiently to appraise the parents of the object of the suit, I am of the opinion that the child's name and the parent's name must be mentioned in the publication notice, together with the basis for filing the petition.

**Requirements for Confidentiality**

The confidentiality statutes in the Juvenile Code control the release of information which would specifically identify or describe a juvenile, or whatever concerns a juvenile, who has become involved with a law enforcement agency or court, if that information is derived either directly or indirectly from an agency or court file. See §§ 16.1-299 through -309. Indiscriminate release of such information would violate the purpose and interest of those statutes—that the welfare of the child is the paramount concern of the State. See Report of the Attorney General (1972-1973) at 246; Report of the Attorney General (1970-71) at 225. See also Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966).

The type of publication you mention, however, is not an indiscriminate release of information, but is, in fact, a release made pursuant to Court order. See § 16.1-264A. The name of the child and his or her parents are published to provide adequate notice of any court proceedings which may affect their interests so that they may appear to protect those interests. I am, therefore, of the opinion that an order of publication which mentions a child's name does not violate the confidentiality requirements in the Juvenile Code.

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**JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—**

**Procedure For Determining “Criminal Insanity” Or “Mental Retardation” Under § 16.1-269.**

**EVIDENCE—Degree Of Proof Required To Find That Child To Be Transferred From Juvenile Court To Circuit Court Is Not Mentally Retarded Or Criminally Insane.**

**JUVENILES—Transfer Of Children Fifteen Years Of Age Or Older From Juvenile Court To Circuit Court.**

**September 13, 1977**

**THE HONORABLE R. BAIRD CABELL, JUDGE**

Juvenile and Domestic Relations District Court

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This is in reply to your inquiry regarding § 16.1-269 of the Code of Virginia (1950), as amended. As you have noted, this statute deals with the transfer of children fifteen years of age or older who have committed acts which, if committed by adults, would be felonies. In order to transfer such cases from a juvenile court to a circuit court, the juvenile court shall, among other things, find that the "child is not mentally retarded or criminally insane." Section 16.1-269A, paragraph 3, subparagraph C. You have asked by what procedure or evidence is the court expected to make such a finding. You have also asked what degree of proof is required to make such a finding.

The finding required by § 16.1-269A, paragraph 3, subparagraph C, is a determination by the juvenile court that the child understands the nature and purpose of the proceedings against him and is able to assist in his defense; i.e., his capacity to stand trial. See § 19.2-167 of the Code; *Thomas v. Cunningham*, 313 F.2d 934, 938 (4th Cir. 1963). One is presumed to be sane unless his mental condition is called into question by proof to the contrary. *Jefferson v. Commonwealth*, 214 Va. 747, 204 S.E.2d 258 (1974); *Thomas v. Cunningham*, supra.

Obviously evidence may be offered by the child or his counsel to rebut this presumption, whether it be by expert medical or psychiatric testimony or any other proof which is relevant to the issue before the court. The evidence presented as to the juvenile's "criminal insanity" or "mental retardation" must be such as to create a reasonable doubt in the juvenile judge's mind whether the child understands the nature and purpose of the proceedings against him and is able to assist in his defense. See *Jefferson v. Commonwealth*, supra; *Thomas v. Cunningham*, supra; *Ashley v. Cox*, 344 F.Supp. 759, 765 (W.D. Va. 1972).

Courts have noted that, under both state and federal procedures in this jurisdiction, a simple suggestion of mental deficiency is not enough to require deferment of trial. *Hawks v. Peyton*, 370 F.2d 123, 125 (4th Cir. 1966). Further, the determination made by the juvenile court as to the child's sanity is a discretionary one and will not be disturbed unless abused. See *Elkins v. Commonwealth*, 208 Va. 336, 157 S.E.2d 243 (1967); *Delp v. Commonwealth*, 172 Va. 564, 200 S.E. 594 (1939).

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Summonses And Warrants In Traffic Infractions And Traffic Misdemeanor Cases In Juvenile Courts Should Be Filed In Circuit Court Pursuant To §§ 14.1-123(6) And 19.2-345.

CLERKS—Traffic Infractions—Summons and warrants in juvenile courts should be filed in circuit court—Circuit court should be aware of statutory provisions requiring separate dockets, etc., for juvenile cases, and confidentiality.

DEFINITIONS—District Courts—Juvenile and domestic relations district courts included within term.

JUVENILES—Proceedings Against Juveniles In Juvenile And Domestic Relations District Courts Are Not Criminal In Nature.

December 5, 1977

THE HONORABLE ROBERT N. BALDWIN
This is in answer to your inquiry whether traffic infractions or traffic misdemeanors in juvenile and domestic relations district courts are to be treated in the same manner as juvenile petitions and retained in the court or are they to be filed in the circuit court in accordance with § 14.1-123(6) and § 19.2-345 of the Code of Virginia (1950), as amended.

Section 14.1-123 provides, in pertinent part, as follows:

"Fees for services performed by the judges or clerks of district courts in criminal or traffic actions and proceedings shall be as follows and such fees shall be included in the taxed costs:

* * *

"(6) For filing and indexing all papers connected with any criminal or traffic action in a district court, 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 of the Code, to which § 14.1-123(6) refers, provides in pertinent part as follows:

"Between the first and tenth day of each month every district court shall make return of the warrants and summonses in all criminal and traffic cases finally disposed of by such court in the preceding month." (Emphasis added.)

In construing §§ 14.1-123 and 19.2-345 prior to the amendments made by the 1977 Session of the General Assembly, this Office has opined that a juvenile and domestic relations district court is a "district court," as that term is used in §§ 14.1-123(6) and 19.2-345 of the Code, and that warrants and summonses in all criminal cases finally disposed of should be returned to the circuit court. See Opinion to Ms. Frances A. Hamm, Clerk, Prince William County Juvenile and Domestic Relations District Court, dated November 16, 1976. The same opinion noted, however, that proceedings against juveniles in juvenile and domestic relations district courts are not criminal in nature. See also Lewis v. Commonwealth, 214 Va. 150, 198 S.E.2d 629 (1973).

The emphasized portions of §§ 14.1-123 and 19.2-345, as quoted above, were words added by the 1977 Session of the General Assembly. Ch. 585 [1977] Acts of Assembly 942. Since the legislature has specifically included traffic cases in district courts in those papers that should be returned to circuit courts under §§ 14.1-123 and 19.2-345, I am of the opinion that the appropriate papers dealing with traffic infractions and traffic misdemeanor cases in juvenile courts should be filed in the circuit court pursuant to §§ 14.1-123(6) and 19.2-345 of the Code.

The circuit courts to which these warrants and summonses are returned should be aware of the provisions of §§ 16.1-302 through -309 of the Code requiring separate dockets, order books and files for juvenile cases, as well as requiring their confidentiality.
REPORT OF THE ATTORNEY GENERAL

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Support Files Of Juvenile Courts Should Not Be Destroyed Pursuant To § 16.1-306.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Financial Records In Support Cases May Be Destroyed Pursuant To § 16.1-69.52.

August 17, 1977

THE HONORABLE JAMES W. FLIPPEN, JUDGE
Roanoke County Juvenile and Domestic Relations District Court

This is in response to your inquiry whether certain files, papers and records regarding support matters may be destroyed by juvenile and domestic relations district courts under § 16.1-193 of the Code of Virginia (1950), as amended. This section of the Code described certain situations in which clerks of juvenile and domestic relations district courts may destroy the files, papers and records connected with proceedings in such courts.

Section 16.1-193 was repealed by the 1977 Session of the General Assembly, and § 16.1-306 enacted in its place. See Ch. 559 [1977] Acts of Assembly 870-871. Since your request pertained to various factual situations under former § 16.1-193 of the Code, I will attempt to be as specific as possible under the new statute dealing with the destruction of records in juvenile courts.

As a general rule, support cases (whether civil or criminal) deal directly with adults, since they are the parties to the case. Juveniles are beneficiaries in some support matters. Former § 16.1-193 recognized this distinction and provided for the permissive destruction of juvenile court records in proceedings both "with respect to a child" and "with respect to an adult." See § 16.1-193.

Section 16.1-306 now provides for the destruction of certain juvenile records. It limits its application to proceedings "with respect to a child" under paragraph A and records "of juveniles" under paragraph B. The legislature has dropped those cases which concern adults, from the provisions of the statute. These cases would include support cases, whether they be civil or criminal, since adults are direct parties to the matter.

This interpretation is further supported by language in § 16.1-306F, which states, in pertinent part, as follows:

"Upon destruction of the records of a proceeding as provided for in subsections A and C, the violation of law shall be treated as if it never occurred." (Emphasis added.)

This paragraph makes it clear that the legislature intended that § 16.1-306 pertain solely to cases involving acts and offenses committed by juveniles. Civil support cases obviously involve no "violation of law." Although criminal support cases do involve a violation of law by the parent (see § 20-61 of the Code), the State would have no interest in treating such violation as if it never occurred unless the parents of the children involved were juveniles themselves.

I am, therefore, of the opinion that files, papers and other records of support cases in juvenile and domestic relations district courts should not be destroyed pursuant to § 16.1-306 of the Code.

You have also asked how § 16.1-306 of the Code is qualified by § 16.1-69.52. The portion of the latter section with which you are concerned permits judges of district courts, with the consent of the Auditor of Public Accounts, to:

"... (d) cause all cash receipts, register sheets, cash disbursements and general ledger sheet to be destroyed after a period of twenty years."
The financial records referred to in § 16.1-69.52 are kept in the regular course of the court's business and do not pertain specifically to the legal and factual matters contained in a juvenile court's case file. These financial records may be destroyed within the limitations of § 16.1-69.52, even though the court's case file does not now fall within the provisions for destruction of records in § 16.1-306.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Suspension Of Minor's Operator's License In Case Of Traffic Violations Under § 16.1-279—Does not include traffic infractions.

MOTOR VEHICLES—Suspension Of Minor's Operator's License By Juvenile And Domestic Relations Court Under § 16.1-279—Does not include traffic infractions—Division authorized to suspend operator's license upon accumulation of demerit points based on traffic infractions.

September 26, 1977

THE HONORABLE R. BAIRD CABELL, JUDGE
Juvenile and Domestic Relations District Court
Fifth District of Virginia

This is in reply to your letter requesting my advice as to the proper application of § 16.1-279 of the Code of Virginia (1950), as amended, effective July 1, 1977. I quote from your letter the following:

"Section 16.1-178(8) of the Code of Virginia, repealed by the 1977 General Assembly, specifically authorized the Juvenile & Domestic Relations Courts to suspend operators' licenses in disposing of traffic violations by juveniles. Subsection E 6 of present § 16.1-279 authorizes the court to suspend the motor vehicle and operators' licenses of children found to be delinquent. Does this provision extend to suspension of operators' licenses of children found to have violated traffic laws, now referred to as 'traffic infractions' in § 46.1-1(40) of the Code of Virginia?"

Former § 16.1-178(8) and (9) of the Code (repealed by Chapter 559 [1977] Acts of Assembly 839) provided that in the event the court found any minor subject to the provisions of the Juvenile and Domestic Relations District Court law, the court could suspend such minor's operator's license in the case of traffic violations "or in any case when, in the judgment of the court, the best interests of the child or minor and of society require such suspension." (Emphasis added.) Section 16.1-279 of the Code, effective July 1, 1977, does not contain such language. It provides in paragraph E the following:

"If a child is found to be delinquent, the juvenile court or the circuit court may make any of the following orders of disposition for his supervision, care and rehabilitation:

   * * *

   "6. Suspend the motor vehicle and operator's license of such child.

   * * *

   "8. In case of traffic violations, impose the penalties which are authorized to be imposed on adults for such violations." (Emphasis added.)
Section 16.1-228 of the Code, in paragraph 1 thereof, defines "delinquent child" as "a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his or her eighteenth birthday." Paragraph H of the same statute defines "delinquent act" as "an act designated a crime under the law of this State, or an ordinance of any city, county, town or service district, or under federal law, except an act, which is otherwise lawful, but is designated a crime only if committed by a child." (Emphasis added.)

These statutes authorize the court to suspend the motor vehicle and operator's licenses of a child who has committed a crime. Section 18.2-8 of the Code states that "[t]raffic infractions are violations of public order as defined in § 46.1-1(40) and not deemed to be criminal in nature."

It is clear from the definitions of "delinquent child" and "delinquent act" cited from § 16.1-228 of the Code that a child who commits a traffic violation denominated a misdemeanor or a felony would be classified "delinquent" for the purposes of § 16.1-279 of the Code. In such cases, the court is authorized to suspend the motor vehicle and operator's licenses of such child or to impose the penalties which are authorized to be imposed on adults for such violations as provided in subsections E 6 and 8, respectively, of § 16.1-279. If a child has committed no "delinquent act," as herein defined, but has only committed a "traffic infraction" as defined in § 46.1-1(40) of the Code, I find no authority in the present law for a court to suspend such child's motor vehicle or operator's license. Accordingly, your question is answered in the negative.

An operator's license, however, may be suspended by the Division of Motor Vehicles upon an accumulation of demerit points based on traffic infractions, as provided in the "Virginia Driver Improvement Act," §§ 46.1-514.1 through -514.20 of the Code. The authorization to suspend licenses under this Act applies equally to a minor or to an adult.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Work Permit—Restrictions in child labor laws may not be varied.

June 7, 1978

THE HONORABLE ROBERT F. WARD, JUDGE
Twenty-second Judicial District
Pittsylvania Juvenile and Domestic Relations District Court

You have asked what restrictions in the child labor laws may be varied in a special work permit issued by the Juvenile and Domestic Relations District Court.

Section 16.1-241H now gives a juvenile court exclusive, original jurisdiction "[i]n any case where a child is not qualified to obtain a work permit under other provisions of law." Section 16.1-279J authorizes the issuance of a special work permit subject to such restrictions and conditions "as [the court] may deem appropriate and as may be set out in chapter 5 (§ 40.1-78 et seq.) of Title 40.1 of the Code." In view of this mandatory language, it is my opinion that the restrictions and conditions in chapter 5 (§ 40.1-78 et seq.) of Title 40.1 may not be varied when special work permits are granted by the Juvenile and Domestic Relations District Court.

There is an alternative procedure in § 16.1-279C, paragraph 4, for the
granting of a work permit for a "child in need of services" who is fourteen years of age or older, when the court finds that school officials have made a diligent effort to meet the child's educational needs, and after study, the court further finds that the child is not able to benefit appreciably from further schooling. This section permits a judge to authorize a "child in need of services" to be employed in any occupation, except one which has been legally declared hazardous for children under the age of eighteen. See Opinion to the Honorable David Bruce Summerfield, Commonwealth's Attorney for Scott County, dated November 28, 1977, a copy of which is attached.

JUVENILES—Child Certified For Trial As Adult May Not Be Housed In General Adult Population Of Local Detention Facility Or Jail Prior To Trial.

September 13, 1977

THE HONORABLE J. ELWOOD CLEMENTS
Sheriff of Arlington County

This is in response to your letter wherein you make the following inquiry:

"If a juvenile is committed to the county detention facility by the Judge of the Juvenile and Domestic Relations District Court, and is subsequently certified for trial as an adult by the Juvenile Court Judge, such certification accepted by the Circuit Court, can said juvenile be housed in the general population of the facility after indictment in the Circuit Court?" (Emphasis added.)

Your question is answered by § 16.1-249D of the Code of Virginia (1950), as amended, which provides as follows:

"When a case is transferred to the circuit court in accordance with the provisions of § 16.1-269 or § 16.1-270, the child if in confinement shall be transferred to a jail or other facility for the detention of adults subject to the limitations of (i), (ii) and (iii) of subsection B hereof."

Subsection B of § 16.1-249, to which the above-quoted paragraph refers, provides that a child fifteen years of age or older may be detained in a jail or other facility for the detention of adults if (i) the detention is in a room or ward entirely separate and removed from adults, (ii) adequate supervision is provided and (iii) the facility is approved by the Department for the detention of children. Accordingly, I must answer your question in the negative.

JUVENILES—"Custody" As Used in § 16.1-286A Means Mere Physical Control Over Juvenile Coming Before Juvenile Court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Unnecessary That Juvenile Court Formally Acquire Total, Legal Custody Of Child Before Ordering Direct Placement Under § 16.1-286A.
This is in response to your inquiry concerning the meaning of the words "take custody and place" in § 16.1-286A of the Code of Virginia (1950), as amended. Specifically, you have asked whether the court must assume complete legal custody over a child prior to placement under this statute or whether custody may remain with parents, or others, when placement is ordered.

Section 16.1-286A of the Code provides, in pertinent part, as follows:

"When the court determines that the behavior of a child within its jurisdiction is such that it cannot be dealt with in the child's own locality . . ., it may take custody and place the child, pursuant to the provisions of subsections C 5 b or E 9 b of § 16.1-279 in a private or locally operated public facility, excluding those facilities operating under the provisions of § 16.1-313, and approved by the State Board." (Emphasis added.)

To adequately answer your question, it is necessary to define "custody," as used in this statute. When dealing with children, courts have defined the term in various ways to effectuate the particular purpose sought to be achieved. These definitions vary from mere physical control [In Re Batey, 6 Cal.Rptr. 655, 183 C.A.2d 78 (1960)] to the sum of parental rights with respect to rearing a child, including his care, control, education, health and religion [59 Am.Jur.2d Parent and Child § 25 (1971)]. Storrs v. Van Anda, 132 Cal.Rptr. 878, 62 C.A.3d 189 (1976).

Section 16.1-286A provides the court access to suitable placements for a child outside its jurisdiction if it determines that the child cannot receive adequate treatment locally. This statute thus allows the court to exercise its acquired jurisdiction over the child and directly place the juvenile in a facility it deems appropriate.

In this context, the purpose of the statute can fully be served by defining "custody" as mere physical control over the juvenile who has come before the court. Accordingly, it is unnecessary that the court formally acquire total, legal custody of a child before ordering direct placement under § 16.1-286A of the Code.

JUVENILES—"D.A.S.H." Program—First-time marijuana possession; referred by juvenile court's intake officer for educational and rehabilitative counseling.


JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Magistrates—When authorized to issue warrants upon application from denial of juvenile court intake officer to file petition—Felony or Class 1 misdemeanor.
Juvenile and Domestic Relations District Court
Twenty Fourth Judicial District

This is in reply to your inquiry as to the legality of a "D.A.S.H." program now in operation in certain areas of the Commonwealth and which you wish to begin in your court. "D.A.S.H." is a program, developed for use by juvenile court service units, to which juveniles, brought before the court's intake officer and involved with marijuana possession on a first-time basis, are referred for educational and rehabilitative counseling. Referrals to the program are made by the juvenile court intake officer and are offered as an alternative to the filing of a formal petition and a hearing before the juvenile court. Specifically you question whether such a program can be conducted, consistent with § 18.2-251 of the Code of Virginia (1950), as amended.

Section 18.2-251, provides, in pertinent part, as follows:

"Whenever any person who has not previously been convicted of any offense under this article or under any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, or has not previously had a proceeding against him for violation of such an offense dismissed as provided in this section, pleads guilty to or enters a plea of not guilty to possession of a controlled substance under § 18.2-250, the court, upon such plea if the facts found by the court would justify a finding of guilt, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place him on probation upon terms and conditions . . . ."

I am of the opinion that this Code provision is inapplicable to the present question since it presupposes charges having been brought and a plea tendered.

In, however, stating the purpose and intent of the Juvenile and Domestic Relations District Court Law, § 16.1-227 provides that "the welfare of the child and the family is the paramount concern of the State." This statute continues, in pertinent part:

"This law shall be interpreted and construed so as to effectuate the following purposes:

"1. To divert from the juvenile justice system, to the extent possible, consistent with the protection of the public safety, those children who can be cared for or treated through alternative programs;"

Further, § 16.1-260 of the Code expressly authorizes the intake officer of a juvenile court to "proceed informally to make such adjustment as is practicable without the filing of a petition," even though such officer has received a complaint which alleges facts sufficient to invoke the jurisdiction of the juvenile court. When § 16.1-227 and § 16.1-260 of the Code are read together, it is clear that a juvenile court intake officer has the authority to attempt to divert first-time marijuana offenders under a program such as that described above.

Section 16.1-260B of the Code further provides, however, that an intake officer shall file a petition in which it is alleged that

"the child has committed an offense which if committed by an adult would be a felony or a Class I misdemeanor, if sufficient information to establish probable cause therefor is brought to the attention of the intake officer."

Section 16.1-260B (iv).

Therefore, if the intake officer fully explains the "D.A.S.H." program to a
complainant and the complainant is then convinced that the filing of a petition with the court is unnecessary, the intake officer may divert the first-time marijuana offender into the "D.A.S.H." program. If after hearing the intake officer's explanation of the program, the complaining witness still wishes to present a petition to the court which establishes the probable cause requirements under § 16.1-260 (iv), as quoted above, the intake officer shall file the petition. See Opinion to the Honorable C. Vincent Hardwick, Fifteenth Judicial District Juvenile and Domestic Relations Court, dated August 4, 1977.

I am, therefore, of the opinion that the "D.A.S.H." program as herein described is legally permissible and that a juvenile court's intake officer may attempt to divert first-time marijuana offenders to such a program.

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**JUVENILES—Deferred Disposition Program**—Juvenile and Domestic Relations judge may not make disposition under § 16.1-178 then offer juvenile opportunity to participate in public service work in lieu of original disposition.

**COUNTIES, CITIES AND TOWNS—Immunity**—Suits by juveniles for tortious actions of their officers, servants and employees while supervising public service work performed by juvenile as condition of probation—Third parties.

**SOVEREIGN IMMUNITY**—Counties, Cities And Towns—Liability for tortious personal injuries resulting from negligence of their officers, servants and employees—Juvenile's public service work as condition of probation—Third parties.

July 18, 1977

**THE HONORABLE R. BAIRD CABELL, JUDGE**
Juvenile and Domestic Relations District Court
Fifth District of Virginia

This is in response to your request for an opinion whether a specific program for deferred dispositions is a "legally permissible disposition available to the Juvenile Court." The program in question is offered as a dispositional alternative in non-violent, first offender cases, in which the individual does not pose a serious threat to community safety. After a finding of not innocent in a criminal case, the Court will make a disposition and then offer the juvenile the opportunity to participate in public service work in lieu of the original disposition. The juvenile must agree to participate in the program, after consultation with his parents and/or attorney. Failure to complete the program satisfactorily will result in the matter being returned to the juvenile court for imposition of the deferred sentence.

In addition to your question as to the legality of such a program, you pose the following inquiries:

"2. May an Order of Probation for a juvenile impose, among other conditions, a set number of hours to be served in a public service job without remuneration?

"3. In regard to the Deferred Disposition program, can and will a waiver form adequately protect the local government unit and others involved from suit arising out of:
A. Injury sustained by the child from his activities in this program?
B. Injury to a third party arising from acts of the child in this program?
C. Damage to private property caused by acts of the child in this program?

"4. What safeguards can and should be taken to protect the jurisdictions and others involved from suit arising from the situations described in nos. 3A-3C above where the child is placed in a public service job as a condition of an Order of Probation?

"5. What is the relationship of the child in either of these two (a) programs to the local governmental unit or its employees or agents who would be supervising the child in performing work under these programs?

"6. Is the child an agent of the city and county even though not a paid employee of the jurisdiction for which the jurisdiction could be held liable for any wrongful or negligent acts committed by the child?

"7. From the standpoint of liability generally, is the status of such a child any different from that of a prisoner serving a sentence and performing work incident to that sentence?"

Section 16.1-178, Code of Virginia (1950), as amended, specifically lists the dispositional alternatives available to a juvenile court when the court finds that the child is subject to the provisions of the Juvenile Code. A public service work program, imposed in lieu of a valid disposition by the court, does not fall into any of the categories in § 16.1-178 of the Code. Notwithstanding the command in § 16.1-140 that the provisions of the Juvenile Code be construed liberally and that the judge be given "all necessary and incidental powers and authority," the Supreme Court of Virginia has not hesitated to strike down decrees that are inconsistent with these statutory provisions (or their predecessors). See, e.g., Lowe v. Gratsy, 203 Va. 168, 122 S.E.2d 867 (1961); Jones v. Commonwealth, 185 Va. 335, 38 S.E.2d 444 (1946).

Also, since other subsections of § 16.1-178 expressly allow the imposition of conditions on probationers [§ 16.1-178(1)] and parents, guardians, legal custodians [§ 16.1-178(11)], the lack of specific authorization for the deferred disposition program you outline implies that it is not a legal alternative under § 16.1-178. Cf. Miller v. Commonwealth, 180 Va. 36, 21 S.E.2d 721 (1938); Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938). It is my opinion, therefore, that the alternative of a public service job in lieu of a valid disposition by the juvenile court, as you have described it, is not an alternative available to a juvenile court under § 16.1-178 of the Code.

Your second inquiry regarding probation, as distinguished from a disposition, must still be considered. Section 16.1-178(1) of the Code permits a juvenile court to place a juvenile offender on probation subject to such conditions as the court deems proper. The condition imposed upon a probationer by the court must be reasonable, in the best interests of the child and not contrary to law. See Report of the Attorney General (1959-1960) at 207. Public service jobs for probationers without remuneration could well be deemed reasonable and in the best interest of the child, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. Dyke v. Commonwealth, 193 Va. 478, 69 S.E.2d 483 (1952); Loving v. Commonwealth, 206 Va. 924, 147 S.E.2d 78 (1966), rev'd on other grounds, 388 U.S. 1 (1966). Such terms of probation have been approved elsewhere. See M.J.W. v. State, 133 Ga.App. 350, 210 S.E.2d 842 (1974). I am of the opinion, therefore, that an order of probation for a juvenile may impose a set number of hours to be served in a public service job without remuneration.
While your third inquiry was directed to the deferred disposition program, it does have relevance to public service work imposed as a condition of probation, and I will answer your question in that context.

Counties are not liable for tortious personal injuries resulting from the negligence of their officers, servants and employees. See Mann v. County Board of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957). I am of the opinion, therefore, that a county will have immunity from suits by a juvenile for injuries incurred by him as a result of negligence of the county's officers, servants and employees in supervising his public service work. The county will also have immunity from suit by the juvenile for tortious injury by the county's officers, servants and employees while they are supervising his work.

Cities and other municipal corporations, on the other hand, only have immunity for acts occurring in the performance of a "governmental" function. See Bryant v. Mullins, 347 F.Supp. 1282 (W.D.Va. 1972); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939). Cities are subject to liability for tortious acts that occur during the performance of a "proprietary" function, that is, an activity frequently or likely to be carried on through private enterprise. Id. I am of the opinion that a city or other municipal corporation, in supervising a juvenile's public service work as a condition of probation, would be performing a governmental function. Accordingly, it would be immune from suit by the juvenile for negligence arising out of such supervision. On the other hand, if the public service work of the juvenile falls within a propriety function of the city or municipal corporation, the city or municipal corporation will not be immune from suit by a third party for the tortious actions of the juvenile while he is performing that work.

In answer to your fourth inquiry, the only action that can be taken to avoid liability is for those persons supervising the juvenile's work to exercise all reasonable care under the circumstances. Obviously, at a minimum this would include ensuring that the juvenile is not assigned to any work which he is not qualified or capable of performing. Also, the juvenile should receive adequate instruction on how to carry out his work assignments.

In response to your fifth and sixth inquiries, juveniles engaged in public service work as a condition of probation will become servants of the local governmental units that control their actions. See Ideal Steam Laundry v. Williams, 153 Va. 176, 149 S.E. 479 (1929); Southern Stevedoring Corp. v. Harris, 190 Va. 628, 58 S.E.2d 302 (1950).

In response to your remaining inquiries, "'[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.' Restatement (Second) of Agency § 1 (1958)." Murphy v. Holiday Inns, Inc., 216 Va. 490, 492, 219 S.E.2d 874, 876 (1975). On the other hand, an individual who works for and is under the control of another, but who does not have the authority to act on behalf of the other person, is considered to be a servant. Merriman v. Thomas, 103 Va. 24, 48 S.E. 490 (1904). Whether a particular juvenile offender is an agent of the governmental unit, or is merely a servant of the unit, will depend on the scope of his authority. Obviously, this is a factual question which can only be answered upon review of each situation. In most, if not all, situations, the juvenile will not be given the authority to act on behalf of the governmental unit, in which case he will have the same status as a prisoner performing work incident to his sentence.
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JUVENILES—Disclosure Of Names—When names of juveniles found not innocent of delinquent acts may be released to victims of those acts.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Disclosure Of Information Or Name Of Juvenile—May be disclosed to victim of juvenile's delinquent act by order of court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Disclosure Of Name Of Juvenile—For purposes of disclosure under §§ 16.1-301 and 16.1-305, court may find victim of juvenile's delinquent act is person having "legitimate interest in case."

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Dissemination Of Information Pertaining To Juvenile—Fact that party requesting information is victim of juvenile's delinquent act is not, in and of itself, enough to allow dissemination.

June 16, 1978

THE HONORABLE HERMAN A. WHISENANT, JR., JUDGE
Thirty-first District Juvenile and Domestic Relations Court

You have asked whether the names of juveniles found not innocent of delinquent acts may be released to the victims of those acts.

Section 16.1-301 of the Code of Virginia (1950), as amended, states that the records and files of law enforcement agencies concerning juveniles are not open to public inspection nor their contents open to public disclosure except in certain enumerated instances. Likewise, § 16.1-305 of the Code only allows certain enumerated parties to inspect court records dealing with a juvenile.

In neither § 16.1-301 nor § 16.1-305 is the victim of the delinquent act listed among those parties permitted to inspect, or entitled to obtain information derived from, said law enforcement or court records. The fact that the party requesting such information pertaining to a juvenile is the victim of the delinquent act is not, then, in and of itself, enough to allow the dissemination of information concerning juveniles contained in the records or files of a law enforcement agency or court.

Paragraphs 3 and 4 of §§ 16.1-301B and 16.1-305A, respectively, allow the disclosure of such records to "[a]ny . . . person, agency or institution, by order of the court, having a legitimate interest in the case." It is my opinion, therefore, that once a court has determined that a victim of a delinquent act is a person having a "legitimate interest in the case" it may order the information contained in such juvenile records released to such person.

JUVENILES—"Entirely Separate And Removed From Adults," As Used In § 16.1-249B(i)—Requires that juveniles be physically separated from adults in jails or other detention facilities—No normal communication with adult prisoners or detainees housed therein.

December 21, 1977

THE HONORABLE H. SELWYN SMITH
Secretary of Public Safety
Office of the Governor
This is in response to your inquiry concerning the meaning of the phrase "entirely separate and removed from adults" in § 16.1-249B(i) of the Code of Virginia (1950), as amended. Section 16.1-249 describes various places of confinement for children and paragraph B of this section provides for the confinement of certain juveniles in a jail or other facility used for the detention of adults under stated conditions. One of these conditions is the requirement of § 16.1-249B(i) that such detention be "in a room or ward entirely separate and removed from adults . . . ."

Section 16.1-249B of the Code provides as follows:

"A delinquent child or a child alleged to be delinquent who is fifteen years of age or older may be detained in a jail or other facility for the detention of adults provided (i) the detention is in a room or ward entirely separate and removed from adults, (ii) adequate supervision is provided and (iii) the facility is approved by the Department for the detention of children and only if:

"1. Space in a facility designated in subsection A hereof is unavailable; provided, however, if the child has previously been before the juvenile court and has by waiver or transfer been treated as an adult in the circuit court, this provision shall not apply; or

"2. A judge or intake officer determines that the facilities enumerated in subsection A hereof are not suitable for the reasonable protection of the child or community, when the child is charged with an offense which would be a Class 1, 2 or 3 felony if committed by an adult; or

"3. The detention home in which the child should be placed is at least twenty-five miles from the place where the child is taken into custody and is located in another city or county; provided, however, a child may be placed in such jail or other facility for the detention of adults pursuant to this subparagraph for no longer than eighteen hours." (Emphasis added.)


The word "separate," as used in § 16.1-249B(i) of the Code, connotes division and disconnection between adult and juvenile prisoners and detainees. Black's Law Dictionary 1529 (4th ed. rev. 1968). It anticipates that juveniles be removed from contact with adults in their normal, day-to-day activities, both in terms of physical and communicative contact. The reason for such separation is to forward the intent of the new Juvenile and Domestic Relations District Court
Law; i.e., that "the welfare of the child . . . is the paramount concern of the State." Section 16.1-227 of the Code.

Accordingly, I am of the opinion that the phrase "entirely separate and removed from adults," as used in § 16.1-249B(i) requires that juveniles be physically separated from adults in jails or other detention facilities so there can be no normal communication with adult prisoners or detainees housed therein.

JUVENILES—Information Which May Or May Not Be Released To News Media Within Constraints Of § 16.1-309.

CONSTITUTIONAL LAW—Records Pertaining To Juveniles—Although United States Supreme Court has opened certain public records to the press, it has refused to decide constitutional questions relating to states' policies of not allowing public general access to juvenile court proceedings.

FREE PRESS—FAIR TRIAL—First Amendment Does Not Guarantee The Press A Constitutional Right Of Special Access To Information Not Available To Public Generally.

JUVENILES—Disclosure Of Names—Authority of court to control.

RECORDS—Inspection Of Juvenile Records By News Media—When court order needed.

August 31, 1977

THE HONORABLE RAYMOND R. GUEST, JR.
Member, House of Delegates

This is in response to your inquiry as to what information may or may not be released to the news media within the constraints of § 16.1-309 of the Code of Virginia (1950), as amended. This section was enacted as a portion of the Juvenile and Domestic Relations District Court Law and provides as follows:

"Except as provided in §§ 16.1-299, 16.1-300, 16.1-301, 16.1-305 and 16.1-307, whoever discloses or makes use of or knowingly permits the use of information concerning a juvenile known to the police or before the court or in the custody of the State Board of Corrections, which information is directly or indirectly derived from the records or files of such agency or acquired in the course of official duties, shall be guilty of a Class 3 misdemeanor."

The disclosures excepted in § 16.1-309 pertain to the taking and filing of fingerprints and photographs (§ 16.1-299); social, medical, psychiatric and psychological reports and records of the Department of Corrections (§ 16.1-300); records of law enforcement agencies (§ 16.1-301); juvenile court records (§ 16.1-305); and various records of the circuit court (§ 16.1-307). Each of these sections provide for inspection of records only by the persons enumerated therein. See, e.g., § 16.1-300(1) through (6). They do permit any person, agency or institution (including the news media) access to juvenile records of the Department of Corrections, law enforcement agencies and courts in the Commonwealth, by order of court, if that person, agency or institution can show a legitimate interest in the case or in the work of the court. Section 16.1-300(6)
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(records of the Department of Corrections); § 16.1-301(B)(3) (law enforcement records); §§ 16.1-305(A)(4) and 16.1-307 (court records).

There is certain information to which the public (and therefore the news media) is entitled without the necessity of court order. Section 16.1-309 prohibits the direct or indirect disclosure of "information concerning a juvenile." Certain facts that merely describe the occurrence of an event or give background information on a child, and do not specifically identify or describe a particular juvenile, may be released. For instance, the disclosure of the fact that a certain act has been committed, that persons (even juveniles) have been arrested and other information of a general nature may be made without violating § 16.1-309 of the Code, since these facts do not specifically "concern" a juvenile.

It is also important to note that § 16.1-309 only prohibits disclosure of certain information concerning juveniles, "which information is directly or indirectly derived from the records or files of (enumerated agencies) or acquired in the course of official duties." As a result, any information concerning a juvenile may be reported by the media (or made use of by the public) if this information is gained independently from the records and files of law enforcement agencies, courts or the Department of Corrections. For instance, if a news reporter personally witnessed a robbery where the perpetrator of the robbery was known by the reporter, that reporter could use the name of the juvenile in his account of the incident since the juvenile's name was neither directly or indirectly derived from agency files or records or acquired in the course of official duties. See § 16.1-309 of the Code.

On the other hand, although the First Amendment to the United States Constitution does prohibit laws that abridge freedom of speech or press, the law has been equally clear for some time that these rights are not absolute. New York Times Co. v. Sullivan, 376 U.S. 254, 283-85 (1964); Schenck v. United States, 249 U.S. 47, 52 (1919). The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. Branzburg v. Hayes, 408 U.S. 665, 684 (1972).

By enacting §§ 16.1-299 to -309 of the Code, the General Assembly has chosen to keep confidential (except to persons enumerated therein) certain information which pertains to investigations, court records and other matters regarding juveniles. To determine if these statutes are violative of the media's "right of access" under the First Amendment, courts have balanced the interests sought to be protected by the confidentiality with the interest of the public to know such information and the concomitant right of the press to gather it. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975); Landmark Communications Inc. v. Commonwealth, 217 Va. 699, 233 S.E.2d 120 (1977).

The information that §§ 16.1-299 to -309 seek to control is that which would specifically identify or describe a juvenile, or whatever otherwise concerns a particular juvenile, who has become involved with a law enforcement agency or court, if that information is derived either directly or indirectly from an agency or court file or acquired in the course of official duties, as discussed above. As stated in prior opinions of this Office concerning the predecessor statutes to § 16.1-309, the disclosure of names of juveniles who are involved with the juvenile justice system in Virginia violates the purpose and intent of the Juvenile and Domestic Relations Court law—that the welfare of the child is the paramount concern of the State. See Report of the Attorney General (1972-1973) at 246; Report of the Attorney General (1970-1971) at 225. See also Peyton v. French, 207 Va. 73, 147 S.E.2d 739 (1966). Present § 16.1-227 is in accord, providing that "[i]t is the intention of this law that in all proceedings the welfare of the child and the family is the paramount concern of the State."
Although the United States Supreme Court has opened certain public records pertaining to juveniles to the press, it has called on states to enact legislation such as §§16.1-299 to -309, which prevent exposure of certain information. Further, such Court has specifically refused to decide constitutional questions relating to states' policies of not allowing the public general access to juvenile court proceedings. See Cox Broadcasting Corp., supra at 496.

When the State's interest in maintaining the confidentiality of certain records and information specifically concerning juveniles is weighed against the right of the press to obtain such information, I am of the opinion that the need for confidentiality must prevail. Information, therefore, that specifically identifies, describes or, in any way, concerns a certain juvenile or juveniles, which information is directly or indirectly derived from the records or files of law enforcement agencies, courts, or the Department of Corrections or acquired in the course of official duties, may not be released to the news media, unless authorized by the court as discussed herein.

JUVENILES—Judge Does Not Have Authority To Publish Names Of Juvenile Offenders Under New Juvenile And Domestic Relations District Court Law.

AMENDMENTS—Juvenile Criminal Offenses—Judge may not now make public the name of offender.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—“Family” As Used In § 16.1-241J Does Not Include Mothers-in-law And Fathers-in-law.

RECORDS—Juveniles—When it is a misdemeanor for anyone to disclose information about juvenile.

October 12, 1977

The Honorable Harold B. Singleton, Judge
Twenty-fourth Judicial District Juvenile and Domestic Relations District Court

This is in response to your inquiry whether a juvenile court judge has the authority to publish the names of juvenile offenders if that judge deems it in the best interest of the public. You correctly point out that former § 16.1-162 of the Code of Virginia (1950), as amended, contained a proviso "that in cases involving criminal offenses by juveniles, the judge may make public the name of the offender, the names of the parents of the offender and the nature of the offense, if he deems it to be in the public interest."

Section 16.1-162 was repealed by the 1977 Session of the General Assembly, and § 16.1-302 enacted in its place. See Ch. 559 [1977] Acts of Assembly 870. The proviso quoted above is not found in present § 16.1-302. Id. Further, the 1977 Session of the General Assembly has made it a misdemeanor for anyone to disclose or make use of or knowingly permit the use of information concerning a juvenile known to the police or before the court or in the custody of the State Board of Corrections, which information is directly or indirectly derived from the records or files of such agency or acquired in the course of official duties. Section 16.1-309 of the Code. See also Opinion to the Honorable Raymond R. Guest, Jr., Member, House of Delegates, dated August 31, 1977, a copy of which is enclosed. I am, therefore, of the opinion that a juvenile judge does not
have the authority to publish the names of juvenile offenders under the provisions of the new Juvenile and Domestic Relations District Court Law.

Your second question is whether the jurisdiction of the juvenile and domestic relations district court, under § 16.1-241J of the Code, includes mothers-in-law and fathers-in-law. Section 16.1-241J of the Code establishes the juvenile court's jurisdiction over

"[a]ll offenses committed by one member of the family, except murder or manslaughter when the person accused of such murder or manslaughter is eighteen years of age or over, and the trial of all criminal warrants in which one member of the family is complainant against another member of the family; . . . The word 'family' as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild." (Emphasis added.)

The definition of "family," as used in § 16.1-241J is identical to that of former § 16.1-158(8) of the Code. This Office has previously opined, in construing the previous Code provisions, that a mother-in-law and daughter-in-law are not within the scope of the definition of "family" included in former § 16.1-158(8). See Report of the Attorney General (1968-1969) at 135. Likewise, an assault by a father-in-law against a daughter-in-law not residing in the same home did not invoke the jurisdiction of the juvenile court under former § 16.1-158(8). See Opinion to the Honorable William L. Cowhig, Commonwealth's Attorney, City of Alexandria, dated January 7, 1977, a copy of which is enclosed. On the other hand, this Office has opined that the juvenile court does have jurisdiction, under § 16.1-158(8), over an offense committed by a step-parent against a stepchild when the parties live in the same home. See Opinion to the Honorable R. Baird Cabell, Judge, dated September 29, 1976, a copy of which is enclosed. For the same reasons as are expressed in the prior Opinion dealing with mothers-in-law and daughters-in-law, it is my view that mothers-in-law and fathers-in-law are not included in the definition of "family" under § 16.1-241J of the Code.

JUVENILES—Political Subdivision Joining A Juvenile Detention Commission Under § 16.1-315 May Withdraw From Commission By Appropriate Ordinance Or Resolution.

ORDINANCES—Amendment Or Repeal—Action required to accomplish withdrawal of political subdivision from juvenile detention commission.

STATUTES—Juvenile Detention Commission—Power of political subdivision to withdraw from not specifically provided in statute—May withdraw by appropriate ordinance or resolution.

August 8, 1977

The Honorable R. Baird Cabell, Judge
Juvenile and Domestic Relations District Court
Fifth District of Virginia

This is in response to your inquiry concerning the establishment of regional juvenile detention commissions under § 16.1-315 of the Code of Virginia (1950),
as amended. You note that this section does not specify any method for a member of a regional juvenile detention commission to withdraw from the commission. Your specific question is whether there is a method by which a political subdivision may withdraw from a commission once it has joined it.

Section 16.1-315 provides, in pertinent part, as follows:

"The governing bodies of three or more counties, cities or towns (hereinafter referred to as 'political subdivisions') may, by concurrent ordinances or resolutions, provide for the establishment of a joint or regional citizen juvenile detention home, group home or other residential care facility commission."

Although the statute permits localities to enter the commission through concurrent ordinance, the fact that it is silent as to procedures for withdrawal is of no consequence. A county, city or town which has been granted legislative authority to enact ordinances or resolutions has, as an incident thereto and without any express reference thereto in the statute, power to amend, change or repeal these ordinances or resolutions. 56 Am.Jur.2d Municipal Corporations § 410 (1971). Such amendment or repeal, however, must be enacted in the same manner as is required for the passage of the ordinance joining the commission. See Report of the Attorney General (1964-1965) at 242; 13 M.J. Municipal Corporations § 56 (Cum. Supp. 1976).

I am, therefore, of the opinion that a political subdivision that becomes a member of a juvenile detention commission under § 16.1-315 of the Code may withdraw from said commission by appropriate ordinance or resolution, even though the power to withdraw is not specifically provided for in the statute. Generally, such withdrawal would have no effect on vested rights of other commission members or contractual obligations previously made by the withdrawing subdivision. See generally 56 Am.Jur.2d Municipal Corporations § 410 (1971).

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JUVENILES—"Status Offenses"—Child in need of services.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Exclusive Original Jurisdiction Over Children Habitually And Without Justification Absent From School—Court has remedies other than incarceration.

JUVENILES—"Child In Need Of Services"—Compulsory school attendance—Incarceration for violation no longer an option.

SCHOOLS—Compulsory School Attendance Law—Effect of changes in juvenile code.

October 25, 1977

THE HONORABLE J. W. O'BRIEN
Member, House of Delegates

This is in reply to your letter of August 19, 1977, in which you present the following inquiry:

"I would appreciate a formal opinion as to what effect the changes in the juvenile code have upon the Compulsory School Attendance law of this
state. My chief concern is whether the law is now enforceable."

Article VIII, Section 3, of the Constitution of Virginia (1971), requires that the General Assembly provide for compulsory school attendance. Sections 16.1-241 and 16.1-228F of the Code of Virginia, (1950), as amended, give exclusive original jurisdiction over children who are "habitually and without justification absent from school" to juvenile and domestic relations district courts. Section 22-275.7 of the Code provides that violation of the compulsory attendance law is a Class 4 misdemeanor.

Section 16.1-228F provides in pertinent part as follows:

"F. 'Child in need of services' means:

1. A child who while subject to compulsory school attendance is habitually and without justification absent from school. . . .

* * *

"Provided, however, to find that a child falls within any of classes 1, 2 or 3 above (i) the conduct complained of must present a clear and substantial danger to the child's life or health or (ii) the child or his or her family must be in need of treatment, rehabilitation or services not presently being received and (iii) the intervention of the court must be essential to provide the treatment, rehabilitation or services needed by the child or his or her family."

The options available to a court once a child is determined to be in need of services are set forth in § 16.1-279C.

It is the clear intent of § 16.1-228F to provide for the so-called "status offenses"—those acts which are otherwise lawful, except when committed by a child. As noted in "Services To Youthful Offenders, Revision of the Juvenile Code, Report of The Virginia Advisory Legislative Council," Senate Document No. 19, [1976] at 12:

"The category of children defined in [§ 16.1-228F] as 'children in need of services' and commonly referred to as 'status offenders' has received national attention in the last several years. The National Council on Crime and Delinquency and the Juvenile Justice Standards Project of the Institute of Judicial Administration and of the American Bar Association advocate completely removing status offenders, juvenile victimless crimes, from the jurisdiction of the juvenile court. It is their position that subjecting a child to judicial sanctions for a status offense helps neither the child nor society and, instead, often does considerable harm to both. Several groups which appeared before the Subcommittee also urged that this position be adopted in these recommendations. The Council does not feel, however, that this is an advisable course of action for the Commonwealth at this time.

"The issue of whether a child in need of services should, under any circumstances, be committed to the State Board of Corrections was also widely debated in the public hearings held by the Subcommittee, in the written correspondence received by the staff and by the members themselves. The Subcommittee resolved this controversial question in favor of non-commitment of the child in need of services as is provided for in § 16.1-274D., but the decision on this issue was not unanimous. Some members of the Subcommittee do not feel the Commonwealth is ready, at this time, to take this step due to the lack of dispositional alternatives for these children on the local level and wish their dissent to this recommendation to be
report of this report.

* * *

"... Incarceration in a State institution of the truant, the runaway and the child who is beyond the control of his parents serves no humanitarian or rehabilitative purpose. It is unwarranted punishment and unjust because it is disproportionate to the harm done by the child's noncriminal behavior."

"The Juvenile Justice and Delinquency Prevention Act of 1974 specifically prohibits the confinement of children in need of services or status offenders in juvenile detention or correctional facilities. Section 223(a) (12). The Act does provide that such children may be placed in 'shelter facilities' but these facilities may not be managed or run by the State Department of Corrections. Governor Mills E. Godwin, Jr., has elected to accept funds from the federal government for this Act. Within two years after submission of the State's plan, the Commonwealth will be required to cease committing children in need of services to the State Board of Corrections or face a cutoff of funds."

The foregoing language is reflective of the current approach to dealing with status offenses. It is equally clear that the language of § 16.1-228F is intended to deal specifically with truants.

Section 16.1-228F specifically precludes a finding that a truant is a "child in need of services" unless the truancy is physically harmful or is the result of a failure to receive services. In the latter case intervention of the court must be "essential." It is permissible for a court to be liberal in concluding that education is a needed service and that, in an appropriate case, intervention of the court is necessary to secure that service. I view a liberal approach as appropriate in view of the constitutional mandate to provide for compulsory attendance.

In light of the foregoing, it is my opinion that the present statutes render the compulsory attendance law enforceable. Incarceration for violation of the compulsory attendance laws is no longer an available statutory option, but the juvenile court is not without other potentially effective remedies.

JUVENILES—Term "Twenty Years" In § 16.1-269E Refers To Maximum Punishment For An Offense, If Committed By Adult.

JUVENILES—Language Of § 16.1-269E Does Not Restrict Statute's Operation Solely To Class 1 And 2 Felonies; Twenty-year Term Possible For Class 3 Felony.

July 22, 1977

THE HONORABLE ROBERT F. WARD, JUDGE
Twenty-second Juvenile and Domestic Relations District Court

This is in response to your inquiry as to the meaning of the phrase "would be punishable by death or confinement in the penitentiary for life or a period of twenty years or more," contained in § 16.1-176(e), Code of Virginia (1950), as amended. This section of the Code, among other things, permitted the Commonwealth's Attorney to seek transfer of a juvenile case to the circuit court, if certain conditions are met. Specifically, you ask the following questions:
"Does the term of twenty years refer to the maximum punishment or the minimum punishment for the offense if it were committed by an adult?

"Does the language used as to penalty restrict this section of the Code to a Class I or Class II Felony (Sec. 18.2-9) by the punishment authorized in Sec. 18.2-10?

"Does the language used permit the Commonwealth's Attorney to seek removal of a case charging an offense under 18.2-248 where the penalty upon conviction is 'not less than five nor more than forty years?'"

Section 16.1-176(e) was repealed by the 1977 Session of the General Assembly, which enacted § 16.1-269E to replace it. See Ch. 559 [1977] Acts of Assembly 856-857. This new statute is substantively identical to the old in the portions you have questioned. This Office has previously opined that the term "twenty years," as used in former § 16.1-176(e) refers to the possible maximum punishment for the offense if committed by an adult. See Report of the Attorney General (1971-1972) at 122. It follows, therefore, that this language does not restrict the applicability of this section to Class I or 2 felonies, since a twenty-year term is a possibility for Class 3 felonies. See § 18.2-10(c) setting a term of imprisonment of not less than five (5) nor more than twenty (20) years for Class 3 felonies.

In response to your inquiry regarding § 18.2-248, I would note that there are several different criminal offenses in such statute, each having a different penalty. Since your question dealt specifically with the penalty of "not less than five nor more than forty years," your reference is to a violation of § 18.2-248 as it relates to Schedule I or II controlled substances. I am of the opinion that a Commonwealth's Attorney may seek the removal of such an offense under § 16.1-269E, since the maximum penalty possible is over twenty years.

JUVENILES—Traffic Infractions Not Criminal In Nature—Traffic violations are not "traffic infractions"—Jurisdiction of juvenile court.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Court May Treat § 16.1-284 As If It References § 18.2-11 (Instead Of § 18.2-311) In Its Proviso Relating To Jailing Of Juvenile Misdemeanants.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Jurisdiction To Try Cases Of Traffic Infractions And Traffic Violations Committed By Juveniles.

STATUTES—Clerical Errors In Use Of Numbers May Be Corrected When Necessary To Carry Out Will Of Legislature.

November 4, 1977

THE HONORABLE FREDERICK P. AUCAMP, JUDGE
Juvenile and Domestic Relations District Court

This is in response to your inquiry concerning various portions of the Juvenile and Domestic Relations District Court law. Your first question is whether juvenile courts have jurisdiction over traffic violations committed by juveniles. You point out that, under § 16.1-241A, paragraph 1, juvenile courts are given jurisdiction in matters involving children who are abused, neglected, in need of
services or delinquent. Section 16.1-228H of the Code defines "delinquent act" as "an act designated a crime under the law of this State, or an ordinance of any city, county, town or service district, or under federal law . . . ." Section 18.2-8 of the Code, however, provides that "[t]raffic infractions are violations of public order as defined in § 46.1-1(40) and not deemed to be criminal in nature." (Emphasis added.)

While it is true that "traffic infractions" are not "delinquent acts" under the juvenile code [compare § 16.1-228H with § 46.1-1(40); Opinion to the Honorable R. Baird Cabell, Judge, Juvenile and Domestic Relations District Court, dated September 26, 1977, a copy of which is enclosed], it does not follow that juvenile courts no longer have jurisdiction over any traffic violation committed by a juvenile. It should be pointed out initially that all traffic violations are not "traffic infractions." See, e.g., §§ 46.1-189 through -192 of the Code.

There are other statutes within the Juvenile and Domestic Relations Court law that specifically deal with various aspects of a traffic case in a juvenile court. For example, § 16.1-302 makes express reference to the trial of "traffic infractions" in juvenile courts. See also § 16.1-279 E, paragraph 8, of the Code.

It is an elemental rule of statutory construction that the intention of the legislature is to be followed whenever possible and is always of major moment. 17 M.J. Statutes § 35 (1951). All statutes dealing with the same subject matter should be construed together, as if they formed parts of the same statute, and where there is a discrepancy or disagreement among them, such interpretation should be given so that all may stand together. Lillard v. Fairfax Airport Authority, 208 Va. 8, 155 S.E.2d 338 (1967). The fact that § 16.1-241 and § 16.1-302 of the Code were passed by the same session of the legislature [Chapter 559 (1977) Acts of Assembly 839] furnishes even stronger evidence that these statutes were intended to stand together. Lillard v. Fairfax Airport Authority, supra; South Norfolk v. Norfolk, 190 Va. 591, 58 S.E.2d 32 (1950).

Based on the foregoing authority, I am of the opinion that the repeated references in the above-quoted statute to the trial of cases involving "traffic infractions" in the juvenile court evidences the intent of the General Assembly that juvenile and domestic relations district courts have jurisdiction to try such cases. The mere fact that the court is not given the authority pursuant to § 16.1-241A, paragraph 1, does not, per se, oust the court of jurisdiction. The cases enumerated in § 16.1-241, over which the juvenile court is given jurisdiction, are not exclusive, especially when it is obvious the legislature intended otherwise. Cf. Miller v. Commonwealth, 180 Va. 36, 21 S.E.2d 721 (1942); Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938). It is my view, therefore, that juvenile and domestic relations district courts have the jurisdiction to try cases involving "traffic infractions" committed by juveniles. Since traffic violations other than "traffic infractions" are, by definition, crimes under both Titles 18.2 and 46.1, a juvenile who commits such a violation would be a "delinquent" under § 16.1-228 and properly before a juvenile court under the provisions of § 16.1-241A, paragraph 1.

Your next inquiry deals with the authority of a juvenile court to sentence a juvenile misdemeanant to jail. You note that the proviso in § 16.1-284, the statute authorizing the sentencing of juveniles to jail, states as follows:

"... no child who is found guilty of an offense which would be a misdemeanor if committed by an adult shall be confined pursuant to this section for a longer period of time than is authorized for an adult in § 18.2-311 of the Code." (Emphasis added.)

Section 18.2-311, to which § 16.1-284 refers, concerns the possession or sale of
blackjacks, brass knucks and switchblades. The penalty for violation of § 18.2-311 does not involve confinement in any way. It is obvious that the legislature meant to refer in § 16.1-284 to the statute in Title 18.2 listing the various penalties for adult misdemeanor convictions, i.e., § 18.2-11 instead of § 18.2-311.

The general rule in such cases is that mere verbal inaccuracies or clerical errors in statutes in the use of numbers may be corrected whenever necessary to carry out the will of the legislature. Looney v. Commonwealth, 145 Va. 825, 133 S.E. 753 (1926). I am, therefore, of the opinion that courts can treat § 16.1-284 as if it makes reference to § 18.2-11 in its proviso relating to the jailing of juvenile misdemeanants. To do otherwise would thwart the obvious intent of the Virginia legislature.

JUVENILES—Transferred To Circuit Court For Trial As Adult—When convicted and sentenced under criminal laws may be placed in general population of local detention center.

JUVENILES—Child Certified For Trial As Adult May Not Be Housed In General Adult Population Of Local Detention Facility Or Jail Prior To Trial.

JUVENILES—Effect On Child Of Treatment As Adult In Circuit Court—Civil disabilities.

November 14, 1977

THE HONORABLE J. ELWOOD CLEMENTS
Sheriff of Arlington County

This is in response to your inquiry whether a juvenile convicted in a circuit court may be placed in the general population of a local detention center while still a juvenile. If the answer to this question is in the negative, you have also asked if there is any method whereby juveniles may be treated as adults and become eligible for participation in adult programs offered at the local facility.

When dealing with a child fifteen years of age or older who is charged with an offense which, if committed by an adult, could be punishable by confinement in the penitentiary, the juvenile and domestic relations district court may transfer jurisdiction to the circuit court for trial as an adult. See §§ 16.1-269 through -272 of the Code of Virginia (1950), as amended. Once jurisdiction over the child has been transferred to the circuit court, that court has the option to try and sentence the child as an adult or hear and dispose of the case in the same manner in which the juvenile court could. Section 16.1-272 of the Code. Under the latter procedure, the child would be treated as a juvenile with the dispositional alternatives as set forth in § 16.1-279.

However, this Office has previously opined that the Virginia General Assembly, by developing the full statutory scheme as embodied in the Juvenile and Domestic Relations District Court Law, intended that a juvenile tried and sentenced by the circuit court as an adult should be treated as an adult offender for all purposes. See Report of the Attorney General (1974-1975) at 234. Section 16.1-249B, which imposes limitations on the jailing of juveniles, is not contrary to this conclusion since juveniles tried as adults and convicted in the circuit court may be sentenced or committed in accordance with the criminal laws of this
Accordingly, I am of the opinion that a juvenile who has been properly transferred to the circuit court for trial as an adult, convicted and sentenced in accordance with the criminal laws of the Commonwealth may be placed in the general population of a local detention center. Since I have answered this question in the affirmative, it is unnecessary that I respond to your second inquiry.

It is important to note, however, that I have opined, in an Opinion to you, dated September 13, 1977, that juvenile and adult detainees should not be commingled after transfer of the juvenile to the circuit court for trial as an adult but prior to said trial.

JUVENILES—Work Permit—Juvenile court may grant special work permits under § 16.1-279J to children before court on petition—Limitations.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Work Permit—Juvenile court has no authority to issue in area where child is not qualified to work under Title 40.1, except for “child in need of services” under criteria set out in § 16.1-279C—Occupation which has not been legally declared hazardous for children under the age of eighteen.

November 28, 1977

THE HONORABLE DAVID BRUCE SUMMERFIELD
Commonwealth’s Attorney for Scott County

This is in response to your inquiry concerning the authority of a juvenile and domestic relations district court judge to grant special work permits. You inquire whether, under § 16.1-158(6) of the Code of Virginia (1950), as amended, a juvenile judge may grant a special work permit to a child, before the court on petition, to perform duties as the court may restrict in the permit.

Section 16.1-158 was repealed by the 1977 Session of the General Assembly and § 16.1-241 enacted in its place. See Ch. 559 [1977] Acts of Assembly 845-846. Section 16.1-241H now gives a juvenile court exclusive, original jurisdiction “[i]n any case where a child is not qualified to obtain a work permit under other provisions of law.” The dispositional alternatives available to the juvenile court in cases involving work permits are dealt with in § 16.1-279 of the Code. Section 16.1-279J provides, in pertinent part, as follows:

“In cases involving a child who is not able to obtain a work permit under other provisions of law, the juvenile court or the circuit court may grant a special work permit . . ., subject to such restrictions and conditions as it may deem appropriate and as may be set out in chapter 5 (§ 40.1-78 et seq.) of Title 40.1 of the Code.”

I am, therefore, of the opinion that a juvenile court may grant special work permits under § 16.1-279J to children before the court on petition to perform such duties as the court may restrict. These permits are, however, subject to the limitations of chapter 5 of Title 40.1 of the Code.

It should be noted that § 16.1-279C, paragraph 4, provides a particularized procedure, separate from the authorization in § 16.1-279J, for the granting of a
work permit for a "child in need of services" [as defined in § 16.1-228F], who is fourteen years of age or older, where the court finds that school officials have made a diligent effort to meet the child's educational needs, and after study, the court further finds that the child is not able to benefit appreciably from further schooling.

Your second question is whether the juvenile judge may grant a child a permit to be employed in areas not enumerated in Title 40.1 of the Code. As stated in my response to your first inquiry, the only restrictions upon the granting of work permits under § 16.1-279J of the Code are conditions which the court itself imposes, in addition to the limitations of chapter 5 of Title 40.1. It is my view, therefore, that the juvenile court may grant work permits under the statute cited above in employment areas other than those enumerated in Title 40.1. The restrictions of chapter 5 of Title 40.1 of the Code would, however, still be applicable.

Your third inquiry asks whether a juvenile judge may issue work permits in any area where the child is not qualified under any other provision of State law, including Title 40.1. It is clear from the general language of § 16.1-279J that a special work permit issued thereunder is "subject to such restrictions and conditions . . . as may be set out in chapter 5 (§ 40.1-78 et seq.) of Title 40.1 of the Code." As noted after my answer to your first inquiry, however, § 16.1-279C, paragraph 4, specifically permits a judge to authorize a "child in need of services" [who meets the other criteria of § 16.1-279C, as discussed above,] to be employed in any occupation, subject only to the exception that the job not be legally declared hazardous for children under the age of eighteen.

I am, therefore, of the opinion that a juvenile judge has no authority under State law to issue a work permit in any area where a child is not qualified to work under Title 40.1, except for children "in need of services" under the specific criteria explained earlier and set out in § 16.1-279C of the Code. When this exception is used as authority for the child to work, such authorization may be for any occupation which has not been legally declared hazardous for children under the age of eighteen.

LABOR—Apprentices—Joint Apprenticeship Committee cannot require applicants for apprentice openings to bear expense of doctor's certificate that applicant is physically able to perform tasks of the trade.

DEFINITIONS—Employer—Joint Apprenticeship Committee performing selection process is within statutory definition though it does not pay apprentices' wages.

RECORDS—Medical Examination Or Records—Unlawful for employer to require employee or applicant for employment to pay cost of—Apprentice.

June 15, 1978

THE HONORABLE ROBERT F. BEARD, JR.
Commissioner, Department of Labor and Industry

You ask whether a Joint Apprenticeship Committee can, in view of § 40.1-28
of the Code of Virginia (1950), as amended, require all applicants for apprentice openings to bear the expense of providing a doctor's certificate that the applicant is physically able to perform the tasks of the trade.

Pursuant to § 40.1-119, a Joint Apprenticeship Committee (J.A.C.) may be appointed for any trade or trade area by the Virginia Apprenticeship Council. The J.A.C. is composed of an equal number of persons representing employers and employees. A person wishing to be employed as an apprentice in a trade for which a J.A.C. has been appointed applies to the J.A.C. rather than directly to employers. When apprentice vacancies occur, the J.A.C. selects from the list of applicants an equivalent number of those applicants who have received the largest number of "points." You advise that there is no absolute requirement that such a certificate be provided, but that in determining the qualifications of an applicant, a certain number of "points" are assigned to those applicants providing a satisfactory certificate and the presence or absence of a certificate is considered in that fashion. Those selected are placed with an employer. No wages are paid by the J.A.C. to the apprentice; the employer for whom the apprentice renders service pays him.

In my opinion, the selection process described above is "in the interest of an employer," since hiring is a necessary function of the employment for compensation of apprentices. The J.A.C., while performing the selection process, is thus within the statutory definition of employer, even though it does not pay the apprentices' wages.

As used in § 40.1-28, the prohibition against requiring an applicant to bear the costs of a physical examination as a "condition of employment" means that an employer may not impose such a requirement in order for the applicant to be selected. Although an applicant's failure to provide a physical does not automatically preclude his selection, it would apparently be a material factor mitigating against his selection. In my opinion this would constitute a requirement that the applicant furnish the physical as a condition of employment, and as such would constitute a violation of the statute.

LIABILITY—Imposed On Parents For Damage To Property By Willful Or Malicious Acts Of Their Minor Children—Constitutional.

GENERAL ASSEMBLY—Authority—May increase amount of limitation of liability imposed on parents for minors' intentional torts.

"Section 40.1-28. "It shall be unlawful for any employer to require any employee or applicant for employment to pay the cost of a medical examination or the cost of furnishing any medical records required by the employer as a condition of employment."

"Section 40.1-2. "Definitions.—As used in this title, unless the context clearly requires otherwise, the following terms have the following meanings:

"(3) 'Employer' means an individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating within the State who employs another to work for wages, salaries, or on commission and shall include any similar entity acting directly or indirectly in the interest of an employer in relation to an employee."
This is in reply to your inquiry wherein you stated that you have been asked to consider introducing legislation increasing the $200 limitations of liability imposed by §§ 8.01-43 and -44. These sections provide for actions against parents by reason of willful or malicious acts by minor children resulting in damage to property. You inquire whether such sections raise any due process problems. It is my opinion, for the following reasons, that the General Assembly may constitutionally impose a monetary limitation upon legal actions for damage to property filed against a parent for the willful or malicious acts of his child.

The general rule in Virginia regarding parental liability for minors' intentional torts follows that recognized at common law. The Supreme Court of Virginia has noted:


In §§ 8.01-43 and -44 of the Code of Virginia (1950), as amended, the General Assembly has created a right of action and remedy which did not exist in common law. For instance, § 8.01-44 provides:

"The owner of any property may institute an action and recover from the parents, or either of them, of any minor living with such parents, or either of them, for damages suffered by reason of the willful or malicious destruction of, or damage to, such property by such minor, provided that not exceeding two hundred dollars may be recovered from such parents, or either of them, as a result of any incident or occurrence on which such action is based. Any such recovery from the parent or parents of such minor shall not preclude full recovery from such minor except to the amount of the recovery from such parent or parents. The provisions of this statute shall be in addition to, and not in lieu of, any other law imposing upon a parent liability for the acts of his minor child."

Similarly, § 8.01-43 provides that the Commonwealth, or governmental entities such as towns and school boards, can institute legal actions against parents for property damage caused by the willful or malicious acts of their minor children. Clearly the General Assembly has not here imposed strictures or limitations
upon a right of action which already existed at common law.

It is well established that when the legislature creates a remedy or legal claim which did not exist in the common law, it may reasonably expand or limit that remedy as it finds necessary. Mattson v. Dept. of Labor & Industries, 293 U.S. 151 (1934). The United States Supreme Court has upheld monetary liability limits similar to those imposed by §§ 8.01-43 and -44 of the Code when it reviewed the constitutionality of monetary recovery limits imposed by Workmen's Compensation Acts. See New York Cent. R.R. v. White, 243 U.S. 188 (1917).

It is my opinion, therefore, that both sections of the Code are constitutional and that the General Assembly may increase the two hundred ($200) dollar limitations now set forth in §§ 8.01-43 and -44.

LIBRARIES—Employees Of County's Library Board Are Not Employees Of Board Of Supervisors—County Manager has no authority to appoint employees nor set compensation.

BOARDS OF SUPERVISORS—County Manager Form Of Government—Administrative authority of county manager limited to matters which board of supervisors itself has authority to control—County manager may fix compensation of all officers and employees he or his subordinates may appoint or employ.

COUNTIES, CITIES AND TOWNS—Governing Body Empowered To Establish Public Library—Management and control of library system vested in library board appointed by governing body.

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.

September 21, 1977

THE HONORABLE WILLIAM G. BROADDUS
County Attorney for Henrico County

This is in reply to your request for my opinion whether, under the county manager form of government, the manager may appoint personnel employed in the county's library system and fix their compensation.

The statutes which provide for the county manager form of government are codified as Title 15.1, Chapter 13, Article 3, of the Code of Virginia (1950), as amended. Section 15.1-634 provides, in part, as follows:

"The county manager shall be responsible to the board of county supervisors for the proper administration of all the affairs of the county which the board has authority to control. To that end he shall appoint all officers and employees in the administrative service of the county, except as otherwise provided in this form of county organization and government, and except as he may authorize the head of a department or office responsible to him to appoint subordinates in such department or office." (Emphasis added.)

Under this statute, the administrative authority of the county manager is limited
to those matters which the board of supervisors itself has authority to control. The county manager may fix the compensation of all officers and employees whom he or his subordinates may appoint or employ. See § 15.1-637(3).

The governing body of every county, city and town is empowered to establish a public library. See § 42.1-33. If it elects to establish such a library, the governing body must appoint a library board, and thereafter the "management and control" of the library system is vested in the library board. See § 42.1-35.

The grant of management and control to the library board includes the power to control personnel employed in the library system. See Opinion to the Honorable Edward A. Natt, County Attorney for Roanoke County, dated November 20, 1975, and found in Report of the Attorney General (1975-1976) at 83. Employees of the county's library board are, therefore, not employees of the board of supervisors. See Opinion to the Honorable Morris E. Mason, County Attorney for Chesterfield County, dated March 31, 1976, and found in Report of the Attorney General (1975-1976) at 151. Since the governing body has no authority to control the personnel of the library system, I am of the opinion that the county manager has no authority to appoint those employees nor to determine their compensation.

This Office has previously ruled that, in a county with the county executive form of government, the appointment of a library board does not divest the governing body of its authority to appoint personnel in the library system. See Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated August 21, 1973, and found in Report of the Attorney General (1973-1974) at 219. That ruling is distinguishable from the opinion I announced above. Under the county executive form of government, the board of supervisors has the express authority to appoint all officers and employees in the administrative services of the county. See § 15.1-598. Under the county manager form of government, however, the board of supervisors has no control over the library system, and the county manager has no greater authority than does the board of supervisors.

LIBRARIES—Private Contributions—No obligation of school board or State Board of Education to match those funds under § 22-163 when General Assembly does not appropriate funds.

APPROPRIATIONS—Public School Libraries Now Receive Federal Funds—General Assembly has not appropriated funds to match private contributions; localities not obligated to.

APPROPRIATIONS—Moneys Mentioned In Appropriations Act Can Be Expended Only For Purpose For Which Specifically Appropriated.

LIBRARIES—Locality's Contribution Of Fifteen Dollars To Match Private Contribution Of Five Dollars—Contingent on State's contribution by General Assembly appropriation.

SCHOOLS—School Boards—Private contributions for purchase of library materials—No obligation for matching funds from school board or State Board of Education under § 22-163 when General Assembly does not appropriate funds.

September 16, 1977
REPORT OF THE ATTORNEY GENERAL

THE HONORABLE JAMES P. BABER
Commonwealth's Attorney for Cumberland County

This is in response to your recent inquiry arising out of the fact that the school board has received several five dollar contributions for the purchase of library materials. You ask whether this gives rise to an obligation on the part of the school board or the State Board of Education to match these funds. Applicable to your inquiry is § 22-163 of the Code of Virginia (1950), as amended, which reads in relevant part:

"Whenever the patrons and friends of any public school shall raise by private subscription the sum of five dollars and tender the same to the clerk of the county school board . . . for the purpose of establishing or purchasing books, materials and appliances for a school library connected with such school, the school board in counties . . . shall appropriate the sum of fifteen dollars for this purpose, and the State Board, out of any funds provided for public school libraries, shall appropriate forty dollars, thus making a minimum of sixty dollars for a library unit. . . ."

The purpose of this statute when it was enacted was to provide for the establishment of, and additions to, school libraries. It was contemplated that the General Assembly would appropriate a sum of money which could be divided into forty dollar units, which would have to be matched by five dollar contributions from the public and fifteen dollar contributions from the locality. After the enactment of the present statute in 1928, the General Assembly did in fact appropriate money for this statutory program for many years, referring specifically to this statute until 1946.

Due to the fact that in recent years public school libraries have been receiving most of their support from federal grant funds, the General Assembly in the last two bienniums has not appropriated funds for this purpose. The only appropriation made by the General Assembly in these years has been to the State Department of Education to reimburse that Department for supervision of the public school libraries. See Item 410 of the Appropriations Act, Ch. 779 [1976] Acts of Assembly 1315. Section 174 of this Act provides that none of the moneys mentioned in the Appropriations Act may be expended for any other purpose than those for which they are specifically appropriated. In addition, Section 7 of Article X of the Constitution of Virginia (1971), states that "... No money shall be paid out of the State treasury except in pursuance of appropriations made by law. . . ." This language is also found in § 2.1-224 of the Code. Thus, since there have been no moneys appropriated for library purposes by the General Assembly, the Board of Education has no funds from which to contribute forty dollars to match the five dollar contribution.

In this regard, this Office issued an informal opinion to Mr. R. E. Huff, Administrator of Augusta County on April 4, 1975, a copy of which is attached, relative to whether in the absence of an appropriation by the General Assembly the Commonwealth must reimburse local electoral boards for the compensation paid board members and the expenses of local electoral board secretaries pursuant to § 24.1-31 of the Code. Therein it was held that the language "such governing bodies shall be reimbursed annually for such sums from the State treasury" only required reimbursement when a specific appropriation for that purpose had been made, due to the restrictions of Article X, Section 7, and § 2.1-224. Similar reasoning would apply in this case.

Regarding the locality's contribution of fifteen dollars required under the statute, it is my opinion that this is contingent on the State's contribution. If the
General Assembly does not choose to appropriate moneys for this purpose, the localities are not obligated to match the five dollar contribution. Section 22-163 contemplates that libraries be supported by contributions from the public, the locality, and the State. The locality's contribution can only be required when the entire statutory scheme is fulfilled. In the current biennium the General Assembly has elected not to provide matching funds. If the General Assembly were in the future to appropriate money for this purpose, the locality would then, in my opinion, be obligated to make the fifteen dollar appropriation.

In view of the foregoing, I am of the opinion that neither the school board nor the State Board of Education is obligated to match the described contributions.

LITERARY FUND—City Council And School Board Of City Of Falls Church May Borrow Money From, Without Prior Approval Of Voters.

APPROPRIATIONS—Future Appropriations To School Board—Contracts in excess of one year prohibited.

CHARTERS—Referendum Not Required As Prerequisite To Literary Fund Loan To City Of Falls Church.

COUNTIES, CITIES AND TOWNS—Literary Fund Loan—Statutory duty of governing body to provide funds for repayment of loan.

LITERARY FUND—School Boards Of Cities Authorized To Borrow Money From—State Board of Education requires governing body to first approve application for loan.

LOANS—City Authorized To Purchase Property For Municipal Purposes—No term specified for notes—Ten-year pay out period not prohibited.

LOANS—School Boards Authorized To Borrow Money From Literary Fund Without Referendum—Other loans by school board do require referendum.

May 26, 1978

THE HONORABLE VINCENT F. CALLAHAN, JR.  
Member, House of Delegates

You ask whether the City Council and School Board of the City of Falls Church may borrow money from the Literary Fund without prior approval of the voters, and whether the city may purchase property and give a ten-year note in payment.

Borrowing From Literary Fund

This Office has held, in a prior Opinion to the Honorable William T. Robey, III, Commonwealth's Attorney for the City of Buena Vista, dated July 30, 1971, and found in the Report of the Attorney General (1971-1972) at 355, that no referendum is required in order for a city school board to borrow from the Literary Fund.

Likewise, the Charter of the City of Falls Church does not require a referendum as a prerequisite to a Literary Fund loan. Chapter 7 of the Charter allows the city council to incur indebtedness by issuance of its negotiable bonds or notes upon adoption of an ordinance authorizing their issuance and the approval of such ordinance by the city's voters in a special election. Section 20.02 of the Charter, which pertains to the school board, provides, however, that none of the Charter's provisions shall be interpreted to refer to or include the school board unless the intention to do so is expressly stated or is clearly apparent from the context. Further, § 20.02 provides that in addition to the authority conferred upon the city by Chapter 7, the school board may borrow from the Literary Fund. Thus, the provisions in Chapter 7 of the Charter relating to the incurring of indebtedness and the issuance of bonds by the city council do not apply to Literary Fund loans obtained by the school board.

I am therefore of the opinion that neither § 22-107 nor the Charter of the City of Falls Church requires a referendum of city voters as a prerequisite to the school board receiving a loan from the Literary Fund.¹

Issuance of Notes Payable Over Ten Years

Section 7.02 of the City Charter, Ch. 292 [1973] Acts of Assembly 395, allows the city to purchase property for municipal purposes. No term is specified for these notes. Accordingly, a ten-year pay out period would not be prohibited.

LOTTERIES—Bingo Not Authorized For Local Of Labor Union.

August 29, 1977

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

This is in reply to your recent letter wherein you inquire whether the local of an organized labor union is entitled to conduct bingo games and/or raffles under § 18.2-335, Code of Virginia (1950), as amended.

The provisions of §§ 18.2-326 and 18.2-328, declaring certain games of chance illegal, are made inapplicable to organizations specified in § 18.2-335; organizations therein described include the following:

“...organizations...exclusively for religious, charitable, scientific, literary, community or educational purposes;” (Emphasis added.)

A local of a labor union is an association organized for the mutual welfare and benefit of those in the labor union and to represent the members collectively in disputes with management in the area of wages, working conditions and the like. It is distinguished from being organized exclusively for community or educational purposes.

A labor union does not in my opinion fall within the definition and purpose of the other types of organizations set forth in the other exemptions in the statute. See § 18.2-335(2)(ii), (iii), (iv). I am of the opinion therefore that such a local of a labor union cannot qualify pursuant to provisions of § 18.2-335 as an organization which may conduct raffles and/or bingo games.

LOTTERIES—Gambling Device—When not illegal.

DEFINITIONS—Gambling Device—Slot machine purely for entertainment.

May 24, 1978

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

You have asked whether a device pictured in a brochure, which you forwarded to me would violate the gambling laws of Virginia. You state that this machine is purely for entertainment purposes and that no prize is awarded for successful operation other than additional games.

In examining the device as pictured in the brochure, it is obvious that it is similar to what is commonly known as a "slot machine." The machine is played by inserting a coin into it, pulling the handle and waiting to see if three like objects appear in a window. Instead of a monetary prize, however, game credits are given for winning. These credits can be used to play additional games.

Section 18.2-325 of the Code of Virginia (1950), as amended, defines a gambling device as:

"Any machine . . . dependent upon the insertion of a coin or other object for . . . [its] 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; provided, however, that the return to the user of nothing more than additional chances or the right to use such machine is not deemed something of value within the meaning of this subsection . . . ."

The device about which you inquire meets all the requirements of an illegal gambling device as set forth in the statute except that of the element of prize. Because the user gains only additional game credits upon successful operation of the device and these credits are used for no other purpose than for replaying the machine, I am of the opinion that the use of this device would not violate the statute.

LOTTERIES—Purchase For Participation Constitutes Consideration—Retail clothing store sells clothing memberships.
THE HONORABLE W. CHARLES POLAND
Commonwealth's Attorney for the City of Waynesboro

I am in receipt of your request for an Opinion in which you inquire whether a certain promotional program would contravene the anti-lottery laws of Virginia, §§ 18.2-325 through -340 of the Code of Virginia (1950), as amended. As outlined in your letter, the sponsor of the program proposes the following:

A retail clothing store sells clothing memberships whereby the purchaser of the membership agrees to pay $4.00 per week for twenty weeks or a total of $80.00. During the twenty-week interval drawings will be made and the winner will receive an $80.00 gift certificate and, in addition, will no longer be required to pay the $4.00 per week for the remainder of the twenty-week term. At the end of the twenty-week period, any member who did not receive an $80.00 gift certificate through a drawing will receive an $80.00 gift certificate.

In conformity with the opinion of the Supreme Court in *Maughs v. Porter*, 157 Va. 415, 161 S.E. 242 (1931), this Office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. The element of chance is present in the enterprise outlined because winners are determined by random drawings from those who have purchased clothing memberships. Likewise, the element of prize is present. The store owner is offering as much as $80.00 as a reward to that person whose name is drawn. With respect to the element of consideration, § 18.2-332 of the Code prescribes:

"In any prosecution under this article, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith." (Emphasis added.)

Your inquiry indicates that eligibility to receive a prize is limited to those who purchase clothing memberships. I am, therefore, of the opinion that the element of consideration is present in the proposed program and that the venture under consideration would constitute a lottery and be in violation of Virginia law. In this connection, I am forwarding to you a copy of an Opinion of this Office, dated December 28, 1962, to the Honorable Elwood H. Richardson, Jr., Commonwealth's Attorney for the City of Hampton, in which a similar situation was considered and discussed. See Report of the Attorney General (1962-63) at 119.
charitable organization is violation of statute.

LOTTERIES—Charitable Organizations Combining For Bingo Games—Proceeds must be used for charitable purposes—Proposed plan prohibited by statute.

March 9, 1978

THE HONORABLE JOHN N. LAMPROS
Commonwealth’s Attorney for Roanoke County

You have asked whether certain activities would violate the gambling laws of Virginia, §§ 18.2-325 through -340 of the Code of Virginia (1950), as amended. You have told me that a person who is not himself a member of a charitable organization, rents facilities to several charitable organizations for use in their bingo games. Rent is charged on a per game basis for each separate bingo game played. In addition to providing the premises, he maintains all funds collected in a single joint "escrow" account and does the bookkeeping. You ask several questions, and I will answer them in order:

"1. May a per game fee, not based on a percentage of the receipts of the game, be charged by such an individual as the rental fee for the facilities provided to these organizations for their games?"

Section 18.2-335 prohibits organizations allowed to conduct bingo games to employ someone to conduct such games for the organizations. None of the proceeds from bingo operations is allowed to inure directly or indirectly to a member, agent, employee, or private shareholder, but must be used for charitable purposes.

The intent of this legislation was to insure that the money received by charitable organizations from bingo operations be used for charitable purposes. Thus, no private individual is allowed to profit from the operation of bingo games. In this regard, I am enclosing a copy of an Opinion to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated August 24, 1973, and found in the Report of the Attorney General (1973-1974) at 223.

Under the scheme you outline, the rent would be based upon the number of games which can be played in a given period of time and not upon the fair market rental value. To the extent such per game fee exceeds the fair market rental value, it would be in violation of § 18.2-335.

"2. May these charitable organizations, operating at this one location, contribute funds into a single joint 'pot' as a prize that may be won on any night?"

Section 18.2-335 provides in part:

"[T]hat any such volunteer fire department, rescue squad or organization shall not enter into a contract with any person or firm, association, organization, partnership or corporation of any classification whatsoever, for the purpose of organizing, managing or conducting bingo games or raffles." (Emphasis added.)

I interpret this to mean that an organization allowed to conduct bingo and raffles may not contract with one or more other organizations of any sort, charitable or otherwise, for the purpose of organizing, managing, or conducting
a bingo game or raffle. In the situation outlined, those organizations which conduct bingo games at the location described would be contracting one with another for the purpose of organizing, managing or conducting bingo games by pooling monies for prizes. I am of the opinion, therefore, that the proposed plan is prohibited by the statute.

"3. May such an individual, not a bona fide member of any of these charitable organizations, operating at one location on various nights, maintain, handle, bookkeep, bank, and disburse to each respective group the funds collected by such organization on its respective night of operation?"

Section 18.2-335 provides that an organization authorized to conduct bingo games and raffles may "delegate the authority or duty of organizing, managing or conducting bingo games or raffles only to a natural person or persons who are bona fide members of such . . . organization."

Anyone who maintains, handles, keeps books, banks receipts, and disburses funds for bingo operations as you have outlined is, in my opinion, "organizing, managing or conducting" bingo games. Therefore, bookkeeping by a person, not a bona fide member of the organization, would be in violation of the statute. See Report of the Attorney General (1972-1973) at 138.

LOTTERIES—What Constitutes—Elements of prize, chance and consideration combine.

CHARITABLE ORGANIZATIONS—Authorized To Conduct Raffles—Fund raising proposal.

LOTTERIES—Definition Of "Raffle" Which Could Be Conducted By Exempt Organization Under § 18.1-340(b).

LOTTERIES—Who May Conduct Lotteries Or Raffles.

February 23, 1978

THE HONORABLE NORMAN SISISKY
Member, House of Delegates

You have asked whether a fund raising proposal would violate the gambling laws of Virginia, §§ 18.2-325 through -340 of the Code of Virginia (1950), as amended. You have told me that the organization proposing to carry out the fund raising proposal is charitable in nature as enumerated in § 18.2-335 of the Code. As outlined in your letter, funds would be raised by the following scheme:

Upon joining the organization, each member would be assigned a permanent number for purposes of identification at drawings to be held. Each month, cash prizes would be awarded to those whose numbers are drawn. The prize money is financed by requiring each member to contribute $5.00 per month for that purpose. Money not awarded in prizes is used for charitable projects of the organization.

Frequently, this Office has been called upon to decide whether a certain activity constitutes an illegal raffle or lottery. This Office has taken the position that an
illegal raffle or lottery exists whenever the elements of prize, chance and consideration combine. Clearly, all three elements exist in the activity about which you inquire and would be prohibited under § 18.2-326. Under § 18.2-335, however, certain organizations are permitted to conduct bingo games and raffles which are otherwise prohibited. It is my opinion, therefore, that the activity in question constitutes a raffle, and could be conducted by any exempt organization authorized to conduct raffles under § 18.2-335. In this regard, see the Opinion to the Honorable Edward E. Lane, Member, House of Delegates, dated June 21, 1973, and found in the Report of the Attorney General (1972-1973) at 257.

MAGISTRATES—Authority to Issue Warrant—Denial of juvenile court intake officer to file petition—Felony or Class I misdemeanor.

WARRANTS—Magistrate’s Power to Issue Warrant—Denial of juvenile court intake officer to file petition—Warrant treated in same manner as if petition had been filed.

August 4, 1977

THE HONORABLE C. VINCENT HARDWICK, CHIEF JUDGE
Fifteenth Judicial District Juvenile and Domestic Relations Court

This is in response to your request concerning the operation and effect of § 16.1-260 of the Code of Virginia (1950), as amended, insofar as it deals with the right of a complainant to apply to a magistrate for the issuance of a warrant when a juvenile court’s intake officer refuses to authorize the filing of a petition in that court. You specifically ask what powers a magistrate has upon application to him of complaints which are not felonies or Class I misdemeanors.

Section 16.1-260 was enacted to give formal status to the intake process and give specific responsibilities to a juvenile court’s intake officer. The statute provides, in pertinent part, as follows:

“B. . . . The intake officer shall accept and file a petition in which it is alleged that . . . (iv) the child has committed an offense which if committed by an adult would be a felony or a Class I misdemeanor, if sufficient information to establish probable cause therefor is brought to the attention of the intake officer.

“C. If the intake officer refuses to authorize a petition, the complainant shall be notified in writing at that time of the complainant’s right to apply to a magistrate for a warrant. In the event a magistrate shall find probable cause to believe that an offense if committed by an adult would constitute a felony or a Class I misdemeanor, he shall issue a warrant returnable to the juvenile and domestic relations district court.”

Under this section, the juvenile court intake officer is to file petitions which allege a child has committed what would be a felony or Class I misdemeanor, if committed by an adult. The intake officer would not file such petition, if the petition was presented him by the complainant, and he did not feel sufficient probable cause had been presented. Furthermore, the intake officer may have not filed a petition presented him because of the mistaken belief that the offense complained of was not a felony or Class I misdemeanor, even though probable
cause for some offense had been established.

If the intake officer refuses to authorize a petition for either of these two reasons, the complainant has the right to apply to a magistrate for a warrant. Where the application to the magistrate is based on the intake officer's failure to find probable cause, the magistrate shall issue a warrant for the child if he finds probable cause to believe that a felony or Class I misdemeanor has been committed. In the second instance described above, the magistrate shall issue a warrant if he finds the intake officer had mistakenly concluded that a felony or Class I misdemeanor had not been committed, even though probable cause for such an offense had been shown.

Under § 16.1-260 of the Code, a magistrate can only issue a warrant under the procedures described above. The juvenile court "shall treat such warrant in the same manner as if a petition had been filed." Section 16.1-260C.

MAGISTRATES—Warrant—Magistrate may not be required to pay for reissuance where original warrant contained clerical error.

CIVIL PROCEDURE—Costs—Recovery by prevailing party, but not assessment of costs against anyone not a party to the action.

COSTS—Magistrate—No statute provides for assessing costs against a State official even if he errs in performance of duty.

JUDGES—Authority—Magistrates—General supervisory administration but no authority to require magistrate to pay cost for reissuance of warrant due to clerical error.

November 2, 1977

THE HONORABLE ROBERT N. BALDWIN
Executive Secretary
Supreme Court of Virginia

This is in reply to your letter wherein you inquired whether a magistrate incurs liability for court costs if he makes a clerical error in issuing a civil warrant. Your letter reads in part as follows:

"Specifically, I am aware of a situation in which a magistrate improperly typed the middle initial of a defendant on a civil warrant. Upon the trial of this particular case, the presiding judge ordered the warrant to be reissued with the issuing magistrate to pay the cost for reissuance. I seek your advice on whether any authority exists for this practice."

Section 19.2-41 of the Code of Virginia (1950), as amended, provides that, when delegated the authority by the chief circuit judge, a chief general district court judge shall exercise general supervisory power over the administration of magistrates within the district. This section, however, in no way grants a judge authority to require a magistrate to pay for reissuance of a warrant when the original warrant contains a clerical error. No other section exists which grants a judge authority over the performance of a magistrate of his duties. Section 14.1-178 provides for the recovery of costs by the prevailing party in a civil action against the opposite party, but the section does not provide for assessment of
costs against an individual not a party to the action. No statute provides for the assessing of costs against a State official even if he errs in the performance of his duty. Finding no authority in the Code pursuant to which costs for reissuance of a warrant in a civil case may be assessed against a magistrate, I am of the opinion that a judge is without authority to require the magistrate to pay the cost for reissuance of warrants due to clerical errors.

MARINE RESOURCES COMMISSION—Wetlands Act And Land Office Act—Use or encroachment upon State-owned wetlands of Eastern Shore—Public right to fish, fowl or hunt.

CONFLICT OF LAWS—Statutes Relating To Same Subject Must Be Construed Together To Give Effect To Each.

WETLANDS ACT—Applicant Desiring To Use Or Develop Wetlands Owned By Commonwealth Shall Apply For Permit To Marine Resources Commission.

May 25, 1978

THE HONORABLE JAMES E. DOUGLAS, JR.
Commissioner, Marine Resources Commission

You ask whether § 41.1-4 of the Code of Virginia (1950), as amended, which is a provision of the Land Office Act, would prevent the Virginia Marine Resources Commission from permitting any use or encroachment upon the State-owned wetlands of the Eastern Shore.

Section 41.1-4 requires that the ungranted marsh or meadowlands of the Eastern Shore remain in public ownership and that they remain accessible to the public for fishing, fowling or hunting.¹ The Wetlands Act is directed primarily at the use and development of privately-owned wetlands by private property owners. The Act also permits, however, the granting of permits to use or develop ungranted, publicly-owned wetlands areas. Thus, § 62.1-13.9 provides that if "an applicant desires to use or develop wetlands owned by the Commonwealth, he shall apply for a permit directly to the Commission."

Sections 41.1-4 and 62.1-13.9 both address the same subject matter—activities which may take place on wetlands. Statutes relating to the same subject or object must be construed together so that, if it can reasonably be done, effect is given to every provision of each. The provisions of one statute should not be construed to control those of another on the same subject matter unless, upon comparison, they are in irreconcilable conflict. II Sutherland, Statutory Construction § 5201 (1943); 73 Am.Jur.2d Statutes §§ 187-190 (1974).

I am of the opinion that these statutes do not conflict and that effect may be given to each. The Marine Resources Commission may grant a permit to “use or

¹Section 41.1-4 provides as follows:

“All unappropriated marsh or meadowlands lying on the Eastern Shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this State, shall continue as such common, and remain ungranted. Any of the people of this State may fish, fowl, or hunt on any such marsh or meadowlands.”
develop" the wetlands of the Eastern Shore. See § 62.1-13.9. Because no use may be permitted on any ungranted wetlands which would injure their public character, only limited activities or uses which do not require development of a private character may be authorized. Furthermore, no permit may be issued for an activity which would interfere with the public right to fish, fowl or hunt in the Eastern Shore marsh or meadowlands protected by § 41.1-4. Accordingly, the Commission should review each permit application for the use or development of these wetlands to determine that such interference will not occur. Any use listed in subsection 3 of § 62.1-13.5 must also be denied if it would interfere with public fishing, fowling, or hunting.

MAYOR—Resignation—When effective.

PUBLIC OFFICERS—Resignation Not Complete Until Accepted—Officer may specify manner of acceptance; prospective resignation may be withdrawn.

August 9, 1977

THE HONORABLE NATHAN H. MILLER
Member, Senate of Virginia

This is in reply to your recent letter in which you request my opinion whether the Mayor of the Town of Grottoes has resigned. You state that on May 4, 1977, the Mayor submitted a written letter of resignation which provided that the Mayor desired "that the Council accept my resignation to be effective at the reading of this letter." Prior to such a reading of the letter at a Town Council meeting, the Mayor, on May 7, 1977, retracted, in writing, his earlier letter of resignation. On May 14, 1977, the Council accepted the resignation of the Mayor.

The resignation of a public officer is not complete until it is accepted. Until that time it is inoperative and the officer remains in his position. 15 M.J. Public Officers § 38 (1951). A prospective resignation may be withdrawn at any time before it is accepted. Bunting v. Willis, Judge, 68 Va. 144, 155 (1876); 63 Am.Jur.2d Public Officers & Employees § 166 (1972); 15 M.J. supra at § 39.

A public officer who wishes to resign may specify the manner in which his resignation is to be accepted and made effective. It is clear that the Mayor of Grottoes indicated that his resignation would become effective only upon a reading of the letter at a Council meeting. The withdrawal of the letter of resignation prior to its acceptance, therefore, made the letter of resignation inoperative. The later acceptance by the Town Council of the resignation was therefore of no effect.

I therefore conclude that the Mayor of Grottoes has not resigned and remains in office.

MEDICAL CARE FACILITIES CERTIFICATE OF PUBLIC NEED LAW—Independent Laboratories Included In Definition Of.
You have asked whether a proposed independent laboratory would have to be approved under the Virginia Medical Care Facilities Certificate of Public Need Law. According to your letter, these proposed facilities would neither have contact with patients nor render any advice or diagnosis to the patient.

Under the Certificate of Public Need Law, a medical care facility is defined to include virtually every facility which in any way relates the prevention, diagnosis and treatment of disease or injury. The only exception is a physician's office.

The definition of "medical care facility" does not expressly include an independent laboratory. However, the term "physician's office," which is the only exclusion from the definition, does expressly exclude an independent laboratory.

The State Health Commissioner, who is responsible for administration of the Law, and the State Board of Health have consistently interpreted the definition of medical care facility to include independent laboratories such as you have described. Such an interpretation is consistent with the purpose of the law, which is to control health care cost. See Opinion to the Honorable James B. Kenley, State Health Commissioner, dated January 13, 1978. The practical construction put upon a statute for a number of years by officials charged with its administration, and the acquiescence of the public in such a construction, will, in cases of doubt, be regarded as decisive. See Virginia Coal and Iron Co. v. Keystone Coal & Iron Co., 101 Va. 723 (1903).

Therefore, I am of the opinion that the definition of medical care facilities includes independent laboratories.

MENTAL HEALTH AND MENTAL RETARDATION—Chapter Ten Boards—Instrumentalities of local not State government.

COMPATIBILITY OF OFFICES—Director Of Chapter Ten Board May Serve As City Department Head.

MENTAL HEALTH AND MENTAL RETARDATION—Chapter Ten Boards—May be provided staff from a city department.

1Sections 32-211.3 to -211.17 of the Code of Virginia (1950), as amended.

2Section 32-211.5(6) defines a medical care facility as: 

"... any institution, place, building, or agency... by or in which facilities are maintained, furnished, conducted, operated, or offered for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition... This term shall not include a physician's office. Provided, however, the term 'physician's office' shall not include independent laboratories..." (Emphasis added.)
REPORT OF THE ATTORNEY GENERAL

July 14, 1977

THE HONORABLE WILLIAM T. PARKER
Member, House of Delegates

This is in response to your request for my opinion on a number of questions concerning community mental health and mental retardation services boards. I shall answer your questions seriatim:

"1. Is the Chapter Ten Board a local or state board?"

Section 37.1-195 of the Code of Virginia (1950), as amended, provides for the establishment of community mental health and mental retardation services boards. These boards are often referred to as chapter ten boards. The members of these boards are appointed by the governing body or bodies of the local government or governments by which they are established. This office has consistently held that the boards are instrumentalities of the localities, not the State. See Report of the Attorney General (1975-1976) at 150; the Report of the Attorney General (1974-1975) at 336; and Report of the Attorney General (1971-1972) at 17. I concur with these previous opinions.

"2. To what person or body is the Board accountable?"

Section 37.1-195 of the Code specifically provides that the boards "shall be responsible to the governing body or bodies of the county or city or combination thereof which establish such board."

"3. In administrative matters such as personnel policy and budget control, to what person or body is the Chapter Ten Board responsible?"

As stated above, the boards are responsible to the local governing bodies. The question of personnel management was addressed in an opinion to the Honorable Morris E. Mason, County Attorney for Chesterfield County, dated March 31, 1976, and found in the Report of the Attorney General (1975-1976) at 150. That opinion held that the enabling authority for the boards did not delegate specific personnel management functions to them and that employees of the Chesterfield County Community Mental Health and Mental Retardation Services Board were employees of the Chesterfield County Board of Supervisors, subject to its grievance procedures, classification, and uniform pay plans.

With regard to budget control, the general accountability of the chapter ten boards to the local governing bodies is augmented by specific statutory language. Section 37.1-197(g) provides:

"... that all fees collected from board administered programs shall be deposited with the treasurer of the political subdivision of which the board is an agency, or, in the case of a joint board, with the treasurer of the political subdivision specified by agreement; provided further, that such collected fees shall be used only for community mental health and mental retardation purposes."

Section 37.1-197(h) of the Code provides that the community mental health and mental retardation services board shall "accept or refuse gifts, donations, bequests or grants of money or property from any source and utilize the same as authorized by the governing body or bodies of the political subdivision or subdivisions of which it is an agency." (Emphasis added.)

Section 37.1-198 of the Code provides that grants made in accordance with the terms of Title 37.1, Chapter 10, of the Code are applied for by the locality or localities that establish a community mental health and mental retardation
services board. This section also provides that no program shall be eligible for a grant under this chapter unless its plan and budget have been approved by the governing body or bodies of each political subdivision of which it is an agency and by the Department of Mental Health and Mental Retardation.

In addition to the accountability to the local governing bodies, the community mental health and mental retardation services boards are accountable to the Department of Mental Health and Mental Retardation for the funds received through it. Section 37.1-199 of the Code directs the Department of Mental Health and Mental Retardation to review budgets and programs and to withdraw funds when they are not needed or when a program is not being administered in accordance with its approved plan and budget.

"4. Would it be contrary to the Code of Virginia if the Executive Director for the Chapter Ten Board is a city department head, appointed by both the Board and the City Manager? This would involve dual responsibility for both hiring and firing of personnel."

There is no provision in the Code which would prohibit a community mental health and mental retardation services board from appointing a city department head as its director. The director is not an officer. See Report of the Attorney General (1975-1976) at 288-289. There is thus not an issue of incompatibility either by statute or at common law. Section 37.1-197(f) directs the board to appoint a director, and the sole limitations on how that duty shall be discharged are that the individual's qualifications be approved by the Department of Mental Health and Mental Retardation and that his compensation be set by the board within the amounts made available by appropriation. Such appointment would be the sole responsibility of the board; the function of the city manager would be confined to permitting his department head to accept the appointment. Thereafter, the director would be responsible to the board for the execution of the board's program, and to the city manager for the administration of his department. Your question concerning personnel management in such a situation is dealt with infra.

"5. Can the Chapter Ten Board be provided staff from a city department under the administration of the City Manager? In this situation, the City Council would not appropriate funds for the board to employ their own staff. However, staff would be assigned to the board through the City Manager."

It is my opinion that a community mental health and mental retardation services board may be provided with staff from a city department as long as this arrangement does not interfere with the board's responsibility to execute and maintain programs under § 37.1-197(c) of the Code. Each case in which this is proposed would have to be reviewed by the Department of Mental Health and Mental Retardation to determine if the arrangement meets the fiscal matching requirements for State grants.

MENTALLY RETARDED—Zoning Ordinances—Should not exclude from benefits of normal residential surroundings—Group homes.

COUNTIES, CITIES AND TOWNS—Mentally Retarded Group Homes—Section 15.1-486.2 does not supersede general rule that local government determines in which zoning districts different uses of land will be allocated.

COUNTIES, CITIES AND TOWNS—Zoning Ordinances—General Assembly
has delegated power to adopt.

GENERAL ASSEMBLY—Authority To Enact Zoning Regulations Is A Legislative Power—May delegate power to adopt zoning regulations to counties, cities and towns.

MENTALLY RETARDED—Group Homes—Conditions imposed shall not be more restrictive than on other dwellings unless necessary to protect health and safety of residents of such homes.

MENTALLY RETARDED—Group Homes—No statute authorizes imposition of different procedural requirements than for other types of land use activities.

MENTALLY RETARDED—Location Of Group Homes For Must Be Within Parameters Set By State Policy—Assimilating these citizens into life of community.

ORDINANCES—Zoning—Lawful exercise of State's police power, if reasonable and nonarbitrary.

ZONING—Ordinances—Conditions that may be imposed in differing zoning districts to ensure wise use of land.

January 9, 1978

THE HONORABLE RAY L. GARLAND
Member, House of Delegates

This is in reply to your recent letter concerning § 15.1-486.2 of the Code of Virginia (1950), as amended, which provides as follows:

"A. It is the policy of this State that mentally retarded and other developmentally disabled persons should not be excluded by county or municipal zoning ordinances from the benefits of normal residential surroundings. Furthermore, it is the policy of this State to encourage and promote the dispersion of residences for the mentally retarded and other developmentally disabled persons to achieve optimal assimilation and mainstreaming into the community. Toward this end it is the policy of this State that the number of such group homes and their location throughout the State and within any given political subdivision should be proportional, insofar as possible, to the population and population density within the State and local political subdivisions.

"B. Notwithstanding any other provision of law, pursuant to the policy set out in subsection A, locally adopted zoning regulations shall provide for family care homes, foster homes or group homes serving mentally retarded or other developmentally disabled persons, not related by blood or marriage, in appropriate residential zoning districts.

"C. Conditions may be imposed on such homes to assure their compatibility with other permitted uses, but such conditions shall not be more restrictive than those imposed on other dwellings in the same zones unless such additional conditions are necessary to protect the health and safety of the residents of such homes."

You inquire whether, under subsection C, the governing body may impose additional procedural requirements, such as additional public hearings, prior to
approval of these facilities, which are not required prior to approval of other dwellings permitted within the same zoning district.

The determination of an answer to your inquiry requires that I distinguish between two types of provisions which are permitted in zoning ordinances. The first type includes the procedural requirements for the review and approval of proposed land uses. The second type includes the conditions imposed on activities to control and regulate the physical development of land. I am of the opinion that different procedural requirements may not be imposed on group homes than on other types of land use activities, but special conditions of physical development which are necessary to protect the health and safety of the residents of the homes may be required. I will discuss the differences between these types of regulations.

Zoning ordinances commonly contain provisions concerning the procedures for enacting or amending the ordinance. Under such provisions, the specific procedure for enactment is committed to the rules of the governing body, but notice and public hearings are often specifically required. 82 Am. Jur. 2d Zoning and Planning § 47 (1976). Virginia statutes establish procedures for advertising zoning ordinances and holding public hearings (§ 15.1-431), preparing and adopting the zoning ordinance and map and amendments thereto (§ 15.1-493), granting variances (§ 15.1-495) and special exceptions (§ 15.1-496), and judicial review of the decisions of the board of zoning appeals (§ 15.1-497). Where such a statute prescribes procedural steps, the required procedure is normally regarded as mandatory. 82 Am. Jur. 2d Zoning and Planning, id. There is no Virginia statute which authorizes the imposition of different procedural requirements on group homes for the mentally retarded than on other types of land use activities.

In addition, zoning ordinance provisions commonly establish conditions that may be imposed in the differing zoning districts to ensure the wise use of land. One objective of such conditions is to ensure the compatibility of differing types of land uses. Section 15.1-486 illustrates some of the conditions which may be imposed on the physical development of land. That section provides, in part, that zoning ordinances may:

"... regulate, restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and other premises for agriculture, business, industrial, residential, flood plain and other specific uses;

(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;

(d) The excavation or mining of soil or other natural resources."

Other such conditions may include architectural design, construction standards, location, minimum lot size and minimum floor space in a permitted structure. 82 Am. Jur. 2d Zoning and Planning §§ 89 to 100 (1967).

The conditions which may be imposed upon group homes for the mentally retarded are intended to assure their compatibility with other permitted land uses. See § 15.1-486.2C. As such, they are conditions which relate to the physical development of land, and not to the procedural requirements of zoning ordinances. No special procedural steps, such as advertising, notice, or public
hearing requirements, may be imposed on group homes by virtue of § 15.1-486.2C. The only requirements which may be imposed on these facilities which are not shared by other dwellings in the same zoning district are those conditions of physical development which are necessary to protect the health and safety of the residents of group homes. Furthermore, if the additional requirements cannot be justified on the basis of the health and safety of the inhabitants of the homes, a locality may not impose conditions to ensure the compatibility of these facilities with other permitted uses which are not shared by other dwellings in the same zoning district.

A final point should be made. Section 15.1-486.2 does not supersede the general rule that it is within the discretion of the local government to determine in which zoning districts different uses of land will be allocated. If the provisions of such zoning regulations are reasonable and nonarbitrary, they will be construed to be a lawful exercise of the police power. If the judgment of a local governing body in enacting the regulations is fairly debatable, the legislative judgment will stand. See Opinion to the Honorable Bernard G. Barrow, Member, House of Delegates, dated September 20, 1977, a copy of which is enclosed.

That discretion, as it affects the location of group homes for the mentally retarded, must be exercised within the parameters set by State policy. Section 15.1-486.2 articulates the policy of the Commonwealth that developmentally disabled persons should not be excluded from normal residential surroundings and that group homes should be located within a political subdivision in a number proportional to the population and population density of a locality. Furthermore, group homes must be provided for in appropriate residential zoning districts.

I interpret these policy statements to require that, at a minimum, one residential zoning classification be designated as suitable for group home facilities. The locality may, within its discretion, determine which residential zoning classifications are most appropriate for this type of activity. Within the locality, group homes must be located in proportion to the population and population density of the political subdivision. All land use decisions regarding group homes for the mentally retarded, moreover, must be made within the objective of assimilating these citizens as fully as possible into the life of the community.

MINISTERS—Nonresident Minister, Not Properly Bonded, Performed Marriage Ceremony In Virginia—Validity of marriage determined by courts.

BONDS—Bonding Requirement Applicable To Resident And Nonresident Ministers.

CLERKS—Minister, Nonresident, Failed To Obtain Bond—Clerk has no enforcement mechanism.


MINISTERS—Not Properly Bonded, Not Authorized To Solemnize A
Marriage—That fact, standing alone, does not affect validity of marriage.

PENALTIES—Minister Not Properly Bonded—No specific statutory penalty for failure to obtain bond.

March 31, 1978

THE HONORABLE HUGH L. STOVALL, CLERK
Circuit Court of the City of Norfolk

You have asked (1) what the clerk may do when a nonresident minister, who is not bonded as required by law, performs a marriage ceremony in Virginia, and (2) whether such a marriage is valid.

1. Indexing A Marriage License

Section 20-23 of the Code of Virginia (1950), as amended, expressly requires that a minister obtain a $500 surety bond before he is authorized to perform a marriage in the Commonwealth. This requirement applies both to resident and to nonresident ministers. However, there is no specific statutory penalty for failure to obtain a bond. Consequently, the clerk has no enforcement mechanism with which to correct the problem you describe.

The clerk of the court has the duty to file with the State Registrar of Vital Statistics “a record showing personal data for the married parties, the marriage license, and the certifying statement of the facts of marriage.” (Emphasis added.) See § 32-353.34(a)(d). If the nonbonded minister has returned the certifying statement, the clerk may index the license and forward the record to the State Registrar. However, without that statement, it cannot be stated conclusively that a marriage license was used. Moreover, because the record is incomplete, neither the clerk nor the State Registrar can file the information he has received. See Regulation 8, Regulations of the Board of Health for Vital Statistics (1971).

The State Registrar has specific statutory authority to demand that “any person,” including the minister, furnish information concerning the marriage. See § 32-353.30. If the minister failed to comply with the Registrar’s request, and if the court obtained jurisdiction over him, he could be convicted and punished under § 32-353.31.

2. Validity of the Marriage

If a minister is not properly bonded, he is not authorized to solemnize a marriage. However, that fact, standing alone, does not affect the validity of the marriage. If the minister professed his authority, if the marriage was in all other respects lawful, and if the marriage was consummated with at least full belief of one of the persons so married that he or she was “lawfully joined in marriage,” the marriage is valid. See § 20-31. The lack of complete written records does not, by itself, render the marriage invalid. Neither the clerk of court nor the State Registrar has the power or the duty to determine whether a marriage is valid; that function is one for the courts.

MOTOR VEHICLES—Authority Of United States Magistrates To Suspend Licenses—Disposition of license—Treatment of such convictions by
REPORT OF THE ATTORNEY GENERAL

Commissioner, Division of Motor Vehicles.

MAGISTRATES—Authority Of United States Magistrates To Suspend License After Conviction Of Violating State Motor Vehicle Laws—Disposition of license—Treatment of such convictions by Commissioner, Division of Motor Vehicles.

May 12, 1978

THE HONORABLE J. R. ZEPKIN, JUDGE
York County General District Court

You ask (1) whether a United States Magistrate, after convicting a person of violating the motor vehicle laws of this State, is authorized by § 46.1-423.3(b) to suspend such person’s privilege to operate a motor vehicle on the highways of this State, (2) whether a United States Magistrate should follow § 46.1-425 as to disposition of operators’ licenses, and (3) whether the Commissioner of the Division of Motor Vehicles is required to treat a conviction by a United States Magistrate in the same manner in all respects as a conviction by a Virginia court, providing the offense occurs within the physical boundaries of this State, and, if so, whether it makes any difference if the conviction is for a violation of Virginia law or a violation of the Code of Federal Regulations of the United States. I shall answer these questions in order.

(1) Title 18 U.S.C.A. § 13 authorizes federal courts to apply state law to acts or omissions not punishable by any enactment of Congress. In my opinion a United States Magistrate, after convicting a person of violating the motor vehicle laws of Virginia, may suspend such person’s license to operate a motor vehicle according to § 46.1-423.3(b) of the Code of Virginia (1950), as amended. This section provides for such suspension for failure to pay fine and costs in addition to any other penalty provided by law “when any person shall be convicted of any violation of this title, or any other law of this State pertaining to the operator or operation of a motor vehicle . . . by the court or judge until such time as such fine and costs shall have been paid.”

(2) Section 46.1-441.1 authorizes United States Magistrates to revoke the operator’s or chauffeur’s license when a person is found guilty of any traffic regulation on a federal reservation “for which, if such violation had occurred on the highways of this State, revocation of such person’s operator’s or chauffeur’s license would be mandatory or discretionary with a court of record or not of record,” provided that the revoked license be “forwarded to the Commissioner of the Division of Motor Vehicles as is provided by law as to courts of this State.” Section 46.1-425 contains the general law which all courts should follow in submitting a suspended license to the Commissioner. It provides that a license suspended by a court shall remain in the custody of the court during the suspension period when such period does not exceed thirty days. If the suspension exceeds thirty days, the license shall be forwarded to the Commissioner. It contains an exception, however, for licenses suspended under § 46.1-423.3. Section 46.1-423.3 provides that the court or judge may suspend the license of a person convicted of a traffic offense who fails to pay the fine and costs in which event the court shall order the surrender of such person’s operator’s license to the court. In the event “such fine and costs shall not be paid within ninety days following such surrender, then the court shall forward such license to the Commissioner.” In any other case of revocation of an operator’s license on the basis of conviction for a violation of any traffic regulation the United States Magistrate finding such person guilty should follow § 46.1-425 as
to the disposition of the operator’s license.

(3) The Commissioner of the Division of Motor Vehicles is required to treat a conviction by a United States Magistrate in the same manner in all respects as a conviction by a Virginia court, except a conviction for driving under the influence of intoxicants or drugs. Section 46.1-514.6 states that the “Commissioner shall assign numerical point values to those convictions received from any other state of the United States, the United States . . . of an offense therein, which if committed in this State, would be required to be reported to the Division by § 46.1-413.” In the case of a conviction for driving under the influence of intoxicants, § 46.1-417 provides for the revocation of the license of any person for a “violation of the provisions of § 18.2-266 . . .” but does not include a violation under the laws of the United States or other states. Section 46.1-466 provides for the revocation or suspension of the license of a resident of this State who is convicted in another jurisdiction “of an offense therein which, if committed in this State, would be grounds for the suspension or revocation of the license granted to him” but limits the length of suspension or revocation to the period of such suspension or revocation in the other jurisdiction, provided the person so convicted files proof of financial responsibility. The federal regulations do not authorize a suspension of license for driving under the influence of intoxicants.

Accordingly, a resident of this State convicted of the federal regulation of driving under the influence of intoxicants would be required by the Commissioner of the Division of Motor Vehicles only to file proof of financial responsibility to retain his operator’s license and motor vehicle registration. If the conviction by the United States Magistrate is for a violation of the Virginia law pertaining to driving under the influence of intoxicants, the revocation of license by the Commissioner would be the same as for a conviction in a Virginia court.

MOTOR VEHICLES—Drunk Driving On Private Property—Policeman’s failure to offer tests provided for in §§ 18.2-267 and -268 does not bar prosecution.

CRIMINAL PROCEDURE—Drunk Driving Arrest—Refusal trial may be held after guilty plea or hearing sufficient evidence for finding of guilt, either before or after completion of ASAP program under § 18.2-271.1.

DEFINITIONS—“Trial” Has Different Meanings; Must Be Construed With Its Context.

MOTOR VEHICLES—Driving Under The Influence Trial And Refusal Trial Are Independent Proceedings.

MOTOR VEHICLES—“Implied Consent” Law—Blood or breath test—No distinction made on basis of where offense occurred.

October 4, 1977

THE HONORABLE R. PAGE MORTON, JUDGE
Charlotte General District Court

This is in response to your correspondence from which I quote as follows:
"If a person is arrested and charged with violation of Section 18.2-266, and he was not operating upon a highway of Virginia, but was operating on a private driveway, or a parking lot of a store, or premises of a church, or school, or on any business property open to the public, is he entitled to have his breath analyzed to determine the probable alcoholic content of his blood, if such equipment is available; or to have his blood analyzed if such equipment is available? . . . Under such circumstances, if neither a breath test nor blood test is offered the accused, should he be prosecuted for such alleged violation?

"If a person is arrested and charged with violation of Section 18.2-266, and refuses to take either a breath test, or to take a blood test, and offers no valid reason for refusing, but at his trial for violation of Section 18.2-266 the attorney for the accused moves that the accused be placed under the VASAP program as provided in Section 18.2-271.1, which motion is granted by the Court, what should be done with the charge of refusing to take a blood test or breath [test]? Should it be tried, if so, at what time? Either before or after the VASAP program has been completed?"

Section 18.2-266 of the Code of Virginia (1950), as amended, provides that it shall be unlawful for any person to drive or operate any motor vehicle, engine or train while under the influence of alcohol. This section is applicable to the operation of motor vehicles on private as well as public roads. Cf. Valentine v. County of Brunswick, 202 Va. 696, 119 S.E.2d 486 (1961).

Pursuant to § 18.2-267(a), "[a]ny person who is suspected of a violation of § 18.2-266 shall be entitled, if such equipment be available, to have his breath analyzed to determine the probable alcoholic content of his blood." (Emphasis added.) The results of such breath analysis are not to be admitted into evidence in any prosecution under § 18.2-266, the purpose of this section being to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of § 18.2-266. See § 18.2-267(e). Section 18.2-267 further provides, in paragraph (c) thereof, that "nothing in this section shall be construed as limiting in any manner the provisions of § 18.2-268."

Section 18.2-268 is Virginia's "implied consent" law. In accordance with paragraphs (f) and (rl) thereof, the results of breath and blood alcohol analyses conducted pursuant to this section are admissible in prosecutions under § 18.2-266. Paragraphs (b) and (s) of § 18.2-268 provide as follows:

"(b) Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this State on and after January one, nineteen hundred seventy-three, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood, if such person is arrested for violation of § 18.2-266 or of a similar ordinance of any county, city or town within two hours of the alleged offense. Any person so arrested shall elect to have either the breath or blood sample taken, but not both. It shall not be a matter of defense that either test is not available.

..."

"(s) The steps herein set forth relating to the taking, handling, identification, and disposition of blood or breath samples are procedural in nature and not substantive. Substantial compliance therewith shall be deemed to be sufficient. Failure to comply with any one or more of such
steps or portions thereof, or a variance in the results of the two blood tests shall not of itself be grounds for finding the defendant not guilty, but shall go to the weight of the evidence and shall be considered as set forth above with all the evidence in the case, provided that the defendant shall have the right to introduce evidence on his own behalf to show noncompliance with the aforesaid procedure or any part thereof, and that as a result his rights were prejudiced.’’

Considering first your questions concerning an individual’s right to have his breath analyzed to determine the probable alcoholic content of his blood, I note that § 18.2-267 expressly entitles any person who is suspected of driving while intoxicated to such an analysis, provided the necessary equipment is available. No distinction is made on the basis of where the alleged offense occurred. Consequently, I am of the opinion that an individual charged with driving while intoxicated is entitled to the test provided for in § 18.2-267, notwithstanding the fact that he was not driving on a public highway at the time of the alleged offense.

As noted hereinabove, the purpose of § 18.2-267 is to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of § 18.2-266. Section 18.2-267 further expressly provides that the results of tests under this section are inadmissible in any prosecution under § 18.2-266, and that nothing in § 18.2-267 shall be construed as limiting the provisions of § 18.2-268. In view of these provisions, I am of the opinion that the failure to offer an accused the test provided for in § 18.2-267 does not bar his prosecution for driving while intoxicated. See United States v. Fletcher, 344 F.Supp. 332, 336-337 (E.D. Va. 1972). The expression of similar views may be found in the Reports of the Attorney General (1972-1973) at 286 and (1970-1971) at 269.

Considering next your questions concerning an individual’s right to have his blood analyzed for alcoholic content, I note that § 18.2-268(b), quoted hereinabove, is expressly applicable only to a person who operates a motor vehicle upon a public highway in this State. Nothing in § 18.2-268, however, precludes an individual whose offense is alleged to have occurred on private property from taking a blood test. This Office has previously expressed the views that an individual accused of driving while intoxicated on private property may take the blood test provided by statute, and that the results thereof would be admissible in evidence. Report of the Attorney General (1968-1969) at 148. In addition, Article I, Section 8, of the Constitution of Virginia (1971) guarantees an accused the right to call for evidence in his favor. Consequently, I am of the opinion that an individual accused of driving while intoxicated on private property is entitled to the blood test provided for in § 18.2-268, provided it is available and he specifically requests it. But see United States v. Fletcher, supra, 344 F.Supp. at 337-338; United States v. Gholson, 319 F.Supp. 499, 501-502 (E.D. Va. 1970).

This Office has also previously expressed the opinion that the failure to administer a blood test would not be grounds for dismissal of a charge of driving while intoxicated, unless the right of the accused to evidence in his favor was thereby prejudiced. Report of the Attorney General (1970-1971) at 249; Report of the Attorney General (1964-1965) at 74 and 184; Report of the Attorney General (1962-1963) at 159. Your specific question, however, is whether an individual accused of driving while intoxicated on private property may be prosecuted if the blood test is not offered. Since there is no requirement in § 18.2-268 that an individual be offered the test under such circumstances, I am of
the opinion he may be prosecuted, even though the test was available.

Your final questions pertain to the trial of a person for unreasonably refusing a blood or breath test when such person, at his trial for driving while intoxicated, is admitted to an alcohol safety action program pursuant to §18.2-271.1. You specifically inquire whether such person should be tried on the refusal charge, and, if so, whether before or after completion of the ASAP program.

A driving under the influence trial and a refusal trial are independent proceedings, *Virginia Beach v. Reneau*, 217 Va. 867, 234 S.E.2d 241 (1977). As the outcome of one is of no consequence to the other, *Deaner v. Commonwealth*, 210 Va. 285, 289, 170 S.E.2d 191, 201 (1969), I am of the opinion that an individual should be tried on the refusal charge unless the warrant for that offense has been dismissed pursuant to paragraph (n) of §18.2-268.

Regarding the timing of the refusal trial relative to completion of the ASAP program, I note paragraph (1) of §18.2-268 provides in part that the court shall fix a date for the refusal trial “at such time as the court shall designate, but subsequent to the defendant’s criminal trial for driving under the influence of intoxicants.” The term “trial,” in a general sense, means “the investigation and decision of a matter in issue between parties before a competent tribunal, including all the steps taken in the case from its submission to the court or jury to the rendition of judgment”; but, in a restricted sense, it means an investigation or examination of fact or issues of facts only. 88 C.J.S. *Trial* §1 (1955). As the word “trial” has different meanings, it must be construed with its context.

Paragraph (i) of §18.2-268 mandates that, in any trial for a violation of §18.2-266, the failure of an accused to permit a blood or breath test is not evidence and shall not be subject to comment by the Commonwealth, except in rebuttal. This paragraph further states that the fact that a test had been offered to the accused is not evidence and shall not be subject to comment by the Commonwealth, except in rebuttal. This Office has previously suggested that the reason for requiring that the refusal charge be tried subsequent to the trial of the charge of driving while intoxicated is to help insure that a defendant’s refusal will not be used to convict him of driving while intoxicated. Report of the Attorney General (1971-1972) at 124. This purpose is served if the refusal charge is tried at any time after the introduction of evidence which is sufficient in law to give rise to a finding of guilt for the offense of driving while intoxicated, or after entry of a guilty plea, and whether before or after completion of an ASAP program and final disposition of the criminal case. In any case of a guilty plea, the introduction of evidence is not necessary to sustain the conviction. *Kibert v. Commonwealth*, 216 Va. 660, 222 S.E.2d 790 (1976). An ASAP assignment may be made, pursuant to §18.2-271.1(a), upon a plea of guilty or after hearing evidence which is sufficient in law to give rise to a finding of guilt. Opinion of the Attorney General to the Honorable John F. Eakin, Judge, Botetourt County General District Court, dated July 11, 1977. I am of the opinion that the trial of a refusal charge may be held after receipt of such plea of guilty or hearing sufficient evidence for a finding of guilt, either before or after completion of the ASAP program.

**MOTOR VEHICLES**—Farm Motor Vehicles—Section 58-829.1:1 has no application to motor vehicles; taxed under §58-829.

**TAXATION**—Farm Motor Vehicles—Exemptions from taxation must be strictly construed.
This is in reply to your letter of December 28, 1977, from which I quote the following:

"I have been requested by the Craig County Board of Supervisors to inquire of your office for your opinion as to whether vehicles registered and licensed under Section 46.1-154.3 of the Code of Virginia, as amended, can be included in the classification of farm machinery as found in Section 58-829.1:1 of the Code of Virginia."

Section 46.1-154.3 of the Code of Virginia (1950), as amended, prescribes a fee for certificates of registration and license plates for certain "farm motor vehicles" on the basis of fifty per centum of the fees assessed on other motor vehicles under § 46.1-154 of the Code. Section 58-829.1:1 of the Code classifies farm animals, grain and "all farm machinery and farm implements" as separate items of taxation and authorizes the governing body of any county, city or town, by ordinance duly adopted, to exempt them in whole or in part from taxation.

Section 58-829.1:1 of the Code is dependant upon Article X, Section 6, of the Constitution of Virginia (1971), which provides, in relevant part, the following:

"(e) The General Assembly may define as a separate subject of taxation household goods, personal effects and tangible farm property and products, and by general law may allow the governing body of any county, city, town, or regional government to exempt or partially exempt such property from taxation, or by general law may directly exempt or partially exempt such property from taxation."

The rule of strict construction, as stated in the quoted constitutional provision, must be applied in considering any statutory exemptions from taxation. Department of Taxation v. Progressive Community Club of Washington County, Va., Inc., 215 Va. 732, 213 S.E.2d 759 (1975). Motor vehicles and farm implements have been classified as separate items for the taxation of tangible personal property. Section 58-829 of the Code, which classifies tangible personal property for local taxation, states, in part, the following:

"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: . . .

"(5) The aggregate number and value of all automobiles other than antique automobiles as defined in § 46.1-1, motor trucks, motorcycles and all other motor vehicles, except any vehicle without motive power used or designed to be used as a mobile home or office or for other means of habitation by any person."

Section 58-829.1:1 of the Code, which is the subject of your inquiry, makes no reference to the terms "automobile" or "motor vehicle." The Supreme Court of Virginia, in recognizing that the legislature has separated several items of per-
sonal property from § 58-829 of the Code, as in § 58-829.1:1 and other related sections, states that "the legislative purpose in doing so was, not to repeal by implication the classification structure previously enacted in Code § 58-829, but to authorize what was otherwise forbidden, viz., either a lower rate of taxation or an exemption from taxation for certain of those classes." Cross v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976). Accordingly, it is my opinion that § 58-829.1:1 has no application to motor vehicles, which must be classified for taxation under § 58-829, supra, and the question presented is answered in the negative.

MOTOR VEHICLES—Habitual Offender Charged With Operating—Venue for trial—Circuit Court in jurisdiction where offense committed.

June 14, 1978

THE HONORABLE ROBERT F. RIPLEY, JR.
Commonwealth’s Attorney for York County

You ask whether venue for trial of a person charged with the operation of a motor vehicle while an order prohibiting such operation is in effect in violation of § 46.1-387.8 of the Code of Virginia (1950), as amended, is in the jurisdiction where the offense occurred or in the jurisdiction where the order was entered finding such person to be “an habitual offender.”

Section 46.1-387.3 requires the Division of Motor Vehicles to furnish three transcripts or abstracts of the conviction record of any person “whose record brings him within the definition of an habitual offender . . . to the attorney for the Commonwealth of the political subdivision in which such person resides” except that the record on nonresidents must be sent to the attorney for the Commonwealth of the City of Richmond. Section 46.1-387.4 requires the attorney for the Commonwealth to file information against the person named therein “in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides.” In the case of a nonresident the information is filed in the Circuit Court of the City of Richmond. Thus, it is quite clear that proceedings for finding a person “an habitual offender” must be in the Circuit Court having criminal jurisdiction in the political subdivision in which such person resides, except that the Circuit Court of the City of Richmond shall have jurisdiction in such proceedings against nonresidents of this State.

Section 46.1-387.8 provides that the court in which an accused is charged with driving a motor vehicle while his license is revoked shall, before hearing such charge, determine whether such person has been held “an habitual offender.” “If the court determines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial.” (Emphasis added.)

The emphasized portion of § 46.1-387.8 establishes the same venue for trial of the habitual offender charged with operating a motor vehicle while prohibited from driving as for the trial of any person charged with the offense of driving a motor vehicle on a revoked license. Considering this directive in § 46.1-387.8 it is my opinion that venue for the trial of a person charged with operating a motor vehicle after being adjudged “an habitual offender” lies in the Circuit Court in the jurisdiction wherein the offense was committed.
MOTOR VEHICLES—Inspection—Effect of § 46.1-315.2, effective January 1, 1978, on inspection procedure—Six-month inspection or twelve.

October 24, 1977

COLONEL D. M. SLANE, SUPERINTENDENT
Department of State Police

This is in reply to your letter requesting my opinion regarding the effect of § 46.1-315.2 of the Code of Virginia (1950), as amended, on the State inspection program. Section 46.1-315.2 was enacted by the 1977 General Assembly. See Chapter 655 [1977] Acts of Assembly 1307.

The basic inspection law is contained in § 46.1-315 of the Code. This authorizes the Superintendent of the Department of State Police of this State to compel the inspection of motor vehicles, trailers and semitrailers, operated upon a highway within this Commonwealth. Inspection is required of all such vehicles registered in Virginia. The Virginia Official Inspection Manual provides that they “shall be reinspected within six months from the month of inspection and within six months from each month of inspection thereafter.” (Emphasis added.)

Section 46.1-315.2 of the Code, effective January 1, 1978, reads as follows:

“New model motor vehicles, excluding leased vehicles or vehicles for hire, required to be inspected pursuant to the provisions of § 46.1-315 shall be reinspected within twelve months of the month of the first inspection; provided, however, that reinspection shall be required within six months of the month of each inspection for each motor vehicle required to be inspected pursuant to the provisions of § 46.1-315 which is one year old or older measured from the model year of such motor vehicle or, if such motor vehicle does not have a model year, such measurement shall be made from the year of manufacture.” (Emphasis added.)

I shall quote and reply to your six questions in the order they have been presented as follows:

“1. If a dealer has a new 1978 model vehicle on his car lot that was inspected prior to January 1, 1978, and he chooses to reinspect it again after January 1, 1978, before delivering it to a purchaser, will this vehicle be entitled to receive a sticker valid for twelve months or shall it receive a six months' sticker?”

In my opinion this vehicle must be given a six months' sticker. As it was first inspected prior to January 1, 1978, the effective date of § 46.1-315.2, the vehicle is subject to the six-month rule presently in effect.

“2. After January 1, 1978, if a new 1977 model vehicle is submitted for inspection, will it be entitled to receive a sticker that is valid for twelve months if the 1978 model vehicle of the same make is already available for purchase?”

This question is answered in the negative. The twelve-month reinspection authorized by § 46.1-315.2 applies only to “new model motor vehicles.” This section requires reinspection “within six months of the month of each inspection” for a motor vehicle “which is one year old or older measured from the model year of such motor vehicle.” The motor vehicle in question is one year old...
"3. If a dealer inspects a new 1978 model vehicle after January 1, 1978, and at some later date prior to the 1979 model vehicles becoming available for purchase, this vehicle is sold and the purchaser wants the vehicle inspected before taking delivery, shall it receive a sticker which is valid for twelve months or six months?"

This motor vehicle shall receive a six months' sticker. The twelve months' period authorized by § 46.1-315.2 applies only to the first inspection on new model motor vehicles.

"4. After January 1, 1978, if a 1978 model vehicle is purchased outside of Virginia and is then submitted for inspection in this State for the first time, is it entitled to receive a sticker valid for twelve months?"

Yes, dependent upon when the motor vehicle is submitted for inspection in this State for the first time. If this 1978 model is presented for inspection for the first time before the 1978 model vehicles become "one year old or older measured from the model year of such motor vehicle," it should be issued a sticker valid for twelve months. Otherwise, it must be issued a sticker valid for six months from the month of inspection.

"5. If new model motor vehicles which are to be used as leased vehicles or vehicles for hire are excluded from receiving a sticker valid for twelve months at the time of the first inspection, would we be correct in using the provision of paragraph (35) of § 46.1-1 of the Code of Virginia to identify leased and for hire vehicles?"

This question is answered in the negative.

Section 46.1-1(35) covers all for rent or for hire vehicles as therein defined. It does not cover all rented or leased vehicles. For example, a vehicle leased by a dealer to an individual for such individual's personal transportation would not be a "for rent or for hire" vehicle as defined in § 46.1-1(35). It would be a leased vehicle.

Section 46.1-1 of the Code, which contains the definition of "leased vehicles or vehicles for hire," states that the words used in that section shall, "for the purpose of this title [Title 46.1] have the meanings respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning." (Emphasis added.) In my opinion, the context of § 46.1-315.2 is broader than that of § 46.1-1(35), in that it excludes all leased vehicles as well as all for hire vehicles.

"6. If a new model motor vehicle is inspected after January 1, 1978, and receives a sticker valid for twelve months and then it is licensed as a leased vehicle or a vehicle for hire, would this vehicle have to be reinspected at the end of six months or would it be permitted to operate until the twelve-month sticker expires?"

A motor vehicle bearing an inspection sticker valid for twelve months which becomes a leased vehicle or vehicle for hire during such period would be subject to reinspection within six months of the month of last inspection. Leased vehicles or vehicles for hire are subject to the exclusion found in § 46.1-315.2. For example, a new model motor vehicle inspected in January 1978 and thereafter leased or operated for hire beginning in March of 1978, would thereby become subject to reinspection before the expiration of July 1978, i.e., six months from
the month of first inspection. If such vehicle were first leased or operated for
hire in August 1978, it would be subject to inspection prior to use as a leased or
for hire vehicle since in such situation the six months since the last inspection
would have expired.

MOTOR VEHICLES—Local License Fees On Vehicles Owned By Nonresident
Students—Working a few hours a week for pay.

COLLECTIVE BARGAINING—Nonresident Graduate Student Teaching One
Class Would Not Be "Employee" Of College For Collective Bargaining
Purposes.

DEFINITIONS—"Gainfully Employed"—Nonresident students working a few
hours a week for pay—Motor vehicle license fees.

April 3, 1978

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

You have asked whether local motor vehicle license fees may be imposed upon
the following students:

1. A nonresident student who is working on a graduate degree at an accredited
institution of learning in Virginia and is teaching one undergraduate class for
pay.
2. A nonresident undergraduate student who works a few hours a week for the
accredited institution of learning in Virginia he is attending and who receives
pay.
3. A nonresident student at an accredited institution of learning in Virginia
who works a few hours a week for a local merchant and who receives pay.

Section 46.1-65 of the Code allows counties, cities and towns to charge license
fees upon motor vehicles. However, § 46.1-66(a)(2) provides an exception for
vehicles owned by nonresidents which are used exclusively for pleasure or
personal transportation. A nonresident student qualifies for this exception if he
is both enrolled full-time in an accredited State institution of learning and is not
"gainfully employed." Section 46.1-1(16a). See also Opinion to you dated
December 13, 1976, and found in the Report of the Attorney General (1976-
1977) at 182.

Accordingly, the answers to your questions depend on whether in each in-
stance there is employment and whether it is gainful.

Defining the Term "Gainful"

The term "gainfully employed" is not further defined in § 46.1-1 or in any
other section of the Code; neither has its meaning been judicially construed by
the Supreme Court of Virginia. The term "gainful," however, has been in-
terpreted by other jurisdictions to mean "profitable, advantageous, or
lucrative." Smith v. Mutual Life Ins. Co. of New York, 165 So. 498, 500 (La.,
1936); Black's Law Dictionary (4th ed. 1968). Under this definition the work of
each of the three situations you pose would be "gainful," since it is both ad-
vantageous and profitable to the student.
Defining "Employment"

Section 40.1-2(4) of the Code, defines "employee" as:

"... any person who, in consideration of wages, salaries or commissions, may be permitted, required or directed by any employer to engage in any employment directly or indirectly."

The Supreme Court of Virginia has held that the definitions in Title 40.1 are directed toward employment for compensation. *Lovisi v. Commonwealth*, 212 Va. 848, 188 S.E.2d 206 (1972).

**Student 1.** Whether the graduate student in question (1) is "employed" depends on the nature of his activity. Receipt of a scholarship or fellowship would not constitute employment. Because of the many variable fact situations which may prevail, I am aware of no single test which has been developed to ascertain the distinction between employment and performing services pursuant to a scholarship or fellowship.

In other contexts, the fact that teaching may be required to fulfill degree requirements is significant. It has been held that where such teaching is required as a condition to receiving a degree, the payment is more in the nature of a stipend than in the nature of wages, and therefore a graduate student teaching one class would not be an "employee" of the college for collective bargaining purposes. *Cedars-Sinai Medical Center*, 223 NLRB No. 57 (1976). Similarly, where the teaching is required and the primary purpose is not remuneration of the graduate student, the payments would be treated as a scholarship or fellowship exempt from federal income taxes. I.R.C. § 117, Reg. § 1.117-1.

Thus, it is my opinion that at least in the situation where the teaching is required as a part of the degree requirement, it would not constitute employment. In such a case the teaching would not be required in consideration of wages as defined in § 40.1-2(4). Therefore, the student would be exempt from the local motor vehicles license fee.

**Students 2 and 3.** Since the undergraduate student who works for the school described in question (2) and the student working for a merchant described in question (3) are receiving compensation for their work and are in a normal employment relationship, it is my opinion that each would be employed within the meaning of § 46.1-1(16)(a). Thus neither would be exempt from the local motor vehicle license fee. It should be noted, however, that a student who is gainfully employed will still be deemed a "nonresident" for purposes of § 46.1-66 and thus exempt from a license fee until he or she has been so employed for a period exceeding 60 days.

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**MOTOR VEHICLES—Local Licenses—Contract carriers not exempt under § 46.1-66(a)(6).**

**DEFINITIONS—"Common Carrier By Motor Vehicle" And "Contract Carrier By Motor Vehicle" Distinguished.**

**DEFINITIONS—Vehicles Operated By Persons Licensed As Common Carriers And Vehicles Operated By Persons Licensed As Contract Carriers.**

September 16, 1977

THE HONORABLE JAMES H. JOINES, JUDGE
Grayson County General District Court

This is in response to your recent inquiry "whether or not Grayson County may impose a license fee upon a motor vehicle principally garaged in Grayson County when said motor vehicle is licensed as a contract carrier and does generally contract hauling for hire and claims to be a common carrier and therefore exempt from local license tax under Section 46.1-66(a)(6)."

Section 46.1-65 of the Code of Virginia (1950), as amended, authorizes counties, cities and towns to impose license fees upon motor vehicles, "[e]xcept as provided in § 46.1-66." Section 46.1-66(a)(6) provides that no county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when the "motor vehicle, trailer or semitrailer is operated by a common 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 intracity transportation." (Emphasis added.)

The terms "common carrier by motor vehicle" and "contract carrier by motor vehicle" are distinguished by their definitions in paragraphs (d) and (f), respectively, of § 56-273. Further, in construing § 46.1-66(a)(6), this Office has, likewise, distinguished between vehicles operated by persons licensed as common carriers, which vehicles are potentially exempt, and vehicles operated by persons licensed as contract carriers, which vehicles do not fall within the scope of § 46.1-66(a)(6). See Opinion of the Attorney General to the Honorable Lee T. Keyes, Commissioner of the Revenue, Loudoun County, dated May 12, 1977, copy enclosed; Report of the Attorney General (1975-1976) at 245; Report of the Attorney General (1974-1975) at 466. As the operation in question is licensed as a contract carrier, and not as a common carrier, I am of the opinion Grayson County may impose a license fee. Accordingly, your question is answered in the affirmative.

MOTOR VEHICLES—Person Assigned To VASAP Program Under § 18.2-271.1—Section 46.1-413 directs court to report Assignment to Division upon issuance of court’s Order—Assignment not affected by later appeal of conviction.

July 11, 1977

THE HONORABLE JOHN F. EAKIN, Judge
Botetourt County General District Court

This is in reply to your letter in reference to the Court's reporting, to the Division of Motor Vehicles, persons assigned to driver alcohol education or treatment programs (VASAP). Your inquiry is as follows:

"The DMV has recently prepared abstract forms to report VASAP assignments in compliance with § 46.1-413. The instructions state that the form is to be submitted at the time the assignment to VASAP is made. As I read that part of § 46.1-413, however, it appears that the abstract form should be submitted only when the assignment becomes final.

"This poses two questions: (1) When does a VASAP assignment become final? (2) If the report is to be made at the time of assignment, what must be
done to correct the DMV records if the case is subsequently appealed?"

Section 46.1-413 of the Code of Virginia (1950), as amended, to which you refer, states in relevant part the following:

"... [I]n the event a court assigns a defendant to a driver education program or alcohol treatment or rehabilitation program, or both such programs, as authorized by § 18.2-271.1, or if compliance with the court's probation order is accepted by the court in lieu of a conviction under § 18.2-266 or the requirements specified in § 18.2-271 as provided in § 18.2-271.1, . . . every general district court or clerk of a court of record shall forward an abstract of the record to the Commissioner within fifteen days . . . after such conviction, forfeiture, assignment, acceptance . . . has become final without appeal or has become final by affirmance on appeal."

This statute requires every general district court or clerk of a court of record to submit an abstract to the Commissioner of the Division of Motor Vehicles "in the event a court assigns a defendant" to a program authorized under § 18.2-271.1 (VASAP) or "if compliance with the court's probation order is accepted by the court in lieu of a conviction" for driving under the influence of intoxicants. (Emphasis added.) The reports are required both upon assignment to the VASAP and when compliance with the court's VASAP order is accepted in lieu of conviction. The required abstracts must be submitted "within fifteen days . . . after such conviction, forfeiture, assignment, acceptance . . . has become final without appeal or has become final by affirmance on appeal."

Section 18.2-271.1 of the Code states that a person charged with the offense of driving under the influence of intoxicants "may upon a plea of guilty or after hearing evidence which is sufficient in law to give rise to a finding of guilt, with leave of court or upon court order . . . enter into an alcohol safety action program." In reference to your question numbered (1), it is my opinion that, for the purposes of § 46.1-413 of the Code, the assignment to such alcohol safety action program becomes final upon issuance of the court's order placing the defendant in such VASAP program. The purpose of furnishing the report of such assignment to the Division is to provide a record of such assignment for the benefit of any court which thereafter may be faced with the decision whether to place such person in a VASAP program. Section 18.2-271.1(a) states: "In the determination of the eligibility of such person to enter such a program, the court shall consider his prior record of participation in any other alcohol rehabilitation program." (Emphasis added.)

In the event a person who is assigned to VASAP violates the terms of his probation resulting in his conviction for drunk driving, which he later appeals, it would not change the fact that he had been assigned to such program. The assignment abstract would remain available in the Division so that the appeal court or any court thereafter could consider his prior record of participation in any VASAP program in determining the eligibility of such person to enter a VASAP program. In respect to your question numbered (2), therefore, it is my opinion that an appeal would have no effect on the record of assignment in the Division, and no correction of the records would be required.

MOTOR VEHICLES—Person Whose Operator’s License Is Revoked—May not legally operate a “motorized bicycle” during period of revocation.
STATUTES—Construction Not Necessary Where Meaning Plain—Caution must be exercised in using action of legislature on proposed amendments as interpretive aid.

July 20, 1977

THE HONORABLE FRANK M. SLAYTON
Member, House of Delegates

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

"Enclosed herewith please find a copy of the engrossed House Bill No. 1305 [of the 1977 General Assembly] which specifically prohibits the operation of motorized bicycles on the highways of the Commonwealth after the operator's license has been revoked or suspended.

"In view of the action by the General Assembly in defeating this legislation, it would clearly appear that the legislative intent is that such operation of these motorized bicycles on the highways of the Commonwealth is to be permitted.

"Please review the opinion of the Attorney General dated October 2, 1975, addressed to Judge G. Warthen Downs in light of the recent legislative history regarding the validity of that opinion."

The Opinion to which you refer, see Report of the Attorney General (1975-1976) at 251, regarded § 46.1-350 of the Code of Virginia (1950), as amended, which states that a person whose license to drive a motor vehicle has been suspended or revoked cannot thereafter drive any motor vehicle "or any self-propelled machinery or equipment." The Opinion held that § 46.1-350 would prohibit a person from operating a motorized bicycle on the public highways during the period of suspension or revocation.

While § 46.1-1(15) of the Code provides that "[f]or the purposes of this chapter, any device herein defined as a bicycle shall be deemed not to be a motor vehicle," a self-propelled bicycle is clearly included within the language "any self-propelled machinery or equipment." (Emphasis added.) In light of the language in the statute, it is neither necessary nor proper to review the legislative intention. "The province of construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation." Carter, Admin'r v. Nelms, 204 Va. 338, 346, 131 S.E.2d 401, 406 (1963); Accord, Hammer v. Commonwealth, 169 Va. 355, 364-65, 193 S.E. 496, 499-500 (1937); Almond v. Gilmer, 188 Va. 1, 14-15, 49 S.E. 2d 431, 439 (1948). See also 2A Sutherland Statutory Construction, § 46.01 at 48 (4th ed. C. Sands 1973); 17 M. J. Statutes § 34 (1951).

There may be any number of reasons why a proposed amendment fails to pass. Because of this it has been stated that caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid. See 2A Sutherland Statutory Construction, § 48.18 at 225 (4th ed. C. Sands 1973). The failure of passage of the bill in question could have been because of knowledge that § 46.1-350 of the Code, quoted supra, already covers the same provisions. House Bill No. 1305 applied to some suspensions and revocations but not to all. Section 46.1-350 covers all suspensions and revocations with the sole exception that a "farm tractor" may be operated from one tract of land used for agricultural purposes to another such tract within a five-mile limit.

For these reasons I do not believe the failure of passage of this bill shows any intent to overrule the Opinion of this Office, nor am I aware of any policy of
statutory construction which would support such a premise. Accordingly, it is my opinion that the operation of a motorized bicycle by a person whose license to drive has been suspended or revoked would be in violation of § 46.1-350 of the Code, and the above cited opinion of the Attorney General is hereby reaffirmed.

MOTOR VEHICLES—Radar—Neither § 46.1-171.1 nor § 46.1-226 preclude its use in police car parked on highway shoulder.

HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF—Controlled Access Highways—Radar used in police car parked on highway shoulder.

September 26, 1977

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

This is in response to your recent letter from which I quote as follows:

"The Blacksburg Police Department has been operating a mobile radar unit from a parked police car along the shoulder of the portion of U.S. Route No. 460 (Blacksburg By-Pass) that is within the corporate limits of the Town of Blacksburg.

"The Virginia Department of Highways Engineer, Christiansburg, Virginia, has requested the Blacksburg Police Department to stop its traffic control operations and cites 46.1-171.1 and 46.1-226 of the Code of Virginia.

* * *

"Question: In view of the facts set out above, may the Blacksburg Police Department operate radar as a traffic control on the Blacksburg By-Pass?"

Section 46.1-171.1 of the Code of Virginia (1950), as amended, provides, in pertinent part, that the State Highway Commission may, when necessary to promote safety, prohibit the use of "controlled access highways or any part thereof by any or all of the following: (1) Pedestrians, (2) persons riding bicycles, (3) horse-drawn vehicles, (4) self-propelled machinery or equipment, and (5) animals led, ridden or driven on the hoof." (Emphasis added.) While a police car is, in fact, self-propelled machinery, I am of the opinion that the words "self-propelled machinery or equipment" in § 46.1-171.1 were not intended to encompass a motor vehicle as defined in § 46.1-1(15). To interpret the language otherwise would mean that motor vehicles could be prohibited; consequently, the highway would be unused. Furthermore, the legislature has clearly distinguished between motor vehicles and self-propelled machinery or equipment. For example, in § 46.1-350, pertaining to driving with a revoked or suspended license, the legislature distinguished between motor vehicles and self-propelled machinery or equipment by providing in paragraph (a) thereof that no person whose license 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." Accordingly, I am of the opinion that § 46.1-171.1 does not preclude the Blacksburg police department from operating radar on Route 460.

Section 46.1-226 provides in part that the operator of "any police vehicle operated by or under the direction of a police officer in the chase or ap-
prehension of violators of the law or persons charged with or suspected of any such violation, or in response to an emergency call . . . may, without subjecting himself to criminal prosecution . . . (2) Park or stand notwithstanding the provisions of this chapter." The effective use of radar, which is authorized in § 46.1-198, may well involve the positioning of a vehicle along the shoulder of a highway. So positioning a vehicle equipped with radar may be the most effective way in which to enforce, by means of radar, the speed limit at a particular location on a highway. Under such circumstances, the parking of the vehicle would constitute an integral part of the apprehension of persons violating the speed limit. Consequently, I am of the opinion that the police activity about which you inquire is within the scope of the actions permitted under § 46.1-226, and I therefore answer your question in the affirmative.

MOTOR VEHICLES—Radar Detector—Requirements of and presumption in § 46.1-198.1 are constitutional.

CRIMINAL LAW—Presumptions—Arising from presence of radar detection device in or upon vehicle per § 46.1-198.1 is valid.

FEDERAL COMMUNICATIONS COMMISSION—Radar Detectors—Do not transmit radio signals; not protected by Communications Act.

FORFEITURES—Radar Detector—Forfeiture of pursuant to § 46.1-198.1 is constitutional.

MOTOR VEHICLES—Radar Detector—Confiscation of pursuant to § 46.1-198.1 is valid—Subject matter not preempted by federal law.

MOTOR VEHICLES—Radar Detector—Requirements of § 46.1-198.1 come within police power of State.

STATUTES—Congress Has Not Preempted Field Of Communication By Radio So As To Preclude All Local Regulations In Exercise Of Police Power—Radar detectors.

November 22, 1977

THE HONORABLE H. SELWYN SMITH
Secretary of Public Safety
Office of the Governor

This is in response to your request for my opinion whether the confiscation of radar detecting devices pursuant to § 46.1-198.1 of the Code of Virginia (1950), as amended, is valid or whether this subject matter is within the exclusive province of the federal government.

First enacted in 1962, § 46.1-198.1 proscribes the operation, on Virginia's highways, of motor vehicles equipped with any device or mechanism to detect the emission of radio microwaves employed by police to measure the speed of motor vehicles. This statute further provides that the presence of any such prohibited device or mechanism in or upon a motor vehicle upon the highways of this State constitutes prima facie evidence of the violation of the statute. A 1976 amendment to § 46.1-198.1 provided that upon conviction for a violation, the "prohibited device or mechanism shall be forfeited to the Commonwealth by
order of the court trying the case, which shall make such disposition of the device or mechanism as it deems proper." Chapter 90 [1976] Acts of Assembly 121.

This Office has previously considered the constitutionality of § 46.1-198.1. In an Opinion to the Honorable John F. Eakin, Judge, dated January 22, 1976, and found in the Report of the Attorney General (1975-1976) at 253, a copy of which is enclosed, my predecessor in office, prior to the 1976 amendment of § 46.1-198.1, expressed the views that the requirements of this statute came within the police power of the Commonwealth, and that the section, as then written, was constitutional. As stated in said Opinion, since the Commonwealth has the power to use radar to enforce speed limits, it follows that it has the power to make and enforce rules regarding radar detectors, the use of which devices, if permitted, would seriously diminish the value of the use of radar by police. Said Opinion also expressed the view that in the absence of a statute providing for the forfeiture of radar detectors, no authority existed for their forfeiture to the Commonwealth.

The Opinion did not consider, however, the validity vel non of the provision of § 46.1-198.1 that the presence of the device or mechanism in or upon a vehicle upon the highways of this State is presumptive of a violation of the section. Valid presumptions are permissible, notwithstanding the fact that they require the defendant to present some evidence contesting the otherwise presumed or inferred fact. Such a presumption merely places upon the defendant the burden of going forward with the evidence; the ultimate burden of persuasion by proof beyond a reasonable doubt remains on the prosecution. *Mullaney v. Wilbur*, 421 U.S. 684, 702 n.31 (1975); *Hodge v. Commonwealth*, 217 Va. 338, 288 S.E.2d 692 (1976).

The United States Supreme Court approved an inference from a defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law," *see United States v. Gainey*, 380 U.S. 63 (1965), and upheld a presumption arising from the possession of heroin of knowledge of its illegal importation, since the evidence showed that the heroin in the United States is imported. *Turner v. United States*, 396 U.S. 398 (1970).

In *Barnes v. United States*, 412 U.S. 837 (1973), the Supreme Court upheld the common law presumption arising from the defendant's possession of stolen property that he must have known that it was stolen.

The Virginia Supreme Court upheld in *Riley v. Commonwealth*, 213 Va. 273, 191 S.E.2d 727 (1972), the provision found in § 18.2-302 of the Code that, from possession of a "sawed-off" shotgun by a person who has previously been convicted of a crime, it is presumed that such possession is for an "offensive or aggressive" purpose, citing *Leary v. United States*, 395 U.S. 6 (1969), for the more likely than not test of validity of presumptions.

As is indicated later in this Opinion, radar detectors have but one function, namely, evading arrests for driving at speeds in excess of the lawful limits. The presence of one of these devices in or upon a motor vehicle upon the highways of this State is clearly indicative of a violation of § 46.1-198.1, perhaps more so than the possession of stolen property indicative of knowledge that the same is stolen (see Barnes, supra).

Accordingly, I am of the opinion that the presumption found in § 46.1-198.1 is also valid.

As amended, § 46.1-198.1 expressly provides for the forfeiture of the specific devices used or sold in violation of its provisions. That the Virginia General Assembly has the power to provide for the forfeiture of property used in violation of law is clear. 14 M.J. *Penalties and Forfeitures* § 4 (1951) at 376. The
Supreme Court of Virginia has repeatedly and unequivocally so stated. Commonwealth v. Lincoln Automobile, 212 Va. 597, 598, 186 S.E.2d 279, 281 (1972); Quigley v. Commonwealth, 190 Va. 1029, 1040, 59 S.E.2d 52, 57 (1950); McNelis v. Commonwealth, 171 Va. 471, 475, 198 S.E. 493, 495 (1938); Boggs v. Commonwealth, 76 Va. 989, 993 (1882). In Lincoln Automobile, supra, the Virginia Supreme Court held valid and constitutional a statute, § 46.1-351.2, providing expressly for the forfeiture of motor vehicles. In Boggs, supra, at 996, the Court explained that the theory of the law in this class of cases is that the property is used by the owner, or someone with whom he has entrusted it, in violation of law, to the detriment of public and private interests, which interests can only be effectively protected by confiscating the property itself as the offender. Statutes providing for specific forfeitures for specific acts have usually been deemed constitutional as against the objection of their being in deprivation of property for public use without compensation, or without due process of law, when such forfeiture fairly tends and is reasonably necessary to accomplish a legitimate purpose under the police power. 37 C.J.S. Forfeitures § 4 (1943) at 8.

In addition, it is said that a statute providing for forfeiture of property is not void because it fails to provide for the mode of disposing of the property after its forfeiture. Id. As the forfeiture provisions of § 46.1-198.1 provide for the forfeiture of property used or sold in violation of law, and as such provisions would seem reasonably necessary to maintain the effectiveness of police radar in enforcing speed limits on the highways of the Commonwealth, I am of the opinion such provisions are, on their face, valid.

Congress, by enacting the Communications Act of 1934, 47 U.S.C.A. §§ 151-609 (1962), has, however, provided for extensive federal regulation of radio communication in the United States. "Radio communication" is defined in paragraph (b) of 47 U.S.C.A. § 153 (1962), to include the transmission by radio of signals of all kinds, "including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Radar utilizes radio transmissions the frequencies of which are allocated by the Federal Communications Commission. 47 C.F.R. §§ 2.102 and 89.101(h) (1976). Responsibility for the execution and enforcement of the Communications Act of 1934 is committed to the Federal Communications Commission, which was expressly created for the purposes of "regulating interstate and foreign commerce in communication by wire and radio," national defense, and "promoting safety of life and property through the use of wire and radio communication." 47 U.S.C.A. § 151 (1962).

Pursuant to 47 U.S.C.A. § 301 (1962), among the functions of the Commission are maintenance of the control of the United States over the channels of interstate radio transmission and federal licensing of the use of such channels. The Commission is expressly authorized in 47 U.S.C.A. § 303 (1962) to classify radio stations, to prescribe the nature of the service to be rendered by each class of licensed stations, and to assign bands of frequencies to the various classes of stations.

Concerning the coexistence of federal and state regulatory legislation, the United States Supreme Court, in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963), stated:

"The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."

"The principle to be derived from our decisions is that federal regulation
of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.’

More recently, in *Great A. & P. Tea Company v. Cottrell*, 424 U.S. 366, 371 (1976), the United States Supreme Court, quoting *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), gave the following test for determining the validity of state statutes affecting interstate commerce:

‘Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.’

I can find no judicial opinion to the effect that statutes such as Virginia's are preempted. The one case pertaining to radar detectors which I have found holds simply that a radar detector is not a "radio receiving set" within the meaning of a New York law making it a misdemeanor to so equip motor vehicles. *People v. Faude*, 88 Misc.2d 434, 388 N.Y.S.2d 562 (1976). It has been suggested that 47 U.S.C.A. § 605, as interpreted in *United States v. Sugden*, 226 F.2d 281 (9th Cir. 1955), aff'd mem., 351 U.S. 916 (1956), gives the Federal Communications Commission such control over intrastate radio transmissions as to preclude state interference with the use of radar detectors. Section 605 makes unlawful certain unauthorized publications or uses of communications by wire or radio. In *Sugden*, which involved a prosecution for conspiracy to violate immigration laws, the United States Court of Appeals for the Ninth Circuit held that radio communications broadcast over a licensed farm radio station by unlicensed operators, which broadcasts were intercepted by an employee of the Federal Communications Commission, were not within the protection of § 605 and were not subject to suppression, but that communications broadcast after the operators were licensed were protected. In my view, neither § 605 nor *Sugden* can be read as protecting the use of radar detectors. If one is to draw any conclusion from them relative to the use of radar detectors, such conclusion would seem to be that since the operators of radar detectors are not licensed as such by the Federal Communications Commission, their use of such devices is not federally protected.

It is my understanding that the radar detectors currently used by motorists to detect the use of police radar are simply devices which, by means of light or noise, alert one to the use of radar in the immediate vicinity. It is further my understanding that since these devices neither transmit radio signals nor emit incidental radio frequency energy, they are not the subject of regulations promulgated by the Federal Communications Commission. No provision of the Communications Act of 1934, *supra*, expressly provides for their protection. The Federal Communications Commission has, however, expressly provided for radio communication essential to the discharge of nonfederal governmental functions, including radio communication essential to official police activities. 47 C.F.R. § 89.1, *et seq.*, (1976). Under such circumstances, when to permit the use of radar detectors may in large measure nullify the value of the use of radar by police, I do not believe it can be said that Congress has ordained the preemption of statutes such as § 46.1-198.1.
Neither do I find in the nature of radar and radar detectors anything which compels one to conclude that § 46.1-198.1 is preempted. Radar detectors used in vehicles operated on the highways of this State would seem to have but one function, namely, aiding in evading arrests for driving at speeds in excess of the lawful limits. Enforcement of the state law thus furthers local public safety and can have but little or no effect on interstate commerce. In addition, such enforcement precludes no one from complying with any federal requirement. Therefore I find nothing in the federal government's regulation of radio communication which conflicts with Virginia's confiscating radar detectors used locally on the highways of this State to circumvent speed limits and evade arrests for driving at speeds in excess of such limits.

That Congress has not preempted the field of communication by radio so as to preclude all local regulations in the exercise of the police powers has been judicially recognized. 15 C.J.S. Commerce § 81 (1967) at 681, 684. In Kroeger v. Stahl, for example, 248 F.2d 121 (3d Cir. 1957), aff'g 148 F.Supp. 403 (D.N.J. 1957), the federal courts held that a mobile land station radio operator to whom the Federal Communications Commission had granted authority to conduct tests at a specific location in New Jersey, was nevertheless subject to a local zoning ordinance which precluded erection of equipment essential to such tests. In Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963), the United States Supreme Court concluded that the authority to regulate radio communication granted the Federal Communications Commission by Congress had not preempted a New Mexico law regulating professional advertising.

Accordingly, I am of the opinion that the confiscation of radar detecting devices pursuant to § 46.1-198.1 is valid, and that this subject matter is not within the exclusive province of the federal government.
domestic relations district court in reporting to the Commissioner of the Division of Motor Vehicles a finding of not innocent of grand larceny of a motor vehicle.

Section 46.1-412 of the Code of Virginia (1950), as amended, provides in part that every county or municipal court or the clerk thereof shall keep a record of every case in which a person is charged with the unauthorized use or theft of a motor vehicle. Section 46.1-413 provides in part that, in the event a person is convicted of such a charge, every general district court shall forward an abstract of the record to the Commissioner. Notwithstanding the distinction in § 16.1-69.5 between general district courts, county courts and municipal courts, on the one hand, and juvenile and domestic relations district courts on the other, this Office has expressed the view that an appropriate juvenile and domestic relations court's finding of not innocent may be reported to the Division of Motor Vehicles in accordance with §§ 46.1-412 and -413. See Reports of the Attorney General (1974-1975) at 288, and (1965-1966) at 213, copies of which are enclosed. As the cited Opinions note, the laws relating to the suspension and revocation of drivers' licenses apply not only to convictions of adults but also to findings of not innocent in the case of juveniles. See, for example, §§ 18.2-270 and 46.1-417 and -514.11. Furthermore, the longstanding administrative practice of the Division of Motor Vehicles has been to hold §§ 46.1-412 and -413 applicable to findings of not innocent in juvenile and domestic relations courts. The legislature is presumed to be cognizant of the construction of a statute by public officials charged with its administration, and where, as here, such construction has long continued without change, the legislature is presumed to have acquiesced therein. Cross v. City of Newport News, 217 Va. 202, 205, 228 S.E.2d 113 (1976).

Thus, I am of the opinion that §§ 46.1-412 and -413 should be construed to apply in appropriate cases to juvenile and domestic relations district courts and their clerks. In the Opinion of the Attorney General to the Honorable Edwin A. Henry, Judge, Norfolk Juvenile and Domestic Relations District Court, dated July 8, 1974, and found in the Report of the Attorney General (1974-1975) at 288, my predecessor expressed the view that if the juvenile court elects to proceed under the provisions of the Juvenile and Domestic Relations District Court Law as set forth in former Chapter 8 of Title 16.1, no report of the violation should be made to the Division of Motor Vehicles, but if the court tries a juvenile and imposes the penalties authorized to be imposed on adults, a report of the court's finding should be forwarded to the Division of Motor Vehicles. Notwithstanding the recent revision of the juvenile law, Chapter 559 [1977] Acts of Assembly 839, the option of juvenile courts relative to imposing penalties authorized to be imposed on adults, in similar cases is preserved in §§ 16.1-279E, paragraph 8, and -284. Furthermore, I do not find in the confidentiality provisions of the Juvenile and Domestic Relations District Court Law, Chapter 559, supra, any prohibition against reporting offenses to the Commissioner of the Division of Motor Vehicles. Section 16.1-305C provides in part that findings and orders of a juvenile court “shall be open to inspection” by those persons and agencies designated in subsection A of such section. The enumeration of persons and agencies in subsection A includes in paragraph 4 “any other person, agency or institution, by order of the court, having a legitimate interest in the case.” I am constrained to interpret these provisions as permitting the making, in accordance with § 46.1-413 and upon order of the court, of appropriate reports of findings of not innocent in the case of juveniles, as the different sections of the Code should be regarded, not as prior and subsequent acts, but as simultaneous expressions of the legislative will, and all of its provisions which deal with the same subject should be construed together and reconciled wherever possible.
REPORT OF THE ATTORNEY GENERAL

Marymount College v. Harris, 205 Va. 712, 717, 139 S.E.2d 43 (1964). Abstract of conviction forms are available from the Division of Motor Vehicles for this purpose pursuant to §§ 46.1-414 and 416.1.

MOTOR VEHICLES—Volunteer Firemen And Rescue Squad Members Responding To Alarms In Their Privately Owned Vehicles—Not authorized under § 46.1-199 to exceed lawful speed limit.

July 26, 1977

THE HONORABLE BEVERLY C. READ
Commonwealth's Attorney for Rockbridge County and City of Lexington

This is in reply to your letter in which you request my opinion whether volunteer firemen and rescue squad members responding to fire and first aid alarms in their privately owned motor vehicles are authorized to exceed the lawful speed limit under § 46.1-199 of the Code of Virginia (1950), as amended.

Section 46.1-199 of the Code states, in relevant part, the following:

"(a) The speed limitations set forth in this chapter shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law, or of persons charged with or suspected of any such violations, or in response to emergency calls, or in testing the accuracy of speedometers on police vehicles, or in testing the accuracy of the radio microwave or other electrical devices specified in § 46.1-198 nor to fire department vehicles when traveling in response to a fire alarm or pulmotor call, nor to ambulances when traveling in emergencies outside the corporate limits of cities and towns." (Emphasis added.)

As indicated by the emphasized language, authorization for an exception to the lawful speed limitation set forth in this statute applies only (1) to vehicles operated under the direction of the police, (2) to fire department vehicles, and (3) to ambulances. The statute is limited to the named classes of vehicles; it has no application to the privately owned vehicles of volunteer firemen or rescue squad members.

Moreover, paragraph (b) of § 46.1-199 of the Code states that the exemptions stated in paragraph (a) of this statute "apply only when the operator of such vehicle displays a flashing, blinking or alternating red light and sounds a siren, bell, exhaust whistle, or air horn designed to give automatically intermittent signals." A fireman or rescue squad member is authorized by § 46.1-267 of the Code to “equip one vehicle owned by him with no more than two flashing or steady-burning red lights” for use in answering emergency calls. This statute does not authorize him to equip his vehicle with any siren, bell, exhaust whistle, or air horn. Section 46.1-285 of the Code, which specifies those vehicles which are either required or authorized to be equipped with a siren, exhaust whistle or air horn does not include vehicles owned and operated by firemen or rescue squad members. I find no such authorization in any other statute. Section 46.1-284 of the Code states "[i]t shall be 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."

In light of these and related statutes I must conclude that a volunteer fireman...
or a rescue squad member operating his privately owned motor vehicle is not authorized to exceed the lawful speed limit, and your question is answered in the negative.

MOTOR VEHICLES—Weight Limits—Liquidated damages for first violation—Conflict with subsequent language of statute.


STATUTES—Act Must Be Construed So As To Avoid Absurdity—Words apparently stated in error; substitution of language intended.

STATUTES—Reference To “Twenty-five Thousand” In § 46.1-342 Should Be “Twenty-five Hundred.”

THE HONORABLE DONALD W. DEVINE
Commonwealth’s Attorney for Loudoun County

You ask whether the reference to “twenty-five thousand” pounds as used in § 46.1-342 of the Code of Virginia (1950), as amended, was intended or represents a clerical error.

The language was inserted in paragraph (a) of § 46.1-342 of the Code by Chapter 644 [1977] Acts of Assembly 1279. Section 46.1-342(a) provides that:

“(a) Upon conviction of any person for violation of any weight limit as provided in this chapter or in any permit issued by the State Highway and Transportation Commission or local authority pursuant to § 46.1-343 or § 46.1-343.1 of this Code the court may, after reasonable notice, assess the owner, operator or other person causing the operation of such overweight vehicle liquidated damages, for a first violation, in the amount of two cents per pound for each pound of excess weight over the prescribed limit in this chapter when the excess does not exceed two thousand five hundred pounds; the court shall, upon such conviction and after reasonable notice, assess such person liquidated damages in the amount of two cents per pound for each pound of excess weight over the prescribed limit in this chapter for a second or subsequent overweight violation within any three-year period where such second or subsequent violation is for an excess weight which is less than twenty-five thousand pounds or in every case when the excess is greater than two thousand five hundred pounds and does not exceed five thousand pounds, five cents per pound for each pound of excess weight over the prescribed limit in this chapter when such excess is more than five thousand pounds . . . .”

This statute, through use of the word may, makes the assessment of liquidated damages discretionary with the court when the conviction is for a first violation of any weight limit as provided in Chapter 4 of Title 46.1 and the excess weight does not exceed two thousand five hundred pounds. In all other cases, the use of the word shall makes the assessment of liquidated damages in the statutory amounts mandatory. The question to be determined is whether the General
Assembly intended, as the language states, the assessment of two cents per pound for each pound of excess weight for a second or subsequent overweight violation within any three-year period when such excess weight is "less than twenty-five thousand pounds."

The amount of twenty-five thousand pounds does not comport with the remainder of the statute. In fact, it manifests a conflict with subsequent language which establishes mandatory requirements for certain violations. A literal reading of the present language would dictate that upon a second or subsequent violation involving less than twenty-five thousand pounds, a two cents per pound assessment is mandatory. On the other hand, subsequent language establishes a mandatory imposition of two cents "in every case" where the excess is greater than twenty-five hundred but does not exceed five thousand pounds and five cents per pound when such excess is more than five thousand pounds. Consequently, between the range of five thousand and twenty-five thousand pounds, a literal reading of the statute calls for the imposition of two conflicting assessments—two cents in the first instance and five cents in the second.

This conflict grew out of a 1977 amendment aimed at allowing the courts to exercise their discretion in those cases where a first violation involves an overweight not exceeding two thousand five hundred pounds. Prior to this amendment, § 46.1-342 provided for a mandatory assessment in all cases of overweight according to a formula which established an assessment of two cents per pound for violations not exceeding five thousand pounds and five cents per pound for violations exceeding five thousand pounds. The phrase "twenty-five thousand pounds" does not accord with that intent, nor is it compatible, in the context of the statute, with the remaining measures of weight stated therein.

It cannot be presumed that the General Assembly, in amending § 46.1-342, intended to impose conflicting assessments which render the statute ambiguous and unreasonable. See Miller v. Commonwealth, 180 Va. 36, 21 S.E.2d 721 (1942). If a literal construction of the words of a statute be absurd, the act must be construed so as to avoid the absurdity. Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934). Accordingly, it is reasonable to assume that the numerical phrase "twenty-five thousand pounds" was included in error. Having reached this determination, the question is posed as to what numerical phrase was intended. A review of the various possibilities reveals that the phrase "two thousand five hundred pounds" comports with the statute and is the only logical choice to dispel the ambiguity and support a legislative scheme whereby discretion is granted to the courts only in those cases involving a first offense overweight violation of less than two thousand five hundred pounds.

In my opinion, the proper numerical phrase can and must be substituted. Where a statute is rendered ambiguous and unreasonable by words which were apparently stated in error, and such ambiguity can be resolved by substituting words which can be ascertained from the intent of the legislature, the statute is properly construed by substituting the language intended.

"Courts have permitted the substitution of one word for another: where it is necessary to make the act harmonious or to avoid repugnancy or inconsistency, where the word to be substituted can be gathered from the context of the act * * * where it is obvious that the word used in the act is the result of clerical error, or mistake, where the substitution will make the act sensible, or give it force and effect, or make it rational ***" 2A Sutherland, Statutes and Statutory Construction § 47.36 (C. Dallas Sands, 4th ed. 1973).
In summary, I am of the opinion that the reference to "twenty-five thousand pounds" in § 46.1-342 was in error. In place thereof, the General Assembly intended the words "two thousand five hundred pounds," and the statute should be construed accordingly.

NATIONAL GUARD—Inactive Duty Training—Practice alert or emergency call-up exercise—Not entitled to leave with pay unless granted as matter of local policy.

DEFINITIONS—“Inactive Duty Training”—What constitutes for organized reserve forces of armed services or National Guard.

SALARIES—Military Leave Or Loss Of Pay—Organized reserve forces of armed services or National Guard on active duty or inactive duty training.

February 22, 1978

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

In your recent letter, you ask whether employees in your office who are members of the organized reserve forces of the armed services of the United States, or of the National Guard, and who are required to be absent because of a practice alert or emergency call-up exercise staged by their military unit, are entitled to military leave without loss of pay for the period of their absence.

Reservists or Guardsmen may perform "active duty," which includes active duty for training, such as attendance at summer camp. They may also perform "inactive duty training," which includes drills or training periods during the year. See 10 U.S.C. §§ 101 and 270. The practice alerts or emergency call-up drills are "inactive duty training." National Guardsmen may also be called forth by the Governor when execution of the law is obstructed or in the event of disaster. See § 44-75 of the Code of Virginia (1950), as amended.

Section 44-93 of the Code provides:

"All officers and employees of the State or of any city, county or town who shall be members of the organized reserve forces of any of the armed services of the United States, national guard or naval militia shall be entitled to leaves or absence from their respective duties, without loss of seniority, accrued leave, or efficiency rating, on all days during which they shall be engaged in annual active duty for training, or when called forth by the Governor pursuant to the provisions of § 44-75; there shall be no loss of pay during such leaves of absence, not to exceed fifteen days per calendar year. When relieved from such duty, they shall be restored to positions held by them when ordered to duty."

Thus, where absence is occasioned by active duty for training or a call by the Governor, state, city, county or town employees are entitled to leave with pay for up to fifteen days. There is no similar entitlement for absences for "inactive duty training," unless granted as a matter of local policy.
NEWSPAPERS—Meaning Of Within § 58-266.1A(3) Of Code—The Daily Report, a daily review of the public record from the courthouse, is not.

TAXATION—Exemption—Newspapers not subject to license taxes.

TAXATION—Exemption—Statutory tax exemptions are strictly construed against taxpayer, with doubts resolved against exemption.

August 2, 1977

The Honorable C. B. Harrell, Jr.
Commissioner of the Revenue for the City of Newport News

This is in response to your recent letter in which you ask whether The Daily Report is a "newspaper" within the meaning of § 58-266.1A(3), Code of Virginia (1950), as amended. The copy of The Daily Report, which you included with your letter, was comprised solely of the following listings:

1. Prospective bidders for public projects,
2. Building permits issued,
3. Suits filed,
4. Judgments,
5. Secured transactions,
6. Marriage licenses issued,
7. Corporate formations, and
8. Deed book entries

for the geographical units of Newport News, Hampton, York County, James City County, and Williamsburg. It is to be noted that these listings were simply matters of public record, available to any member of the public at the city or county courthouse. No advertising, articles of opinion (as editorials), features, or other news information of general interest were included. Besides a daily review of the public record from the courthouse, no independent reporting, research, or investigation is involved. The only sentence found in the entire publication is contained in the editorial block naming the publisher.

Section 58-266.1 empowers cities, towns, and counties to enact license taxes, subject to certain limitations, one of which is § 58-266.1A(3), which states in pertinent part:

"No city, town or county shall require a license to be obtained for the privilege or right of printing or publishing any newspaper . . . ."

Nowhere is the term newspaper defined. Where no technical or special meaning is explicitly expressed in or necessarily implied from the language and context of a statute, words which the legislature has seen fit to employ are to be given their usual and ordinary signification. Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938); 17 M.J. Statutes § 34 (1951). The words newspaper is a word of general and common usage and is to be construed in its plain and ordinary sense. In ordinary understanding a newspaper is a publication appearing at regular, or almost regular, short intervals of time, as daily or weekly, appearing usually in sheet form and containing news, that is, reports of happenings of recent occurrence and of a varied character, such as political, social, moral, religious, and other subjects of a similar nature, local or foreign, and intended for the information of the general reader. 58 Am. Jur. 2d Newspapers, Periodicals, Etc. § 1 (1971). Similar definitions are given in Black's Law Dictionary and Webster's Third International Dictionary, and their import is the same—a
publication intended for general circulation and published regularly at short intervals, normally in sheet form, and containing matter of general interest to the average reader.

Whenever the advantage of a tax exemption is sought, it must be remembered that the Constitution of Virginia mandates the application of the rule of strict construction. "[S]tatutory tax exemptions are strictly construed against the taxpayer, with doubts resolved against the exemptions." Commonwealth v. Research Analysis, 214 Va. 161, 163, 198 S.E. 2d 622, 624 (1973). Taxation is the rule, and to doubt an exemption is to deny it.

Comparing The Daily Report to the meaning accorded that term in common usage, and keeping in mind the rule of strict construction, I am unable to conclude that The Daily Report is a newspaper as contemplated by the language of § 58-266.1A(3).

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NOTARIES PUBLIC—Appointment Of Is Discretionary With Governor—Minimum qualifications—Regulations prescribed by general law.

March 14, 1978

THE HONORABLE STANFORD E. PARRIS
Secretary of the Commonwealth

You have asked whether the Governor may require notary public applicants to satisfy certain minimum qualifications, such as the ability to read and write and to be familiar with the laws relating to the office of notary public.

The appointment of notaries is discretionary with the Governor. Sections 47-1 and 47-2 of the Code of Virginia (1950), as amended, authorize him to appoint "as many notaries public as to him may seem proper." Article II, Section 5, of the Constitution of Virginia (1971) limits the qualifications that may be imposed as a precondition to holding elective office, but there is no prohibition against requiring reasonable qualifications related to capability and capacity to hold nonelective office. The qualifications must, however, reflect a valid public purpose, such as securing competent public officers. 15 Michie's Jurisprudence Public Officers § 4 (1977 Cum. Supp. at 25).

Therefore, I am of the opinion that the Governor may require notary public applicants to satisfy certain minimum qualifications, such as the ability to read and write and to be familiar with the laws relating to the office of notary public.

Section 47-2 of the Code provides that the Governor may appoint notaries public for the State at large, subject to any regulations prescribed by general law for other notaries. Accordingly, regulations adopted by the Governor would have to be consistent with any regulations promulgated by general law. However, at present there are no such regulations requiring qualifications of an individual to serve as a notary public.

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NOTARIES PUBLIC—Fees—When employee is entitled to keep notary fee for performing notarial duties for his employer.

NOTARIES PUBLIC—Fees—Notarial services performed in addition to
required duties of employment, employee entitled to fees for notarial services rendered to employer.

NOTARIES PUBLIC—Fees—Whether notarial services are distinct from, or embraced in, employee's contract of service is question of fact, determined on case-by-case basis.

SALARIES—Notary Public—Acceptance of a salary as payment in full for all services may result in waiver of right to notarial fees.

SHERIFFS—Notary Public In Sheriff's Office—When entitled to keep notary fee.

STATE EMPLOYEES—Notary Public—May collect notarial fees where duties of employment do not include performance of notarial functions.

December 30, 1977

THE HONORABLE LOUIS L. ARMISTEAD
Sheriff for the City of Alexandria

This is in reply to your recent inquiry in which you ask the following question:

"When a paper needs to be notarized does the person in my office notarizing the paper get to keep the notary fee or should the State of Virginia get it assuming she is on duty when the paper is notarized?"

Section 14.1-134 of the Code of Virginia (1950), as amended, prescribes the fees which a notary may charge for the performance of his duties. That section provides:

"A notary may, for taking and certifying the acknowledgment of any writing, or administering and certifying an oath, or for certifying affidavits and depositions of witnesses, charge a fee of one dollar.

"For other services a notary shall have the same fees as the clerk of a circuit or city court for like services.

"Any person appointed as a member of an electoral board, a general registrar, or an officer of election, shall be prohibited from collecting any fee as a notary from the time of such appointment."

No Virginia statute or reported case indicates when an employee may keep fees charged for performing notarial duties for his employer. There have been decisions in several other states, however, which are helpful in responding to your inquiry.

It has been held that an employee of the State, who is a notary, may properly charge and collect, for his personal use, notarial fees from persons requesting notarial acts, where the duties of his employment do not include the performance of notarial functions. Riggs v. Leininger, 278 P. 344, 137 Okla. 138 (1929). Thus, where notarial services are performed by an employee in addition to the required duties of his employment, the employee is entitled to recover fees for notarial services rendered to the employer. Archer v. Dorman, 263 Ky. 105, 91 S.W.2d 1007 (1936).

Where a notary is employed by another in a capacity which requires the whole of his time, however, and during the course of his employment takes affidavits and acknowledgments at his employer's request and regularly receives payment of a regular salary, he is not entitled to recover his notarial fees, since the services
are not independent of his regular employment. Whether notarial services are
distinct from, or embraced in, the employee’s contract of service is a question of
fact, to be determined on a case-by-case basis. Bryden v. Delaware, L. and
W. R. Co., 262 Pa. 211, 105 A. 79 (1918). Furthermore, the acceptance of a
salary as payment in full for all services rendered may result in a waiver of a right

The above cases indicate that a distinction should be drawn between those
notarial services which are performed as an incident of employment respon-
sibilities, and those which are performed by a notary in his capacity as an
individual public officer. For those acts which are within the scope of em-
ployment, I am of the opinion that a notary must turn over all fees to his em-
ployer. A notary public may, however, keep fees which accrue to him as an
individual, for the performance of services unrelated to his employment.

OBSCENITY—Jury Not Required To Determine "Community Standards"—
Criminal defendant not entitled to jury trial in general district court.

CIVIL PROCEDURE—Obscenity—Same standards apply in civil proceeding as
in criminal prosecutions.

CRIMINAL PROCEDURE—Jury Trial—Not required in general district
court—Jury not required to determine "community standards" in obscenity
cases.

CRIMINAL PROCEDURE—Jury Trial—Two-tier system of trial courts in
criminal cases; jury only in second tier—Due process clause of Fourteenth
Amendment not violated.

November 2, 1977

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

This is in reply to your letter in which you seek an opinion regarding the en-
forcement of Virginia’s obscenity laws. You inquire whether a criminal
defendant is entitled to a jury trial “to ascertain community standards,” and
second, if a jury trial is required, can a defendant be proceeded against in the
General District Court where no jury is available under Virginia law. You
particularly ask me to consider the case of City of Kansas City v. Darby, 544
S.W.2d 529 (Mo. 1976), app. dis. cert. denied, 45 U.S.L.W. 3773 (May 31,
1977), in rendering my opinion.

In Miller v. California, 413 U.S. 15 (1973), the United States Supreme Court
reformulated the constitutional tests for determining obscenity under the First
and Fourteenth Amendments. The Miller decision arose in the context of a jury
trial, and it is unexceptional that the Supreme Court refers to juries in the course
of its opinion. But, I find no language in Miller or in any subsequent Supreme
Court case which stands for the proposition that only a jury is capable of
ascertaining community standards. To the contrary, four days after the Miller
decision, the Supreme Court rendered its decision in Alexander v. Virginia, 413
U.S. 836 (1973), in which the Court held that a jury was not constitutionally
required to adjudge obscenity. Alexander arose in the context of the civil
proceeding to declare certain books obscene, but the Supreme Court of Virginia
REPORT OF THE ATTORNEY GENERAL

has held that the same standards regarding obscenity, including the ascertainment of community standards, which apply in criminal prosecutions are likewise applicable in the civil proceeding. See *Alexander v. Commonwealth*, 214 Va. 539, 203 S.E.2d 441 (1974).

Pursuant to § 18.2-380, Code of Virginia (1950), as amended, a first time offense for a violation of the obscenity law is a Class I misdemeanor, the punishment for which is confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both. Section 18.2-11. Accordingly, such a violation is considered to be a serious offense for which a jury is constitutionally required. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970).

In answer to your first inquiry, it is my opinion that a criminal defendant charged with a violation of the obscenity law is entitled to a jury trial. This right, however, arises not from any peculiar requirement in obscenity cases, but springs from the defendant’s right under the Sixth Amendment.

Since a criminal defendant is entitled to a jury trial, the question arises whether this right attaches at his appearance in the General District Court. Virginia, like a number of other States, has a two-tier system of trial courts for criminal cases. See *Colten v. Kentucky*, 407 U.S. 104, 112 n.4 (1972). Some of these States, including Virginia, provide a jury only in the second tier. This procedure has been expressly approved by the United States Supreme Court which in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), held that the due process clause of the Fourteenth Amendment is not violated by a state’s two-tier trial system for specified crimes, under which the accused is tried in the lower tier, in which no jury is available, and, if convicted, may take a timely appeal to the second tier in which he is entitled to request a trial *de novo* by a jury.

In *City of Kansas City v. Darby*, supra, the Supreme Court of Missouri held that in obscenity cases only, a defendant was entitled to a jury trial in the first instance, and that trial by jury after appeal to the Circuit Court did not satisfy the requirements of the Constitution. In arriving at its decision, the Missouri Supreme Court premised its holding on *Callan v. Wilson*, 127 U.S. 540 (1888), which held that except in petty offenses, a defendant was entitled to a jury trial from the first moment, and in whatever court, he is put on trial. The decision in *Callan*, however, has been held to apply only in federal trials. See *Ludwig v. Massachusetts*, supra, at 630. In its opinion, the Supreme Court of Missouri recognized that *Callan* was not applicable to state trials, but nevertheless felt free to follow it. 544 S.W.2d at 531. While Missouri is free to follow *Callan*, its decision has no constitutional underpinning.

Contrary to the decision in *Darby*, the Supreme Court of Virginia has held that *Callan* is not applicable in Virginia. See *Manns v. Commonwealth*, 213 Va. 322, 191 S.E.2d 810 (1972). Since the Supreme Court of Virginia has specifically addressed the question of the constitutionality of providing a jury in the second tier of our two-tier system, its decision in *Manns* is binding upon Virginia courts, and the decision in *Darby* is entitled to no weight.

In view of the above, it is my opinion that a criminal defendant charged with a violation of the obscenity laws may be proceeded against initially in the General District Court, and his right to trial by jury is amply protected by providing him a jury trial in the Circuit Court.

ORDINANCES—Authority Of Localities To Enforce Ordinances Requiring Local Motor Vehicle License.
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DILLON'S RULE—Limits Authority Of Local Governments To Powers And Functions Statutorily Established.

MOTOR VEHICLES—Criminal Procedure—Operation of vehicle without displaying license tag involves misdemeanor, not failure to purchase tag.

MOTOR VEHICLES—Local License—Ordinance imposing tax may be enforced as other local law.

GENERAL ASSEMBLY—Penalty Added For Use Of Expired Motor Vehicle License Did Not Prevent Local Ordinance Prohibiting Operation Of Vehicle On Highways Without Local License.

STATUTES—Construction That Would Create An Absurdity Is To Be Avoided.

April 24, 1978

THE HONORABLE J. R. ZEPKIN, JUDGE
York County General District Court

This is in response to your recent inquiry whether paragraph (e) of § 46.1-65 of the Code of Virginia (1950), as amended, impairs the authority of a locality to adopt ordinances making it unlawful to fail to obtain local licenses for automobiles.

Section 46.1-65(a) expressly authorizes counties and incorporated cities and towns to "‘levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers.’" The section further provides, in part, that "‘[s]uch license fees and taxes shall be imposed in such manner, on such basis, for such periods . . . as the proper authorities of such counties, cities and towns may determine.’" Paragraph (e) of the statute, which was added by Chapter 574 [1962] Acts of Assembly 904, contains the statute's only express reference to penalties.¹

The Supreme Court of Virginia, in Whiting v. City of Portsmouth, 202 Va. 609, 118 S.E.2d 505 (1961), decided prior to the addition of paragraph (e) to § 46.1-65, affirmed the conviction of an individual for operating his automobile on city streets without having purchased a local license required by city ordinance.

The Dillon Rule of construction applicable to the powers of local governing bodies in Virginia limits such powers to those conferred expressly by statutory law or by necessary implication. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975); 13 M.J. Municipal Corporations §§ 25-26 (1951). While penalties for operating a motor vehicle without first having obtained the local license required by local ordinance are not provided for in § 46.1-65, §§ 15.1-13, -505 and -901 expressly authorize local governing

¹"‘Any county, city or town levying taxes and charging license fees under this section may by ordinance provide that it shall be unlawful for any owner of a motor vehicle, trailer or semitrailer to display upon such motor vehicle, trailer or semitrailer any license plate of such county, city or town after the expiration date of such license plate. Any such ordinance may provide that a violation of such ordinance shall constitute a misdemeanor and be punishable by a fine not exceeding twenty dollars.’" § 46.1-65(e), Code of Virginia (1950), as amended.
bodies to impose penalties for the violation of ordinances. Moreover, it is the general rule "that a municipal corporation with power to pass ordinances has, as a necessary incident thereto, implied power to provide for their enforcement by appropriate and reasonable penalties against those who break them." 5 McQuillen on Municipal Corporations, § 17.04 (3rd ed. 1969). See also Report of the Attorney General (1961-1962) at 176.

There is nothing in the provisions of paragraph (e) of § 46.1-65 which expressly prohibits local governing bodies from enacting ordinances declaring it to be unlawful to operate a vehicle without a valid local license. It does not follow that the General Assembly's declaration that it is unlawful to display an expired license was intended, expressly or impliedly, to prohibit ordinances making operation of motor vehicles without local license unlawful. The General Assembly has not treated the concept of operation without license, but has simply expressly provided that if one displays a license, it must be a valid license. I am, of course, aware of the maxim that the mention of one thing implies the exclusion of another; however, this is merely an aid to statutory construction and not a rule of law. Gordon v. Board of Supervisors, 207 Va. 827, 153 S.E.2d 270 (1967).

To construe paragraph (e) as limiting a locality's enforcement of its local license program to those situations where an expired license is displayed, would create an absurdity in the statute. It is well settled that such statutory constructions are to be avoided. Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934).

Finally, this Office has repeatedly expressed the view that § 46.1-65 authorizes local governing bodies to adopt and enforce ordinances making it unlawful to operate a motor vehicle on the public highways without having first obtained the required local license. See Reports of the Attorney General (1963-1964) at 195, (1961-1962) at 176, and (1953-1954) at 128. As you can observe, two of the aforementioned opinions were rendered after paragraph (e) was added as an amendment.

Thus, I am of the opinion that the legislature, in adding paragraph (e) to § 46.1-65, providing a penalty for the use of an expired license did not thereby prevent local governing bodies from adopting ordinances prohibiting the operation of motor vehicles on public highways without first obtaining the required local license.

ORDINANCES—County Has Authority To Enact Ordinance Compelling Property Owners To Eradicate Multiflora Rose Along Highway If County Determines Plant A Nuisance.

AGRICULTURE AND COMMERCE—Noxious Weed Law—Board authorized to identify weeds deemed noxious and establish statewide control program.

COUNTIES—Authority—Counties have same powers granted to municipalities by general law.

COUNTIES—Authority—To compel removal of nuisance; multiflora rose planted by Department of Highways on right of way to control soil erosion.

COUNTIES—Police Power—If spread of multiflora rose plant would cause harm to welfare of community, plant may be designated "public" nuisance.
DEFINITIONS—Public Nuisance—Act or condition that unlawfully hurts or inconveniences indefinite number of persons.

June 19, 1978

THE HONORABLE W. L. LEMMON
Member, House of Delegates

You ask whether a county has authority to enact an ordinance compelling the property owners along Interstate 81 to eradicate the multiflora rose plant which you say was planted by the Department of Highways along the right of way of the road to prevent soil erosion, but has now spread to adjacent areas and is endangering other flora.

A municipal corporation has authority to compel the abatement and removal of nuisances, including the removal of weeds from private and public property. See § 15.1-867 of the Code of Virginia (1950), as amended. The power conferred by this section is not self-executing; rather, it must be exercised by ordinance. See Report of the Attorney General (1971-1972) at 52. Counties have the same powers granted to municipalities by general law. See § 15.1-522. Thus, a county may exercise the power granted by § 15.1-867 to abate and remove nuisances.

A public nuisance is an act or condition that unlawfully operates to hurt or inconvenience an indefinite number of persons. 14 M.J.2d Nuisances § 5 (1951). If the spread of the multiflora rose plant would cause harm to the welfare of the community, the police power is sufficiently broad to permit the designation of the plant as a "public" nuisance. While the decision of the county to declare the plant a nuisance must rest on a reasonable state of facts, a court will not superimpose its judgment on that of a legislative body in determining what, under the facts presented, constitutes a public nuisance. Bowman v. Va. State Entomologist, 128 Va. 351, 105 S.E.141 (1920).

If the county determines that the multiflora rose plant is a nuisance, I conclude that it has authority to enact an ordinance declaring it to be such and to compel property owners along the right of way of Interstate 81 to take efforts to eradicate the plant.

ORDINANCES—County May Not Enact Ordinance To Withhold Rezoning Or Subdivision Plat Approval Until All "Fees And Taxes" Owed On Property Are Paid—Fees unrelated to land use planning process.

COUNTIES, CITIES AND TOWNS—Powers Of Local Governments Can Be No Greater Than Those General Assembly Has Conferred On Them.

ORDINANCES—Zoning—Lawful exercise of State's police power, if reasonable and nonarbitrary.

Note, however, that the Noxious Weed Law, § 3.1-296.11, et seq., authorizes the Board of Agriculture and Commerce to identify weeds deemed noxious and establish a statewide program for their control. If such a declaration is made, that action would bar the county from enacting its own program requiring property owners to eradicate a noxious weed. Because the Board of Agriculture and Commerce has not designated the multiflora rose plant to be a noxious weed, the county's power under § 15.1-867 to declare the plant a nuisance and compel its eradication is not barred by the Noxious Weed Law.
ORDINANCES—Zoning—Statutes establish procedures to be followed when enacting or amending—Additional steps may not be inserted.

PENALTIES—Violation Of Zoning Ordinance.

TAXATION—Delinquent Taxes—Remedies available to assist county in collection—Board of supervisors may not condition rezoning or subdivision plat approval upon payment of fees and taxes.

ZONING—Ordinance May Regulate, Restrict, Permit, Prohibit, And Determine Use And Dimensions Of Land, Buildings And Attendant Facilities.

ZONING—Prepayment Of Taxes and Fees Unrelated To The Rezoning Not Required As Part Of Zoning Process.

February 21, 1978

THE HONORABLE WILLIAM H. HARRIS
County Attorney for Stafford County

This is in reply to your recent letter in which you inquire whether Stafford County may enact an ordinance providing that the Board of Supervisors may withhold rezoning or subdivision plat approval until all "fees and taxes" owing on the property are paid. I understand that the term "fees" refers to payments, such as business and professional license taxes, or dog license fees, which are unrelated to the land use planning process. I am of the opinion that the Board of Supervisors may not enact such an ordinance.

Because they are creatures of the Commonwealth and thus subordinate, the powers of local governments can be no greater than those which the General Assembly has conferred upon them. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967). A local governing body may take action of the type contemplated in your inquiry only if it has been granted the power to do so, or if that power can be implied necessarily from those expressly granted. Any doubt as to the existence of a power must be resolved against the locality. See I. J. Dillon Law of Municipal Corporations (1911). There is no express grant of authority which would empower a local government to enact an ordinance of the nature described in your inquiry. That power, if it is deemed to exist, must be implied necessarily from those powers expressly granted to counties.

Zoning Approval

I first consider whether the prepayment of taxes and fees may be required as part of the zoning process. The authority granted to counties to enact and enforce zoning regulations is codified in Title 15.1, Chapter 11, Article 8, §§ 15.1-486 through -498 of the Code of Virginia (1950), as amended. Section 15.1-486 provides that zoning ordinances may "regulate, restrict, permit, prohibit, and determine" the use and dimensions of land, buildings and attendant facilities. See Opinion to the Honorable Bernard G. Barrow, Member, House of Delegates, dated September 20, 1977, a copy of which is enclosed. The purposes for which a zoning ordinance may be enacted are set forth in § 15.1-489. Among the provisions which are authorized by § 15.1-491 to be included in a zoning ordinance are:

"(e) For the imposition of penalties upon conviction of any violation of the zoning ordinance. Any such violation shall be a misdemeanor punish-
able by a fine of not less than ten dollars nor more than one thousand dollars.

"(f) For the collection of fees to cover the cost of making inspections, issuing permits, advertising of notices and other expenses incident to the administration of a zoning ordinance or to the filing or processing of any appeal or amendment thereto.

"(g) For the amendment of the regulations or district maps from time to time, or for their repeal. Whenever the public necessity, convenience, general welfare, or good zoning practice require, the governing body may by ordinance, amend, supplement, or change the regulations, district boundaries, or classifications of property. Any such amendment may be initiated by resolution of the governing body, or by motion of the local commission, or by petition of any property owner addressed to the governing body or the local commission, who shall forward such petition to the governing body; provided, that the ordinance 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 specific period, not exceeding one year." (Emphasis added.)

Note that the fees authorized by § 15.1-491(f) are costs necessitated by the land use planning process. They are not those fees unrelated to the rezoning itself, to which your inquiry refers.

In addition to these requirements, Virginia statutes establish the procedures which must be followed when enacting or amending a zoning ordinance. See Opinion to the Honorable Ray L. Garland, Member, House of Delegates, dated January 9, 1978, a copy of which is enclosed. Neither those express procedural requirements, not the purposes and authorized provisions of zoning ordinances permit a governing body to insert in the zoning process additional steps which must be completed before the rezoning request is approved or disapproved. I am of the opinion, therefore, that authority to enact a requirement that all property taxes and fees be paid before a rezoning request will be considered may not be implied from those powers expressly granted.

Subdivision Plat Approval

I now turn to the question whether subdivision plat approval may be withheld until taxes and fees are paid. The general statutes of Virginia set forth with great specificity the powers and duties of local governing bodies to provide for the subdivision and development of land. Subdivision enabling legislation requires prompt action on subdivision plats and site plans by local officials. The power of a local governing body to insert, absent express statutory authority, additional procedural steps in the subdivision approval process must thus be narrowly construed. Bd. of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975).

Subdivision ordinances may provide for, among other things:

"(i) . . . the administration and enforcement of such ordinance, not inconsistent with provisions contained in this chapter, and specifically for the imposition of reasonable fees and charges for the review of plats and plans, and for the inspection of facilities required by any such ordinance to be installed; such fees and charges shall in no instance exceed an amount commensurate with the services rendered taking into consideration the time, skill and administrator's expense involved. All such charges heretofore made are hereby validated . . . ." (Emphasis added.) Section 15.1-466.
Note that the fees authorized above cover the costs of determining the adequacy of the subdivision plan. They are thus related to the land use planning process. Section 15.1-475, furthermore, requires approval or disapproval of subdivisions within sixty days after their submission. These statutes do not, however, provide implicit authority for a local government to withhold consideration of a subdivision plat until all taxes and fees are paid. In addition, the remaining sections of Title 15.1, Chapter 11, Article 7, provide no source from which such authority may be implied.

There are remedies available to the county to assist in the collection of delinquent taxes and fees. See §§ 58-978 through 58-1117.11 and 14.1-174. Nothing in those statutes authorizes the board of supervisors to condition rezoning or subdivision plat approval upon payment of fees and taxes.

ORDINANCES—Land Use Tax—Number of property owners who will qualify for special treatment not relevant; reasonable basis for classification system.

CONSTITUTIONAL LAW—Equal Protection Of Law Not Violated By Number Of Property Owners Affected By Land Use Tax Ordinance.

GENERAL ASSEMBLY—Authority—Enacted general legislation authorizing local government which has adopted a land use plan, to adopt ordinance to tax such land at use value.

July 6, 1977

THE HONORABLE RAYMOND R. GUEST, JR.
Member, House of Delegates

This is in reply to your letter requesting my opinion concerning a land use tax ordinance which is currently under consideration by the Town of Front Royal. You note that this tax ordinance would, if adopted, presently affect only two property owners in the Town. You request my opinion whether such an ordinance would violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Since the answer to your inquiry will depend upon the reasonableness of the classification system established by the ordinance, it is necessary to review the provisions of State law, and the purposes thereof, which would authorize the adoption of such an ordinance.

Article X, Section 2, of the Constitution of Virginia (1971) authorizes the General Assembly to enact general legislation to permit local governments to grant tax deferral or relief on agricultural, horticultural, forest, or open-space land. This provision, which is an exception to the general provision that real estate be taxed at its fair market value, is designed to encourage the preservation of agricultural and other open-space land by taxing those lands on the basis of their use value, rather than fair market value. II A. Howard Commentaries on the Constitution of Virginia 1048-1057 (1974).

The General Assembly has enacted general legislation authorizing any county, city, or town which has adopted a land use plan to adopt an ordinance to tax such land at use value. See § 58-769.6 of the Code of Virginia (1950), as amended. It is my understanding that the ordinance under consideration by the Town Council conforms to the requirements of that general legislation.
Your inquiry is whether, because the ordinance would grant tax benefits to only two property owners initially, it would violate the Fourteenth Amendment to the United States Constitution. The number of property owners who will qualify for special treatment under the ordinance is not relevant to this determination; the relevant factor is whether there is a reasonable basis for the classification system which determines the conditions under which property owners may qualify for favorable tax treatment.

The Equal Protection Clause does not prevent a state from treating some individuals differently from others. See Harper v. Virginia Board of Elections, 383 U.S. 663, 666 (1966). Indeed, where taxation is concerned, the states have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 359 (1973). Taxing systems may be designed both to raise revenues and to foster local interest within the State. See Allied Stores of Ohio v. Bowers, 358 U.S. 522, 526 (1959).

The classification system embodied in the proposed ordinance conforms to the authorizing legislation, and, in turn, to the Constitution. The purpose of the system, which would grant tax benefits to owners of agricultural and other open-space land, is to induce its owners to maintain that land at its present use. This system of land classification for tax purposes is reasonably related to the goal of preserving open-space land and does not discriminate arbitrarily between property owners. Accordingly, I am of the opinion that the proposed ordinance, if adopted, would not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The classification system embodied in the proposed ordinance conforms to the authorizing legislation, and, in turn, to the Constitution. The purpose of the system, which would grant tax benefits to owners of agricultural and other open-space land, is to induce its owners to maintain that land at its present use. This system of land classification for tax purposes is reasonably related to the goal of preserving open-space land and does not discriminate arbitrarily between property owners. Accordingly, I am of the opinion that the proposed ordinance, if adopted, would not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

ORDINANCES—Land Use Tax—Validity of ordinance imposing taxes—Must be passed by majority of all members elected to governing body.

GENERAL ASSEMBLY—Special Assessments For Agricultural, Horticultural, Forest, Or Open Space Land—Terms “assessment” and “taxation” used interchangeably.

ORDINANCES—Affecting Financial Condition Of County, City Or Town—Must be passed by recorded affirmative vote of majority of all members elected to local governing body.

TAXATION—Land Use Tax Ordinance—Local assessor required to assess land solely on its value in present use, not fair market value.

October 14, 1977

THE HONORABLE PAUL W. MANNS
Member, Senate of Virginia

This is in reply to your letter in which you indicate that the four-member Caroline County Board of Supervisors recently enacted a land use tax ordinance pursuant to § 58-769.4, of the Code of Virginia (1950), as amended. Two members of the Board of Supervisors voted to adopt the ordinance, one member voted against adoption of the ordinance, and one member abstained. You request my opinion whether the Board of Supervisors properly enacted this land use tax ordinance.

Article X, Section 2, of the Constitution of Virginia (1971) authorizes the
General Assembly to enact general legislation to permit local governments to grant tax deferral or relief on agricultural, horticultural, forest, or open space land. This provision, which is an exception to the general provision that real estate be taxed at its fair market value, is designed to encourage the preservation of agricultural and other open space land by taxing those lands on the basis of their use value, rather than fair market value. See II A. Howard Commentaries on the Constitution of Virginia 1048-1057 (1974).

The General Assembly has enacted general legislation authorizing any county, city, or town which has adopted a land use plan to adopt an ordinance to assess and tax such land at use value. See §§ 58-769.4 to -769.16. See also Opinion to the Honorable Raymond R. Guest, Jr., Member, House of Delegates, dated July 6, 1977, a copy of which is enclosed. It is my understanding that the ordinance enacted by the Board of Supervisors conforms to the requirements of that general legislation.

Article VII, Section 7, of the Constitution of Virginia provides in pertinent part:

"No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body." (Emphasis added.)

This Office has previously held that the above-noted procedures must be followed before certain ordinances may be enacted by a local governing body. See Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated January 29, 1975, and found in Report of the Attorney General (1974-1975) at 36. The issue thus is whether the ordinance in question is one "imposing taxes." If so, it was not properly adopted since it did not pass by "a majority of all members elected to the governing body."

The term "imposition of a tax" refers to the "power inherent in the sovereign state to recover a contribution of money or other property, in accordance with some reasonable rule or apportionment from the property or occupations within its jurisdiction for the purpose of defraying the public expenses." See I Cooley Taxation § 57 (1924). While the Supreme Court of Virginia has not construed the term "imposing a tax" as contained in Article VII, Section 7, the General Assembly, in enacting legislation permitting special assessments for agricultural, horticultural, forest, or open space land, has used the terms "assessment" and "taxation" interchangeably. See §§ 58-769.4, 58-769.6 and 58-769.8. Following the enactment of a land use tax ordinance, the local assessor will be required to assess land solely on its value in its present use, and not its fair market value. See § 58-769.9. Since the tax liability of real property is largely determined by the rate of taxation and the assessed value of that property, a change in the method of assessment will in fact determine the amount of tax payable by a property owner.

Article VII, Section 7, requires, in effect, that any ordinance which will affect the financial condition of a county, city, or town must be passed by a recorded affirmative vote of the majority of all members elected to the local governing body. The provision has previously been construed as contemplating the power to tax real estate. See Opinion to the Honorable H. Selwyn Smith, Member, Senate of Virginia, dated November 7, 1974, and found in Report of the Attorney General (1974-1975) at 364. The requirements of Article VII, Section 7, derive from Section 123 of the Constitution of Virginia (1902). See II A. Howard, supra, at 846. That provision was enacted to establish a system of procedural safeguards to protect the "financial condition of cities." It required
that all local ordinances which affected the financial status of a city had to be enacted in a different manner from other local ordinances. The 1901-1902 Constitutional Convention was of the opinion that a requirement for passage by a majority of all elected members would provide the needed financial safeguard. See II Report of the Proceedings and Debates of the Constitutional Convention 1953, 1955-60, 2032 (1906). In 1971, this requirement was made applicable to all units of local government. See II A. Howard, *supra*.

The constitutional provision is applicable to ordinances or resolutions appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money. Each of these local enactments will affect the financial condition of localities. Since the land use tax ordinance enacted by the Caroline County Board of Supervisors permits the relief or deferral of taxes on agricultural, horticultural, forest, or open space land and authorizes the establishment of a separate tax rate for and in these categories of use, it will clearly affect the financial condition of a locality which enacts such legislation.

I am of the opinion, therefore, that such an ordinance must be construed as legislation subject to the provisions of Article VII, Section 7. Before such an ordinance may be enacted, a recorded affirmative vote of the majority of all members elected to the local governing body must be taken. The vote of the Caroline County Board of Supervisors to enact the land use tax ordinance, however, was a majority vote of a mere quorum of that body, not of all the members elected to the Board. A majority of the four members elected to the Board would be three members. Therefore, I am of the opinion that the ordinance was not enacted pursuant to Article VII, Section 7, of the Constitution of Virginia and is therefore invalid.

ORDINANCES—Resolution Authorizing Submission Of Grant Application Is Not An Appropriation Within Meaning Of Constitution—Need not be passed by recorded affirmative vote of members elected to Board of Supervisors.

DEFINITIONS—Appropriation—Act of setting money apart formally for special use or purpose by legislature.

June 1, 1978

THE HONORABLE HUBERT MARLOW, JR.
County Attorney for Warren County

You ask whether a resolution of the Warren County Board of Supervisors authorizing the submission of an application for a grant from the Virginia Division of Justice and Crime Prevention must be passed by a recorded affirmative vote of the majority of the elected members as required by the Constitution.¹

¹Article VII, Section 7, of the Constitution of Virginia (1971), provides in part:

"*No ordinance or resolution appropriating money exceeding the sum of five hundred dollars, imposing taxes, or authorizing the borrowing of money shall be passed except by a recorded affirmative vote of a majority of all members elected to the governing body.*" (Emphasis added.)
You state that if the grant is awarded to the County, funds would not be available for use until the County submitted a form stating that it accepts the grant conditions. Documentation must also be provided to the Division of Justice and Crime Prevention which demonstrates that these conditions have been satisfied. If funds are made available under the grant award, however, the County's required "matching" share would exceed five hundred dollars.

Section 7 requires that any ordinance which will affect the financial condition of a county, city, or town must be passed by a recorded affirmative vote of the majority of all members elected to the local governing body. See Opinion to the Honorable Paul W. Manns, Member, Senate of Virginia, dated October 14, 1977, a copy of which is enclosed.²

The resolution would not be subject to the requirements of Article VII, Section 7, unless the submission of an application is an "appropriation" of a sum exceeding five hundred dollars. An "appropriation" is defined as an authority of the legislature, given at the proper time and in legal form to the proper officers, to apply a distinctly specified sum from a designated fund out of the treasury, in a given year, for a specified object or demand against the government. It is the act of setting money apart formally or officially for a special use or purpose by the legislature in clear and unequivocal terms in a duly enacted law. Following a proper appropriation, an executive officer would be authorized to use that money, and no more, for that purpose, and no other. 63 Am.Jur.2d Public Funds § 46 (1972). The legislative intent to appropriate funds must be clear and certain, and cannot be inferred by a construction of doubtful acts or ambiguous language. Id. § 48.

The resolution in question is not an "appropriation" within the meaning of Article VII, Section 7, since a specific sum has not been set aside for the purpose of payment of a specified claim. No official is yet authorized to spend a specific sum of money for a purpose, since there is, at present, no object for which a demand for payment could be made. Prior to the making of an appropriation, the grant must be awarded and the County must certify that the grant conditions have been satisfied. The County may withdraw from the grant by refusing to so certify, or the grant may be denied if the conditions are not met. Furthermore, a sum certain which the County is obligated to set aside to pay its required matching share has not yet been determined.

Because conditions must be satisfied before the obligation to set aside specific funds is created, the resolution authorizing the submission of a grant application to the Division of Justice and Crime Prevention is not an appropriation. Therefore, the resolution need not be passed by a recorded affirmative vote of the members elected to the Board of Supervisors.

²The requirements of Article VII, Section 7, derive from Section 123 of the Constitution of Virginia (1902). See II A. Howard, Commentaries on the Constitution of Virginia 846 (1974). That provision was enacted to establish a system of procedural safeguards to protect the "financial condition of cities." It required that all local ordinances which affected the financial status of a city had to be enacted in a different manner from other local ordinances. The 1901-1902 Constitutional Convention took the position that a requirement for passage by a majority of all elected members would provide the needed financial safeguard. See II Report of the Proceedings and Debates of the Constitutional Convention 1953, 1955-60, 2032 (1906). In 1971, this requirement was made applicable to all units of local government. See II A. Howard, supra.
ORDINANCES—Statute Provides Procedure For Enacting—Statement required by statute not included in published notice; copy not filed with clerk of circuit court; ordinance invalid even though complete ordinance set out in published notice.

CHARTERS—Procedure Provided For Local Governing Bodies—Designed to protect citizens and taxpayers from hasty and ill-considered legislation—Statutory requirements are imperative.

STATUTES—Procedure Provided For Enacting Ordinances—Procedure must be followed strictly; ordinance invalid otherwise.

TAXATION—Use Value Assessment Of Real Property—Ordinance must strictly follow statutory procedure—Statement to be included in published notice.

December 19, 1977

THE HONORABLE WILLIAM N. ALEXANDER, II
Commonwealth’s Attorney for Franklin County

This is in reply to your recent letter requesting my opinion whether an ordinance authorizing the use value assessment and taxation of real property in accordance with § 58-769.4, et seq., of the Code of Virginia (1950), as amended, was properly adopted by the Franklin County Board of Supervisors. Your inquiry refers to the requirement of § 15.1-504 that descriptive notice of the intention to propose the ordinance be published once a week for two successive weeks prior to its passage. That section also requires:

". . . The publication shall include a statement that a copy of the full text of the ordinance is on file in the clerk's office of the circuit court of the county; . . ."

Your letter indicates that the statement quoted above was not included in the published notice and that a copy of the ordinance was not filed with the Clerk of the Circuit Court of Franklin County. The complete ordinance, however, was set out in the published notice.

When a statute or charter provides a mode of procedure for local governing bodies which is designed to protect the citizens and taxpayers from hasty and ill-considered legislation or to enforce publicity in the actions of the council, the mode of procedure thus prescribed must be strictly observed. Such statutory provisions constitute conditions precedent, and unless an ordinance or resolution is adopted in compliance with the conditions and directions thus prescribed it will have no force. 56 Am.Jur.2d Municipal Corporations § 346, 372 (1971). All statutory requirements for such a purpose are imperative. 13 M.J. Municipal Corporations § 54, 429 (1951).

The provisions of § 15.1-504, which establish specific procedural requirements for the manner in which proposed ordinances must be published, are not unique to the Code of Virginia.

"It is commonly required by statute or charter provision that ordinances, bylaws, and, in some cases, resolutions having the effect of ordinances shall be published in some manner within the municipality. Such a requirement is generally deemed to be mandatory, and unless an ordinance is published in accordance with the requirement it is void. It is the general rule that an
ordinance is not effective until published as required by law.” 56 Am. Jur. 2d. supra. § 350, 376.

I am of the opinion that the procedure established by § 15.1-504 is mandatory and that failure to publish the proposed ordinance in the manner required by the statute invalidates the legislation. The fact that the complete ordinance was set out in the published notice in no way alters this conclusion. This conclusion is consistent with the prior opinions of this Office regarding the proper interpretation of this statute. See Opinions to the Honorable Robert L. Asbury, Commonwealth’s Attorney for Smyth County, dated January 18, 1966, found in Report of the Attorney General (1965-1966) at 227, the Honorable L. J. Hammack, Jr., Commonwealth’s Attorney for Brunswick County, dated September 22, 1964, found in Report of the Attorney General (1964-1965) at 242, the Honorable A. D. Johnson, Commonwealth’s Attorney for Isle of Wight County, dated December 2, 1957, found in Report of the Attorney General (1957-1958) at 194, and the Honorable W. P. Parsons, Commonwealth’s Attorney for Wythe County, dated June 23, 1948, found in Report of the Attorney General (1947-1948) at 126.

Since the published advertisement of the use value assessment and taxation ordinance did not include a statement that a copy of the ordinance was on file at the clerk’s office, I am of the opinion that the use value assessment and taxation ordinance enacted by the Franklin County Board of Supervisors is invalid and of no legal effect.

ORDINANCES—Use-value Tax Assessment—Whether ordinance properly enacted, now in litigation—Changes to ordinance during litigation—When to amend to provide authority to charge application fees.

FEES—Application Fees Authorized But Must Be Made Part Of Land Use-value Assessment Ordinance.

ORDINANCES—County Must Enact Land Use Plan Before It May Enact Ordinance Authorizing Use-value Assessment Of Real Estate.

ORDINANCES—Statute Provides Procedure For Enacting—Mandatory whenever ordinance is enacted, amended or reenacted.

TAXATION—Assessments—Special, for agricultural, horticultural, forest or open space real estate.

March 31, 1978

THE HONORABLE JAMES H. WARD, JR.
County Attorney for Middlesex County

You have asked about special assessments for agricultural, horticultural, forest or open space real estate. You have said that the Middlesex County Board of Supervisors enacted an ordinance to provide for use-value assessment in accordance with § 58-769.6 of the Code of Virginia (1950), as amended. Whether this ordinance was enacted in accordance with required procedures is presently in litigation. If the ordinance is invalidated, you state that the Board may wish to enact a similar ordinance which, in addition, provides for the payment of application fees by property owners desiring taxation on the basis of
use assessment of their lands. If, on the other hand, the ordinance is upheld, the Board may wish to amend it to provide authority to charge application fees.

You ask (A) what procedures must be followed to authorize application fees; (B) whether the Board may consider changes to the ordinance before the litigation is completed; and (C) whether the Board’s land use plan must be reenacted if the ordinance is invalidated.

(A) Application Fees

The present ordinance does not include a provision concerning application fees. Such fees are authorized but their requirement must be made a part of the use-value assessment ordinance. Section 58-769.8.

(B) Changes to Ordinance During Litigation

The procedures by which a county may enact an ordinance are established by § 15.1-504. These procedures are mandatory. See Opinion to the Honorable William N. Alexander, II, Commonwealth’s Attorney for Franklin County, dated December 19, 1977, a copy of which is enclosed. They must be followed whenever an ordinance is enacted, amended, or reenacted.

In this case the Board has several options. First, it may amend the present ordinance to provide for application fees and await the outcome of the litigation. Second, it may reenact the ordinance with a provision requiring application fees; if the litigation solely concerns the procedures by which the ordinance was enacted, this reenactment may remove any purpose for proceeding with litigation. Third, the Board may defer all action until the litigation is completed.

(C) Present Land Use Plan

Section 58-769.6 requires that a county enact a land use plan before it may enact an ordinance authorizing the use-value assessment of real estate. See Opinion to the Honorable Robert L. Gilliam, III, Commonwealth’s Attorney for Westmoreland County, dated September 13, 1972, and found in Report of the Attorney General (1972-1973) at 417. You state in your letter that Middlesex County has a duly-adopted land use plan. Since that plan is not at issue and cannot be affected by the pending litigation, the Board will not have to reenact it if the ordinance is invalidated.
supervision, there is established a minimum date for release from supervision. It is the general policy of the Board that persons be released on or before the established release date, or other action taken to clearly extend the parole period.

"The problem arises in those cases wherein the minimum date for discharge approaches, and shortly before that date arrives, the parolee is arrested on other charges.

"For example, John Doe has a minimum date of discharge for October 26, 1977. On October 25, he is arrested and charged with a new offense. Some action is necessary quickly, in order that the discharge not be issued in the face of the new law violation.

"Currently, the Parole Board uses a form which allows the parolee to waive a hearing before the Board, and for the continuance of his parole. For your information, I attach a copy of the form.

"The use of this form allows the parolee to continue in his established environment, and does not require his immediate return for a hearing before the Board, incidental to the new arrest. It is my judgment that this procedure applies to the overall advantage of all concerned, more specifically the parolee. Unless this form or other procedure is available, it would be necessary to take custody of the parolee and return him to confinement for an immediate hearing by the Board, to determine whether parole should be continued in view of the new act of delinquency."

Although there are no definitive decisions of significance with respect whether hearings are required in cases where a minimum discharge date from supervision is to be extended, due process of law may require such hearings. Cf. Morrissey v. Brewer, 408 U.S. 471 (1972), wherein it was held that parole revocation hearings are required by due process of law; and Gagnon v. Scarpelli, 411 U.S. 778 (1973), wherein it was held that probation revocation hearings are required. It is to be noted that hearings to extend probation are required pursuant to § 19.2-304 of the Code of Virginia (1950), as amended. Assuming, arguendo, however, that such hearings are required by due process of law, in my opinion they may be waived by a parolee if the waiver is a voluntary, knowing, and intelligent one. Johnson v. Zerbst, 304 U.S. 458 (1938). In the waiver form, the parolee is informed that he has a right to hearing, a qualified right to appointment of counsel, a right to disclosure of evidence against him, an opportunity to be heard and present witnesses and evidence, and a qualified right to confront and cross-examine witnesses. The form clearly advises the parolee as to all rights to which he would be entitled. The form should be read to the parolee, and the officer should be satisfied that the parolee fully understands its contents before it is signed by the parolee. If this procedure is followed the form, in my opinion, may be used.

PARDON, PROBATION AND PAROLE—Halfway Houses—Director of Department of Corrections may not expend State funds for room and board in private facilities.

DEFINITIONS—"Halfway Houses"—Facility used for temporary housing
or rehabilitation for inmates, probationers or parolees established by
Director of Department of Corrections.

November 2, 1977

THE HONORABLE TERRELL DON HUTTO, DIRECTOR
Department of Corrections

This is in reply to your inquiry whether, pursuant to § 53-128.6 of the Code of
Virginia (1950), as amended, the Director of the Department of Corrections has
authority to expend State funds for the room and board of probationers and
parolees who are under the supervision of the Division of Probation and Parole
Services. You stated that the Division desired to contract with existing private
facilities to house or provide services in certain cases to such persons under
supervision and in need of the services offered by such facilities.

Section 53-128.6 provides as follows:

"The Director of the Department of Corrections is hereby authorized to
establish and maintain such a system of halfway houses as he may from time
to time purchase, construct or rent for the temporary care of adults who are
deemed capable of participation therein. The Director is further authorized
to employ necessary staff personnel for such facilities and to promulgate
such rules and regulations for the operation of such facilities as may be
appropriate. The Director is further authorized to advise and assist in-
dividuals, groups, corporations or other governmental agencies in the
establishment of halfway houses. The Director may, with the approval of
the Board of Corrections, provide minimum standards for the operation of
said facilities and, if such minimum standards are established, shall
maintain a list of approved halfway houses."

The General Assembly did not define the term "halfway houses" as used in
§ 53-128.6. I conclude that the term generally would refer to any facility used for
the temporary housing or providing of rehabilitative services to any person
sentenced to confinement in the Commonwealth and under the jurisdiction of
the Department of Corrections. Consequently, such facilities could be utilized
not only for inmates but also for probationers or parolees. A literal reading of
the section clearly shows that the General Assembly intended to authorize the
Director to establish and maintain such houses. The statute, however, does not
permit the Director to contract with private facilities to provide such services
although he may place probationers or parolees in such facilities if the facilities
have met minimum standards prescribed by him. You have indicated that as of
this time no minimum standards for the operation of such facilities operated by
the private sector have been prescribed by the Director. In my opinion,
therefore, the Director does not have authority to expend State funds for the
room and board of probationers and parolees in private facilities although he
may place probationers or parolees in such facilities at such time as they have
met minimum standards prescribed by him.

PARK AUTHORITIES—Dissolution Of Regional Park Authority—Section
15.1-1230 provides means—Obligation remains binding.

BOARDS OF SUPERVISORS—Authority—May guarantee repayment of
obligations of Regional Park Authority upon its dissolution.
REPORT OF THE ATTORNEY GENERAL

CONSTITUTIONAL LAW—Limitations On Local Debt—If member political subdivisions assume obligations of Regional Park Authority upon its dissolution.

COUNTIES, CITIES AND TOWNS—Authority—Dillon Rule—No authority in absence of expressed power in political subdivisions.

COUNTIES, CITIES AND TOWNS—Cities And Towns May Incur Debt Without Referendum, But Subject To Ceiling—Counties not subject to ceiling but must submit such obligations to referendum.

COUNTIES, CITIES AND TOWNS—Regional Park Authority—Dissolution—When and how governing bodies of member political subdivisions may assume obligations of Authority to guarantee repayment.

REFERENDUM—Requirement Of § 15.1-1236(b) For Is Applicable To Cities, Towns And Counties.

January 13, 1978

THE HONORABLE EDWARD A. PLUNKETT, JR.
County Attorney for Augusta County

This is in reply to your recent letter concerning the Upper Valley Regional Park Authority. You inquire as follows:

"Under what circumstances, if any, may the member political subdivisions of the Upper Valley Regional Park Authority dissolve the Authority and create a new Authority, with specified projects, despite the fact that obligations have been incurred which remain binding?"

Section 15.1-1230 of the Code of Virginia (1950), as amended, provides the means pursuant to which a Regional Park Authority may be dissolved. That statute provides in relevant part:

"Whenever an authority has been incorporated by two or more political subdivisions, any one or more of such political subdivisions may withdraw therefrom, and any political subdivision not having joined in the original incorporation may join in the authority but no political subdivision shall be permitted to withdraw from any authority after any obligation has been incurred by the authority and while any such obligation remains binding."

(Emphasis added.)

Withdrawal of all the member political subdivisions from the Upper Valley Regional Park Authority would result in its dissolution. You state that since its establishment in 1966, the Authority has incurred obligations which remain binding. Revenue bonds, however, have not been issued. Obviously, if these obligations are subsequently satisfied, the member political subdivisions of the Upper Valley Regional Park Authority may withdraw therefrom and dissolve the existing Authority. Because of the time necessary to satisfy the outstanding obligations, however, this may not be a practical solution. You indicate, however, that the governing bodies of the member political subdivisions may be willing to assume the obligations of the Upper Valley Regional Park Authority and thus guarantee their repayment.

An answer to your inquiry therefore requires a determination whether, and under what conditions, the governing bodies of member political subdivisions
may guarantee the repayment of the Authority's obligations. I must also determine whether such assumption of obligation would satisfy the requirements of § 15.1-1230.

Because they are creatures of the Commonwealth and thus subordinate, the powers of local governments can be no greater than those which the General Assembly has conferred upon them. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967). A local governing body may take action of the type your inquiry concerns only if it has been granted the power to do so, or if that power can be implied necessarily from those expressly granted. Any doubt as to the existence of a power must be resolved against the locality. See 1 J. Dillon Law of Municipal Corporations (1911).

Since there is no express grant of authority which would empower a local government to assume the obligations of a regional park authority, that power, if it is deemed to exist, must be implied necessarily from those powers expressly granted to counties, cities and towns.

The nature of a guarantee of obligations was discussed in Button v. Day, 205 Va. 629, 139 S.E.2d 91 (1964). In that case, the Supreme Court rejected the contention that a guarantee would be a conditional indebtedness, and that, accordingly, it would not be subject to the constitutional limitations on local debt. The court held that those limitations are applicable to all "obligations . . . or liabilities, which may directly or indirectly require the obligor . . . to discharge by the payment of money." Id. at 642. See also Opinion to the Honorable A. L. Philpott, Member, House of Delegates, dated August 25, 1977, a copy of which is enclosed. An assumption of obligations will require a locality to discharge debt by the payment of money. A local government thus cannot assume the obligations of an authority without thereby becoming subject to the constitutional limitations on local debt. Such constitutional limitations are set forth in Article VII, Section 10, of the Constitution of Virginia (1971), which states in part as follows:

"(a) No city or town shall issue any bonds or other interest-bearing obligations which, including existing indebtedness, shall at any time exceed eighteen per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes . . . .

* * *

"(b) No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt . . . unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt."

The distinction created by Article VII, Section 10, between the differing types of local governments is that cities and towns may incur debt without referendum, but are subject to a ceiling based on the assessed value of real property, whereas counties, unless they elect to be treated like municipal corporations, are not subject to any ceiling and must submit such obligations to referendum. II A. Howard Commentaries on the Constitution of Virginia 861 (1974).
The General Assembly has enacted laws which authorize cities and towns to expend funds to construct public facilities, including parks, and to incur debt to underwrite all or part of the costs of such improvements. See §§ 15.1-172, 15.1-175, 15.1-271 and 15.1-874. Specific charter provisions may grant further authority to fund such facilities. The debt incurred by any municipal corporation when it undertakes to assume the obligations of a regional park authority is thus subject to the debt limitations of Article VII, Section 10(a).

Counties are empowered by general statutes to expend public funds for parks. See §§ 15.1-185, 15.1-278 and 15.1-279. Should a county assume these obligations, it will be subject to the requirements of Article VII, Section 10(b).

Section 15.1-1236(b) grants local governments power to "contract with any authority created hereunder for park services; provided, however, that no political subdivision shall enter into any contract with an authority involving payments by such political subdivision to such authority for park services which requires the political subdivision to incur an indebtedness extending beyond any one fiscal year, unless the question of entering into such contract shall first be submitted to the qualified voters of the political subdivision for approval or rejection by a majority vote of such qualified voters voting in an election on such question; provided that nothing herein contained shall prevent any political subdivision from making a voluntary contribution to any authority at any time."

Your letter states that the obligations of the Authority which will be assumed by local governments extend beyond one fiscal year. The debt was incurred by the Authority in the course of creating a system of regional park facilities. The assumption of debt by local governments is therefore analogous to payments by a political subdivision to an Authority for park services. Since § 15.1-1236 requires approval of the qualified voters at a referendum on the question of contracting debt, the statute conforms to the requirements of Article VII, Section 10. Observe, however, that the referendum requirement of § 15.1-1236(b) is applicable to cities and towns, as well as to counties.

Since a local governing body is expressly authorized to expend public funds to construct and operate park facilities, and may make payments to an Authority for park services, it is my opinion that a locality has the power, by necessary implication, to assume the debts of a regional park authority. This power must be exercised by cities and towns within the restrictions established by Article VII, Section 10(a). Depending upon the manner in which a municipality assumes these obligations, the debt limitations of the Constitution of Virginia may be applicable. See Article VII, Sections 10(a)(1) through (4). Furthermore, the power may not be exercised by any locality until the qualified voters have granted their approval on the issue of incurring that debt at a referendum as required by Article VII, Section 10(b), and § 15.1-1236(b).

A local government cannot, however, assume unilaterally the obligations of a regional park authority. The Upper Valley Regional Park Authority is an independent entity. II A. Howard, supra, at 865. Its obligations are not those of the locality. Since assumption of obligations requires agreements in the nature of contracts between the Authority and the member political subdivisions, the assumption can only be consummated if the Authority accepts the localities' offer. See §§ 15.1-175(h) and 15.1-1232.

Should the member political subdivisions undertake to assume the obligations of the Authority, the question then arises whether such guarantee will permit the Upper Valley Regional Park Authority to dissolve. The purpose of § 15.1-1230,
which prohibits members of the Authority from withdrawing unless all outstanding obligations of the Authority are satisfied, is intended to protect the creditors of the Authority. Withdrawal of members prior to such time as the obligations are satisfied would threaten the position of those who have extended credit to the Authority. Should local governing bodies be willing to assume the debts of an Authority, they would be providing assurance to the creditors that the obligations will be satisfied and the creditors' position will be protected.

Therefore, should the local governing bodies which are members of the Upper Valley Regional Park Authority be willing to assume fully the outstanding obligations of the Authority, I am of the opinion that they may withdraw from Authority membership. Should all members withdraw, the Authority will be dissolved.

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**PHYSICIANS—Fee To Be Paid By Commonwealth**—To determine mental condition of prisoner when defense is insanity or feeblemindedness—M.C.V. faculty member not entitled to.

**AMENDMENTS—Physicians Eligible For Prescribed Statutory Fee Limited**—Examination to determine mental condition of prisoner.

**STATE EMPLOYEES—Full-time Geographic Faculty Member Of State Institution (M.C.V.) Is Regularly Employed Within Meaning Of § 19.2-175—Not eligible to receive payment for certain examinations of prisoners.**

October 26, 1977

THE HONORABLE ANDREW J. WINSTON

City Sergeant, City of Richmond

You have requested my opinion whether a "'full time geographic' member of the faculty at M.C.V.'" is eligible to receive payment for performing certain examinations of prisoners. The examinations are those required when a defense of insanity or feeblemindedness is raised.

Section 19.2-175 of the Code of Virginia (1950), as amended, provides for a fee, to be paid by the Commonwealth, to "[e]ach expert or physician or clinical psychologist skilled in the diagnosis of insanity or feeblemindedness or other physician appointed by the court to render professional service," i.e., an examination determining an individual's mental condition. The fee is not payable to any physician who is "regularly employed by the State of Virginia."

A "geographic" faculty member is a full-time employee, who is allowed a limited private practice as a condition of employment. Medical examinations pursuant to § 19.2-175 are not a part of the assigned duties of the faculty member who is the subject of your inquiry.

I am of the opinion that a full-time geographic faculty member of a State institution is regularly employed within the meaning of the statute and is not eligible to receive payment for performing the described services.

The prohibition against services by State employees was adopted in Ch. 657 [1968] Acts of Assembly 1058. In an Opinion to the Honorable Robert L. Rhea, Commonwealth's Attorney for Augusta County, dated November 18, 1966, and found in Report of the Attorney General (1966-1967) at 111, it was ruled that (in the absence of the current statutory language) a physician "regularly" employed by the Commonwealth could perform such examinations for compensation as long as they were not part of his assigned duties. The adoption of the 1968 Act
had the effect of excluding all regularly employed physicians without regard to whether the examinations were part of their assigned duties or part of an otherwise authorized private practice. In addition, the 1976 amendment to the statute deleted a provision which allowed regularly employed State employees to perform such examinations if they were on authorized leave. See Ch. 140 [1976] Acts of Assembly 179. This amendment had the effect of further limiting those physicians eligible for the prescribed statutory fee.

In light of the above, I am of the opinion that your inquiry must be answered in the negative.

PLANNING COMMISSIONS — Authority — To deny final approval of subdivision plat because developer declines to change location of road.

COUNTIES, CITIES AND TOWNS—Authorized To Establish Subdivision Regulations—Approval of site plan is ministerial act—Applicant must comply with local ordinance requirements.

ORDINANCES—Local Government May Not Include Any Requirement In Its Subdivision Ordinance Other Than Those Specifically Enumerated In Legislation.

SUBDIVISIONS — Planning Commission — Authority to examine location of proposed streets as related to existing and planned streets within or contiguous to subdivision.

April 4, 1978

THE HONORABLE ALEXANDER B. MCGRUIE, JR.
Member, House of Delegates

You have asked whether the Colonial Heights Planning Commission has authority to deny final approval of a subdivision plat because the developer declines to change the location of a road within the subdivision. You have said that the request to relocate the road was made by the Commission in order to provide access to undeveloped land, not owned by the developer, which is planned for future development.

State Law

Title 15.1, Chapter 11, of the Code of Virginia (1950), as amended, authorizes localities to establish subdivision regulations. Approval of a site plan is a ministerial act and the performance of that act may be compelled by mandamus when an applicant has complied, or is ready, willing and able to comply, with the local ordinance requirements. Planning Commission v. Berman, 211 Va. 774, 180 S.E. 2d 670 (1971). Prince William Co. v. Hylton Enterprises, 216 Va. (582), 221 S.E. 2d 534 (1976). Furthermore, a local government may not include any requirement in its subdivision ordinance other than those specifically enumerated in the enabling legislation. National Realty Corp. v. Virginia Beach, 209 Va. 172, 163 S.E. 2d 154 (1968), Board of Supervisors v. Horne, 216 Va. 113, S.E.2d 453 (1975).

Section 15.1-466(c) sets forth the provisions which must be included in a subdivision ordinance. That section provides that a subdivision ordinance shall contain provisions "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." See Opinions to the Honorable O'Conor G. Ashby, Acting County Attorney for Spotsylvania County, dated June 1, 1976, and found in Report of the Attorney General (1975-1976) at 165; and the Honorable Philip H. Miller, County Attorney for Augusta County, dated January 10, 1973, and found in Report of the Attorney General (1972-1973) at 302.

Local Ordinance

The subdivision ordinance of the City of Colonial Heights contains provisions which must be included in such an ordinance. Section 20-32 requires that the location of streets conform to the Master Plan or Trafficways Plan and be considered in relation to both existing and planned streets, and to the proposed use of land served by them.

Furthermore, § 20-33 provides that when a street is not shown in the Master Plan the arrangement of streets shall either provide for continuation of present streets into surrounding areas or, where continuation is not practical, that they conform to a neighborhood plan adapted to its particular situation.

The ordinance provides that if a final plat of a subdivision conforms to its requirements the plat will be approved. See § 20-24 of the City ordinance. Under State law the decision to approve must not be arbitrary or capricious. See § 15.1-475 of the Code of Virginia.

Conclusion

I am therefore of the opinion that the Planning Commission may examine, during the subdivision review process, the extent to which the location of proposed streets is related to existing and planned streets within or contiguous to the subdivision. If the Planning Commission finds that the proposed streets (A) do not conform to the Master Plan or Trafficways Plan; or when proposed streets are not shown on the Master Plan either, (B) that there is no provision for continuation or projection into surrounding areas; or, if continuation is not practical, (C) they do not conform to a neighborhood plan; and (D) that the developer is unwilling to change his plat, then the Planning Commission may deny final approval of the plat.

PLANNING COMMISSIONS — Authority — To purchase, mortgage, encumber, sell, exchange and convey real estate—Purchase building as office of commission staff.

January 31, 1978

THE HONORABLE CHARLES A. CHRISTOPHERSEN, DIRECTOR
Department of Intergovernmental Affairs

This is in reply to your recent letter in which you inquire whether a planning district commission has authority to purchase, mortgage, encumber, sell, exchange and convey real estate. You also inquire whether a commission may purchase a building to be used as an office for the commission staff. I am of the opinion that your questions must be answered in the affirmative.

Section 15.1-1404 of the Code of Virginia (1950), as amended, provides in pertinent part:
"(a) Upon organization of a planning district commission, pursuant to charter agreement, it shall be a public body corporate and politic, the purposes of which shall be to perform the planning and other functions provided by this chapter, and it shall have the power to perform such functions and all other powers incidental thereto. 

"(b) Without in any manner limiting or restricting the general powers conferred by this chapter, the planning district commission shall have power:

* * *

"(6) To exercise any power usually possessed by private corporations, including the right to expend such funds as may be considered by it to be advisable or necessary in the performance of its duties and functions.

* * *

"(9) To execute any and all instruments and do and perform any and all acts or things necessary, convenient or desirable for its purposes or to carry out the powers expressly given in this chapter." (Emphasis added.)

Under the general statutes in Virginia, corporations have the power:

"(d) To purchase, take by gift, devise or bequest, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein, wherever situated.

"(e) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of its property and assets." See § 13.1-2.1.

I am of the opinion, therefore, that a planning district commission has the power to purchase and hold real estate, secure a mortgage on the property, sell, exchange and convey it.

This power extends, however, only to such real estate as is reasonably necessary to carry out the purposes for which the corporation is organized, and corporations may not take and hold real estate for purposes wholly foreign to their creation. 19 Am.Jur.2d Corporations § 958 (1965). The purpose of a planning district commission is:

"...to promote the orderly and efficient development of the physical, social and economic elements of the district by planning, and encouraging and assisting governmental subdivisions to plan for the future. It shall not be the duty of the commission to perform the functions necessary to implement the plans and policies established by it or to furnish governmental services to the district." See § 15.1-1405.

The purchase of a building to be used as an office for the staff of a planning district commission will further the purpose for which such regional commissions are established. Such action will not constitute the performance of functions necessary to implement plans, or to furnish governmental services. I therefore conclude that the planning district commission has authority to purchase a building to house commission offices.
subdelegate responsibility to committee to speak for commission may not be implied.

PLANNING DISTRICT COMMISSIONS—Authority To Delegate Advisory Planning Responsibility To One Of Its Committees.

STATUTES—Commissions Are Creatures Of Legislature Without Inherent Or Common-law Power.

August 22, 1977

THE HONORABLE CHARLES A. CHRISTOPHERSEN, DIRECTOR
Department of Intergovernmental Affairs

This is in reply to your recent letter concerning the Virginia Area Development Act, codified as Chapter 34 of Title 15.1 of the Code of Virginia (1950), as amended. You state that a planning district commission has passed a resolution purporting to delegate its responsibility for transportation planning to a committee. The resolution contemplates that the committee will act independently, without further action by the commission on all transportation matters. You request my opinion whether a planning district commission can delegate any of its powers, to one of its committees.

Planning district commissions are public bodies established pursuant to general law by the Virginia Area Development Act. As public bodies, commissions are creatures of the legislature, without inherent or common-law power. Statutes relating to such agencies are interpreted strictly against the public body. 3 Sutherland Statutory Construction Public Grants 198 (1945). Any power provided to a planning district commission must therefore be conferred expressly or by necessary implication.

The authority of a public body to subdelegate discretionary powers and duties, in the absence of extenuating circumstances making it essential for the proper and efficient operation of the agency, is usually regarded with disfavor. Id. at 278.

No such authority has been conferred on planning district commissions by the Virginia Area Development Act. The Act provides for the organization of planning district commissions, and establishes procedures by which their membership is to be determined. The powers of such commissions are limited to regional planning activities and all other powers incidental thereto. See § 15.1-1404. The authority to subdelegate responsibility to a committee to speak for the commission on a regional planning issue thus may not be implied. A planning district commission, of course, may delegate the authority to assist in the planning and development of transportation policies to a committee, but official action in support of those policies, as well as the ultimate responsibility for those policies, must remain with the commission itself. The role of the committee is to advise the commission as a whole.

I therefore conclude that a planning district commission may delegate advisory planning responsibility to one of its committees. It may not, however, subdelegate the authority to speak for the commission to a committee, since such authority may not be implied from the Virginia Area Development Act.

Please note, however, that this Opinion does not address whether a committee of a planning district commission may be delegated authority to conduct specialized planning activities by a source other than the commission. An example of such a situation would concern a committee designated by an authority, other than the commission of which it is a part, to function as a
Metropolitan Planning Organization (MPO). As you know, those issues have been raised by your request of August 15, 1977, for an Opinion.

POLICE OFFICERS—Medical Examination Prescribed In § 51-122 Relating To Hypertension And Heart Disease Benefits—Who pays costs.

FIREMEN—Medical Examination Prescribed In § 27-40.1:1 Relating To Hypertension, Respiratory Disease Or Heart Disease—Who pays costs.

THE HONORABLE GARLAND L. FORRESTER
Sheriff of Lancaster County

This letter is in response to your inquiry concerning § 51-122 of the Code of Virginia (1950), as amended, as it relates to hypertension and heart disease benefits for police officers. You ask the following questions:

"First, is it necessary for the officers to have the examination as prescribed in the section in order to be eligible for the benefits? Secondly, if the examination is a requirement, who is responsible for the costs involved, the officer or the local governing body?"

Section 51-122 of the Code provides in pertinent part that:

"The death of, or any condition or impairment of health of, any member of a county, city or town police department, or of a sheriff or deputy sheriff, or city sergeant or deputy city sergeant of the city of Richmond, caused by hypertension or heart disease resulting in total or partial disability shall be presumed to have been suffered in the line of duty unless the contrary be shown by competent evidence; provided that prior to making any claim based upon such presumption for retirement, sickness or other benefits on account of such death or total or partial disability, such member, sheriff, or deputy sheriff, or city sergeant or deputy city sergeant of the city of Richmond, shall have been found free from hypertension or heart disease, as the cause may be, by a physical examination which shall include such appropriate laboratory and other diagnostic studies as such governing body shall prescribe and which shall have been conducted by physicians whose qualifications shall have been prescribed by such governing body; and provided, further, that any such member, sheriff, or deputy sheriff, or city sergeant or deputy city sergeant of the city of Richmond, or, in the case of his death, any person entitled to make a claim for such benefits, claiming that his death or disability was suffered in the line of duty shall, if requested by such governing body or its authorized representative submit himself, in the case of a claim for disability benefits, to physical examination by any physician designated by such governing body which examination may include such tests or studies as may reasonably be prescribed by the physician so designated or, in the case of a claim for death benefits, submit the body of the deceased to a postmortem examination to be performed by the medical examiner for the county, city or town appointed under § 19.1-40. Such member, sheriff, or deputy sheriff, or city sergeant or deputy city sergeant of the city of Richmond, or claimant shall have the right to have present at such examination, at his own
expense, any qualified physician he may designate."

This statute requires that in order to maintain any claim for benefits on account of death or disability caused by hypertension or heart disease, a police officer or his representative must provide a report of a prior physical examination in which such officer was found to be free from hypertension or heart disease. Section 51-122 also requires that any person making a claim for benefits shall, if requested by the governing body or its authorized representative, submit to a physical examination. Accordingly, it is my opinion that a prior report of a physical examination must be provided in order to maintain any claim for benefits on account of death or disability due to hypertension and heart disease, and that the employee may be required by the governing body to submit to an examination at the time of the claim.

The statute does not specify when such examination must be made, nor does it specify who will bear the cost of the examinations. I note that § 51-122 is virtually identical in language to § 27-40.1, which establishes a presumption to be applied with regard to any claim for benefits for the death or disability of fire fighters due to hypertension, respiratory disease, or heart disease. Section 27-40.1 was originally enacted in 1964, Chapter 216 [1964] Acts of Assembly 285, and rewritten in 1972, Chapter 607 [1972] Acts of Assembly 751. In 1973, § 27-40.1 was amended to make the presumption applicable to claims for death benefits and § 27-40.1:1 was enacted to implement the requirement for a physical examination contained in § 27-40.1. Section 27-40.1:1 required localities to provide for the examination of all fire fighters employed by a locality within 90 days from July 1, 1973. Chapter 543 [1973] Acts of Assembly 219. In the same year, a paragraph which was virtually identical to the 1972 version of § 27-40.1 was added to § 51-122 to establish a presumption applicable to claims for benefits by law enforcement officers. Chapter 499 [1973] Acts of Assembly 1065.

In 1976, the General Assembly amended § 27-40.1 to provide that if a locality failed to furnish an examination for fire fighters by certain dates, the presumption available pursuant to § 27-40.1 would apply without regard to the requirement regarding a prior physical examination. Chapter 772 [1976] Acts of Assembly 1239. In the same act, § 51-122 was amended to conform to the present language of § 27-40.1. Id. at 1240. No statute similar to § 27-40.1:1 was enacted to implement the examination requirement of § 51-122.

The General Assembly was aware of the similarity of the provisions of §§ 27-40.1 and 51-122. By failing to implement § 51-122 by enacting a statute similar to § 27-40.1:1, the General Assembly did not directly address the question as to when the examinations required by § 51-122 must be performed and who must pay the costs of such examinations. Section 51-122 requires that such examinations must include such appropriate laboratory and other diagnostic studies as the governing body shall prescribe and must be conducted by physicians whose qualifications are prescribed by the governing body. The statute also provides that, concerning the examinations conducted after a claim for benefits, a claimant has the right to have another physician in attendance at his own expense. While the statute arguably embodies an assumption that the costs of such examinations will be borne by a locality, I cannot, in the absence of an explicit directive as contained in § 27-40.1:1, opine that a locality is required to pay the costs of such an examination. A locality may thus require that an employee bear the costs of such examination or may pay such costs itself. Cf. Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977).
POLICE OFFICERS — Oaths — Under § 8.01-405 police may not administer out-of-court oaths to witnesses.

CIVIL PROCEDURE — Oaths — Section 19.2-267 expressly provides that § 8.01-405 is applicable to criminal and civil proceedings.

DEFINITIONS — Oaths — Group empowered to administer.

MOTOR VEHICLES — Oaths — Authority of State Police and police officers appointed by Commissioner of Division of Motor Vehicles to administer.

November 23, 1977

THE HONORABLE LYNN C. ARMENTROUT
Sheriff of Warren County

This is in response to your recent letter wherein you state as follows:

"I am writing in regard to Section 8.01-405, Code of Virginia to see if a Police Officer has the authority to administer an oath to a witness, when taking a voluntary statement from the witness in a criminal action."

Section 8.01-405 of the Code of Virginia (1950), as amended, states:

"Any person before whom a witness is to be examined may administer an oath to such witness."

Section 19.2-267 expressly provides that such section is applicable to criminal as well as civil proceedings.

An oath, in order to be effective, must be administered by an officer authorized to administer oaths. Except where the administration of an oath may be deemed an exercise of the inherent power of a court, an officer possesses only such authority to administer oaths as is conferred on him by constitution or statute. 67 C.J.S. Oaths and Affirmations § 5 (1950). Where an oath is given by a person having no legal authority to do so, such an oath is voluntary and cannot constitute grounds for perjury. 60 Am.Jur.2d Perjury § 6 (1972).

I direct your attention to § 49-4, which states in pertinent part:

"Any oath or affidavit required by law, which is not of such nature that it must be made in court, may be administered by or made before a justice of the peace . . ., a notary, a commissioner in chancery, a commissioner appointed by the Governor, or a court or clerk of a court or deputy clerk of a court, or clerks of city councils, common councils, or boards of aldermen . . . ."

Section 49-4 does not include police officers within the group specifically empowered to administer oaths. I am of the opinion that law enforcement officers may administer oaths only if specific statutory authority for such administration exists.

My research discloses only two statutes which provide such authority. Section 52-9 states that all State Police officers may administer oaths and take acknowledgments and affidavits which are "incidental to the administration and enforcement of all laws relating to the operation of motor vehicles, applications for operators' and chauffeurs' licenses and the collection and refunding of taxes levied on gasoline . . . ." Section 46.1-37 bestows an identical authority upon all police officers appointed by the Commissioner of the Division of Motor Vehicles.
In the absence of such circumstances, I must conclude that police officers as such lack the power to administer out-of-court oaths. Accordingly, my answer to your inquiry is in the negative. *Cf. Floyd v. Commonwealth*, 191 Va. 674, 62 S.E.2d 6 (1950) (memorandum of witness's oral statements to police officers inadmissible as evidence).

**PRIVACY ACT**—Arlington County Environmental Health Department May Disclose Master List And Supporting Files—Health inspections of restaurants, grocery stores and similar businesses—Disclosure required by Freedom of Information Act.

**CONFLICT OF LAWS**—Conflict Between Privacy Protection Act And Freedom Of Information Act On Letters Of Reference—No conflict in disclosure of master list of health inspections of businesses.

**PRIVACY ACT**—Master List On Health Inspections Contains Information About Businesses, Not Individuals—Act would not apply to dissemination of such records.

**RECORDS**—Master List And Supporting Files On Health Inspections Of Restaurants Are “Official Records” As Defined In Freedom Of Information Act.

October 25, 1977

THE HONORABLE JERRY K. EMRICH
County Attorney for Arlington County

This is in reply to your letter wherein you ask whether the Privacy Protection Act prohibits the Arlington County Environmental Health Department’s disclosure, upon citizen request, of its master list and supporting files pertaining to health inspections of restaurants, grocery stores and similar establishments. You indicate that the master list contains the name and address of an establishment, the date of last inspection and the number of health violations. Supporting files contain, among other things, inspection reports, citizen complaints and narrative reports by inspectors regarding action taken relative to complaints.

Both the master list and the supporting files relative to inspections of establishments are “official records” of the Arlington County Environmental Health Department as defined in the Freedom of Information Act, §§ 2.1-340 through -346.1 of the Code of Virginia (1950), as amended. The Freedom of Information Act requires that official records of governmental agencies be disclosed for public inspection upon citizen request unless otherwise specifically provided by law. *See § 2.1-342(a).* No provision of the Freedom of Information Act would, in my opinion, provide an exemption of these records from required disclosure. Further, I have reviewed Title 32 of the Code, which contains the health laws of the Commonwealth, and can find no provision which would prohibit or otherwise limit disclosure of such records.

The Privacy Protection Act of 1976 was enacted with the stated purpose of ensuring safeguards for personal privacy by record-keeping agencies of the Commonwealth and her political subdivisions. It does not generally prohibit agency disclosure of records containing “personal information.” *See § 2.1-380,*
paragraph 1. Rather, it requires certain administrative procedures attendant to
the collection and dissemination of "personal information" otherwise required
or permitted by law. See § 2.1-380, paragraphs 2-9. The Act's provisions, in any
event, apply only to collection and dissemination of records containing "per-
sonal information" as defined in § 2.1-379, paragraph 2. The master list, as
described in your letter, does not, in my opinion, contain personal information
as defined in § 2.1-379, paragraph 2, since the master list contains information
about businesses, not individuals. Accordingly, the Privacy Protection Act
would not apply to dissemination of such records.

With respect to the supporting files, I am unable to determine whether there
are, in such files, records containing personal information about individuals. To
the extent that supporting files do contain personal information, their disclosure
would not be prohibited by the Privacy Protection Act. As I noted above, § 2.1-
380, paragraph 1, does not prohibit disclosure of personal information, but
provides that agencies shall disseminate only that personal information per-
mitted or required by law to be disseminated. Inasmuch as the Freedom of In-
formation Act requires disclosure of such records pursuant to § 2.1-342(a), I am
of the opinion that the Arlington County Environmental Health Department's
disclosure of supporting files would be consistent with the provisions of the
Privacy Protection Act.

The situation presented by your inquiry is readily distinguishable from that
involved in my recent opinion to John W. Garber, Director, Department of
Personnel and Training, dated May 20, 1977, a copy of which I enclose. In the
Garber Opinion I ruled that because the Privacy Protection Act, specifically
§ 2.1-382B, prohibited disclosure of recommendations or letters of reference
contained in agency personnel files, the Privacy Act, as the later enactment,
controlled over conflicting provisions of the Freedom of Information Act [§ 2.1-
342(b)(3)], requiring disclosure of such records to the data subject. In this in-
stance, however, there is no conflict between the requirement of disclosure under
the Freedom of Information Act and the Privacy Protection Act, since no
provision of the latter statute prohibits disclosure of the records here in question.

PRIVACY ACT — Dissemination Of Personnel Seniority Rosters Of Arlington
County School Board—Personal information.

GRIEVANCE PROCEDURE—School Board May Disclose Entire Seniority
Roster To Employee For His Use In Processing Grievance In Application
Of Seniority.

SCHOOLS—Freedom Of Information—School Board required to disclose to
employee or his representative information relating to that employee.

SCHOOLS—School Boards—Required to maintain list of persons or
organizations provided access to personal information.

VIRGINIA FREEDOM OF INFORMATION ACT—Permits, But Does Not
Require, Agencies To Disclose Personnel Information—Security of in-
formation disseminated.

October 27, 1977

THE HONORABLE MARY A. MARSHALL
Member, House of Delegates
This is in reply to your letter in which you ask certain questions regarding the Privacy Protection Act, §§ 2.1-377 through -386, Code of Virginia (1950), as amended, as it may apply to dissemination of personnel seniority rosters of the Arlington County School Board. Specifically, you ask:

"1. Are employee seniority rosters deemed personal information within the meaning of § 2.1-379, paragraph 2?

"2. May seniority rosters be disseminated, per § 2.1-380, paragraph 5, to the teachers' association and other employee labor organizations that represent employees within the several employee groups?

"3. May the seniority roster be disclosed to an individual employee and/or his designated representative if the employee feels he has been aggrieved in the application of seniority and for the use of the employee and/or his designated representative in processing the grievance?"

Your letter indicates that seniority rosters contain the employee's name, dates of employment, number of seniority credits, job title and code, job location, and information whether employment is full or part time. Such information is clearly "personal information" within the meaning of § 2.1-379, paragraph 2, of the Code. Your first inquiry is, therefore, answered affirmatively.

Section 2.1-380, paragraph 1, provides that governmental agencies maintaining personal information systems shall disseminate only that personal information required or permitted by law to be disseminated or necessary to accomplish a proper purpose of the agency. I know of no provision of law that would prohibit dissemination of the information on such seniority rosters. The Freedom of Information Act, pursuant to § 2.1-342(b)(3), permits, but does not require, agencies to disclose personnel information. Accordingly, I am of the opinion that the Arlington County School Board may disseminate its employee seniority rosters to teachers' associations or other employee labor organizations so long as the requirements of § 2.1-380, paragraphs 5 and 7 are fulfilled. Section 2.1-380, paragraph 5, requires that the School Board ensure the security of the information disseminated to the extent it deems necessary through agreements with the receiving organization. Section 2.1-380, paragraph 7, requires that the School Board maintain a list of persons or organizations provided access to this personal information.

With respect to your third inquiry, I direct your attention to the provisions of § 2.1-382A, paragraph 3, subsections (a)-(c), which would require the School Board to disclose to any employee or his designated representative the information contained on rosters which relates to that particular employee. Further, I know of no provision of law which would prohibit the School Board from disclosing the entire seniority roster to an employee if the Board wishes to do so. Accordingly, I would respond to your final question in the affirmative.

PRIVACY ACT—Scholastic Records Constitute "Personal Information"—Act does not prevent educational institutions from disseminating student scholastic records to Director of Division of War Veterans' Claims for review in approving payment of tuition under § 23-7.1.

RECORDS—Buckley Bill—Federally assisted educational institutions may release student educational records for student's application for or receipt of financial aid.
SCHOOLS — Tuition — Children of certain war veterans attending Virginia educational institutions tuition free — Privacy Act does not prevent federally assisted institutions from releasing scholastic records to Director of Division of War Veterans' Claims.

October 21, 1977

THE HONORABLE HARRY F. CARPER, JR., DIRECTOR
Division of War Veterans' Claims

This is in reply to your letter in which you ask:

"The Code of Virginia, Paragraph 23-7.1, as it pertains to the admission of children of certain veterans to State Institutions, free of tuition, ... provides that the Director of the Division of War Veterans' Claims shall satisfy himself of attendance and satisfactory progress of such children of such institutions.

"The question arises as to whether the State Privacy Act prevents the school from furnishing information as to the satisfactory performance of an individual of a respective school. May they also furnish grades in order that a determination can be made regarding satisfactory progress, and whether or not the child is repeating subjects."

As you have noted, § 23-7.1 of the Code of Virginia (1950), as amended, provides that children of certain war veterans may attend Virginia educational institutions tuition free, the tuition being paid from State-appropriated funds upon approval of the Director of the Division of War Veterans' Claims. The Director's approval is dependent upon his determination of the child's attendance and satisfactory progress at the institution.

The Privacy Protection Act of 1976, §§ 2.1-377 through -386, imposes certain administrative requirements upon State and local agencies and institutions who collect, maintain and disseminate records containing "personal information." Scholastic records of students maintained by State-supported educational institutions do constitute "personal information" within the meaning of § 2.1-379, paragraph 2.

Section 2.1-380, paragraph 1, provides that agencies and institutions shall disseminate only that personal information which they are required or permitted by law to disseminate, or necessary to accomplish a proper purpose of the agency or institution. While educational institutions are not required to release scholastic records to persons other than the student or parents, institutions are permitted to release such records pursuant to § 2.1-342(b)(3). See Report of the Attorney General (1975-1976) at 305. I am, therefore, of the opinion that the Privacy Protection Act does not prevent educational institutions from disseminating student scholastic records to the Director of the Division of War Veterans' Claims for his review in approving payment of tuition under § 23-7.1 of the Code.

The Buckley Bill, 20 U.S.C. § 1232(g) (Supp. 1975), imposes certain limitations upon release of educational records by institutions receiving federal assistance. Pursuant to 20 U.S.C. § 1232(g)(b)(1)(D), however, federally assisted educational institutions may release student educational records for purposes of the student's application for or receipt of financial aid. Accordingly, the provisions of the Buckley Bill would not prevent federally assisted institutions from releasing scholastic records to the Director for his review under § 23-7.1. Your inquiry is answered in the affirmative.
PROFESSIONAL AND OCCUPATIONAL REGULATION—Engineering Firms Contracting Exclusively With Federal Government—Absent conflict with federal statute, performance of engineering services in Virginia subject to applicable licensing requirements.

CONFLICT OF LAWS—Supremacy Clause—Prohibits exercise of a state regulation where conflicts with federal statute or defined policy.

DEFINITIONS—“Professional Engineer”—Police regulation extends to those performing engineering services exclusively for federal government in Virginia—Licensing requirement.

November 23, 1977

THE HONORABLE RUTH J. HERRINK, DIRECTOR
Department of Professional and Occupational Regulation

This is in response to your letter in which you set forth the following situation and questions relating thereto:

“There are a number of firms located in the Commonwealth that act exclusively as contractors with the federal government. Many such entities provide services which include engineering as defined in § 54-17.1(2)(b) of the Code. For the purpose of this question, it may be assumed that the project in question is located on a federal government installation or outside of Virginia. However, the actual engineering tasks are being performed in the Commonwealth by the individual, firm or corporation on property owned or leased by such individual, firm or corporation. Further, it may be assumed that such firms do not render services to clients other than the Government of the United States, nor list themselves in the telephone directory as engineers or otherwise advertise engineering services to the general public.

“Given an individual that performs such engineering work, would it be necessary that he obtain licensing as a professional engineer? Further, would such a firm, should it wish to offer such services in a corporate form, be required to organize as a professional corporation?”

In the exercise of its police power, the Commonwealth of Virginia requires that each and every person seeking to practice as a “professional engineer” within the meaning of § 54-17.1 of the Code of Virginia (1950), as amended, be licensed by the State Board of Architects, Professional Engineers and Land Surveyors. See § 54-1.14; Clark v. Moore, 196 Va. 878, 881, 86 S.E.2d 37 (1955). At issue is whether this police regulation extends to those who perform engineering services for the exclusive use of the United States Government.

The Supremacy Clause of the United States Constitution, Article VI, C1. 2, provides that the U.S. Constitution and laws of the United States made in pursuance thereof shall be the supreme law of the land. A corollary to the Supremacy Clause is that the activities of the federal government exercised through its agents or instrumentalities are immune from regulation by any state. 72 Am.Jur.2d States § 19 (1974). The Supremacy Clause, therefore, prohibits the exercise of a state regulation where there is a conflict between the state law involved and some federal statute or defined federal policy. United States v. State Corporation Commission of Virginia, 345 F.Supp. 843, 847 (E.D. Va. 1972), aff’d, 409 U.S. 1094 (1973).

In Sperry v. Florida, 373 U.S. 379 (1963), the United States Supreme Court
held that a person registered to practice before the United States Patent Office who maintained an office in Florida was not engaged in the unauthorized practice of law in Florida. The Court in Sperry stated as follows:

"A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress." Id. at 385.

In response to your first question, it is my opinion that the determination whether a state licensing requirement for engineering work is prohibited where an individual is performing engineering services exclusively for the federal government depends upon an examination of the relevant federal statute or federal policy permitting such activity. Thus, where the grounds for licensing of contractors in Arkansas were similar to provisions of the Armed Services Procurement Act, 10 U.S.C. § 2301, et seq., regarding competitive bidding, it was held that a conflict existed between state law and the federal policy concerning a construction contract for a federal military installation. Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956).

In the absence of a conflict, I am of the opinion that the performance of engineering services for the federal government within the Commonwealth of Virginia is subject to the applicable licensing requirements. For example, a general rate increase allowed a state regulated telephone utility for its services has been held to apply to federal government facilities within the utility's service area where the United States could not show a federal statute, contract or prior course of conduct evidencing a federal policy of exemption from regularly established tariff rates. United States v. State Corporation Commission of Virginia, supra. Since your second question is based on an affirmative response to your first inquiry, it need not be answered at this time.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Guidance And Personnel Counselor—Associate guidance and personnel counselor.

AMENDMENTS—"Grandfather" Provision—Professional counselor.

DEFINITIONS—Professional Counselors Defined By Statute; § 54-932(a).

VIRGINIA BOARD OF BEHAVIORAL SCIENCE—Authority To License Professional Counselors.

VIRGINIA BOARD OF PROFESSIONAL COUNSELORS—Authority To Certify Qualifications Of Individuals For Licensure As Professional Counselors.

September 29, 1977

THE HONORABLE RUTH J. HERRINK, DIRECTOR
Department of Professional and Occupational Regulation

This is in response to your inquiry in which you ask the following questions:

"1.) Whether the language of § 54-935 encompasses both a person
certified as a guidance and personnel counselor under former § 54-102.17 and a person certified as an associate in guidance and personnel counseling under former § 54-102.19?

"2.) If the answer to number 1 is in the affirmative, does the Board have authority to distinguish two levels of Professional Counselors with different qualifications such as was provided for in § 54-102.17 and § 54-102.19 and 'grandfather' persons formerly certified under both sections into the two levels so designated?"

In 1975, the General Assembly enacted Chapter 5.2 of Title 54 of the Code of Virginia (1950), as amended, to govern the practice of guidance and personnel counseling in Virginia. See Ch. 648 [1975] Acts of Assembly 1350. Chapter 5.2 defined guidance and personnel counseling and provided for the certification of certain individuals to practice guidance and personnel counseling. See §§ 54-102.16 and 54-102.17. Section 54-102.17 sets forth as the requirements for certification: (1) a masters degree in guidance, personnel services, or educational counseling, or an equivalent degree, and (2) four years experience in guidance and personnel counseling. Other individuals could practice guidance and personnel counseling if the counseling was performed under the supervision and direction of a certified guidance and personnel counselor, a licensed psychologist, or a licensed psychiatrist. These individuals were certified as associate guidance and personnel counselors upon a showing that they (1) held a baccalaureate degree in guidance counseling, personnel services, or educational counseling, or an equivalent degree, and (2) were regularly employed by a certified guidance and personnel counselor, licensed psychologist, or a licensed psychiatrist. See § 54-102.19.

Chapter 5.2 was to expire and be of no effect on and after July 1, 1976. Ch. 648 [1975] Acts of Assembly 1350. The provisions of Chapter 5.2, however, were extended until January 1, 1977, at which time the provisions were repealed. See Ch. 608 [1976] Acts of Assembly 771. Effective on the same date, the Virginia Board of Behavioral Science was granted authority to license individuals to practice as professional counselors and the Virginia Board of Professional Counselors was granted authority to certify the qualifications of individuals for licensure as professional counselors. Professional counselors are defined by statute. See § 54-932(a).

Section 54-935, about which you inquire, is a "grandfather" provision and specifies that only those certified or qualified for certification "as a guidance and personnel counselor under Chapter 5.2" shall be granted a license to practice as a professional counselor. Chapter 5.2 of Title 54, to which § 54-935 refers, draws a distinction between certified guidance and personnel counselors and those certified as associate guidance and personnel counselors in terms of education, experience and working conditions. I am of the opinion, therefore, that § 54-935 does not encompass a person certified as an associate in guidance and personnel counseling under Chapter 5.2. Accordingly, your second question need not be answered.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Laryngectomees-License required for person practicing as speech pathologist for a fee—Laryngectomyee instructing other laryngectomees, without charging fee, not required to be licensed.
DEFINITIONS—"Audiology Or Speech Pathology"—When person is deemed to be practicing—Laryngectomee.

DEFINITIONS—"Speech Pathologist"—Fee charged by.

October 20, 1977

THE HONORABLE STANLEY C. WALKER
Member, Senate of Virginia

This is in response to your recent letter in which you ask whether a person instructing laryngectomees to regain the ability to speak, is required to obtain an occupational license. You state that members of the International Association of Laryngectomees have been instructing other laryngectomees in reacquiring the capacity to speak. The people rendering this service do not charge a fee, nor are they licensed to instruct laryngectomees.

As a result of the surgical removal of the larynx, a laryngectomee loses the ability to speak. The training of a laryngectomee to reacquire the capability to speak involves a nonmedical procedure whereby the laryngectomee is taught a technique of trapping and compressing air to produce a vibration in his throat which, combined with the normal articulation of words, produces speech.

Section 54-83.1:5(d) of the Code of Virginia (1950), as amended, defines the practice of audiology or speech pathology as follows:

"'The practice of audiology or speech pathology' shall mean the rendering or offering to render to communicatively impaired members of the public for a fee, monetary or otherwise, any nonmedical service, not authorized or permitted by some other licensure law of this State, relating to the prevention, diagnosis, evaluation and treatment of disorders of impairments of speech, language, voice or hearing, whether of organic or nonorganic origin. A person is deemed to be practicing audiology or speech pathology if he offers such services to the public under any descriptive name or title which would indicate that such professional services are being offered.'"

Section 54-83.1:5(f) defines a "speech pathologist" in the following manner:

"'Speech pathologist' shall mean any person who examines, tests, evaluates, treats or counsels, for which a fee may be charged, persons having or suspected of having disorders or conditions affecting speech, voice or language and who is not authorized or permitted by some other licensure law of this State to perform any such services."

With certain statutory exceptions, those persons who practice as speech pathologists, treating persons having a condition affecting their speech or voice for a fee, are required to be licensed by the Virginia Board of Examiners for Audiology and Speech Pathology. See § 54-83.1:7. The word "treatment" is a broad term which has been defined as "covering all the steps taken to effect a cure of an injury or disease." Black's Law Dictionary 1673 (Rev. 4th ed. 1968). Whether the instructing of a laryngectomee in the manner outlined is within the meaning of the term "treatment," however, is an issue that need not be decided. Even assuming, arguendo, that the practice outlined is a "treatment" within the ambit of § 54-83.1:5(d), no occupational license need be obtained since, as indicated, there is no fee, monetary or otherwise, charged for the service. Where no fee is charged for instructing a laryngectomee, I am of the opinion that a
person rendering such a service is not a speech pathologist within the meaning of § 54-83.1:5(f). Accordingly, there is no requirement that a person who trains a laryngectomee to regain the ability to speak without charging a fee be licensed to engage in such an endeavor. The answer to your inquiry is in the negative.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Licensed Land Surveyor May Not Prepare Engineering Plans And Specifications For Waterworks.

DEFINITIONS—“Waterworks;” “Practice Of Land Surveying.”


August 18, 1977

THE HONORABLE JAMES B. KENLEY, M.D.
State Health Commissioner

This is in reply to your request for my opinion whether a licensed land surveyor may prepare engineering plans and specifications for a waterworks. The term "waterworks" is defined as follows:

“All structures and appliances used in connection with the collection, storage, purification and treatment of water for drinking or domestic use and the distribution thereof to the public or more than twenty-five individuals, or in the case of residential consumers to more than fifteen connections, except only the piping and fixtures inside the buildings where such water is delivered." § 62.1-45(a) of the Code of Virginia (1950) as amended.

The practice of land surveying is defined as follows:

“(a) ‘Land Surveying’ includes surveying of areas for their correction, determination and description, and for the conveyancing, or for the establishment and reestablishment of internal and external land boundaries, and the plotting of land and subdivisions thereof. The plotting of land and subdivisions thereof may include the laying out and plotting of roads, streets and sidewalks, topography and contours setting forth road grades and determining drainage on the surface.

“(b) In addition to the work described above, a land surveyor may, for subdivisions, only, prepare plats, plans for profiles for roads, storm drainage and sanitary sewer extensions where such work involves the use and application of standards prescribed by local or State authorities. . . .” § 54-17.1 of the Code.

From the foregoing definitions, it is evident that the design of waterworks does not fall within the scope of the practice of land surveying. Accordingly, it would not be lawful for a person licensed as a land surveyor to prepare engineering design drawings for the construction of a waterworks. See § 54-1.14 (1)A of the Code.
PROFESSIONAL AND OCCUPATIONAL REGULATION—Optometrist—Unlawful to practice as lessee of any commercial or mercantile establishment.

DEFINITIONS—“Commercial Or Mercantile Establishment” Within Meaning Of § 54-388, Paragraph 2, (j) And (k)—Optical corporation; optometrist-employee.

STATUTES—Penal In Nature Must Be Strictly Construed—Optometrists as lessees under § 54-397.1.

THE HONORABLE HERBERT H. BATEMAN
Member, Senate of Virginia

You have asked whether an optometrist-employee of an optical corporation can practice optometry where the corporation leases its premises from a commercial or mercantile establishment.

Section 54-397.1, Code of Virginia (1950), as amended, renders it unlawful “for any optometrist to practice his profession as a lessee of any commercial or mercantile establishment.” It further provides that:

“Any optometrist who shall violate any of the provisions of this section shall be guilty of a misdemeanor and punished accordingly.

“Nothing in this section shall be construed as repealing subsections (j) and (k) of subdivision 2 of § 54-388.”

It is my understanding that an optometrist such as you describe would not himself be a lessee of either the optical corporation or of the firm which has leased space to the corporation. By its terms, § 54-397.1 applies only to optometrists who are themselves lessees. That statute is penal in nature and must be strictly construed. Accordingly, the optometrist you contemplate would not violate that statute.

That optometrist may, however, violate § 54-388, paragraph 2, (j) and (k), as a result of which his license could be revoked. Those statues, as construed by the Supreme Court of Virginia, permit any registered optometrist to practice optometry as a full-time employee on the premises of any commercial or mercantile establishment, but only if that establishment was employing a full-time registered optometrist in its established place of business on June 21, 1938. Cowardin v. Burrage, 195 Va. 54, 58, 77 S.E.2d 428, 431 (1953).

The question then is whether an optical corporation is a “commercial or mercantile establishment” within the meaning of § 54-388, paragraph 2, (j) and (k). Black's Law Dictionary (Rev. 4th Ed. 1968) defines “mercantile” as “having to do with . . . the business of buying or selling merchandise” (p. 1138), and defines “commercial establishment” as “a place where commodities are exchanged, bought or sold” (p. 337). If one may assume that the optical corporation to which you refer exists primarily for the purpose of manufacturing and selling optical products, any office, store or department operated by that corporation primarily for that purpose is a “commercial or mercantile establishment.”

Therefore, unless that optical corporation was employing a full-time registered optometrist at its established place of business on June 21, 1938, the optometrist to which you refer would be in violation of § 54-388, paragraph 2, (j) and (k), for which violation his license could be revoked.
REPORT OF THE ATTORNEY GENERAL

PROFESSIONAL AND OCCUPATIONAL REGULATION—Psychologists—New licensing provision required by Virginia Board of Behavioral Science—Internship.


DEFINITIONS—“Psychologist” And “Practice Of Psychology” Defined In § 54-102.1.

December 5, 1977

THE HONORABLE GERALD L. BALILES
Member, House of Delegates

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

"It is my understanding that until August, 1977, all applicants for licensure as a psychologist were eligible for licensure permitting the direct delivery of clinical services in an unsupervised private practice, provided that said applicants had two years of supervised experience in the direct delivery of clinical services. It is my further understanding that after August, 1977, only those applicants for licensure who can document an approved internship during one of the two years of required experience are eligible for licensure permitting the direct delivery of clinical services in an unsupervised private practice.

"Enclosed are certain materials relative to the new licensing provision required by the Virginia Board of Behavioral Science. The materials would indicate that the Board’s provision may involve an impermissible retroactive application to an applicant who has sought licensing by the Board. I would appreciate your review of the materials and would ask for a ruling on the validity of the Board’s application of its new requirement to an applicant who has been in the process of applying for licensure. In addition, please consider the question of whether the Board’s “approved internship” requirement is a permissible condition for licensing a psychologist to deliver direct clinical services."

The licensing of psychologists in Virginia has a relatively recent history. In 1966 the General Assembly enacted Chapter 5.1 of the Title 54 of the Code of Virginia (1950), as amended, establishing the Virginia Board of Psychologist Examiners: (1) to examine applicants seeking a license as a psychologist or as a clinical psychologist (2) to license qualified applicants to practice psychology and (3) to recommend qualified applicants to the State Board of Medical Examiners for licensure for the practice of clinical psychology. See Ch. 657 [1966] Acts of Assembly 1012. The terms “psychologist”, and “practice of psychology” were defined in § 54-102.1 of the Code of Virginia (1950), as amended. The General Assembly in 1974 amended §§ 54-102.2 and -102.3 and repealed §§ 54-102.4 through -102.13 with the direction that the repealed Code provisions be adopted by the Virginia Board of Psychologist Examiners as rules and regulations. See Ch. 534 [1974] Acts of Assembly 1002. Furthermore, the powers and duties of the Virginia Board of Psychologists Examiners were embodied in a new statute, § 54-1.10.

date, the Virginia Board of Behavioral Science was granted authority to license individuals to practice as psychologists and the Virginia Board of Psychologists Examiners was continued, *sub nomine*, Virginia Board of Psychology and granted the authority to certify the qualification of individuals for licensure as psychologists, clinical psychologists and school psychologists. The definition of "psychologist" and "practice of psychology" remain virtually unchanged in the new legislation. Compare § 54-102.1 with § 54-936.

Pursuant to §§ 54-1.10 and 54-927, the Virginia Board of Behavioral Science promulgated regulations, effective October 7, 1977, setting forth the educational and experience requirements of applicants for licensure as psychologists, clinical psychologists and school psychologists. In addition to the two year post-doctoral training requirement set forth in POR 2.2 of the regulations of the Board, the following internship experience is required:

"E. Internship Required for Licensure as Clinical Psychologist: An applicant for clinical licensure must provide documentation, by letters from the appropriate supervisor(s) or agency, of a clinical internship of at least one year continuous full time, or two calendar years of half time experience. An internship required by a regionally accredited institution for the granting of a doctorate degree in clinical psychology may be counted toward the required two years of post doctoral experience. The internship must be APA approved or meet the guidelines of the Board.

"F. Internship Required for Licensure as Psychologist with a Specialty in the Direct Clinical Service Area. Psychologists with a specialty in this area must provide documentation, by letters from the appropriate supervisor(s) or agency, of an internship of at least one year continuous full time, or two calendar years of half time experience. The internship experience shall be in an area relevant to the psychologist's proposed specialty and, if required by a regionally accredited institution for the granting of a doctorate degree in psychology, may be counted toward the required two years of post doctoral experience. The internship must be APA approved or meet the guidelines of the Board."

It is my opinion that the above-quoted internship regulations were promulgated in accordance with the Board's statutory authority and duty. Section 54-927, paragraph a, empowers the Board to promulgate qualifications for the licensing of psychologists "provided that all such qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation." Pursuant to § 54-929, paragraph b, the Virginia Board of Psychology developed and forwarded to the Board those qualifications it deemed necessary for licensure. Absent a showing that the internship requirements of POR 2.2 have no relationship to the practice of psychology or clinical psychology and cannot be fulfilled by reasonable means, I am of the opinion that the Board's internship requirements are valid conditions for licensing a psychologist to deliver clinical services to the public. See 16 Am.Jur.2d Constitutional Law § 323 (1964).

You have also asked for an opinion whether the internship provisions of POR 2.2 may be applied to an applicant who had submitted an application for licensure as a psychologist prior to the effective date of the regulation. The application in question was submitted in 1971 to the Virginia Board of Psychologists Examiners. On January 19, 1972, the applicant was informed that he had failed the oral examination administered by the Virginia Board of Psychologists Examiners and that credit for the objective and essay examinations would be available through two more attempts at the oral ex-
amination. I am unaware of any information which would indicate that the applicant has been denied an opportunity to retake the relevant oral examination prior to the repeal of the statutes empowering the Virginia Board of Psychologists Examiners to license qualified applicants as psychologists.

Generally, an amendment of the law pending an application is applicable to a prior application for a license. See 169 A.L.R. 584 (1947). Accordingly, as a general rule, the internship provisions of POR 2.2 may be applied to an applicant who submitted an application prior to the legislative amendment creating the Virginia Board of Behavioral Science. Based on the facts at hand, as mentioned herein, I am of the opinion that the application in question is subject to the current regulations of the Virginia Board of Behavioral Science.

PUBLIC OFFICERS—County Administrator Need Not Be Resident Of County At Time Of Appointment, But Must Become Actual Bona Fide Resident In Due Course.

CONFLICT OF LAWS—Conflict Between General Statute And Specific Statute; Specific Legislation Controls—Place of residence of county administrator.

DEFINITIONS—“Reasonable” Time Within Which County Administrator Must Become Actual Resident Of County.

July 5, 1977

THE HONORABLE HARRISON MAY
Commonwealth’s Attorney for Augusta County

This is in reply to your recent letter in which you request my opinion whether the County Administrator of Augusta County may continue to reside in the City of Staunton. You note that Staunton is the county seat of Augusta County, but is not, of course, a part of the County.

Section 15.1-51 of the Code of Virginia (1950), as amended, provides in pertinent part:

“... 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...”

A public officer occupies a position created by law with specific duties established by law, the conduct of which involve the exercise of a portion of the sovereign power. See Reports of the Attorney General (1975-1976) at 289, and (1968-1969) at 201. A county administrator is a public officer. See § 15.1-117 of the Code.

Section 15.1-116, however, provides in part that a county administrator “need not be a resident of the county at the time of his appointment, but must become an actual resident of the county and in due course a bona fide resident.”

Section 15.1-51 is a general statute dealing with the place of residence of county officers. Section 15.1-116 is a more specific statute which controls the place of residence of a county administrator. When a conflict arises between a statute dealing generally with a subject, and another dealing specifically with a
certain phase of it, the specific legislation controls. 73 Am. Jur. 2d Statutes § 257 (1974). In addition, where an act contains specific provisions they must be read as exceptions to a general provision in a separate earlier or subsequent act. Southern Railway Co. v. Commonwealth, 124 Va. 36, 97 S.E. 343 (1918).

I therefore concur with your opinion and am of the opinion that § 15.1-116 controls the place of residence of a county administrator. If the administrator of Augusta County was not a resident of the County at the time of his appointment, he must become an actual resident within a reasonable period of time; the determination of "reasonable" would be dependent upon the personal status of the individual who must move.

PUBLIC OFFICERS—Incompatibility—Member of County Board vacates position on Board if he qualifies as member of County Hospital and Health Center Commission.

PUBLIC OFFICERS—Appointment Or Election—Individual only qualifies for an office if he is able to assume its duties and is capable of holding the office.

PUBLIC OFFICERS—Appointment Or Election To Public Office Does Not Result In Qualification—Must accept appointment and assume functions of office.

PUBLIC OFFICERS—Compatibility—Arlington County Health and Hospital Center Commission not activated until term of office of Commissioner who is member of County Board had expired—Provisions of § 15.1-50 not applicable.

PUBLIC OFFICERS—Defined.

PUBLIC OFFICERS—Members Of Arlington County Hospital And Health Center Commission Are.

January 13, 1978

THE HONORABLE JERRY K. EMRICH
County Attorney for Arlington County

This is in reply to your recent letter concerning a member of the Arlington County Board. You inquire whether the member's appointment to the Arlington County Hospital and Health Center Commission resulted in vacation of his position on the County Board.

The member was serving on the County Board on March 20, 1973, when the Commission was created pursuant to § 32-276 of the Code of Virginia (1950), as amended. All the existing Board members were appointed to a one-year term on the Commission pursuant to § 32-279 at that time. On February 23, 1974, the member was appointed to a second one-year term of office on the Commission. When that term expired in 1975, he was not reappointed to the Arlington County Hospital and Health Center Commission. On January 1, 1975, following his reelection, the member began serving another term on the County Board.

From its creation by the Board in 1973 until August, 1975, the Commission neither met nor performed any of the powers authorized by § 32-280. In August, 1975, the Commission was activated and began to implement its authorized
powers without any members of the Arlington County Board as Commission members.

Section 15.1-50 provides in relevant part that subject to certain exclusions not pertinent here:

"No person holding the office of county treasurer, sheriff, attorney for the Commonwealth, county clerk, commissioner of the revenue, superintendent of the poor, or supervisor shall hold any other office, elective or appointive, at the same time . . . ."

"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 . . . ." (Emphasis added.)

This statute provides that no person holding one of the offices enumerated in the first paragraph may be appointed or elected to a second public office. If he is, qualification in office is a bar to the right to qualify in one of the enumerated offices. Further, if, while holding one of the enumerated offices, he is appointed to any other public office, his qualification in the second office shall require him to vacate the enumerated office.

Arlington County is organized and governed under the County Manager form of government, which is codified as § 15.1-674, et seq. I am of the opinion that a member of the Arlington County Board is subject to the provisions of § 15.1-50.

In determining whether a position is a public office several criteria must be considered. One important consideration is that, to constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office. See Reports of the Attorney General (1976-1977) at 110, (1974-1975) at 375 and (1962-1963) at 213. See also 63 Am.Jur.2d Public Officers and Employees § 12 (1972).

The members of the Arlington County Hospital and Health Center Commission are public officers since they meet the above criteria. See § 32-276. Therefore, should the member of the County Board have qualified as a member of the Commission, he will have vacated his position on the Board pursuant to § 15.1-50.

Mere appointment or election to a public office does not result in qualification in that office. In order to qualify for a public office, an individual must accept the appointment and assume the functions of the office. See Report of the Attorney General (1963-1964) at 246. Following election or appointment, an individual only qualifies for an office if he is able to assume its duties and is capable of holding the office. Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952); Shepard v. Sartain, 185 Ala. 439, 64 S. 57 (1913); McCluskey v. Hunter, 33 Ariz. 513, 266 P. 18 (1928); Martin v. Granview, 266 S.W. 607 (Tex. 1924). For example, the taking of an oath of office is indicative of the qualification for an office. See Report of the Attorney General (1971-1972) at 211.

The Arlington County Health and Hospital Center Commission was not activated until the term of office of the Commissioner who is a member of the County Board had expired. Minutes of County Board meetings indicate that at all times, when the Board discussed matters pertinent to the Commission, it was
sitting as the County's governing body and not as the Hospital and Health Center Commission. Since the Commission was not activated during his term, the Board member did not accept the appointment to the Commission, nor did he assume the responsibilities of the office.

I am therefore of the opinion that the provisions of § 15.1-50 are not applicable here. The member's term on the Commission ended prior to the inception of his present term of office as a member of the Arlington County Board. He remains a member of the County governing body and has not vacated that office.

REAL ESTATE—Estates Of Those Dying On Or After July 1, 1977—Surviving spouse's interest in.


AMENDMENTS—Retroactive Operation—Estates of those dying on or after July 1, 1977—Surviving spouse's interest in real estate.

DEEDS—Contracts For Sale Of Real Estate Entered Into Prior To July 1, 1977, Amendment To § 64.1-19.

November 3, 1977

THE HONORABLE CALVIN G. SANFORD
Member, House of Delegates

I have received your letter in which you make two inquiries regarding § 64.1-19 of the Code of Virginia (1950), as amended. I shall answer your inquiries seriatim.

Question No. 1. As to real property owned or acquired by a spouse during coverture but prior to July 1, 1977, if such spouse dies after July 1, 1977, what is the dower or curtesy interest to the surviving spouse: a one third undivided fee simple interest or a one third life estate?

Answer: Section 64.1-19 provides, in pertinent part, that:

"A surviving spouse shall be entitled to a dower or curtesy interest in fee simple of one third of all the real estate whereof the deceased spouse or any other to his use was at any time seized during coverture of an estate of inheritance, unless such right shall have been lawfully barred or relinquished." (Emphasis added.)

The 1977 amendment to § 64.1-19 amended the statute by inserting the phrase "in fee simple" in the first sentence of the section. See Ch. 657 [1977] Acts of Assembly 1309. The emphasized language of the section clearly indicates that the section operates retroactively. In view of the 1977 amendment and the clear statutory language, it is my opinion that § 64.1-19, now, provides that for estates of those dying on or after July 1, 1977, the surviving spouse shall be entitled to a dower or curtesy interest in fee simple of one third of all real estate whereof the deceased spouse was seized at any time during coverture of an estate of inheritance, unless such right shall have been lawfully barred or relinquished.

Question No. 2. What is the meaning of the last sentence of § 64.1-19, to-wit:
"This section shall not change the nature of any dower or curtesy interest retained in real estate transferred to a grantee or made the subject of a valid contract prior to July one, nineteen hundred seventy-seven"?

Answer: This language conveys the General Assembly's intent that the 1977 amendment does not operate to alter the nature of any dower or curtesy interest retained or reserved prior to July 1, 1977. It is my opinion, therefore, that for all deeds and valid contracts for the sale of real estate entered into prior to July 1, 1977, wherein the grantor(s) reserves or retains a dower or curtesy interest, such retained interest shall constitute a one third life estate, not a fee simple of one third.

RECORDATION—Burial Contracts Between Individuals And Funeral Homes Must Be Recorded—If personal property only, recorded in miscellaneous lien book; real property, or real and personal property, recorded in deed book.

FEES—Recordation By Clerk Of Burial Contracts Between Individuals And Funeral Homes.

September 12, 1977

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

This is in reply to your request for my opinion whether burial contracts between individuals and funeral homes must be admitted by the clerk to record, and if so, to what record. This Office has previously opined that § 11-24 of the Code of Virginia (1950), as amended, requires that the clerk admit such burial contracts to record. See opinion to the Honorable C. W. Smith, Clerk, Circuit Court of Washington County, dated July 14, 1971, and found in Report of the Attorney General (1971-1972) at 428.

If the burial contract relates to or affects only personal property, it shall be recorded in the miscellaneous lien book. See § 17-61 of the Code. If, on the other hand, the burial contract relates to or affects real property, or both real property and personal property, the contract shall be recorded in the deed book. See §§ 17-60 and 17-61 of the Code. Fees for such recordation are prescribed by § 14.1-112.

RECORDATION—Clerk Of Circuit Court Required To List On Recordation Receipt All Grantors And Grantees Named On Deed.

CLERKS—Information Clerk Is Required To Furnish Commissioner Of Revenue On His Copy Of Recordation Receipt.

DEEDS—Recordation Receipt For Deeds Of Conveyance And Deeds Of Partition—Information clerk must include on.

May 24, 1978

THE HONORABLE JUANITA E. SHIELDS, CLERK
Circuit Court of the City of Lynchburg
You have asked (1) whether § 58-797 of the Code of Virginia (1950), as amended, requires the clerk of the circuit court to list upon the recordation receipt all grantors and grantees named on a deed, and (2) what information the clerk is required to furnish the commissioner of the revenue on his copy of the recordation receipt.

I shall answer your questions in order.

1. For all deeds of conveyance and deeds of partition, § 58-797 requires, in part, that the recordation receipt include "the name of the grantor and grantee." This statute also provides that the clerk supply the commissioner of the revenue with a copy of the receipt. The commissioner of the revenue uses this receipt to assist him in making up the land book. Naturally, it is important that the commissioner of the revenue have at his disposal the information which will enable him to show upon the land books the present owners of the land, in a manner prescribed by law.

Thus, it is my opinion, that even though the statute is written in the singular, the clerk is required to list all grantors and grantees upon the recordation receipt. See Jennings v. City of Norfolk, 198 Va. 277, 283, 93 S.E.2d 302, 307 (1956).

2. For deeds of conveyance and deeds of partition, it is my opinion that the receipt shall state: the date of the deed; when the deed is admitted to record; the name(s) of the grantor(s) and grantee(s); the address(es) of the grantee(s), if known; the quantity and a brief description of the land conveyed and the specified value thereof. See § 58-797. With specific reference to the identity of the grantor(s) and grantee(s), it is my opinion that the receipt should recite the name and other identifying remarks contained in the premise (first part) of the deed. See 5B M.J. Deeds § 19; 2 Minor on Real Property § 1031 (2d ed. Ribble 1928).

RECORDATION—Fees And Other Charges Payable On Recordation Of Certificate Of Satisfaction, And Certificate Of Transfer In Lieu Of Marginal Notation On Deed Of Trust.

June 5, 1978

THE HONORABLE FREDERICK F. JACKSON, CLERK
Circuit Court of the City of Alexandria

You ask two questions regarding fees and other charges to be paid upon the recordation of a certificate of satisfaction, which evidences the payment of a debt secured by a deed of trust, and a "certificate of transfer," which a party is seeking to record in lieu of a marginal notation on a deed of trust.

Fee for Certificate of Satisfaction

Section 55-66.7 of the Code of Virginia (1950), as amended, provides that the clerk's fee shall be $2.50 for the recording of a certificate of satisfaction. You wish to add an additional $1.00 charge pursuant to § 14.1-112(1), for a total charge of $3.50. I am of the opinion that the total charge allowable for the recordation of a certificate of satisfaction is $2.50, the amount specified in § 55-66.7. The $1.00 fee permitted by § 14.1-112(1) is the fee a clerk is to receive "generally," that is, whenever the Code does not specify a fee. To permit a charge of $3.50 would be to allow two fees for the performance of one service.

This view is supported by an examination of Chapter 469 [1975] Acts of Assembly 805, in which the certificate of satisfaction procedure was initially
adopted. An amendment to § 17-60 was necessary to acknowledge that the certificate of satisfaction was a document properly recordable in the deed book. As a part of the same act, § 55-66.7 was amended to state that the clerk’s fee “for a release . . . shall be two dollars and fifty cents when recorded by a certificate of satisfaction . . .” [Emphasis added.] Thus the general reference in § 14.1-112(1) to Chapter 2 of Title 17 (wherein § 17-60 is found) does not allow the clerk to add an additional fee for admitting the certificate to record; that very service is to be compensated for pursuant to § 55-66.7.

Recording Tax on Certificate of Transfer

Your second question arises because you are no longer making marginal notations on deeds of trust in preparation for a procedural change to the microphotographic recording of documents. The microphotography process makes it impractical or impossible to enter marginal notations upon previously recorded instruments, and § 17-60.1 was enacted in 1975 to provide a procedure to replace the entry of marginal notations. To achieve this end, “certificates of transfer” were developed under the authority granted by § 17-60.1 and modeled after the forms for certificates of satisfaction and partial satisfaction found in § 55-66.4:1, which are not taxable instruments. You ask whether you can demand payment of the recordation tax imposed by § 58-58 for the recording of these certificates of transfer.

I am of the opinion that a certificate of transfer is to be treated in the same way as a marginal notation. The entry of a marginal notation does not trigger the recordation tax under § 58-58. It merely places parties on notice that the note underlying the deed of trust has been assigned to a different holder. The marginal notation is not a contract or memorandum relating to real estate. Neither is the certificate of transfer; it is one party’s (the assignor) certification that the note has been assigned. It does not bear the assignee’s signature and is of limited legal significance. The act of indexing the certificate does not incur recordation tax liability. Only the fee required by § 55-66.7 may be collected by the clerk.

Your letter refers to an Opinion to the Honorable Julian Updike, Clerk of the Circuit Court of Warren County, dated May 20, 1958, and found in Report of the Attorney General (1957-1958) at 278. The Updike opinion held that the recording of an assignment of a deed of trust, a formal document, was subject to tax under § 58-58; however, the fact situation involved there differs from the one you present. The certificate of transfer is not an assignment instrument and, therefore, does not rise to the level of a contract or memorandum as contemplated by § 58-58. Moreover, the Updike opinion specifically mentions the marginal notation procedure as being tax-free and the more usual technique of placing other parties on such notice. For these reasons, the Updike opinion is not controlling in this instance.

You also mention that the deed of trust states that it secures $3,549,600 while the certificate lists the amount secured as $3,488,400. This difference in amounts probably reflects the payments made since the deed of trust was recorded in February 1976.
DEFINITIONS—"Institution Of Learning"—Proper level of education at which to commence exemption is first level in public school system.

RECORDATION—Tax Is A Privilege Tax, Not A Property Tax—Exemptions strictly construed against taxpayer—Project HOPE.

January 4, 1978

The Honorable J. H. Wood, Jr., Clerk
Circuit Court of Clarke County

This is in response to your letter from which I quote:

"This office has recently been presented with a deed transferring title to property in this county to 'People-to-People Health Foundation, Inc., a D.C. Corporation.'

"It is our understanding that the present plans provide for moving the national headquarters of the grantee to the subject property and that the property will also be utilized to conduct classes in the various phases of 'Public Health Techniques.'

"Please advise, if in your opinion, the grantee falls within the definition of 'other incorporated institution of learning' as stated in Section 58-64 of the Code, and is therefore exempt from the statutory recording taxes."

I am advised that the grantee organization is a nonprofit corporation more popularly known as Project HOPE. Literature published by Project HOPE indicates that it utilizes a team teaching approach to train professional and auxiliary personnel in many aspects of health care in this country and throughout the world, and its teaching programs span "the entire spectrum of the health sciences from medicine, nursing, dentistry, every kind of paramedical science, . . . to the lowest levels of the support fields."

Section 58-64 of the Code of Virginia (1950), as amended, provides that the State recordation taxes "shall not apply to any deed conveying real estate to an incorporated college or other incorporated institution of learning, not conducted for profit, where such real estate is intended to be used for educational purposes and not as a source of revenue or profit; . . . ." (Emphasis added.) The State recordation tax is a privilege tax, not a property tax; and exemptions from such taxes are strictly construed against the taxpayer. Commonwealth v. Community Motor Bus, 214 Va. 155, 157, 198 S.E.2d 619, 620-621 (1973).

The phrase "institution of learning" generally embraces the concept of an organization with a faculty, a student body, and a course of study, wherein capable persons are in the position to impart knowledge and skill to others who are in the position to learn them. See Reports of the Attorney General (1975-1976) at 348-349, and (1968-1969) at 228. The Supreme Court of Virginia had occasion, in Department of Taxation v. Progressive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975), to construe the phrase "institution of learning" as that phrase appears in a sales and use tax exemption statute, § 58-441.6(t). The Court, applying a rule of strict construction, acknowledged the aforementioned basic criteria of an "institution of learning" and held that "the proper level of education at which to commence the exemption is that accepted as the first level in the public school system. . . ." 215 Va. at 739, 213 S.E.2d at 763.

In this instance, there is no doubt that the grantee-organization is a nonprofit corporation which is primarily engaged in a teaching function, involving a higher
than first level curriculum. Based upon the information presented to me, I conclude that the teaching staff of Project HOPE constitutes a "faculty" and the recipients of the knowledge imparted thereby constitute a "student body." It appears, also, that the land to be conveyed will be used by the grantee for administrative purposes essential to its overall operation and not as a source of revenue or profit.

Based upon the foregoing, it is my opinion that the grantee-organization qualifies as an "other incorporated institution of learning" within the meaning of § 58-64. This result is not changed if the grantee intends to build its main administrative offices on the parcel, since the tax exemption applies to property used for purposes immediately and directly related to the exempt purpose. See *City of Richmond v. United Givers Fund of Richmond*, 205 Va. 432, 438, 137 S.E.2d 876, 880 (1964).

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**RECORDATION—Separate Fee For Recording Each Document—Affidavit; Power of Attorney; Bargain and Sale.**

**GENERAL ASSEMBLY—Recordation By Clerk—Certain documents deemed of such primary importance that separate recordation is required—Affidavit and Power of Attorney are documents of equal dignity, not mere supportive paper of the other.**

October 26, 1977

**THE HONORABLE HUGH L. STOVALL, Clerk**

**Circuit Court of the City of Norfolk**

This is in response to your letter in which you asked whether your practice of charging fees for certain instruments recorded in the clerk's office was proper. The fact situation you posed was as follows:

"My office was presented with an Affidavit stating that the Power of Attorney had not been revoked by death, etc., which is in compliance with Virginia Statute 11-9.2. The Affidavit was to be filed simultaneously with the Power of Attorney and a Bargain and Sale. When the person was confronted with the fact that I interpret the Code as stating that an Affidavit is a separate instrument and, as such, should be recorded separately, and a regular fee should be charged for putting it to record, he attached the Affidavit to the Power of Attorney, which I refused to record as a part of the Power of Attorney. He then attached the Affidavit to the Bargain and Sale, which I still refused to record, . . . My question is whether the above was the proper way to handle this matter, . . ."  

It is my understanding that this was a real estate transaction for which recordation of all the above-named documents is necessary to protect the parties involved. I also understand that the long-standing administrative practice is to consider these three documents as separate instruments requiring separate entries in the deed book, and thus warranting separate fees for each.

The relevant statutes are §§ 11-9.2, 17-59, 17-60, and 14.1-112 of the Code of Virginia (1950), as amended. Section 11-9.2(b) provides "[i]f the exercise of the power [of attorney] requires execution and delivery of any instrument which is recordable under the laws of this State, such affidavit when authenticated for
record in the manner prescribed by law shall likewise be recordable." Section 17-60 requires that "powers of attorney to convey real estate . . . shall, unless otherwise provided, be recorded in a book to be known as the deed book." All deeds, grants, and transfers of real estate are likewise required to be recorded in the deed book. Section 17-60. Section 14.1-112 controls the fees charged by Circuit Court clerks for the services they perform, which are described in the provision.

Section 14.1-112(2) speaks of recording and indexing "any writing and all matters therewith." Any writing is singular but the subsection continues to say "all matters therewith." Section 14.1-112(1) speaks of "a writing . . . [and] for everything related to it," but then provides an explanation as to what matters are related, such as receiving proof of acknowledgments, entering orders, endorsing a clerk's certificate and embracing it in a list for the Commissioner of Revenue. Section 17-59 also refers to "[e]very writing . . . with all certificates, plats, schedules or other papers thereto annexed or thereon endorsed." Reading these provisions together, it is apparent that "writing" is singular and means the particular document or instrument which is entered in the deed book, while the related papers pertain to those supportive or probative of the document which the clerk is required to admit to record. Thus, the clerk is required to record the power of attorney pursuant to § 17-60, if it is in proper form. Those auxiliary certificates necessary to comply with statutory requirements, such as the acknowledgment, are the related matters included with the writing and referred to in §§ 14.1-112(1), 14.1-112(2), and 17-59.

A reading of the aforementioned sections of the Code demonstrates that the General Assembly has specifically considered the various documents which may be submitted for recordation. The result is that certain documents are deemed of such primary importance that separate recordation is required, while other papers are mere auxiliary writings which are to be annexed to the primary documents. It must be determined whether the § 11-9.2 Affidavit is a primary or auxiliary writing.

The formalities required of a valid power of attorney (certificate of acknowledgment pursuant to § 55-120) are no greater than the authentication required of § 11-9.2 affidavits for recordation purposes. Section 11-9.2 is found in Chapter 1 of Title 11 along with the Statute of Frauds and contracts which must be in writing to be legally enforceable. It appears that both statutorily required instruments are of equal dignity, and nowhere is it provided that they are to be recorded together or jointly.

It is arguable that the Bargain and Sale agreement is the key document because its recordation is necessary to establish the chain of title and that the power of attorney is a mere supportive document. Section 17-60, however, specifically requires recordation of the power of attorney when real estate conveyances are involved. Section 17-60 does not state that such documents are to be recorded together or jointly. The power of attorney and the affidavit are documents of equal dignity such that neither can be considered a mere supportive paper of the other. A properly executed affidavit is "conclusive proof of the nonrevocation or nontermination of the power." The affidavit is no more a part of the bargain and sale than the power of attorney. In my opinion, it is reasonable to consider them all as separate instruments. I am advised that this is the general policy followed by clerks throughout the Commonwealth.

RECORDATION—Tax On Deed Of Trust Securing Promissory Note—
Secondary financing called "wrap-around financing."

**TAXATION—Recordation Tax**—Measured by entire amount of obligation secured by Second Deed of Trust.

**TAXATION—Recordation Tax**—Second Deed of Trust fails to qualify for exemption under § 58-60—Additional sum owed by second loan; different holder.

October 20, 1977

THE HONORABLE DAVID A. BELL, CLERK
Circuit Court of Arlington County

I have received your recent letter wherein you inquire as to the proper recording tax to be levied on a deed of trust which secures a promissory note arising out of a form of secondary financing referred to as "wrap-around financing."

The facts as presented to me are as follows:

In order to secure additional commercial financing, a borrower executes a note in the face amount of $6,500,000, which amount represents the sum of the total indebtedness outstanding on a First Note and First Deed of Trust ($4,434,780.93), plus additional money loaned ($2,065,219.07). A recordation tax was paid upon the recording of the First Deed of Trust. To secure the Note, the Borrower conveys certain real property in trust to the lender pursuant to a Second Deed of Trust. The Second Deed of Trust is subordinate to the First Deed of Trust but, it recites that its purpose is "... to secure the prompt payment of the Indebtedness, when and as the same shall become due and payable, according to the Note, ..." (Emphasis added.) The "Indebtedness," as defined in the Second Deed of Trust, includes principal and interest due under the "Note." The Second Deed of Trust also obligates the Lender of the amount secured thereby to make all payments due the Holder of the First Note in accordance with the terms thereof. The Holder of the First Note is a party other than the Holder of the Second Note.

Your inquiries are whether the recordation tax imposed on the Second Deed of Trust is based upon the actual face amount of the Note secured thereby ($6,500,000), or on the additional money loaned ($2,065,719.07), and does this "wrap-around" Second Deed of Trust qualify as a supplemental deed of trust within the meaning of § 58-60?

Section 58-55, Code of Virginia (1950), as amended, provides, inter alia:

"On deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or other obligations secured thereby." (Emphasis added.)

The "obligations secured thereby" in this instance is an indebtedness in the amount of $6,500,000. Accordingly, unless there is an exemption under § 58-60, the tax should be collected upon the entire amount ($6,500,000). Section 58-60 exempts certain supplemental deeds of trust from the tax imposed by § 58-55 provided it has been paid upon the recordation of the original instrument.

This exemption, however, is limited by the requirement that "... the sole purpose and effect of the supplemental ... [instrument] is to convey ... property, real or personal, in addition to or in substitution ... of the property
The Second Deed of Trust fails to qualify for exemption under § 58-60 for two reasons:

First, the Second Deed of Trust is given to secure both the outstanding amount secured by a previous deed of trust and an additional sum owed as a result of a second loan. Consequently, the sole purpose of the new deed of trust is not to secure or to better secure the payment of the amount secured by the original instrument.

Second, the Second Deed of Trust does not "secure" or "better secure" the payment of the First Note. The holder of the First Note is not affected in any way by the note secured by the Second Deed of Trust, except that in the future the holder of the First Note will receive payments thereon from the Lender secured by the Second Deed of Trust instead of from the Borrower under the First Note. The fact that the Second Deed of Trust is subordinate to the First Deed of Trust does not change this result.

Accordingly, this Office has consistently held in the past, and it is my opinion in this instance, that the tax imposed by § 58-55 is measured by the entire amount of the obligation secured by the Second Deed of Trust, $6,500,000. See, Reports of the Attorney General (1972-1973) at 433; (1972-1973) at 431, 432; (1969-1970) at 283.

RECORDS—Hospital Or Physician's Records—Shall be furnished at reasonable charge to patient or his attorney within fifteen days, upon written request.

CLERKS—Records Of Hospital Or Physician—Authorized to subpoena records in suit if patient's request for records has not been honored.

GENERAL ASSEMBLY—Presumed To Act With Full Knowledge Of The Law When It Enacts Or Amends A Statute.

RECORDS—Hospital Or Physician's Records—No duty to supply further portions of record accumulated after date of request, if patient does not make further requests.

RECORDS—Pendency Of Litigation Not A Precondition To Exercise Patient's Right To Hospital Or Physician's Records.

STATUTES—Application Of Statutory Construction Rules—Hospital or physician's records furnished to patient.

SUPREME COURT OF VIRGINIA—Rules—Production of documents in a suit—Records of hospital or physician.

July 27, 1977

THE HONORABLE RALPH L. AXSCELLE, JR.
Member, House of Delegates

This is in response to your inquiries about § 8-277.1B of the Code of Virginia (1950), as amended by the 1977 Session of the General Assembly, which provides:
"B. Copies of hospital or physician's records or papers shall be furnished at a reasonable charge and within fifteen days of such request to the patient or his attorney upon such patient's or attorney's written request; provided, however, that copies of a patient's records shall not be furnished to such patient where the patient's treating physician has made a part of the patient's records a written statement that in his opinion the furnishing to or review by the patient of such records would be injurious to the patient's health or well-being, but in any such case such records shall be furnished to the patient's attorney within fifteen days of the date of such request."

You have asked the following questions:

1. Although the original Code Section was written to permit the substitution of authenticated copies of hospital records to be submitted in evidence in lieu of the original records, under Section B of this statute does a patient have the absolute right to have copies of hospital or physician's records or papers furnished him regardless of whether litigation is pending or contemplated?

2. In the situation where the patient was hospitalized for thirty days and written request was made by the patient for his record on the fifth day of hospitalization, could the hospital wait until the patient's discharge and completion of the record before complying with the request?

3. If question 2's answer is "no," then in the same situation where the patient was hospitalized for thirty days and written request was made by the patient for his record on the fifth day of hospitalization, would the hospital be under an obligation to provide without further written request any portion of the record beyond that which had accumulated in the patient's first five days of hospitalization?

Resolution of your first inquiry requires application of statutory construction rules. One such rule is that the General Assembly is presumed to act with full knowledge of the law when it enacts or amends a statute. Powers v. County School Board of Dickenson County, 148 Va. 661, 139 S.E. 262 (1927). Rule 4:9 of the Rules of the Supreme Court of Virginia (1972), which relates to the production of documents in a suit, was promulgated prior to the enactment of §8-277.1B. If the General Assembly had intended to condition the applicability of §8-277.1B upon the pendency of litigation, the statute would grant nothing more than the plaintiff patient already had under the discovery rule. Therefore, application of that rule of construction leads to the conclusion that the pendency of litigation is not a precondition to the exercise of the right to records.

The language of §8-277.1C supports that conclusion. The clerk of the circuit court in which "any eventual suit, if any," must be filed is authorized, upon request and affidavit of the patient or his attorney, that the request for records has not been honored, to subpoena such records. (Emphasis added.) Consequently, I am of the opinion that §8-277.1B confers upon patients the right to receive, upon request, copies of their records in the possession of both hospitals and physicians. Therefore, your first question is answered in the affirmative.

Concerning your second inquiry, §8-277.1 provides the records or papers "shall be furnished . . . within fifteen days of such request." This language would not permit, in my opinion, any delay beyond your hypothetical patient's twentieth day of hospitalization if the request were made on the fifth day. Thus, your second question is answered in the negative.

In reply to your third question, I am of the opinion that the hospital would be
under no duty to supply further portions of the record which accumulated after
the fifth day, assuming the patient does not make further requests.

REFERENDUM—Advisory—May not be held by city on whether to build
vocational high school.

ELECTIONS—Referendum—Absent specific authority for a referendum,
election machinery cannot be used to take sense of the people.

ELECTIONS—Referendum May Not Be Held To Take Sense Of People On
Local Issue.

February 3, 1978

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your recent letter in which you inquire whether an advisory
referendum may be held by the City of Colonial Heights on the question whether
the municipality should build a vocational high school.

Section 24.1-165 of the Code of Virginia (1950), as amended, provides, in
pertinent part, as follows:

"Notwithstanding any other provision of any law, or of the charter of
any city or town, to the contrary, no referendum shall be placed on the
ballot, unless specifically authorized by statute.""

This Office has consistently ruled that, absent specific statutory authority, a
referendum may not be held to take the sense of the people on a local issue. See
Opinions to the Honorable Thomas Stark, III, Commonwealth's Attorney for
Amelia County, dated June 23, 1977, and found in Report of the Attorney
General (1976-1977) at 73, the Honorable John P. Alderman, Commonwealth's
Attorney for Carroll County, dated August 27, 1974, and found in Report of the
Attorney General (1974-1975) at 161, and to the Honorable Lewis P. Fickett,
Jr., Member, House of Delegates, dated February 3, 1975, and found in Report
of the Attorney General (1974-1975) at 332. Advisory referenda may only be
held where there exists a specific legislative grant authorizing such an advisory
referendum. See Opinions to the Honorable Walther P. Fidler, Member, House
of Delegates, dated July 2, 1973, and found in Report of the Attorney General
(1973-1974) at 29, and to the Honorable Glenn B. McClanan, Member, House of
Delegates, dated August 24, 1972, and found in Report of the Attorney General
(1972-1973) at 324.

I find no authority that exists for an advisory referendum on the construction
of a vocational high school.

REFERENDUM—Removal Of Prince William County Courthouse From City
Of Manassas.

BONDS—Referendum—County may at same special election hold referenda on
removal of courthouse and issuance of bonds to finance that removal.
ELECTIONS—Ballot For County Election On Removal Of Courthouse—Form expressed in § 15.1-567 is mandatory—None of required words were excluded; supplementary language provided public with additional financial information.

STATUTES—Requirements Are Mandatory—Supplementary language not altering basic structure of required form of ballot will not invalidate it.

February 24, 1978

THE HONORABLE FLOYD C. BAGLEY
Member, House of Delegates

This is in reply to your recent letter concerning a referendum to be held in Prince William County to remove the County courthouse from the City of Manassas. At that election, voters will also be requested to authorize the issuance of bonds to acquire a building site and construct a new facility. You pose two questions regarding this referendum, which are as follows:

1. May a county properly hold a referendum to authorize the issuance of bonds to construct a new courthouse simultaneously with a referendum on the removal of the courthouse?

I am of the opinion that these issues may properly be decided simultaneously in referenda held at the same special election. Article VII, Section 10(b), of the Constitution of Virginia (1971) provides that a county may not issue bonds until the qualified voters have granted their approval on the issue of contracting that debt at a referendum. Section 15.1-185 of the Code of Virginia (1950), as amended, statutorily implements this constitutional requirement. The Constitution provides no further requirement, however, regarding the scheduling of a bond referendum. No bonds may be issued until voter approval has been received, but authorization to contract bonded debt does not mandate issuance of bonds or require the construction of a facility which was to be financed by bonded indebtedness. Therefore, authorization may be granted to issue bonds to finance a project before voter approval has been given to construct the facility.

Section 15.1-559 establishes the procedures to be followed in the removal of a courthouse and authorizes the holding of a referendum to be held on the question. See Opinion to the Honorable Paul E. Ebert, Commonwealth's Attorney for Prince William County, dated November 7, 1977, a copy of which is enclosed. Land and money may be donated to the county as an inducement for removal of the courthouse. See § 15.1-563. Should no donation of funds be made, or those funds be insufficient, § 15.1-566 authorizes the county to issue bonds to finance removal and construction of the necessary facilities.

If the removal be approved, but the issuance of bonds not be authorized, the County would have to look to other sources of funds to finance the courthouse. If bonds are approved, their issuance would, of course, not be mandatory, since the referendum required by Article VII, Section 10(b), and § 15.1-185 is merely to authorize the issuance of bonds, not to require such action. It is within the discretion of the local governing body not to issue the bonds previously authorized. Section 15.1-566 expressly provides for such a decision by noting that if “‘the financial condition of the county shall be such as to render the issue of bonds unnecessary the supervisors may decline to issue them.’” Following approval of the issuance of bonds, the county governing body may issue bonds, expend current revenues, or accept donations of land and money to finance construction of the facility. I therefore conclude that a county may at the same
special election hold referenda on the removal of a courthouse and the issuance of bonds to finance that removal.

2. Is the form of ballot ordered by the Circuit Court of Prince William County in compliance with the requirements of the law?

Section 15.1-567 provides the form of ballot for a county election on removal of a courthouse. The form of a ballot as expressed in a statute is mandatory. See Opinion to the Honorable Lawrence R. Ambrogi, Commonwealth’s Attorney for Frederick County, dated July 28, 1977, a copy of which is enclosed. The form of ballot required for a removal referendum is:

"Shall the courthouse be removed to . . . . . , and shall the Board of Supervisors be permitted to spend $. . . . therefor?"

The Order of the Circuit Court of Prince William County calling this election provides that the ballot shall take the following form:

"Shall the courthouse be removed to Independent Hill in Prince William County, more specifically to a tract of land of approximately 150 acres located in the southwest corner of the intersection of State Routes 234 and 619, and shall the Board of County Supervisors be permitted to spend $6,401,000 therefor, which figure shall include $360,000 for the acquisition of land and $6,041,000 for the erection of the necessary buildings and improvements?" (Emphasis added.)

Although the language required by § 15.1-567 could not have been excluded or altered in a material fashion, the mandatory statutory requirements have been satisfied by the Order. Supplementary language, which does not alter the basic structure of a required form of ballot will not invalidate it. Although statutory requirements are mandatory, a literal interpretation of those requirements will not be employed to viti ate a ballot if the spirit and intention of the law is not violated. 26 Am.Jur.2d Elections § 205 (1966).

In the above case, none of the required words have been excluded; supplementary language was added to provide the public with additional financial information on which to base its vote. I am therefore of the opinion that the language added by the Order of the Circuit Court of Prince William County to the ballot required by § 15.1-567 will not invalidate the referendum to be held on removal of the courthouse, and that the ballot is in compliance with the law.

RELIGIOUS ORGANIZATIONS—Use Of Publicly Owned Property, Such As A Street, For Nondenominational Religious Gathering.

CONSTITUTION—Religious Groups Use Of Public Street For Assembly And Communication—Protected by First Amendment but subject to reasonable regulation of time, place and manner.

CONSTITUTIONAL LAW—Public Streets—Use for assembly and communication part of privileges, immunities, rights and liberties of citizens—Regulations to assure safety and convenience in use of public streets and highways.

HIGHWAYS—County, Through Use Of Its Police Powers, May Abandon Or Impose Restrictions On Road To Protect Its Property.
REPORT OF THE ATTORNEY GENERAL

RELIGIOUS ORGANIZATIONS—Use Of Public Street For Religious Gathering—Establishment Clause inapplicable if locality merely authorized nondiscriminatory use rather than actively supported it.

February 13, 1978

THE HONORABLE VIRGIL H. GOODE, JR.
Member, Senate of Virginia

This is in response to your recent inquiry in which you ask the following question:

"Is there in the Statutes or the Constitution of Virginia or the United States any prohibition on a nondenominational religious group or organization from using publicly owned property, such as a street, for a religious gathering?"

The use by religious groups of a public street for assembly and communication is a privilege protected by the First Amendment to the United States Constitution which guarantees the right to free speech and assembly. However, such use is subject to reasonable regulation of time, place and manner.

Constitutional Law

Regardless of whether religion is involved, the United States Supreme Court has held that the use of public streets and parks for purposes of assembly and communication has from ancient times been a part of the privileges, immunities, rights and liberties of citizens, and that they are, in effect, held in trust for the public. Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). However, this right is not absolute, but relative, and must be exercised in consonance with peace and good order.

The specific use of public streets, as distinguished from other public places, for example, sidewalks or parks, for purposes of assembly must be weighed against the state's interest in the safety and convenience of its citizens. As the Supreme Court stated in Cox v. New Hampshire, 312 U.S. 569, 574 (1941):

"... The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. . . ."

See also Thomas v. City of Danville, 207 Va. 656, 152 S.E.2d 265 (1967). In Cox v. Louisiana, 379 U.S. 536, 554-555 (1965), the Court also stated:

"... The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil
right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.

In exercising this authority over the control of streets, a statute or ordinance may be enacted "which prevents serious interference with normal usage of streets and parks." *Shuttlesworth, supra* at 153. Whether a contemplated use of a public street would constitute such a serious interference that it could be totally prohibited would be a factual question depending on the particular circumstances and the alternatives available. Thus, although there is a constitutional right to use public parks and streets for speech and assembly, it is subject to reasonable limitation as to time, place and manner. This limitation may only be exercised pursuant to "narrow, objective, and definite standards" and cannot be left to the uncontrolled discretion of local officials. *Shuttlesworth, supra* at 151. Obviously, any such standards also must be applied in a nondiscriminatory fashion. *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972).

I know of no other constitutional provision which would prohibit a religious group from using streets for purposes of assembly. The Establishment Clause of the First Amendment would be inapplicable, as long as a locality merely authorized the use in nondiscriminatory fashion rather than actively supported it.

**Statutory Law**

The street about which you specifically inquire in your letter is owned by the county. In an Opinion to the Honorable Ford C. Quillen, Member, House of Delegates, dated April 1, 1975, and found in Report of the Attorney General (1974-1975) at 205, the ability of a county to barricade a county road was discussed. In that Opinion it was stated:

"When determining whether a governing body has the power to restrict travel on a road by obstructions or other means of control, absent specific legislative authority, it is my opinion that each situation must be reviewed on its own merits as to the reasonableness and necessity of the restriction, in light of the need to protect the health, safety, and welfare of the public."

It should also be noted that § 46.1-234 of the Code of Virginia (1950), as amended, provides that:

"Pedestrians shall not use the roadways or streets, other than the sidewalk thereof, for travel, except when necessary to do so because of the absence of sidewalks . . . in which case, if they walk upon the hard surface, or the main travelled portion of the roadway, they shall keep to the extreme left side or edge thereof."

However, the restrictions imposed by this statute presume the use of streets for travel by pedestrians and vehicular traffic concurrently, serving the interests of
public safety. I am of the opinion that the prohibitions therein are inapplicable
to pedestrians using a street upon which traffic has been lawfully restricted for
the purposes addressed by your inquiry.

REPORTS—Elimination Of Duplication Of Reporting Requirements—
Amendment to Toxic Substances Information Act does not supersede or
repeal reporting requirements of State Water Control Board Regulation No.
7—Dual reporting; differences in purpose and scope.

CONFLICT OF LAWS—Reporting Requirements Of Toxic Substances In-
formation Act—Effect of 1977 amendments on State Water Control Board
Regulation No. 7.

STATUTES—In Pari Materia Statutes Should Be Harmonized.

STATUTES—Reporting Requirements—Purpose and scope of reports—Order
in which statutes enacted.

WATER AND SEWERAGE SYSTEMS—State Water Control Board Regulates
Discharge Of Wastes Into Sewerage Systems—Toxic Substances Control
Act requires commercial establishments to report to Board of Health
manufacture or emission of any substance listed as toxic.

July 29, 1977

THE HONORABLE GERALD L. BALILES
Member, House of Delegates

This is in response to your request for my opinion concerning Chapter 471
asks what effect the 1977 amendments have on the reporting requirements of
State Water Control Board Regulation No. 7, adopted pursuant to § 62.1-
44.18:1 of the Code of Virginia (1950), as amended. Specifically, you have
inquired:

"1. Does the specific language of § 32-429B requiring the elimination 'to
the maximum extent possible duplication of reporting requirements' act to
supersede or repeal the reporting requirements of Regulation No. 7 adopted
by the State Water Control Board?

"2. If the answer to the first question is in the negative as a matter of
law, are the specific reporting requirements of Regulation No. 7, as a matter
of fact, duplicative of the information required by Chapter 471 of the 1977
Acts of Assembly?"

The questions you have raised require examination of the statutes which direct
that reports be made and of the purpose and scope of their respective reporting
requirements. Further, attention must be given to the order in which those
statutes were enacted.

Both § 62.1-44.18:1, pursuant to which Regulation No. 7 was adopted, and §
62.1-44.18:2 were enacted by the 1976 Session of the General Assembly and
Section 62.1-44.18:1 directs every owner of a sewerage system to survey, by July
1, 1977, those industrial and other wastes discharged into his system. The survey
is conducted in accordance with regulations promulgated by the State Water Control Board. The Board was directed to promulgate those regulations by July 1, 1976. The purpose of the survey is to determine the physical, chemical and biological properties, as appropriate, of each such discharge.

Section 62.1-44.18:2 empowers the Board to prohibit, or to regulate by permit under specified conditions, the discharge of such wastes into sewerage systems. Such prohibition is permitted when the Board determines that the discharge would "threaten the public health and safety, or would substantially interfere or be incompatible with the treatment works, or would substantially interfere with usage of State waters."

When the foregoing statutes are construed together, as statutes in pari materia must be, it becomes evident that the purpose of the survey is to serve as the data base upon which the Board may prohibit, or permit under certain conditions, the discharge of wastes into sewerage systems where those wastes would, if not prohibited or regulated, cause one or more of the undesirable effects set forth in § 62.1-44.18:2.

The Toxic Substances Control Act was also enacted by the 1976 Session of the General Assembly and also became effective on April 9, 1976. See Ch. 627 [1976] Acts of Assembly 850. That statute directed, inter alia, each person who owns or operates a commercial establishment in which is manufactured, or from which is emitted, any substance listed as toxic by the Board of Health, to report to the Board such manufacture or emission, together with certain specified information on that substance. See § 32-435 of the Code. The reporting requirements of that Act were designed to effectuate the legislative purpose "to collect, catalogue, and evaluate all necessary information concerning substances which are toxic . . . to provide such information and conclusions to the agencies of the Commonwealth for use in the discharge of their respective regulatory functions, and to thereby protect the public health, safety and welfare." See § 32-429 of the Code. While one must provide information on adverse effects on sewerage systems, the scope of the reporting duty thereunder extends far beyond to effects upon workers in the work environment, the amounts emitted to the air and otherwise into the environment, and means to deal with toxic effects. See § 32-435C of the Code.

It is evident that the same information might be reported pursuant to both of those reporting requirements. If such dual reporting is burdensome, however, the General Assembly doubtless intended that such a burden would be borne, because the statutes were enacted simultaneously, and because no provision either proscribed or discouraged rules requiring dual reporting. Moreover, examination of the reporting requirements discloses the differences in purpose and scope of the two programs: the industrial waste survey report covers those substances deemed incompatible with sewerage systems or deleterious otherwise, of which class toxic chemicals would be a fraction, and the toxic substances report required disclosure of all known information on a listed toxic substance, including, as a part, its impact on a sewerage system. See §§ 32-435.1A and C and 62.1-44.18:1 of the Code.

The 1977 Session of the General Assembly amended and reenacted the Toxic Substances Information Act, adding the policy statement to which you have referred in your first question and substantially rewriting the reporting requirements of that statute. Section 32-429B provides, in pertinent part, that:

"... it is the policy of the Commonwealth to avoid requiring unnecessary production and filing of information which may be required by the Federal Toxic Substances Control Act (Public Law No. 94-469) or by
various agencies of the Commonwealth. This act shall be construed and implemented so as to eliminate to the maximum extent possible duplication of reporting requirements. . . ."

In response to your initial question, the foregoing section does not, by its express terms, or by necessary implication, supersede or repeal the requirements of §62.1-44.18:1 and Regulation No. 7. Rather, it is a statement of policy which embodies an express recognition that information required under the Toxic Substances Information Act might also be required to be reported under other authorities, including, specifically, the referenced Federal Act, which became effective on October 11, 1976. Moreover, it is "[i]tis Act," i.e., the Toxic Substances Information Act, which must "be construed and implemented so as to eliminate . . . duplication of reporting requirements." From this, I must conclude that the General Assembly intended that the reporting requirements imposed by that Act must be adjusted to eliminate duplication, rather than other reporting requirements being constrained to accommodate those of that Act.

In reply to your second inquiry, I am of the opinion that, while both statutes, and regulations promulgated thereunder, may require that the same information be reported, this is neither prohibited, as a matter of law, nor, as a matter of fact, as I have discussed, supra, would duplicated information constitute a significant portion of either report.

RETIREMENT SYSTEM—Judge’s Benefits Denied Pursuant To Order Of Supreme Court Of Virginia, Virginia Constitution And Statutes—Federal statute would not change result.

JUDGES—Certification That Judge Was Removed From Office For Dishonesty, Malfeasance Or Misfeasance Not Necessary Before Retirement Benefits Denied—Constitution and §2.1-37.2 mandate imposition of this sanction.

JUDGES—Retirement—After retirement, judge continued to hold an office from which he could be removed.

JUDGES—Retirement Benefits Denial Has No Effect On Life Insurance Policy Issued Under §51-175—Two programs separate and distinct.

JUDGES—Retirement Benefits Denied, But Entitled To Refund Of Contributions To Judicial Retirement System And Interest.

RETIREMENT SYSTEM—Denial Of Benefits Upon Judge’s Removal From Office Did Not Abridge Any Contractual Or Property Rights In Such Benefits.

RETIREMENT SYSTEM—Pension Reform Act Of 1974—Does not apply to governmental retirement systems regarding forfeiture provisions.

STATUTES—Prohibition Against Ex Post Facto Laws Does Not Apply To Legislation Imposing Civil Disabilities.

SUPREME COURT OF VIRGINIA—Authority To Remove Judge From Office After Date Of His Retirement.

October 12, 1977
This is in response to your inquiry concerning an Order entered by the Supreme Court of Virginia on September 1, 1977, which removed retired Judge Harold C. Maurice from the office of Judge of the City of Richmond General District Court for misconduct in office. The Order of the Supreme Court resulted from proceedings initiated by a complaint filed by the Judicial Inquiry and Review Commission. Your inquiry raises several pertinent issues, to which I will respond *seriatim*:

1. Did the Supreme Court of Virginia have the authority to remove Judge Maurice from office after the date of his retirement?

   Article VI, Section 1, of the Constitution of Virginia (1971), provides that the Supreme Court of Virginia shall have original jurisdiction in matters of judicial censure, retirement, and removal for those offices specified in Article VI, Section 10, of the Constitution. Article VI, Section 10, applies to Justices of the Supreme Court and judges of courts of record, and provides that if the Supreme Court finds that such judge engaged in misconduct while in office it must censure him or remove him from office. That constitutional provision further states that the General Assembly may provide by general law for the retirement, censure or removal of judges of courts not of record. Pursuant to § 2.1-37.2 of the Code of Virginia (1950), as amended, the General Assembly has conferred upon the Supreme Court jurisdiction to conduct hearings and impose sanctions upon the filing of complaints against judges of courts not of record. The extent of such jurisdiction is equivalent to that conferred by Article VI, Section 1 and 10, of the Constitution of Virginia (1971) and is to be exercised in the same manner.

   Although Judge Maurice had retired on March 16, 1977, it is implicit in the Court's decision that he continued to hold an office after his retirement. The majority opinion held that Judge Maurice was "removed from the office of Judge of the City of Richmond General District Court" and even the dissent agreed that Judge Maurice held an office from which he could be removed but questioned what penalty would attach to such removal. The position of retired judge is a public office. 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 Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated December 18, 1975, and found in Report of the Attorney General (1975-1976) at 288. Pursuant to § 51-178, a retired judge is subject to recall to duties by the Supreme Court and possesses all the powers, duties and privileges of a judicial officer. I am therefore of the opinion that prior to September 1, 1977, Judge Maurice held a public office from which the Supreme Court had the authority to remove him.

2. Are Judge Maurice's retirement benefits to be denied pursuant to the Order of the Supreme Court of Virginia?

   Article VI, Section 10, of the Constitution of Virginia, under which Judge Maurice was removed from office, provides, in pertinent part, that:

   "A judge removed under this authority shall not be entitled to retirement benefits, but only to the return of contributions made by him, together with any income accrued thereon."
As noted in my response to your previous question, § 2.1-37.2 requires that the jurisdiction conferred on the Supreme Court in cases involving the removal of judges of courts not of record be exercised in the same manner as that conferred by Article VI, Section 10, of the Constitution. It is thus clear that this requirement mandates the imposition of the same sanctions for judges removed from office under § 2.1-37.2 as are imposed under Article VI, Section 10, of the Constitution. See Maurice v. Board of Trustees, No. G-1232-1 (Circuit Court of the City of Richmond, September 14, 1977) at 11A.

Although Judge Maurice became entitled to receive retirement benefits upon retirement, that right remained subject to the Supreme Court's authority to remove him from office and thus deny him those benefits. Nor would any federal statute change such result. The provisions of the Pension Reform Act of 1974, which amended the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, do not apply to governmental retirement systems, at least as regards forfeiture provisions. The statutory provisions governing a governmental retirement system do not create private contractual or vested property rights but merely declare a policy to be pursued until the legislature shall ordain otherwise, with the exception of past due payments and a member's contributions to the System. Flemming v. Nestor, 363 U.S. 603 (1960); Dodge v. Board of Education, 302 U.S. 74 (1937). When Judge Maurice joined the Judicial Retirement System in 1973, the Code of Virginia indicated that any rights accruing to him were subject to provisions of the Constitution and Code of Virginia, including those relating to removal from office. See §§ 51-111.16 and 51-160. There was, furthermore, no private contractual agreement between Judge Maurice and the Judicial Retirement System, since the rights possessed by the Judge were based entirely upon statute. I am therefore of the opinion that the denial of retirement benefits to Judge Maurice upon his removal from office did not abridge any contractual rights to or property rights in such benefits.

That is not to say that the General Assembly may act free of all Constitutional restraint. A member's interest in his retirement benefits is of sufficient substance to be within the protection from arbitrary governmental action. It is, however, only a law utterly lacking in rational justification that violates due process protections. Such is not the case here. It is my opinion that Article VI, Section 10, of the Constitution and § 2.1-37.2 of the Code and the sanctions imposed by those provisions are rationally related to the need to maintain the integrity of the judiciary.

Article I, Section 9, of the Constitution of the United States establishes a prohibition against ex post facto laws. The prohibition forbids penal legislation which imposes or increases criminal punishment for conduct which was lawful previous to its enactment. It does not, however, apply to legislation imposing civil disabilities. Harisiades v. Shaughnessy, 342 U.S. 580 (1952). The proceedings in the Supreme Court of Virginia were in the nature of civil, rather than criminal, proceedings. The language of Article VI, Section 10, of the Constitution and § 2.1-37.2 of the Code of Virginia, as well as the deprivation of retirement benefits upon removal from office, do not require the finding of a punitive intent. The sanction is the mere denial of a noncontractual governmental benefit, and, as stated above, the denial of retirement benefits to judges removed from office bears a rational relationship to the need to maintain the integrity of the judiciary. Flemming v. Nestor, 363 U.S. at 614-617. I am of the opinion that the purpose of the denial of benefits is deterrence of misconduct, rather than punishment, and that Article VI, Section 10, of the Constitution of Virginia and § 2.1-37.2 of the Code are not invalid as ex post facto laws.

Based on the above-noted authorities, I am of the opinion that the Supreme
Court's Order removing Judge Maurice from office has the effect of directing a mandatory denial of his retirement benefits.

3. Does the Code of Virginia require a certification that Judge Maurice was removed from office for dishonesty, malfeasance, or misfeasance before he may be denied retirement benefits by the Judicial Retirement System?

Section 51-167 establishes three types of retirement for members of the Judicial Retirement System in service at the age of retirement: "mandatory retirement" pursuant to § 51-167(a), "normal retirement" pursuant to § 51-167(b), and "early retirement" pursuant to § 51-167(c). Section 51-167(d) applies only to members who have terminated service prior to retirement age, but who, having been credited with five or more years of creditable service, are entitled to receive retirement benefits upon attaining normal retirement age as provided in § 51-167(b) or early retirement age as provided in § 51-167(c). Section 51-167(d) provides in pertinent part that:

"[N]o member shall be entitled to the benefits of this subsection if his appointing authority certifies that his service was terminated because of dishonesty, malfeasance or misfeasance in office; . . ." 

Since Judge Maurice retired under § 51-167(b) after attaining normal retirement age while still in service, I am of the opinion that § 51-167(d) is inapplicable in this case and there is no requirement that the General Assembly certify that Judge Maurice was removed from office for dishonesty, malfeasance or misfeasance before he may be denied retirement benefits.

Although the Supreme Court's Order did not expressly order the denial of Judge Maurice's retirement benefits, both Article VI, Section 10, of the Constitution of Virginia and § 2.1-37.2 of the Code mandate the imposition of this sanction. Once the Supreme Court ordered Judge Maurice's removal from office, no additional order was necessary because the denial of his retirement benefits became effective as a matter of law. Maurice v. Board of Trustees, supra. Rather, the Order is self-executing. I am therefore of the opinion that after the Supreme Court ordered the removal of Judge Maurice from office, the denial of his retirement benefits became automatically effective as of September 1, 1977.

4. What action should be taken by the Judicial Retirement System to comply with the Supreme Court's Order?

You indicate that as of March 16, 1977, the Judicial Retirement System had credited $14,809.25 in contributions and accumulated interest to Judge Maurice's retirement account. No additional interest has been paid on the accumulated contributions in his account since the date of his retirement. After retirement, Judge Maurice received $1,806.07 per month in retirement allowance payments. As of September 1, 1977, the amount of these payments totaled $9,962.52.

Upon retirement, a judge ceases to be an active member of the Judicial Retirement System and his accumulated contributions are transferred from the individual member's account to the general trust fund of the Retirement System. See §§ 51-111.49(e), 51-160. Pursuant to long-standing administrative practice, retirement allowance payments are made first from the amount of a member's accumulated contributions until those funds are exhausted. Remaining payments are then made with State funds. One of the major reasons for such charac-
terization of the payments is to allow retired members to receive tax-free income up to the amount of their accumulated contributions, since retired members pay no federal income tax on the amount of retirement allowance payments attributable to a return of contributions if repayment occurs within three years after retirement. Internal Revenue Code of 1954, 26 U.S.C. § 72(d)(1). Judge Maurice would have been entitled to receive an annual retirement allowance of $21,672.84, and thus would have received a refund of his contributions within three years.

In addition, when a member who has not elected the joint and last survivor option dies after retirement, his beneficiary is entitled to a refund of the accumulated contributions pursuant to § 51-174 which had been paid by that member to the System prior to his retirement. By making retirement allowance payments first from a member's accumulated contributions, the Judicial Retirement System can easily and accurately compute the amount, if any, owing to a beneficiary when a member dies after retirement. Any change in this longstanding administrative practice would require the adoption of a more complex and less accurate method of computing such refunds based on a member's potential benefits and various life expectancy estimates. To now characterize these payments as being something other than a refund of contributions would subject a retiree to additional tax liability and be contrary to past valid administrative practice.

Although judges removed from office must be denied retirement benefits, they are entitled to a refund of the contributions they have made to the Judicial Retirement System, together with any income accrued thereon. I am, therefore, of the opinion that as of September 1, 1977, the date of his removal from office, Judge Maurice should be denied all future retirement allowance payments. He should, however, receive a refund of the accumulated contributions contained in his account on the date of his retirement. That figure should be reduced by the amount of retirement allowance payments previously received by him. He is therefore entitled to receive a refund of $14,809.25, less $9,967.52 in previous payments.

5. What is the effect of the Supreme Court's Order on the life insurance policy issued to Judge Maurice under § 51-175 of the Code?

Neither the Constitution nor the Code of Virginia specifically define the term "retirement benefits." The Constitution, however, states that upon removal a judge shall be denied retirement benefits, but shall be entitled to a refund of his contributions and interest. See Article VI, Section 10. Those contributions are the basis for retirement allowance payments, and are unrelated to a life insurance policy issued under § 51-175. The life insurance program is established and administered under a separate article of Title 51. See Article 9 of Chapter 3.2, §§ 51-111.67:1 to -111.67:12. Pursuant to long-standing administrative practice the life insurance program is separate and distinct from the retirement allowance program. Consequently, on the basis of the statutory provisions and administrative practice, I am of the opinion that the term "retirement benefits" as used in Article VI, Section 10, of the Constitution of Virginia, should not be construed to include life insurance benefits. I find nothing in the Commentaries on the Constitution or the recorded Proceedings and Debates (II A. Howard Commentaries on the Constitution of Virginia at 681 (1974); Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, Ex. Sess. 1969, Sess. 1970; Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution, Ex. Sess. 1969, Sess. 1970) which would indicate a contrary result.
Section 51-111.67:4(e) provides in general terms that life insurance on an employee shall cease upon separation from service "except in case of retirement on an immediate annuity for service or disability . . . ." Though Judge Maurice was removed from office, this does not alter the fact that he in fact did retire. I have indicated *supra* the effect, based on the pertinent statutory and constitutional provisions, of the Supreme Court's order on the retirement benefits; the fact of retirement did not alter the effect of forfeiture. I am unaware of any provision of law which would have a similar effect on the life insurance benefits.

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**RETIREMENT SYSTEM—Mandatory Retirement Age Extended To 70 By Federal Legislation—Applicable to school teachers and other school employees.**

May 24, 1978

THE HONORABLE GEORGE R. ST. JOHN
County Attorney for Albemarle County

You ask whether recent federal legislation extending the mandatory retirement age to 70 will apply to school teachers and other school employees and, if so, what effect it will have.

The provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, apply to states and any agency, instrumentality, or political subdivision of a state, 29 U.S.C. § 630(b). This would include public school employees. The 1978 amendments to the Act prohibit employers from requiring employees to retire prior to the ages specified in the Act even under the terms of a bona fide seniority system or employee benefit plan. 29 U.S.C. §623(f)(2).

At present, the Act prohibits the compulsory retirement of employees between the ages of 40 and 65. As of January 1, 1979, the Act will prohibit the compulsory retirement of employees between the ages of 40 and 70. 29 U.S.C. § 631(a). There are certain exceptions to the Act under which employers may require the compulsory retirement of employees prior to the time they reach the age of 70. In my opinion, however, none of these exceptions apply to school teachers or other school employees.

Accordingly, at the present time school boards may not require teachers and other employees to retire prior to the time they reach the age of 65. As of January 1, 1979, no school teachers or other school employees may be required to retire prior to the time they reach the age of 70. I note, however, that the Act does not prohibit school boards from discharging or otherwise disciplining such employees for good cause. 29 U.S.C. § 623(f)(3).

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**RETIREMENT SYSTEM—Transfer Of Membership—Political subdivisions must transfer contributions they made on behalf of district court employee from local to State retirement systems when employee elects to transfer.**

**RETIREMENT SYSTEM—Accounting Procedures—Different treatment of various localities based on, not actuarially sound for retirement systems.**
January 23, 1978

THE HONORABLE GLEN D. POND, DIRECTOR
Virginia Supplemental Retirement System

This is in response to your inquiry whether § 51-111.10:1(a)(2) of the Code of Virginia (1950), as amended, requires political subdivisions to transfer the contributions made by such political subdivision on behalf of a clerk or other district court employee who elects to transfer membership from a local retirement system to the State Retirement Systems.

It is my opinion that the contributions made by the locality are required to be transferred to the appropriate State retirement system.

Section 51-111.10:1(a)(2) provides that:

"Any clerk or employee of a district court who is not a member of the retirement system on June thirty, nineteen hundred seventy-three, but who is a clerk or employee of a district court and a participant in a local retirement system on that date and who is a State employee as defined in § 51-111.10, may elect to become a member of the retirement system. Any clerk or employee who so elects may transfer from such local system as prior service his creditable service in such local system, in which event the locality operating such system shall transfer to the retirement system all funds credited to the account of such clerk or employee, whether contributed by such employee or by such locality." (Emphasis added.)

Section 51-176.1(a)(2), which applies to district court judges, provides that:

"Any judge of a district court who is not a member of the judicial retirement system on June thirty, nineteen hundred seventy-three, 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 earned 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. Such service shall be weighted as provided in subsection (c) of § 51-163." (Emphasis added.)

In 1973, all city and county courts not of record were reorganized as state district courts. Pursuant to §§ 51-111.10:1(a)(2) and 51-176.1(a)(2), judges, clerks and district court employees were given the option of retaining memberships in a local retirement system or electing membership in the State retirement systems. These sections also require localities to transfer to the Retirement System all funds credited to the account of an employee, whether contributed by such employee or by the locality, when such employee transfers membership from a local pension system to the State retirement system. The various localities credited employee and employer contributions in different ways. For example, some localities such as Roanoke, simply paid all contributions into a general fund while other localities, such as Danville, set up individual accounts for each employee's contributions and paid employer contributions into a general fund. Thus, the phrase "funds credited to the ac-
count of such employee" is ambiguous, since it may refer to all funds contributed for an employee, however held, or only to those funds actually paid into an employee's individual account, if any.

You advise that it is the administrative practice of your Office to require that the contribution made by the locality be transferred as well.

When a phrase in a statute, standing alone, is ambiguous, the interpretation which should be adopted is that which would carry into effect the object sought to be accomplished by the statute. *Bott v. Hampton Roads Sanitation District* 190 Va. 775, 783, 58 S.E.2d 306 (1950). The interpretation of these statutes must thus be based upon the intent of the General Assembly as it appears from a reading of Title 51 as a whole.

To interpret the statute to require only those funds actually deposited in an account in an employee's name to be transferred to the State retirement systems would result in the different treatment of various localities based on their accounting procedures and would not be in accord with actuarially sound retirement systems. Accordingly, the statutory requirement for the transfer of all funds contributed by the locality refers both to contributions by the locality on behalf of the employee and to contributions made by the locality to match contributions made by the employee.

The statement of facts contained herein is at variance with the assumed facts in a prior Opinion of this Office to the Honorable Beverly T. Fitzpatrick, Chief Judge of the General District Court of the City of Roanoke, dated May 10, 1976, and found in the Report of the Attorney General (1975-1976) at 177. The factual distinctions compel the different legal conclusion reached herein.

**SALARIES—Mayor And Town Council Members—Manner of increase.**

**PUBLIC OFFICERS—“Term Of Office” Refers To Period Of Time For Which Individual Is Elected, Not Length Of Time Actually Served.**

**SALARIES—Additional Compensation—Increase from lower level of salary to higher level qualifies as “increase” pursuant to statute; § 15.1-827.1.**

**SALARIES—Compensation Paid As Per Diem Does Not Constitute Salary.**

**SALARIES—No Increase In Salaries Of Public Officers May Be Made During An Incumbent’s Term Of Office.**

August 8, 1977

THE HONORABLE W. L. LEMMON
Member, House of Delegates

This is in reply to your letter requesting my opinion concerning §§ 15.1-827 and 15.1-827.1 of the Code of Virginia (1950), as amended. Those sections prescribe the manner in which the salary of the mayor and council members of a town may be increased. The statutes provide:

"The mayor shall preside over the council; and the council may direct the payment to the mayor of a salary in an amount established by council, payable as the council may direct; notwithstanding any provision of a town charter or any other law setting forth the salary of a mayor. *No increase in salary of a mayor shall take effect during the incumbent mayor's term in
office. In the event of the absence of the mayor, the council may appoint a
president pro tempore.” Section 15.1-827. (Emphasis added.)

“Notwithstanding any provision of a charter of a town or any other law,
a town council may establish the compensation to be paid to council
members; provided, however, no increase in salary of a council member
shall take effect during the incumbent council member’s term in office.”
Section 15.1-827.1. (Emphasis added.)

You have stated the mayor of the Town of Marion has traditionally been paid
a salary of $900.00 per year. No records have been found which indicate that this
salary level was ever officially established. You ask whether an increase of the
mayor’s salary to $2,400.00 per year would be an “increase” within the meaning
of § 15.1-827. You have also inquired concerning the salaries of the members of
the town council of Marion. These officers have traditionally received $20.00 for
attendance at official council meetings. No record has been discovered, however,
which indicates that council set that level of compensation. You ask whether an
increase in that compensation would be permitted under § 15.1-827.1.

Although no local ordinance has been found by which the amount of com-
ensation to be received by the mayor or council members was set, these persons
have nonetheless been receiving compensation for the services they have per-
formed as public officers. The $900.00 paid to the mayor each year is com-
ensation to him for performing the duties of that office during the course of a
year. The compensation is regularly accrued, without regard to the actual
amount of work performed during the year. Salary is defined as “a fixed annual
or periodical payment for services, depending upon the time and not upon the
184 Va. 54, 60, 34 S.E.2d 385 (1945). I conclude that the compensation regularly
received by the Mayor of Marion for the performance of official duties must be
defined as salary. Section 15.1-827 is therefore applicable to an increase in the
compensation received by the Mayor.

Council members receive a fixed amount, $20.00, for the attendance of
council meetings. The compensation received is awarded without regard to the
length of the council meeting or the amount of work performed by council
members. Compensation received in this manner has attributes of both salary
and “per diem” payments. This Office has previously ruled that compensation
paid as a per diem does not constitute salary. See Opinion to the Honorable
William T. Parker, Delegate Elect, dated December 8, 1975, and found in
Report of the Attorney General (1975-1976) at 144. A per diem payment is a
method of compensating a public officer based on an allowance for each day
actually spent in the performance of official duties. 63 Am.Jur.2d Public Of-
ficers and Employees § 377 (1972). I express no opinion regarding whether the
compensation paid council members qualifies as per diem payments or salary.
Regardless of such distinction, the additional compensation received is subject to
the provisions of § 15.1-827.1. Obviously, an increase from a lower level of
salary to a higher level qualifies as an “increase” pursuant to the statute. In
addition, the introduction of salary, when none had earlier been paid, also
constitutes an “increase” such that the provisions of § 15.1-827.1 are pertinent
to the resolution of questions concerning council members.

Under §§ 15.1-827 and 15.1-827.1, no increase in the salary of those public
officers may be made during an incumbent’s term of office. A “term of office”
refers to the period of time for which an individual is elected, not the length of
time actually served. Opinion to the Honorable William J. McGhee, County
Attorney for Montgomery County, dated September 24, 1976. Since the four-
year term of office of the incumbent mayor ends on June 30, 1980, council may not make the increase of the salary received by the mayor effective before July 1, 1980.

The seven council members serve staggered terms of office. The salary of the four council members elected to a four-year term of office which began July 1, 1976, may be increased by council, effective July 1, 1980. The salary increase of the three members elected to four-year terms of office beginning July 1, 1974, may be made effective at the beginning of the succeeding term of office, July 1, 1978.

Although the construction of this statute will result in the receipt of different levels of compensation by council members, this Office is of necessity bound by § 15.1-827.1 in reaching a conclusion. The language of that statute clearly prohibits an increase in salary during the term of office. Since the terms of office of council members are established on a staggered basis, salary increases may not be instituted until 1978 and 1980.

SCHOOLS — Appropriations — Interest — Use of funds derived by counties from investment of moneys held for appropriation to school boards.

COUNTIES — Interest — After appropriation to school board, such moneys (including State and federal funds and interest thereon) become part of school funds.

INTEREST — General Principle; Interest On A Fund Belongs To Such Fund.

INTEREST — Use Of Funds — Differentiation between county funds not yet appropriated to school board and State and federal funds paid to county on behalf of school board.

SCHOOLS — Interest — Before county funds are appropriated to school board, county is entitled to retain any investment income on such moneys.

September 13, 1977

THE HONORABLE FLOYD C. BAGLEY
Member, House of Delegates

This is in response to your letter of August 3, 1977, in which you inquire as follows:

"Your opinion is requested as to the use of funds derived by counties from investment of moneys held for appropriation to school boards."

"It is my understanding that if $100,000 is invested at 6% until it is appropriated that the $6,000.00 investment interest may be placed in a county's general fund even though its source is budgeted for or received from State or federal sources for use by a school system."

In order to respond to your inquiry, I find it necessary to differentiate between county funds not yet appropriated to the school board and State and federal funds paid to the county on behalf of the school board.

Section 22-116 of the Code of Virginia (1950), as amended, describes the "school fund" as consisting of:

"(1) State funds embracing all appropriations made by the General
Assembly for public school purposes and such State taxes as the General Assembly, from time to time, may order to be levied.

“(2) Local funds embracing all appropriations as may be made by the board of supervisors or council for school purposes, or such funds as shall be raised by levy by the board of supervisors or council, either or both, as authorized by law, and donations or the income arising therefrom, or any other funds that may be set apart for local school purposes.”

Section 22-132 of the Code provides that all State and local funds for educational purposes be kept by the County Treasurer in an account "separate and distinct from all other funds."

Before county funds are appropriated to the school board, I am of the opinion that the county is entitled to retain any investment income on such moneys. Once the appropriation is made, however, such moneys along with the others described in § 22-116, (which includes the federal and State funds referred to in your letter) become a part of the school fund, and a different result prevails.

Section 58-930 of the Code, provides as follows:

"Whenever the treasurer of any county or city in this State shall receive interest on funds belonging to the State or to any political subdivision thereof, such interest shall become a part of the principal of the particular fund on which such interest accrued and shall be accounted for by the treasurer in the same manner as he is required by law to account for the principal; provided, however, that the governing body of any county or city may direct that the interest received from general obligation bond proceeds invested shall be credited to the general fund of such county or city. Any treasurer violating this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five thousand dollars."

This section, which was formerly § 363 of the Tax Code, has never been construed by the Supreme Court of Virginia. In recent years it has been the subject of a number of opinions of this Office which have held that, except for the interest on general obligation bonds, interest income becomes a part of the fund which generates the income. See Reports of the Attorney General (1974-1975) at 71; (1974-1975) at 213; (1972-1973) at 340.

It is my opinion that § 58-930, when read with §§ 22-116 and 22-132 of the Code, requires that interest (or other investment income) be credited to the school fund.

SCHOOLS — Buses — Yellow color need not be concealed when school bus used to transport persons or commodities other than school personnel or school children — Lettered identification and school bus traffic warning lights must be covered with opaque detachable material.

CONFLICT OF LAWS — Irreconcilable Inconsistency Between §§ 46.1-169.1 And 22-280.1 — More recent expression of legislative will prevails — Use of school buses.

DEFINITIONS — School Bus — Defined in § 46.1-1(37).

MOTOR VEHICLES — School Buses Used For Charter Bus Operation.
STATE CORPORATION COMMISSION — School Bus — Before use for charter purposes, authorization must be obtained from Commission which is charged with regulation of charter party carriers.

May 22, 1978

THE HONORABLE STANLEY C. WALKER
Member, Senate of Virginia

This is in response to your recent letter concerning a constituent of yours who owns some school buses and has an application for charter bus operations pending before the State Corporation Commission. You inquire as to how much of the yellow color of the school buses must be masked with tape or other material before they may be used in charter service without violating § 46.1-169.1 of the Code of Virginia (1950), as amended.¹

A school bus is defined in § 46.1-1(37), as a motor vehicle which is designed and used primarily for the transportation of pupils to and from schools, which is painted yellow with the words "School Bus" in black letters on the front and rear, and which is equipped with warning devices prescribed in § 46.1-287. By the terms of § 46.1-169.1, most recently amended and reenacted by Chapter 521 [1970] Acts of Assembly 1112, Virginia-registered yellow motor vehicles having a seating capacity of more than fifteen persons may not be operated on the highways of this State unless used in transporting students or for the purposes specified in § 46.1-287.¹² Section 22-280.1, which is also pertinent to your inquiry, was amended and reenacted by Chapter 633 [1975] Acts of Assembly 1303, and provides in part that "[e]xcept as provided in § 22-151.2,¹³ it shall be unlawful for a Virginia school bus to be operated on the public highways of this State for the purpose of transporting persons or commodities other than school personnel or school children unless the lettered identification and school bus traffic warning lights on the front and rear of such bus are covered with some opaque detachable material." Notwithstanding the limited purposes for which

¹"It shall be unlawful for any motor vehicle licensed in Virginia having a seating capacity of more than fifteen persons to be operated on the highways of this State if it be yellow in color, unless such motor vehicle is used in transporting students who attend public, private or parochial schools, or for the purposes specified in § 46.1-287.¹² This section shall not apply to motor vehicles which transport passengers as well as school children for hire in the cities of Bristol and Charlottesville. Violators of this section shall be guilty of a misdemeanor." Section 46.1-169.1, Code of Virginia (1950), as amended.

¹²Any private individual, corporation or civic, charitable or eleemosynary organization, for the purpose of transporting children to or from school, camp or any other place during any part of the year, may contract to hire motor vehicles identified as regular school buses, having a seating capacity of more than fifteen persons, which are painted yellow, and if such motor vehicles are used for such purpose they shall be equipped and operated in the same manner as are regular school buses pursuant to the provisions of chapter 4 (§ 46.1-168 et seq.) of this title relating thereto." § 46.1-287.¹, Code of Virginia (1950), as amended.

¹³The provisions in § 22-151.2 relate to use of school buses by departments, boards, commissions or officers of certain counties, cities, towns or State agencies for their governmental purposes, including the transportation of the elderly and mentally or physically handicapped. Consequently, the section has no applicability to the inquiry at hand.
the specified yellow motor vehicles may be operated under § 46.1-169.1, no provision is made in § 22-280.1 for covering a school bus's yellow paint when such bus is used in accordance with § 22-280.1 for transporting persons or commodities other than school personnel or school children. Consequently, there is a conflict between the two statutes and the issue arises whether the General Assembly has repealed one of the statutes by implication.

Where two statutes are in apparent conflict, they should be construed, if reasonably possible, in such manner that both may stand together. *Lillard v. Fairfax County Airport Authority*, 208 Va, 8, 155 S.E.2d 338 (1967); *City of Richmond v. County Board*, 199 Va. 679, 101 S.E.2d 641 (1958). The repeal of statutes by implication is not favored. In *South Norfolk v. Norfolk*, 190 Va. 591, 601, 58 S.E.2d 32 (1950), the Virginia Supreme Court said that "a later act does not by implication repeal an earlier act unless there is such a clear, manifest, controlling, necessary, positive, unavoidable, and irreconcilable inconsistency and repugnancy, that the two acts cannot, by a fair and reasonable construction, be reconciled." However, in collating the language and purposes of §§ 46.1-169.1 and 22-280.1, I find such an irreconcilable inconsistency.

Where a statute expressly excepts one class of persons or things which would otherwise be within the provisions of that statute, it is presumed that no other exceptions were intended. *Trustees of American Bank v. McComb*, 105 Va. 473, 54 S.E. 14 (1906). Having expressly excepted from the application of § 46.1-169.1, motor vehicles which transport passengers as well as school children for hire in the cities of Bristol and Charlottesville, the legislature indicated its intent not to exclude any other motor vehicles coming within the terms of said statute. Thus, the general proscription in § 46.1-169.1 against the operation of certain yellow motor vehicles unless used in transporting students or for the purposes of § 46.1-287.1 conflicts with the more permissive language of § 22-280.1, which, in effect, authorizes the operation of yellow vehicles, "for the purpose of transporting persons or commodities other than school personnel or school children."

Where, as here, there is an irreconcilable conflict, the more recent expression of the legislature will prevails. *City of Danville v. Ragland*, 175 Va. 27, 7 S.E.2d 121 (1940). Accordingly, I am of the opinion that a school bus may be used to transport persons or commodities other than school personnel or school children pursuant to § 22-280.1 without concealing any of its yellow paint so long as it remains a school bus and the lettered identification and school bus traffic warning lights are covered with some opaque detachable material. Please note, however, that to remain a school bus, it must, among other things as provided in § 46.1-1(37), continue to be used primarily to transport pupils to and from schools.

You understand that in setting forth the opinion above I do not determine that, without more, § 22-280.1 expressly authorizes the use of school buses for charter purposes. Before such buses may be used for such purposes, authorization must be obtained from the State Corporation Commission which is charged with the regulation of charter party carriers under Chapter 12.4 of Title 56 of the Code. In particular, § 56-338.52 states that, except as otherwise provided, "no person shall engage in the business of a special or charter party carrier of passengers by motor vehicle on any highway within the State unless such person has secured from the Commission a certificate authorizing such business."
SCHOOLS—Compulsory School Attendance Law—Authority to excuse children who are habitually and without justification absent from school rests with Juvenile and Domestic Relations Court.

CONFLICT OF LAWS—Compulsory School Attendance—Specific statutes take precedence over general statutes—Section 16.1-279C, paragraph 4, subparagraph a, prevails over § 22-275.4:1.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Exclusive Original Jurisdiction Over Children Habitually And Without Justification Absent From School—Court has remedies other than incarceration.

JUVENILES—“Child In Need Of Services”—Compulsory school attendance—Incarceration for violation no longer an option.

SCHOOLS—School Boards—Ultimate authority to excuse children who, for other than habitual absence, school board feels cannot benefit from attendance—Recommendation of juvenile court.

May 26, 1978

THE HONORABLE HERMAN A. WHISENANT, JR., JUDGE
Thirty-first District
Juvenile and Domestic Relations Court

You ask whether there is a conflict in the statutory law on whether the ultimate authority to excuse a child from compulsory school attendance rests with the Juvenile and Domestic Relations Court or with the school board.

Section 22-275.1 of the Code of Virginia (1950), as amended, requires all children of eligible age to attend school. However, § 22-275.4(i) allows a school board, upon the recommendation of the principal and superintendent and with the written consent of the parent or guardian, to excuse from attendance any pupil who in the board’s opinion cannot benefit from education. If the school board cannot obtain the parent’s consent, it may excuse a pupil from attendance at school on the recommendation of “the juvenile and domestic relations district court” under § 22-275.4:1.

Sections 22-275.11 and -275.20 provide that a child who is habitually absent from school may be proceeded against under Title 16.1 of the Code. This Office has held in a prior Opinion to the Honorable J. W. O’Brien, Member, House of Delegates, dated October 25, 1977, a copy of which is enclosed, that §§ 16.1-241 and 16.1-228F of the Code give exclusive jurisdiction over children who are subject to compulsory attendance law and are “habitually and without justification absent from school” to juvenile and domestic relations district courts.

Upon proof that a child subject to compulsory attendance is habitually and without justification absent from school, he or she shall be adjudicated “in need of services.” Section 16.1-279C, paragraph 4, subparagraph a, then provides that a child may be excused by the court from school attendance if the child is fourteen years of age or older, if the court finds that the school officials have made a diligent effort to meet the child’s educational needs, and if the child is not able to benefit appreciably from schooling.

Section 22-275.4:1 is a general statute which gives local school boards the authority to excuse students from attendance at school upon the recommendation of the juvenile and domestic relations court. Section 16.1-279C, paragraph 4, subparagraph a, is a specific statute which gives juvenile and domestic relations court judges the authority to excuse children over the age of fourteen who have been found to be “in need of services” from compulsory school attendance. Specific statutes take precedence over general statutes. *City of Richmond v. Board of Supervisors*, 119 Va. 679, 101 S.E.2d 641 (1958).

Thus, § 16.1-279C, paragraph 4, subparagraph a, the specific statute, prevails over § 22-275.4:1 with respect to the ultimate authority of a juvenile and domestic relations district court judge to excuse from compulsory school attendance children fourteen and over who are habitually absent from school. However, § 22-275.4:1 remains in effect so far as it gives school boards the ultimate authority to excuse children who, for reasons other than habitual absence, the school board feels cannot benefit from attendance, as long as such action is recommended in advance by the juvenile and domestic relations district court judge.

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**SCHOOLS—Compulsory School Attendance Law—Parents who teach their children at home—Tutor’s qualifications; approved by division superintendent of schools; curriculum; days and hours per day; children of several families.**

**JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Compulsory Attendance Law—Complaint before court when child fails to comply with law.**

**SCHOOLS—Conscientious Objection To School Attendance—Procedure for determination.**

**SCHOOLS—Compulsory School Attendance Law—State Board of Education has general authority and duty to enforce.**

**SCHOOLS—School Boards Have No Obligation To Investigate Alternative Educational Methods Of Child Excused For Conscientious Objection.**

**SCHOOLS—Tutors—Must meet State Board of Education qualifications.**

**VIRGINIA COMPELLARY SCHOOL ATTENDANCE LAW—Division Superintendent Of Schools Has Duty To Assure That Child Is Receiving Education.**

February 6, 1978

**The Honorable Robert C. Boswell**
Commonwealth’s Attorney for Floyd County

This is in response to your recent inquiry regarding the application of the Virginia Compulsory Attendance Law, § 22-275.1 of the Code of Virginia (1950), as amended, to parents who wish to teach their children at home.

I shall answer your questions in order:

1. Do parents who teach their children at home, because they feel they
can better educate them and wish to teach from the Bible, have to be approved to teach said children?

Section 22-275.1 of the Code provides as follows:

"Every parent, guardian, or other person in the Commonwealth, having control or charge of any child, or children, who have reached the fifth birthday on or before December thirty-first of the school year and have not passed the seventeenth birthday, shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualifications prescribed by the State Board of Education and approved by the division superintendent in a home, and such child, or children, shall regularly attend such school during the period of each year the public schools are in session and for the same number of days and hours per day as in the public schools."

Thus, a parent whose child is subject to the compulsory attendance laws who does not wish to send the child to a public school may either have him or her attend a private, denominational or parochial school or be taught at home by a qualified tutor. This Office has ruled that any such tutor must be approved by the division superintendent of schools and must meet the qualifications prescribed by the State Board of Education. See Report of the Attorney General (1971-1972) at 359. It would make no difference whether the proposed tutor was the child's parent.

2. Must a tutor teach any particular curriculum?

Section 22-275.1 does not require that any particular curriculum be taught. However, in my opinion it would be permissible for a division superintendent to condition his approval of the tutor on the teaching of a particular curriculum. Section 22-275.1 does place tutors in a different category from private school teachers, who are not required to be both certified and approved. Since certification requires certain academic preparation, it is my opinion that the approval required by the division superintendent of tutors is intended, at least partially, to ensure that the child is taught the subjects which are taught in the public schools.

3. Must classes be held for any particular number of days and hours per day?

This Office has previously issued an Opinion to Dr. Woodrow W. Wilkerson, Superintendent, State Department of Education, dated October 14, 1970, and found in the Report of the Attorney General (1970-1971) at 331, to the effect that a child being tutored under § 22-275.1 must receive tutorial instruction for the same number of days and hours per day as instruction is given in the public schools.

4. If there are children of several families being taught in a home of one of the parties, must the State Board of Education give its approval to this arrangement?

As long as a qualified tutor is approved by the division superintendent, there is no requirement that the State Board of Education approve the tutoring, other than to ensure that the tutor meets the State Board of Education qualifications.
5. Who is in charge of monitoring compliance with any requirements?

The State Board of Education, pursuant to § 22-275.23, has general authority and duty to see that the compulsory attendance laws are properly enforced throughout the Commonwealth. In addition, § 22-275.6 states that every person having under his or her control a child subject to § 22-275.1 shall cause the child to attend school or receive instruction as required. If the person having control of the child fails to comply with the law, the division superintendent or chief attendance officer has the specific responsibility for making a complaint in the name of the Commonwealth before the juvenile and domestic relations district court pursuant to §§ 22-275.10 and -275.11. In addition, such child may be proceeded against as provided in Title 16.1 of the Code.

The above answers only apply, however, if the child is subject to compulsory attendance under § 22-275.1. If the determination is made pursuant to § 22-275.4 that the pupil and his parents are conscientiously opposed to attendance at school by reason of bona fide religious training or belief (as opposed to essentially political, sociological, or philosophical views or a merely personal moral code), the child is exempt from the compulsory attendance laws and the school board has no further obligation of any nature. See Report of the Attorney General (1974-1975) at 350 and Report of the Attorney General (1971-1972) at 359.

SCHOOLS—Conflict Of Interests—Nothing in Virginia education law, Title 22, to prohibit a father from voting on appointment of his daughter to school board.

VIRGINIA CONFLICT OF INTERESTS ACT—School Board—Member of board not prohibited by Act from voting on appointment of his daughter, who does not live in his household, to school board.

October 26, 1977

The Honorable James T. Edmunds
Member, Senate of Virginia

This is in reply to your recent inquiry whether the Virginia Conflict of Interests Act prohibits a member of a board of supervisors from voting on the appointment of his daughter, who does not live in his household, to the school board.

There is nothing in the Virginia education law, Title 22, which would prohibit a father from voting on the appointment of his daughter to the school board. Likewise, the Virginia Conflict of Interests Act would not prohibit such action. That Act defines a "material financial interest" to be "a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household." Section 2.1-348(f) of the Code of Virginia (1950), as amended. You state in your letter that the daughter does not reside in her father's household. Therefore, the father would not have a material financial interest in the appointment of his daughter to the school board. Without this material financial interest, the action of the individual in question is not prohibited by the Virginia Conflict of Interests Act. See § 2.1-352.
SCHOOLS—One Man-One Vote Rule Not Violated By Provision Of Altavista Charter—Appointment of member of Campbell County School Board from Altavista does not involve office filled by popular election.

ELECTIONS—One Man-One Vote Rule—Does not apply to members of county school board where members not chosen by popular election.

SCHOOLS—School Boards—One man-one vote rule applies to elections; does not apply to members of county school board where members not chosen by popular election.

ZONING—One Man-One Vote Rule—Does not apply to members of local administrative boards which serve a non-legislative purpose for which no popular election is required.

February 3, 1978

THE HONORABLE JOSEPH P. CROUCH
Member, House of Delegates

This is in reply to your letter of January 31, 1978, in which you ask:

"Whether the special School Board seat, given to the Town of Altavista, violates the 'one man-one vote' principle laid down by the United States Supreme Court?"

In 1937, the Town of Altavista petitioned the State Board of Education for representation on the Campbell County School Board. The State Board of Education authorized the Town to set up a separate school district for the purposes of representation only on the Campbell County School Board. In 1958, the Honorable Albertis S. Harrison, as Attorney General, in response to an inquiry from the Honorable Leonard F. Jones, Commonwealth's Attorney for Campbell County, issued an opinion raising certain questions as to the authority for the Town of Altavista to appoint a three-member Town School Board for the purposes of representation only on the Campbell County School Board and as to the selection of a delegate from the Town School Board to serve on the County School Board. Report of the Attorney General (1957-1958) at 253. Subsequently, the General Assembly in 1958 amended § 33 of the Charter of the Town of Altavista to provide as follows:

"... The town council may appoint a town school board of three members, the members of which board shall be appointed for terms in accordance with § 22-89 of the Code of Virginia. The town school board as such shall have no authority relative to the county schools, but one of its members shall be designated annually during the month of December by the town school board as a member of the county school board for the ensuing calendar year." Chapter 512 [1958] Acts of Assembly 650.

Thus, the representative on the Campbell County School Board from the Town of Altavista is appointed by the Town School Board, which, in turn, is appointed by the Town Council. The present Campbell County School Board consists of eight members; one member each is appointed by the School Trustee Electoral Board from the County's six magisterial districts, an "at-large" member appointed by the School Trustee Electoral Board and a member from Altavista appointed by the Town School Board pursuant to § 33 of the Altavista Town Charter. Selection of school boards by the School Trustee Electoral Board
method has been expressly upheld by the Supreme Court of Virginia. *Board of Supervisors of Chesterfield County v. County School Board*, 182 Va. 266, 28 S.E.2d 698 (1944).

The "one man-one vote" principle of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution was set forth in *Wesberry v. Sanders*, 376 U.S. 1 (1964), as requiring that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. (Emphasis added.)

The "one man-one vote" principle was further considered in *Reynolds v. Sims*, 377 U.S. 533 (1964), to apply to elections for state legislatures. The Court in *Reynolds*, however, recognized that:

"Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in carrying out of state governmental functions." 377 U.S. at 575.

Based on this language found in *Reynolds*, the Supreme Court in *Sailors v. Kent Board of Education*, 387 U.S. 105 (1967), held that the "one man-one vote" did not apply to members of a county school board where the members of the board were not chosen by popular election. Subsequent Supreme Court cases extending the "one man-one vote" rule have held that an "election" is a necessary precondition to the rule. See, e.g., *Hadley v. Junior College District*, 397 U.S. 50 (1970); *Avery v. Midland County*, 390 U.S. 474 (1968).

Consistent with these cases this Office, in an Opinion to the Honorable David R. Thompson, Commonwealth's Attorney for King George County, dated December 1, 1977 (a copy of which is attached), has ruled that the "one man-one vote" rule does not apply to members of local administrative boards which serve a non-legislative purpose for which no popular election is required.

Thus, I am of the opinion that the appointment of a member of the Campbell County School Board from Altavista, as provided in § 33 of the Charter of that Town, does not violate the "one man-one vote" rule since it does not involve an office filled by popular election.

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**SCHOOLS—Salaries**—School board may establish policy of paying teachers and school employees employed on 10-month basis in twenty-six biweekly installments.

**CONTRACTS**—School Board—May establish policy of paying teachers and school employees employed on 10-month basis in twenty-six biweekly installments—Contract should include special covenant section.

December 20, 1977

**THE HONORABLE MARY A. MARSHALL**
Member, House of Delegates

This is in reply to your inquiry whether the school board of Arlington County may establish a policy of paying teachers and school employees employed on a
10-month basis in twenty-six biweekly installments.

Section 22-72(5) of the Code of Virginia (1950), as amended, provides in pertinent part that county school boards shall have the power:

"... to provide for the payment of teachers and other officers monthly or biweekly, as may be determined by the Board, but such payment shall be made on the last day of such pay period, or as soon thereafter as possible."

Section 22-97(12) of the Code, which is applicable to city school boards, recognizes the existence of the power to pay teachers but makes no provision for any particular method of paying school employees. The standard form contract prescribed by the Board of Education for teachers on annual contracts specifies that the salary will be paid in "... installments for services rendered, payable by the first day of each calendar month or as soon thereafter as possible or in accordance with Schedule under Special Covenants." The form contract for teachers on continuing contract status is silent on the point. Both contracts are, by their terms, subject to school board regulations. There is no form contract for nonprofessional employees.

I do not construe the language in the form contract as preventing payment over twenty-six biweekly pay periods for work performed in ten months.

Normally, such a payment policy of twenty-six pay periods could be established by regulations of the Board. Section 22-72(5) gives counties the specific authority to do so. The power to prescribe the number of pay periods is a properly implied power in the case of cities. Since the annual form contract would require monthly payments unless special covenants are added, language providing for payment in twenty-six installments should be included under the special covenants section of the contract. This would avoid creating a situation where a teacher's contract appeared to conflict with the Board's regulation.

In the case of persons on a continuing contract, the absence of an applicable contractual provision means that no covenant is required in the contract, and the school board may establish such a policy by regulation. Notice of the change should be given by April 15th prior to the next school year for which the regulation is to be effective. Changes in conditions of employment may be made in the case of persons on continuing contract by observing the April 15th notice date. See Opinion to the Honorable L. Douglas Wilder, Member, Senate of Virginia, dated August 18, 1976, and found in the Report of the Attorney General (1976-77) at 246, a copy of which is attached.

SCHOOLS—School Boards—Authority—May adopt self-funded health insurance program under § 22-72(5) for counties; § 22-97(3) for cities.

HEALTH BENEFITS—Meaning Of "Related Service"—Plans for prepaid hospital, medical, surgical or prescription drugs.

December 1, 1977

THE HONORABLE ADELAARD L. BRAULT
Member, Senate of Virginia

This is in reply to your letter of November 8, 1977, in which you inquire whether a school board has the general authority under existing law to adopt a self-funded health insurance program. You describe the proposed program as follows:
"Under most current plans, a school system contracts with a commercial carrier, such as Blue Cross/Blue Shield, who, in return for a premium, agrees to honor valid medical claims made by employees. The premiums are partially paid by the school system and partially paid by employees. Under a program of self-funding, the school system would pool those premiums in a special fund and pay claims out of that fund. The administration of the self-funding plan would be handled by contracting with an outside administrator . . . ."

In a previous opinion, I ruled that §22-72(5) of the Code of Virginia (1950), as amended, and Article VIII, Section 7, of the Constitution of Virginia (1971), authorize a county school board to provide health insurance coverage for teachers and their families in the absence of a regulation by the State Board of Education prohibiting the school board from providing this type of benefit, and assuming that the county school budget authorizes such expenditures. See Opinion of the Attorney General 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. To date, the Board of Education has not adopted a regulation prohibiting health benefits from being provided by county school boards.

In an Opinion to the Honorable Ira M. Lechner, Member, House of Delegates, dated December 2, 1974, and found in the Report of the Attorney General (1974-1975) at 199, it was ruled that a county school board could administer a prepaid health services plan pursuant to §32-195.3:1 of the Code either directly or through an agent who may be an individual or a nonstock corporation. In view of the foregoing, I am of the opinion that the school board has the general authority to adopt a plan of the type you describe pursuant to its statutory powers under §22-72(5). Similar authority would exist in the school boards of cities pursuant to the provisions of §22-97(3) of the Code. While it is possible for a self-funded program to be created and administered pursuant to the present authority conferred by statute, the current law (absent any proposed enabling legislation, to control such programs) does not provide any method by which the expenses during a budget period may exceed the sum appropriated for that purpose.

SCHOOLS—School Boards—Authority to suspend, dismiss or place on probation teachers, supervisors and principals employed by boards—Superintendent’s role; delegation of authority.

DEFINITIONS—“Teacher”—Procedures for dismissing, suspending or placing on probation—Term “teacher” includes principals or supervisors as well as classroom teachers.

SCHOOLS—Teachers—Dismissal—No requirement imposing on school board the duty to conduct a pretermination hearing; ex parte prior determination would not necessarily taint subsequent hearing.

January 10, 1978

THE HONORABLE GEORGE W. GRAYSON
Member, House of Delegates
This is in response to your inquiry concerning the validity of a resolution passed by the Williamsburg-James City County School Boards, a copy of which you enclose, which delegates to the Division Superintendent of Schools the authority to suspend, dismiss or place on probation the teachers, supervisors and principals employed by the boards.

In relevant part, the policy states as follows:

"Whenever the Superintendent shall have reason to believe that any teacher, supervisor or principal should be dismissed, suspended or placed on probation, he shall have the authority to take such action on behalf of the Boards, and to furnish a written notice of such action to the employee concerned in accordance with the provisions of § 22-217.6 of the Code of Virginia."

The policy then states that the superintendent shall notify the boards of this action and, if the employee makes a timely request, a hearing shall be held wherein the superintendent and the teacher may present any relevant evidence to the boards, which shall make the final decision. If a hearing is not requested, the superintendent shall request that his action be affirmed by board action. The boards have the authority to review the action of the superintendent, and to modify or reverse such action.

The authority to dismiss teachers clearly lies with the school board. Section 22-203 of the Code of Virginia (1950), as amended, states that:

"The school board on recommendation of the division superintendent shall employ teachers and place them in appropriate schools and shall dismiss teachers when delinquent, inefficient, or otherwise unworthy."

Also, § 22-72(5) and § 22-97(3) of the Code use essentially the same language in delineating the powers of county and city school boards respectively.

The foregoing statutes make it clear that the school board shall have the sole responsibility for dismissing teachers, and that the superintendent's role is limited to recommending the dismissal. Since the statutes specifically set out the functions of both the school board and superintendent, it is my opinion that the superintendent's role is limited to recommendation, and the power to dismiss may not be delegated to him. See Report of the Attorney General (1973-1974) at 306. For the reasons noted below, this defect is of a technical nature and would not initiate a dismissal where the board took the final action.

As to the authority of the superintendent to suspend a teacher, §§ 22-72(5) and 22-97(3) grant the authority to the school board but mention nothing about the recommendation of the superintendent. Section 22-10.8:1, however, specifically allows a division superintendent or central office designee to suspend teachers subject to a board hearing. This is in the superintendent's capacity as an agent of the board, and thus the decision to suspend may be delegated, subject to board review.

The authority to place teachers on probation is dealt with in § 22-217.5, et seq. Section 22-217.8:1 states that the authority to place a teacher on probation lies with the school board, and § 22-217.6 allows the teacher to then request a hearing before the board. The statutes are silent as to who should make the initial decision to place a teacher on probation, but since § 22-217.8:1 specifically allows the superintendent to act as the school board's agent in the suspension of a teacher, the same rationale would apply to placing a teacher on probation, which is a less serious penalty, and thus this authority could also be delegated. Since this decision is reviewable by the board if the teacher requests a hearing,
the final decision still is that of the school board. The Regulations of the Board of Education (1975), ¶ IX, at 16, do provide that the superintendent should report violations of regulations to the school board, but this does not diminish the superintendent's authority over suspensions and probations.

The reason for the adoption of the policy is that if a school board has to vote to dismiss on the recommendation of the superintendent, and then the teacher requests a hearing under §§ 22-217.6 to -217.8, the board is required to entertain the hearing after the superintendent has already presented evidence to the board. It then may be argued that the board does not meet the due process standard of being an impartial decision-maker. In an Opinion to the Honorable Ray L. Garland, Member, House of Delegates, dated January 13, 1977, and found in Report of the Attorney General (1976-1977) at 243, it was held that a prior determination by a school board to dismiss a teacher, subject to the right of the teacher to request a hearing, does not, ipso facto, disqualify the board from conducting the hearing and making a final determination.

Although the school board may not delegate the authority to the superintendent to dismiss teachers, the superintendent could be given the authority to notify the teacher in writing of his intention to recommend dismissal to the school board and his reasons therefor, stating that the teacher may request a hearing before the school board within fifteen days after receiving said notice. If the teacher were to make such a request, the hearing pursuant to § 22-217.7 would be held, and the board would vote thereon. If no hearing were requested, the board could then vote whether to dismiss upon the superintendent's recommendation.

The major difference between this procedure and the one in question is that, in the foregoing, dismissal does not occur until the board votes to dismiss. Thus, the superintendent is merely delegated the authority to extend the opportunity for a pre-termination hearing. If the facts are such that the superintendent feels the teacher would be ineffective for the period between the sending of the notice and the board decision to terminate, the superintendent may simultaneously send him a notice pursuant to § 22-217.8:1 suspending him until the board's decision, stating his reasons therefor and offering him a hearing on his suspension, which could be held at the same time as the dismissal hearing.

Although the preceding discussion has been limited to the procedures for dismissing, suspending or placing "teachers" on probation, the State Board of Education has defined the term "teacher" for these purposes to include principals or supervisors as well as classrooms teachers, so that the above-mentioned statutes would also apply to those employees mentioned in the policy. Regulations of the Board of Education (1975), ¶ 1, at 9.

Consequently, I am of the opinion that the policy in question is valid as to the authority of a superintendent to initially suspend a teacher or place him on probation, and is invalid to the extent it allows a superintendent to dismiss a teacher.

SCHOOLS—School Boards—Game warden may serve on local school board—Not conflict under § 22-69.

PUBLIC OFFICERS—Defined—Distinguished from employees.

PUBLIC OFFICERS—Game Warden—Not a public officer.

May 1, 1978
You have asked whether there is any prohibition against a special game warden serving on a local school board. Section 22-69 of the Code of Virginia (1950), as amended, prohibits State and county officers from serving on a school board. However, a game warden is not an officer within the meaning of this section merely by reason of his authority to enforce laws. Such a person is an employee rather than a public officer. See Report of the Attorney General (1974-1975) at 373, a copy of which is enclosed.

Therefore, it is my opinion that a special game warden is not prohibited from serving on a school board.

SCHOOLS—School Boards—May charge combined textbook rental and materials fee—Fees may be imposed so long as not requirement for admission to school.

FEES—Schools—Sale or rental of textbooks; sale at cost of certain other consumable supplies.

SCHOOLS—General Assembly Has Never Required All Materials And Supplies To Be Provided Free To Every Student.

October 24, 1977

This is in response to your recent letter in which you inquire whether a school may impose a combined textbook rental and materials fee. I am informed that the fee in question is in the amount of $6.00, which is less than the actual cost of textbooks. In the case of some of the lower grades, the fee plus the $2.00 State appropriation per student for textbooks may exceed the cost of textbooks. In no event does the cost of books plus cost of materials exceed the actual wholesale cost of materials used by a student. From the information available, the fee in question is comparable to others in general use in Virginia.

For the reasons indicated below, I am of the opinion that the described fee is lawful.

Such a fee is not in contravention of Article VIII, Section 1, of the Constitution of Virginia (1971), which requires a system of “free” public schools. Article VIII, Section 3, of the Constitution requires provision of textbooks free of charge to persons who cannot afford them, and thereby permits the sale or rental of textbooks to those who can. Fees may be imposed as long as they are not a requirement for admission to school. See Opinion to the Honorable Charles J. Colgan, Member, Senate of Virginia, dated May 6, 1977, a copy of which is attached, which states in pertinent part:

“Although the constitutionality of fees such as those described in your letter has never been considered by the Supreme Court of Virginia, it has been presented and resolved by the highest courts in other States with constitutional provisions relating to ‘free’ schools. Those courts have held that fees cannot be charged as a requirement for students to be admitted to

Section 22-307.1 of the Code of Virginia (1950), as amended, authorizes textbook rental systems. Section 22-314 allows consumable material such as workbooks, writing books and drawing books to be sold at a price equal to the publisher's price plus seven percent. Section 22-199 allows the rental of such materials and the sale at cost of certain other consumable supplies in any school within the jurisdiction of the school board. It is clear from the above-referenced Code provisions that Article VIII, Section 1, of the Constitution has never been interpreted by the General Assembly to require that all materials and supplies be provided free to every student. Accordingly, as indicated above, I am of the opinion that the fee in question is valid so long as it is not a requirement for admission to school.

SCHOOLS—School Boards—Power to allow children (Virginia residents) who reside outside school division, to attend local school tuition free, or at reduced tuition.

COUNTIES, CITIES AND TOWNS—School Boards—Authority to adopt rule setting tuition for nonresident students at level lower than cost of educating student.

SCHOOLS—Tuition—School Board has discretion to set amount.

October 28, 1977

THE HONORABLE EDWARD A. PLUNKETT, JR.
County Attorney for Augusta County

This is in reply to your letter regarding the adoption by the City of Waynesboro of a tuition of $325 per pupil for Virginia residents attending City schools. You ask the following questions:

"1. Whether a city, town or county school board has the authority to adopt a rule waiving tuition payments for nonresident students who are residents of Virginia in other localities for the purpose of attracting students from such other localities in order to increase the funds available to it from The Basic School Aid Fund of the State of Virginia; and

"2. Whether a city, town or county school board for the same purpose has the authority to adopt a rule setting tuition payments for such nonresident students at a level significantly lower than the cost of educating the student."

Your letter presents the following facts, and for purposes of this Opinion may be assumed to be accurate. Because of a decrease in student enrollment, the City of Waynesboro may be forced to close several neighborhood schools. On August
9, 1977, the Waynesboro School Board voted to lower the tuition for nonresident students in the City schools from $724 to $325 per pupil for the 1977-78 school year. By this means, Waynesboro hopes to attract up to 200 nonresident students, most of whom would come from neighboring Augusta County, to attend its schools.

In the 1975-76 school year, Waynesboro received approximately $330 per pupil in State aid and spent approximately $800 per pupil in local funds to operate the City schools. Augusta County received approximately $434 per pupil that year in State aid, and spent approximately $483 per pupil in local funds to operate its schools. Because the amount of State aid received by a city or county is based on the number of students attending its schools, Waynesboro will receive additional State funds for each student who transfers from Augusta County schools, with a corresponding loss in State aid to Augusta County. Augusta County anticipates that these students can be assimilated into Waynesboro City schools without additional expense for Waynesboro, while the transfer of students from scattered classrooms will not result in any decrease in expenditures for Augusta County.

Section 22-219 of the Code of Virginia (1950), as amended, provides that:

"The school board of each county, city or town operating as a separate school district shall have the power to make regulations whereby persons other than [residents of a county, city or town] . . . who are residents of the State of Virginia may attend school in such county, city or town, and may charge tuition for the attendance of such persons in such schools, provided, however, that the tuition charge for any such person shall not exceed the total per capita cost of education . . . for high school or elementary pupils . . . of such county, city or town. . ." (Emphasis added.)

I have previously advised, in an Opinion to the Honorable William H. Harris, County Attorney for Stafford County, dated July 31, 1975, and found in the Report of the Attorney General (1975-1976) at 309, that § 22-219 authorizes, but does not require, a school board to charge tuition for persons permitted to attend school under this provision. The school board thus has the power to allow children who reside outside the school division, but who are Virginia residents, to attend a local school, tuition free, or for a very low tuition. The only requirement imposed upon the Waynesboro School Board in setting the amount of tuition payments for such students is the requirement contained in § 22-219 that the tuition charge shall not exceed the total per capita cost of education for local school students.

I note further that even though school boards are required, pursuant to § 22-220 of the Code of Virginia, to charge tuition for students who are nonresidents of the Commonwealth of Virginia, there is no requirement that they charge a certain minimum tuition. The statutory language would require only that the tuition charge reflect the cost incurred in educating the student in question; that is, that the school board not charge an amount greatly in excess of actual costs. See Opinion to the Honorable Charles J. Colgan, Member, Senate of Virginia, dated June 10, 1977, a copy of which is attached.

Accordingly, I am of the opinion that the Waynesboro School Board may adopt any tuition charge for nonresident City pupils, or may allow them to attend the local schools tuition free. All such students should be charged the same rate or treated in the same manner.
SCHOOLS—School Boards—Residence of members controlled by § 22-68 modified by § 15.1-571.1—Bona fide residents of election districts from which appointed.

ELECTIONS—School Board Members Should Be Residents Of Election District They Represent; § 15.1-571.1.

SCHOOLS—Each Election District Entitled To Representation On School Board—“Special school districts.”

May 1, 1978

THE HONORABLE B. RANDOLPH BOYD
Commonwealth’s Attorney for Charles City County

You have asked whether school board members should be appointed from each of the county’s election districts or from its magisterial districts. You say that the present school board consists of three members appointed from each of the county’s election districts; however, because the lines of the county’s magisterial districts differ from its election districts two members of the school board reside in the same magisterial district, with the term of one of these members expiring in June 1978.

Residence of school board members is controlled by § 22-68 of the Code of Virginia (1950), as amended, which provides:

"Each member of the county board at the time of his election shall be a bona fide resident of the magisterial district or town from which he is elected. . . ."

Section 15.1-571.1 of the Code, however, modifies the requirements of § 22-68 by providing:

"The governing body of a county may by ordinance provide that the magisterial districts of the county shall remain the same, but that representation on the governing body shall be by election districts, in which event all sections of this Code providing for election or appointment on the basis of magisterial districts shall be construed to provide for election or appointment on the basis of election districts; such election districts shall also constitute school districts as prescribed by § 22-61 of this Code."

In a similar inquiry, this office held that each election district is entitled to representation on the School Board. See Opinion to the Honorable William J. McGhee, County Attorney for Montgomery County, dated September 27, 1972, and found in Report of the Attorney General (1972-1973) at 335. Section 15.1-571.1 provides that the residence requirement of § 22-68 means that members of the school board be bona fide residents of the election district from which they are appointed. See Opinion to the Honorable W. L. Person, Jr., Commonwealth’s Attorney for the City of Williamsburg, dated July 10, 1974, and found in the Report of the Attorney General (1974-1975) at 168.

Thus, I am of the opinion that members of the County of Charles City School Board should be appointed from the county’s election districts and that each district should be represented on the School Board by a bona fide resident from that district.
You have asked whether a local school board has the authority to review the assignment of a teacher by the superintendent and to change that assignment where the board disagrees with that assignment or feels that the assignment was made arbitrarily.

Section 22-205 of the Code of Virginia (1950), as amended, provides that:

"The division superintendent shall have authority to assign to their respective positions in the school wherein they have been placed by the school board all teachers, including principals, and, after the school board has adopted a resolution authorizing the division superintendent to reassign teachers and principals, may reassign any teacher or principal employed by the school board to any school within such division, provided no change or reassignment shall affect the salary of such teachers; and provided, further, that he shall make appropriate reports and explanations on the request of the school board."

In addition, § 22-203 states:

"The school board on recommendation of the division superintendent shall employ teachers and place them in appropriate schools and shall dismiss teachers when delinquent, inefficient, or otherwise unworthy."

1. Assignment Within a School:

Under these two sections, teachers are initially hired by the school board on the recommendation of the superintendent. The school board then decides in which school the teacher shall be placed. The division superintendent has the authority to assign those teachers to positions within the school in which they have been placed by the school board.

The school board has no control over the assignment of teachers within a school, since the superintendent is not acting as the agent of the school board but pursuant to his legislative grant of authority under § 22-205. See Report of the Attorney General (1935-1936) at 131. Where a statute specifically confers a power on a school official, the board may not remove that power. See Report of the Attorney General (1973-1974) at 306. The school board would lack the authority to change an assignment within a school by the superintendent, whether the school board questioned the wisdom of the assignment or whether the board felt the assignment to be arbitrary.

2. Assignment Among Schools:

The result is different in the case of a "reassignment" of a teacher to another school. Pursuant to § 22-205, the school board clearly has the authority to make such reassignments; however, the board may pass a resolution authorizing the superintendent to make reassignments without seeking board approval. In this situation the superintendent has no independent statutory authority, but is merely acting as the agent of the school board. If the school board, after
receiving any reports or explanation provided by § 22-205, feels the reassignment was not in the best interests of the school system or was arbitrary, it could revoke the resolution and make whatever placement it desired under its own statutory authority.

SCHOOLS—School Boards—Whether religious observances in schools must be prohibited—Christmas programs.

CONSTITUTION—“Establishment Clause” (Establishment Of Religion By Congress) Made Applicable To States By Fourteenth Amendment—Purpose-effect-entanglement test.

CONSTITUTION—Religion In Public Schools—Traditional public school Christmas pageant not prohibited by Constitution—Purpose and effect inquiry into each case.

CONSTITUTION—Teaching Of Religion For Other Than Sectarian Purposes Is Entirely Within.


SCHOOLS—Religion—School may neither promote nor oppose; nor completely ban religious holiday programs, religious music, or religious symbols.

December 9, 1977

THE HONORABLE FREDERICK T. GRAY
Member, Senate of Virginia

I am in receipt of your inquiry concerning a policy entitled Religious Observances in Schools recently adopted by the Williamsburg-James City County School Boards. You inquire whether the School Boards must prohibit the activities discussed in the policy.

A school board can exercise those powers and functions granted to it expressly or by necessary implication. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Both county and city school boards have the power to make local regulations for the "conduct" and "government" of the schools. See §§ 22-72(2) and 22-97(1) of the Code of Virginia (1950), as amended. Such regulations must be in harmony with general rules of the State Board of Education and statutes of the Commonwealth. The regulations, of course, may not be violative of the Constitution of the United States or the Constitution of Virginia (1971).

The First Amendment to the United States Constitution states in relevant part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

As has been repeatedly stated by this Office and by jurists, the questions you have presented are among the most difficult of the many issues which educators must resolve in the administration of the schools. Difficulties are caused by
conflicts between the traditional views of the proper role of religion in the public schools and Supreme Court rulings. See Opinion to the Honorable George W. Jones, Member, House of Delegates, dated June 4, 1970, and found in the Report of the Attorney General (1969-1970) at 230. Though the Supreme Court has set forth a tripartite test applicable to questions arising under the religion clauses, even Chief Justice Burger has admitted, speaking for the entire Court, that "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area." Tilton v. Richardson, 403 U.S. 672, 678 (1971). I recognize that the policies as adopted are an attempt by the School Boards to deal with a very sensitive matter. The Boards' intent is to maintain a required position of neutrality with respect to the exercise of religious beliefs.

The subject matter of the policy is within the general power of the boards regarding regulations they are authorized to adopt. I construe the policy to be aimed at activities sponsored by the schools themselves. I do not, therefore, construe the policy to impinge upon a student's right to the free exercise of religious belief. For example, the School Boards cannot prohibit the wearing of religious symbols, unless shown to interfere with the orderly function of the schools, and the policy should not be so construed. A student is free to exercise religious beliefs and express opinions "if he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513 (1969).

Consequently, in order to respond to your inquiry, a determination of the applicability of the "Establishment Clause" to the policy must be made. The "Establishment Clause," that "Congress shall make no law respecting an establishment of religion," is made applicable to the states by the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940).

As discussed, infra, I am of the opinion that the policy when viewed under the applicable tests established by the Supreme Court, is correct in noting that a school may neither promote nor oppose religion, but the policy is not required to be as wide sweeping nor are the School Boards obligated to completely ban religious holiday programs, religious music, or religious symbols. Though a state cannot actively involve itself in religion, McCollum v. Board of Education, 333 U.S. 203 (1948); Engel v. Vitale, 370 U.S. 421 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963), it is not required to completely ignore religion.

The test to be applied in determining that a statute does not violate the Establishment Clause was set out by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court stated:

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. at 612-13. See also Walz v. Tax Commission, 397 U.S. 664 (1970); Schempp, supra.

What is thus required under the Supreme Court's "purpose-effect-entanglement" test, is a factual inquiry concerning the purpose of the conduct, its effect and entanglement of the state in the conduct.

Before turning to the policy itself, it may be well to discuss in some detail the applicability of the test to observances of the Christmas season since the policy itself addresses that subject.
In *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973), the Court of Appeals considered a challenge to participation by the federal government in the annual Christmas Pageant of Peace, celebrated on the Ellipse adjacent to the White House, and in particular the maintenance of a creche in connection with such Pageant.

In determining the purpose, the Court found that:

"The Pageant itself is an outgrowth of the traditional National Community Christmas Tree Celebration, and as the record amply demonstrates evolved in 1954 as a vehicle for bolstering tourism in the District of Columbia. On a more philosophical level its continually expressed purpose has been that of manifesting this 'nation's desire for "Peace on Earth, Goodwill Toward Men."' The Pageant is conducted each year at the approximate time of the celebration of the national legal holiday of Christmas, and is meant to serve as 'a visible expression of this Nation's aspiration to foster peace, understanding and friendship between the nations of the world and the American People.' The creche itself, while obviously a religious symbol, is part of a commemoration of 'the Nation's celebration of Christmas as a national holiday, by depicting all the traditional aspects of our national history associated with Christmas.' While the creche is utilized neither to promote nor profane any religion, it is 'intended to be reverential to the religious heritage aspect of Christmas.'" 495 F.2d at 69.

In applying the "primary effect" test, the Court quoted from *Hunt v. McNair*, 413 U.S. 734, 742-43 (1973), wherein the Supreme Court iterated guidelines to be followed in administering the primary effect test:

"... Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected.

* * *

"Aid normally may be thought to have a primary effect of advancing religion when it [1] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or [2] when it funds a specifically religious activity in an otherwise substantially secular setting. . . ." (Emphasis added.)

In applying such guidelines the Circuit Court of Appeals found:

"... the Pageant itself is not subsumed in religiosity, but rather the creche, the only religious symbol in the celebration, is one of many integral displays and is manifestly utilized only to emphasize the religious heritage aspect of the Christmas holiday; finally, although good motives cannot save impermissible actions, the Supreme Court has made clear that analysis of activities and reason for being can have a direct bearing on the permeation of religiosity in any institution. It would be carrying the logic of the primary effect test to an unwarranted extreme to find in this case that appellant's proof that the creche was a patently religious symbol met its burden of showing that the Pageant is 'an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.'" 495 F.2d at 72.

In applying the second half of the *Hunt* test, the Court stated:

"We do not dispute that the creche is an obvious religious symbol, nor do
we consider lightly the testimony of plaintiff's witnesses concerning its effect upon them. Yet when we engage in the inevitable 'line drawing' that this and other First Amendment problems require, see United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), we do not find the Government's involvement constitutionally infirm. In reaching such a conclusion we are particularly impressed by the following factors: (1) the secularized nature of the Pageant and, to a certain degree, of the Christmas holiday season itself; (2) the utilization of the creche only to manifest the religious heritage aspect of the Christmas celebration, as only one of many 'traditional aspects of our national history associated with Christmas'; (3) the presence of explanatory plaques on the grounds of the Pageant which state, *inter alia*:

"The National Park Service sponsors the Pageant on the basis that this National Celebration Event is wholly secular in character, purpose, and main effect. The illuminated creche display is intended to be reverential to the religious heritage aspect of Christmas; but that display is not meant, and should not be taken, either to promote religious worship, or profane the symbols of any religion." 495 F.2d at 73-74.

Though the Court found excessive entanglement, it was not on the basis of the government's mere co-sponsorship of the event, but rather on facts not presented herein.

Entanglement, however, is basically measured by the amount of involvement of the state in the activities of a religious event. A state cannot, for example, administratively intercede into a religious event to ensure that funds are used only for secular purposes. In short, the state may not intrude on religion.

Turning specifically to the Williamsburg-James City County policy, the opening paragraph states:

"The school division shall maintain a position of neutrality with respect to the exercise of religious beliefs and shall neither promote nor oppose religion."

This position of neutrality was required of public schools by the Supreme Court in both *Schempp, supra*, and *Engel v. Vitale, supra*. In the latter, the Court stated at 435:

"It is neither sacrilegious or antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

And in *Schempp*, the Court stated at 226:

"The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment."
The Williamsburg-James City policy then specifically prohibits four categories of religious observances in the schools.

"1. Any religious holiday program or activity, including prayer, worship or religious services of any kind, whether or not conducted by a clergyman. Such prohibition shall include Christmas or Easter pageants and other presentations whose purpose or effect is the promotion or opposition of the exercise of religious beliefs.

"Such religious observances are not justified by the fact that the majority of students or individuals in a given community happen to approve such practices, or by the fact that individual students may be excused, upon the request of their parent or guardian. Joint holiday observances, such as Christmas-Hanukkah, are equally inappropriate."

This policy regarding religious holiday programs or activities by its express terms proscribes only those activities "whose purpose or effect is the promotion or opposition of the exercise of religious beliefs." This is basically the test laid down in Schempp. The policy, however, seems to say that all holiday programs involving religion are regarded as constituting an improper promotion or opposition of religious beliefs. Before beginning the complicated legal analysis of this point one thing needs to be stated with clarity. The traditional public school Christmas pageant is not prohibited by the Constitution.

The inquiry as to the purpose and effect must be made in each individual case, and not all programs would be constitutionally prohibited merely because the holiday has some religious significance, since many religious holidays have developed independent secular aspects which may be emphasized, as well as having religious references which would not have a purpose or effect which advances religion.

The Supreme Court in Engel v. Vitale, supra, noted that merely because religion was mentioned in some way in a school activity did not mean that such activity would be unconstitutional. The Court stated:

"There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." 370 U.S. at 435.

Thus, each activity must be viewed independently as to its purpose and effect. Since this is obviously a matter of intent in the former instance and degree in the latter, I cannot state that all religious holiday programs either would or would not be constitutional. It is clear, however, that merely because religion is involved in some way the activity is not proscribed. For example, in Grossberg v. Deusebio, 380 F.Supp. 285 (E.D. Va. 1974), it was held that an invocation at a high school graduation was constitutional due to its short duration, even though it directly involved religion.

The other categories of religious observances are:

"2. The display of religious objects or symbols. Such prohibition shall include crosses, Stars of David, nativity scenes and menorahs. Such objects
or symbols may be used only as part of a unit or course which teaches about religion.

"3. The presentation of religious music, except as such music is presented for its musical rather than its religious content. No songs, carols or music programs which possess significance for a particular religion shall be sung or performed in a school during the period which coincides with the community celebration of the events portrayed in the music. This provision does not prohibit the singing of festive songs which are not associated with a religious celebration."

As with holiday programs, the display of religious objects or symbols and the presentation of religious music must be examined in each case to ascertain whether there is a secular purpose behind the display or presentation and if the primary effect neither advances nor inhibits religion. This is recognized in the policy, which proscribes only music "that is presented for its . . . religious content." I assume that the same limitation would apply to the display of religious symbols.

Lastly, the policy of the school board prohibits:

"4. The distribution of Bibles, or other religious materials for devotional use, or for other than study about religion."  

The distribution of Bibles, or other religious materials for devotional use, is proscribed by law only when it is for other than secular purposes. This is one of the tests in Schenck, supra. See also Goodwin v. Cross Country School District, 394 F.Supp. 417 (E.D. Ark. 1973), and Meltzer v. Bd. of Public Instruction of Orange County, 548 F.2d 559 (5th Cir. 1977).

The policy then covers three additional areas of concern. The first states that in planning school calendars, the possible effect of religious holidays shall be taken into account, and, when possible, examinations, etc., shall not be scheduled on religious holidays. It is my opinion that a policy such as this would not violate the Establishment Clause since neither the purpose nor the primary effect is to aid religion, but is to ensure that attendance on important school days is at the maximum. Neither would there be excessive entanglement by the state. The Supreme Court, in Zorach v. Clauson, 343 U.S. 306 (1952), in holding that a released time program of religious instruction was constitutional, found that the schools in such cases did "no more than accommodate their schedules to a program of outside religious instruction." Id. at 315.

The policy continues by stating that the right of parents to determine when their children shall be absent from school because of religious observance shall not be limited, and children shall not be penalized for attending religious observances. Although such a policy may not be constitutionally required by the Free Exercise Clause of the First Amendment, the school board may allow students to be absent from school for various reasons, one of which could be to attend religious observances. See Report of the Attorney General (1974-1975) at 358, approving released time programs of religious instruction.

The last paragraph of the policy states that nothing therein shall limit the opportunity for schools to instruct students in "religion's role in the social, intellectual and historical development of civilization." The Supreme Court in Schenck, supra, made it clear that the teaching of religion for other than sectarian purposes was entirely within the Constitution,

"... In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion
and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. . . .” 374 U.S. at 224.

This Office has also previously held that the study of religion may be included in the curriculum of a public school. See Report of the Attorney General (1969-1970) at 230.

In conclusion, though a thorough factual inquiry must be made as to the purpose and effect of certain holiday or Christmas programs it is clear that any such program is not per se in violation of the “Establishment Clause.” To the extent that the policy in question bars any such program without room for any factual inquiry, the policy is not required. Your inquiry is answered in the negative.

SCHOOLS—Students—School personnel may conduct warrantless searches of students and their lockers for illegal drugs, contraband or weapons if search is for enforcing order and discipline in school, not for criminal prosecution.

SEARCH AND SEIZURE—Entire Law As Applied In Criminal Law Not Automatically Incorporated Into School System—Search of student or his locker.

SEARCH AND SEIZURE—Fourth Amendment Applies To Searches By Public School Officials But Educational Interests Must Be Balanced Against Prohibition.

SEARCH AND SEIZURE—Warrantless Searches Of Students And Their Lockers For Illegal Drugs, Contraband Or Weapons—Factors determining reasonableness of search.

June 16, 1978

THE HONORABLE KENNETH R. PLUM
Member, House of Delegates

You ask what legal limitations are imposed on a search by a school official when the official believes a student may possess illegal drugs, weapons or stolen items on his person or in his locker.

Public school authorities have the inherent power to maintain order and discipline in the schools, Pleasants v. Commonwealth, 214 Va. 646, 203 S.E.2d 114 (1973), and school boards have the specific authority to make local regulations for the conduct and discipline of students. See §§22-72(2) and -97(1) of the Code of Virginia (1950), as amended, and Report of the Attorney General (1975-76) at 303.

The Fourth Amendment to the United States Constitution protects all persons against unreasonable searches. To what extent it applies to searches conducted by school authorities has yet to be decided by either the Virginia Supreme Court or the United States Supreme Court. However, the weight of authority is that although the Fourth Amendment applies to searches conducted by public school
officials, educational interests must be balanced against the prohibition of the Fourth Amendment, and the entire law of search and seizure as applied in criminal law to searches by the State is not automatically incorporated into the school system.

In applying a balancing test, it is my opinion that school personnel may conduct warrantless searches of students and their lockers when they have reasonable grounds to believe that the student is in possession of illegal drugs, contraband or weapons, provided the search is conducted primarily for enforcing order and discipline in the school and not for criminal prosecution. This is in line with other recent decisions. *State v. Baccino*, 282 A.2d 869 (Super.Ct. Del. 1971); *People v. Jackson*, 65 Misc.2d 909, 319 N.Y.S.2d 731 (1971), aff'd 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (1972); *State v. McKinnon*, 88 Wash.2d 75, 558 P.2d 781 (1977); *Nelson v. State*, 319 So.2d 154 (Fla. App. 1975); *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (1975); *M v. Board of Education of Ball-Chatham Community Unit School District No. 5*, 429 F.Supp. 288 (S.D. Ill. 1977).

Whether reasonable grounds exist in a particular case depends on the circumstances surrounding the search. Examples of relevant factors in determining reasonableness include the child's age, history and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency of making the search without delay, the probative value and reliability of the information used as a justification for the search, and the scope of the search.

Section 19.2-59 of the Code makes unlawful the search of any person, place, or thing by an officer of the law or any other person without a proper warrant. This section is inapplicable to proper searches by school personnel because it does not outlaw warrantless searches otherwise constitutionally permissible under the Fourth Amendment. See *Kirby v. Commonwealth*, 209 Va. 806, 167 S.E.2d 411 (1966); *Carter v. Commonwealth*, 209 Va. 317, 163 S.E.2d 589 (1968); *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 444 (1977); Report of the Attorney General (1973-74) at 171.

Consequently, it is my opinion that a warrantless search of a student or his locker by school personnel when reasonable grounds exist for such a search is permissible.

SCHOOLS—Teachers—Daughter regularly employed as teacher prior to father's appointment to school board.

VIRGINIA CONFLICT OF INTERESTS ACT—Teachers—Daughter regularly employed as teacher prior to father's appointment to school board.

July 6, 1977

THE HONORABLE VIRGIL H. GOODE, JR.
Member, Senate of Virginia

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

"A School Board member was appointed to the School Board in County A in 1975 and is currently serving on the Board. His daughter was a teacher in the public school system in County B for several years prior to his ap-
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pointment as School Board member in County A. Can the daughter who had the prior experience in County B transfer to and teach public school in County A?"

Applicable to your inquiry is § 2.1-349.1, Code of Virginia (1950), as amended, which reads, in pertinent part, as follows:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school division to employ or pay any teacher or other school board employee from the public funds, federal, State or local, or for a division superintendent to recommend to the school board the employment of any teacher or other employee, if such teacher or other employee is the ... daughter ... of the superintendent, or any member of the school board.

* * *

"This provision shall not apply to any person within such relationship or relationships who has been regularly employed or employed as a substitute teacher by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed or employed as a substitute teacher by any school board prior to the inception of such relationship or relationships. . . ."

Because the daughter was regularly employed as a teacher by the School Board of County B prior to her father being appointed to the School Board of County A, she would not be prohibited by § 2.1-349.1 from being employed as a teacher by the School Board of County A. See Report of the Attorney General (1959-1960) at 300. Accordingly, your inquiry is answered in the affirmative.

SCHOOLS—Term "College" May Not Be Used In Name Of School Without First Obtaining Approval Of State Council Of Higher Education—Student required to be "born again Christian."

DEFINITIONS—Words "To The General Public" Are Not Words Of Limitation—Identify class of persons statute (§ 23-8.1) intended to protect.

EDUCATION—School Provides Education To General Public—Only "born again Christians" eligible for attendance.

June 6, 1978

THE HONORABLE A. JOE CANADA, JR.
Member, Senate of Virginia

You ask whether schools which require that any student who attends be a "born again Christian" may use the term "college" in their names without first obtaining the approval of the State Council of Higher Education for Virginia.

Section 23-8.1 of the Code of Virginia (1950), as amended, provides that no school which purports to provide education, training or research to the general public shall use the terms "college," "university" or similar term unless an associate, baccalaureate, graduate or professional degree is offered upon completion of the program. Section 23-9 then requires approval by the State Council of Higher Education before those degrees are awarded, the practical
effect being to require the approval of the State Council of Higher Education prior to a school calling itself a "college," or "university."

The issue herein is whether a school such as you have mentioned purports to provide education "to the general public" if only "born again Christians" are eligible for attendance. The intent of §§ 23-8.1 and -9 is to protect persons desirous of obtaining postsecondary education, and the words "to the general public" are not words of limitation, but rather identify the class of persons the statute is intended to protect. See Petition of Krebs, 213 Minn. 344, 6 N.W.2d 803 (1942); Rayor v. City of Cheyenne, 63 Wyo. 72, 178 P.2d 115 (1947). The fact that the services are offered only to a segment of the public does not divest them of their public character. See Barkin v. Board of Optometry, 75 Cal. Rptr. 337, 269 Cal. App.2d 714 (1969). Indeed, few private educational entities are open to all persons without restriction.

Thus, it is my opinion that a school limiting its membership to "born again Christians" would be purporting to provide education to the general public under § 23-8.1, and consequently would not be able to use the word "college," "university" or similar term in their title or business absent the approval of the State Council of Higher Education pursuant to § 23-9.

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SCHOOLS—Tuition—Handicapped child attending approved out of state private residential school—Father (military man) transferred to Germany—Domicile is matter of intent.

BURDEN OF PROOF—Change Of Domicile—Burden of proving change is on party alleging it.

RESIDENCE—Tuition Rates—Parents of handicapped child do not lose domicile solely by virtue of fact that husband is transferred out of country.

August 22, 1977

THE HONORABLE CHARLES J. COLGAN
Member, Senate of Virginia

This is in reply to your letter in which you inquire whether a county is required to provide special education tuition assistance in the following circumstances:

"The question involves a handicapped child of school age, who has been attending an approved out of state private residential school. At the time of the child's enrollment, his father and family were residents of Prince William County, and as such applied for and received reimbursement under Code Section 22-10.8. Prior to beginning of the current fiscal year, his father (a military man) and family were transferred to Germany. The transfer was a permanent change of station and there is no guarantee that the next transfer will be back to Virginia. No guardian or other person with custody of the child remains in Virginia. The child continues to attend the out of state school.

"The child's father has petitioned for reimbursement again this year, claiming county residency for himself and his child on the basis of his domicile for state and federal income tax purposes, registration to vote, real estate ownership (now rental property) and payment of real property taxes. . . ."
If the parents of the child in question were Virginia domiciliaries while they resided in Prince William, they would not lose their domicile solely by virtue of the fact that the husband is transferred out of the country. Whether they retain their domicile is a matter of intent, to be proven by sufficient evidence, with the burden of proof upon the party alleging the change of domicile. See Report of the Attorney General (1974-1975) at 381, a copy of which is enclosed.

Your letter presents no facts from which it can be said that the family in question has abandoned its domicile in Prince William County. Assuming there are no other facts to the contrary, it is my opinion that the child in question would continue to be eligible for tuition assistance.

SEARCH AND SEIZURE—Attaching Copy Of Affidavit To Search Warrant To Be Returned To Circuit Court Complies With Requirements Of § 19.2-56.

SEARCH AND SEIZURE—No Requirement That Copy Of Search Warrant Be Left With Person Or Place Being Searched.

July 21, 1977

THE HONORABLE D. M. SLANE
Superintendent, Department of State Police

This is in reply to your letter in which you seek an opinion regarding § 19.2-56 of the Code of Virginia (1950), as amended. Section 19.2-56 was amended by Chapter 289 [1977] Acts of Assembly 351, by the addition of the following language:

"The judge, magistrate or other official authorized to issue criminal warrants shall attach a copy of the affidavit required by § 19.2-54 and such copy shall thereby become a part of the search warrant."

You advise that search warrants are usually prepared in duplicate, one copy being left with the person or place being searched, and the other being returned to the clerk of court after execution. Your inquiry is whether a copy of the affidavit required by § 19.2-54 must be attached to the copy of the search warrant left with the person or place to be searched as well as attached to the copy to be returned to the clerk of court.

The provisions relating to the execution of search warrants are contained in § 19.2-57, which provide in pertinent part, that "[t]he warrant shall be executed by the search of the place described in the warrant. . . . The officer executing the warrant shall endorse the date of the execution thereon and shall file the warrant . . . in the circuit court clerk's office, wherein the search was made, as provided in § 19.2-54." See Ch. 109 [1977] Acts of Assembly 132.

The leaving of a copy of the search warrant at the place searched is simply a policy or practice. I find no requirement in § 19.2-57 or the other Code sections dealing with search warrants, §§ 19.2-52 to -60, nor in the Rules of the Supreme Court of Virginia, which mandate that a copy of a search warrant be left with the person or place being searched. These statutes stand in contrast to § 19.2-75, which specifically requires that process issued against a person charged with a criminal offense shall be in duplicate and the officer serving such process shall leave a copy with the person so charged.
Further, I know of no constitutional requirement that an officer charged with the execution of a search warrant is obliged to leave the warrant as a prerequisite to the right to execute it. 68 Am.Jur.2d Searches and Seizures § 115 (1973). In dealing with the question of the execution of a search warrant, the Supreme Court of Virginia has held that generally, police officers must attempt to gain admittance peaceably by announcing their presence, identifying themselves as police officers and stating their purpose. Heaton v. Commonwealth, 215 Va. 137, 207 S.E.2d 829 (1974). This, in my opinion, would include where necessary exhibiting a copy of the warrant. The Court has never held, however, that there was any requirement that a copy of the search warrant be left with the person or place being searched.

In view of the absence of any statutory requirement that a copy of the search warrant be left with the person or place being searched, it is my opinion that the requirement of § 19.2-56 of attaching a copy of the affidavit to the search warrant is satisfied when a copy of the affidavit is attached to the search warrant which is executed by the police and returned to the clerk of court.

SEWAGE DISPOSAL SYSTEM—Authorization From Board Of Health To Install Septic Tank System.

DEFINITIONS — Sewerage System — Septic tank system.

HEALTH — Septic Tanks And Disposal Of Sewage—State Health Department may enforce rules and regulations concerning.

August 26, 1977

THE HONORABLE EDWARD M. JASIE
Commonwealth’s Attorney for Craig County

This is in reply to your request for my opinion concerning § 32-9 of the Code of Virginia (1950), as amended, which provides in pertinent part, as follows:

"The Board may regulate and prescribe the method or methods of disposition of sewage in this State and may require any person . . . to obtain a septic tank permit before commencing the construction of any building for which a septic tank will be installed. . . ."

You suggest in your letter that a person is not required to obtain prior authorization from the Board to install a septic tank system to serve an existing, as distinguished from a new, building. This conclusion is not, in my judgment, correct.

Under a literal reading of this statute, the Board has two separate powers. First, the Board may "regulate and prescribe the method or methods of disposition of sewage." The Board has implemented this power by adopting regulations which prohibit the construction of "a sewerage system in the Commonwealth of Virginia unless a valid permit has been issued for that system by the Health Commissioner in the name of a specific person for a specific location." See Rules and Regulations of the Board of Health, Commonwealth of Virginia, governing the disposal of sewage, Art. III, § A (July 1, 1971). Sewerage system is defined to mean "all or any part of a device . . . designed and constructed to collect, receive, and/or treat and dispose of sewage." Id., Art. I, § E. A septic tank system, in my opinion, falls within that definition.
Secondly, the Board may require that a permit be obtained, evidencing the Board’s approval of the ability of the site to percolate, before construction of the building is commenced. This language, in my opinion, does not mean that the scope of the Board’s first power is limited solely to approving septic systems for new buildings. The latter provision means exactly what it says, and is designed to prevent construction of a new building until it has been determined that the site is suitable for a septic tank system. Both provisions of the statute stand on their own.

The legislative history of § 32-9 supports the foregoing interpretation. The Board of Health has had authority since 1910 to “regulate the method of disposition of . . . sewage.” See Ch. 179 [1910] Acts of Assembly 269. The Board’s regulations have long provided that approval must be obtained before sewage disposal systems, including septic tanks, may be constructed. See Opinion to the Honorable E. E. Brooks, Clerk of the Circuit Court of Wise County, dated June 3, 1964, and found in Report of the Attorney General (1963-1964) at 149. In 1972, the General Assembly amended § 32-9, thereby authorizing the Board to become involved at an earlier stage of the approval process on construction of new buildings, that is, before construction of the building starts, the septic tank permit must be obtained.

In response to the specific issue raised by your inquiry, I am of the opinion that the Board of Health has authority to require pre-construction approval of a septic tank system which will serve an existing structure.

SHERIFFS—Courtroom Security — Deputies — Judges’s general order requiring sheriff to provide additional security in courthouse.

SALARIES—Appropriations Act Prevents State From Paying Any Amounts To Deputies In Excess Of Number Permitted By Act, Even Though Additional Security In Courthouse Was Required By Judge’s General Order — Additional deputies paid solely from local funds.

August 3, 1977

THE HONORABLE FRED G. POLLARD
Chairman, Compensation Board

This is in response to your inquiry in which you request a formal opinion as to the meaning of certain language in Item 149, § 46, Chapter 685 [1977] Acts of Assembly 1407. The language in question is as follows:

“Except in special cases when the judge specifically orders it, and notwithstanding the provisions of § 53-168.1 or any other section of the Code of Virginia, no expenditures shall be made out of this appropriation to provide courtroom security deputies for civil cases, more than one deputy for criminal cases in a district court nor more than two deputies for criminal cases in a circuit court, or to operate security devices such as magnetometers in standard use in major metropolitan airports.” [Emphasis added.]

The facts and accompanying documents in your letter establish that a judge of a circuit court entered a general order requiring the sheriff of the county to provide additional security in the county courthouse. The additional security ordered exceeded the numbers provided for in the above-quoted language from the Appropriations Act. On the same day, a judge of a juvenile and domestic
relations court entered an order of similar content with respect to additional security being required in the Juvenile and Domestic Relations District Court Building.

Your letter contained two specific inquiries in regard to the meaning of Item 149, § 46, Chapter 685 Acts of Assembly (1977):

1. Does § 46 of the Appropriations Act prohibit expenditures being made out of the Item 149 appropriation to provide security in compliance with the above-mentioned Orders?

2. Does § 46 prohibit expenditures out of the Item 149 appropriation for security in compliance with similar orders entered by courts in other jurisdictions?

The language "[e]xcept in special cases when the judge specifically orders it" [emphasis added] refers, in my opinion, to individual cases before a court where the special (meaning extraordinary, uncommon, unique) circumstances of the case warrant the conclusion that additional security is required to prevent disruption and violence from erupting in the courthouse because of the particularly volatile factors surrounding that case. Except for such extraordinary situations, it was the intent of the General Assembly that the State's contribution to the salaries of deputies be limited to the numerical restrictions required by Item 149, § 46.

General orders requiring additional security in all cases, or certain classes of cases, or for particular structures because of the peculiar security problems a building design creates, do not meet the statutory requirement so that a sheriff or sergeant can rely on the quoted language and seek partial reimbursement from the State for deputies employed in excess of the Item 149, § 46 limit. Such partial reimbursement will be forthcoming only if the individual case by case determination is made and a specific order issued.

Of course, such general orders are not in any way affected by the Act, and their promulgation is entirely within the discretion of each judge. However, the Act does prevent the Commonwealth from paying any amounts to those deputies utilized in excess of the number permitted by the Act, even though the additional security was required by such a general order. Consequently, the salaries of such additional deputies must be paid solely from local funds.

Question 1. and 2. must be answered in the affirmative. If a court orders additional security by way of a general order, the cost of providing such security falls upon the locality.

SHERIFFS—Employees' Vacation And Sick Leave—Days entitled to accumulate.

April 6, 1978

THE HONORABLE HARRY O. TINSLEY
Sheriff of Madison County

You have asked (A) whether your employees are entitled to vacation and sick leave time accumulated since 1972, and if so, (B) how many days they are entitled to accumulate. You say that Madison County has not had a personnel policy regarding this matter but plans to implement one in the future.
(A) Accumulating Leave

As held in a prior opinion to you, § 15.1-19.3 of the Code of Virginia (1950), as amended, gives the Madison County Board of Supervisors the authority to provide for the accumulation of leave or to set a time period within which vacation and sick leave shall terminate. See Opinion to the Honorable Harry O. Tinsley, Sheriff of Madison County, dated November 7, 1977. Thus, employees would be entitled to accumulate leave only when the County adopts a specific policy on accumulation.

However, a county would not be prohibited from adopting a policy which allows employees to carry over leave accumulated prior to adoption by the county of an accumulation policy. Thus, leave earned prior to adoption of a policy by the Board of Supervisors could be accumulated up to whatever limits were prescribed by the board, consistent with the limitations of § 15.1-19.3 discussed below.

(B) Amount of Time Accumulated

Only July 1, 1977, § 15.1-19.3 was amended by adding a proviso imposing a limit of six weeks on vacation time which could be accrued. Previously, the Code of Virginia contained no specific limitation on the accumulation of vacation and sick leave for employees coming within § 15.1-19.3. Therefore, employees could be allowed to accumulate whatever leave the County Board determines it wishes to permit prior to July 1, 1977. Vacation leave accumulated after July 1, 1977, however, may not exceed six weeks.

Since there is no limit on the amount of sick leave which can be accrued, that would be a matter to be resolved by the particular policy which the county adopts.

SHERIFFS—Personnel Policies Of Madison County Board Of Supervisors—Employees cannot carry over vacation or sick leave time made applicable to employees and deputies of sheriff by statute.

BOARDS OF SUPERVISORS—Authority—Cannot control employees of constitutional officers except in matters spelled out by statute—Vacation and sick leave.

CONSTITUTIONAL OFFICERS—Employees And Deputies Of—Board of supervisors has no authority to impose personnel policies upon sheriff’s office except in matters spelled out by statute.

PERSONNEL ACT—Sheriff Whose Salary Is Partly Paid From State Funds—Board of supervisors has authority by statute to require that sheriff’s employees and deputies not carry over vacation, holiday, or sick leave.

1Paragraph 2 of § 15.1-19.3 provides in part that:

"(2) Each county and city in which such an employee is employed shall provide for each such employee for each year of service at least two weeks vacation with pay, at least seven days sick leave with pay, and such legal holidays as are provided for in § 2.1-21. If any such employee or deputy is required to work on any such legal holiday, he shall receive an equal amount of compensatory time with pay in the same calendar year in which such holiday occurs in lieu of such holiday. Such county or city may provide that such vacation or sick leave may be accumulated or shall terminate within a given period of time; provided, however, that such vacation may not be accumulated in excess of six weeks."
REPORT OF THE ATTORNEY GENERAL

November 7, 1977

THE HONORABLE HARRY O. TINSLEY
Sheriff of Madison County

This is in reply to your letter requesting my opinion regarding certain personnel policies adopted by the Madison County Board of Supervisors. You state that the Board has taken the position that none of the County employees could carry over any vacation, holiday, or sick leave time into a subsequent year. You further state, however, that you are aware that some, if not all, State employees are allowed to carry over a certain number of sick leave days. You inquire whether there is any provision of the Code of Virginia for carrying over sick leave days and whether employees of your department must abide by County regulations or State regulations concerning sick leave.

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 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 personnel system. A sheriff is a constitutional officer. Article VII, Section 4, Constitution of Virginia. Accordingly, employees and deputies of the sheriff are not governed by personnel regulations of the county. See Opinion to the Honorable Charles A. Reid, Treasurer of Greensville County, dated July 6, 1977. Moreover, such individuals are not State employees subject to the State personnel system. See Report of the Attorney General (1975-1976) at 149.

Thus, absent a specific statutory exception to the above principles, a constitutional officer has the sole responsibility regarding the personnel policies of his office. As to vacation and sick leave, however, such an exception is provided in § 15.1-19.3 of the Code. Section 15.1-19.3 states:

“(1) 'Employee' means an employee or deputy of the attorney for the Commonwealth, the county or city treasurer, the county or city commissioner of the revenue, the clerk of the circuit court, and a sheriff of a county or city in each case whose salary is partly paid from State funds or whose salary is paid from fees, the excess of which is shared jointly by the State and the county or city in which the person is employed; it shall also include the employee of a county court whose salary is paid by the State.

“(2) Each county and city in which such an employee is employed shall provide for each such employee for each year of service at least two weeks vacation with pay, at least seven days sick leave with pay, and such legal holidays as are provided for in § 2.1-21. If any such employee or deputy is required to work on any such legal holiday, he shall receive an equal amount of compensatory time with pay in the same calendar year in which such holiday occurs in lieu of such holiday. Such county or city may provide that such vacation or sick leave may be accumulated or shall terminate within a given period of time; provided, however, that such vacation may not be accumulated in excess of six weeks. The cost of providing such benefits shall be borne in the same manner and on the same basis as the costs of the office are shared or as the excess fees therefrom may be shared.” (Emphasis added.)

I note that you come within the above section, as being a sheriff whose salary is partly paid from State funds. Moreover, I am of the opinion that the power granted to a county or city in this section may be exercised by its respective
governing body, in this case the Madison County Board of Supervisors. As a result, I am of the opinion that the Madison County Board of Supervisors has authority to require that employees and deputies of the sheriff shall not carry over any vacation, holiday, or sick leave time into the next year.

SHERIFFS—Required To Go To Clerk's Office Of Juvenile And Domestic Relations District Court Every Day Office Is Open For Business To Receive All Papers To Be Served By Him.

FORFEITURES—Sheriffs—Failure to go to clerk's office of juvenile and domestic relations district court every day office is open for business to receive all papers to be served by him—Forfeit fifty dollars.

SHERIFFS—Wording Of Statute Is Mandatory—Must go to clerk's office every day regardless that juvenile court convenes only twice monthly and clerk's office is some distance away.

November 21, 1977

THE HONORABLE SPENCER R. HODGES, JR.
Sheriff of Mathews County

This is in response to your inquiry whether § 8.01-294 of the Code of Virginia (1950), as amended, requires a sheriff to go to the clerk's office of a juvenile and domestic relations district court every day when the court convenes only twice monthly and the clerk's office is in another county sixteen miles away.

Section 8.01-294 of the Code provides as follows:

"Every sheriff who attends a court shall, every day when the clerk's office is open for business, go to such office and receive all process, and other papers to be served by him, and give receipts therefor. For any failure to do so, he shall forfeit fifty dollars."

The wording of this statute is clear in its requirement that sheriffs go to clerks' offices every day to receive process and other papers to be served by him. The revisers' note to this statute supports this view, since it points out that the new requirement that a sheriff go to the clerk's office to receive process every day modifies the once a week requirement in former § 8-49 of the Code.

The fact that the juvenile court in your jurisdiction convenes only twice monthly and the clerk's office is some distance away is not of import, since juvenile petitions and summonses may be issued on any day of the week regardless of the convening of court. See § 16.1-260 of the Code. After issuance, such petitions and summonses should be picked up for service. See §§ 16.1-264B and 16.1-265 of the Code.

Accordingly, I must answer your question in the affirmative.

SHERIFFS AND SERGEANTS—Town Sergeant Of Hillsville Did Not Automatically Forfeit His Office When Convicted In Federal Court Of Violating Federal Gun Control Act—May be removed by town council in its discretion.
AMENDMENTS—Officer Sentenced For Crime Under § 24.1-79.3 Shall Be Removed From Office Only By The Person Or Authority Who Appointed Him.

CHARTERS—Town Sergeant Convicted In Federal Court Of Violating Federal Gun Control Act—Removal from office governed by § 24.1-79.2 and Town Charter.

CRIMINAL JUSTICE SERVICES COMMISSION—Compulsory Minimum Training Standards—Law enforcement officers must complete firearms training to fulfill.

PUBLIC OFFICERS—Town Sergeant Is Appointed Public Officer Who May Be Removed Automatically If Convicted Of Felony By Courts Of This State, Or By The Authority That Appointed Him, In Its Discretion.

WEAPONS—Town Sergeant Convicted Of Violating Federal Gun Control Act May Not Possess Gun That Has Been Transported In Interstate Commerce.

November 1, 1977

THE HONORABLE JERRY H. GEISLER
Member, House of Delegates

This is in response to your letter in which you requested my opinion whether the current town sergeant of the Town of Hillsville might continue in office. In the attached correspondence it is stated that the sergeant, E. M. Pack, has been convicted of a felony violation of the Federal Gun Control Act, 18 U.S.C. §§ 921 through 928 (1970), in the United States District Court for the Western District of Virginia. It has also been advised that regardless of Mr. Pack’s federal felony conviction, the town council for the Town of Hillsville desires to retain him as town sergeant if possible.

The Town Charter for the Town of Hillsville provides that the town council “may appoint additional officers for said town as they may deem proper, such as . . . sergeant.” (Emphasis added.) Ch. 64 [1940] Acts of Assembly 89, 90. Such offices “shall only be held coincident with the council,” and “such officer may be removed at any time in the discretion of the council.” Id. at 90. Accordingly, the town sergeant of the Town of Hillsville is an appointed public officer, who, in accord with the town charter, may be removed in the discretion of the town council.

Prior to 1975, the removal of public officers was governed by §§ 2.1-36 and 15.1-63 to -65 of the Code of Virginia (1950), as amended. Section 15.1-63 provided for the removal of public officers who had been “convicted . . . of any act constituting a violation of any penal statute involving moral turpitude.” Clearly federal felonies involving moral turpitude were included within “any penal statute involving moral turpitude.” See Smith v. Commonwealth, 134 Va. 589, 113 S.E. 707 (1922).

Sections 2.1-36 and 15.1-63 to -65, however, were repealed and replaced by §§ 24.1-79.1 to -79.10. See Ch. 515 [1975] Acts of Assembly 1042, 1053; Ch. 595 [1975] Acts of Assembly 1241. Section 24.1-79.2 now provides that unless an officer has been sentenced for a crime as provided in § 24.1-79.3, he “shall be removed from his office only by the person or authority who appointed him.”

Section 24.1-79.3 provides, in part:

“Any person holding any public office of honor, profit or trust in this
State who may be convicted for commission of a felony by the courts of this State and all rights of appeal have terminated, shall by such final conviction forfeit his office . . . and be thereafter incapable of acting therein under his previous election or appointment; . . . ." (Emphasis added.)

Section 24.1-79.3 was interpreted in the Virginia Law Review to mean that "[a]n official must forfeit his office when he has been convicted of a felony by a Virginia court and his rights of appeal have terminated. . . . No provision is made regarding a felony conviction in federal court." Note, Twentieth Annual Survey of Developments in Virginia Law, 1974-1975, 61 Va.L.Rev. 1627, 1818-1819 (1975). Because the General Assembly specifically changed the removal statutes to use the terminology "convicted . . . by the courts of this State," it is my opinion that such an interpretation of § 24.1-79.3 is proper. As recognized by the Supreme Court of Virginia, the remedy of removal of a public officer is a drastic one which is highly penal in nature, and the statutory provision defining the grounds of removal must be given a strict construction. Commonwealth v. Malbon, 195 Va. 368, 377, 78 S.E.2d 683 (1953).

I am of the opinion, therefore, that Mr. Pack's felony conviction in federal court did not disqualify him under § 24.1-79.3 from holding appointive office.

It will be unlawful, however, under 18 U.S.C. app. § 1202(a)(1) (Supp. 1977) for Mr. Pack to possess a gun which has been transported in interstate commerce. See United States v. Kenner, 508 F.2d 409 (4th Cir. 1974), cert. den., 421 U.S. 917, 43 L.Ed.2d 783, 95 S.Ct. 1578 (1975). Accordingly, it is my opinion that Mr. Pack may not possess a gun that has been transported in interstate commerce while performing his duties as town sergeant.

Moreover, § 9-109(2) of the Code of Virginia (1950), as amended, confers the power upon the Criminal Justice Services Commission to establish compulsory minimum training standards for law-enforcement officers subsequent to their employment. Law-enforcement officers are defined in § 9-108.1H of the Code as including 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. Pursuant to this authority the Commission has adopted Rule 2(II)(A) of the Rules Relating to Compulsory Minimum Training Standards for Law-Enforcement Officers which requires that to fulfill their minimum training standards such law-enforcement officers must complete twenty-four hours of firearms training. Since Mr. Pack must possess a gun to complete such firearms training and since he may not possess a gun transported in interstate commerce, he will be unable to meet the compulsory minimum training standards established for law-enforcement officers.

Since, as indicated, Mr. Pack, pursuant to the provisions of § 24.1-79.3, did not, upon being convicted in Federal Court, automatically forfeit his office, then his removal would be governed by the provisions of § 24.1-79.2 and the applicable provisions of the Town Charter. Both provisions authorize the appointing authority, the town council, to remove if in their discretion removal is required. In exercising such discretion, however, I am of the opinion that the town council would be bound by other applicable provisions of the Virginia Code. If in fact Mr. Pack cannot, due to his conviction, meet the required compulsory minimum training standards, then the council must in fact suspend him from his office. See § 9-111.1.

SOCIAL SECURITY—Deductions From Per Diem Payments—Retired justices, judges, and commissioners recalled to service.
REPORT OF THE ATTORNEY GENERAL

SALARIES—Compensation Paid As Per Diem Does Not Constitute Salary, But Is Form Of Compensation.

STATE EMPLOYEES—Retired Justices, Judges, And Commissioners Serving On Recall Are—Social security deductions from per diem payments.

November 4, 1977

THE HONORABLE GLEN D. POND, DIRECTOR
Virginia Supplemental Retirement System

This is to acknowledge your letter in which you request a formal opinion on the following question: whether retired justices, judges, and commissioners who are recalled to service pursuant to § 51-178 of the Code of Virginia (1950), as amended, are subject to social security deductions from the per diem payments received for performing such services.

I have previously advised that per diem payments are a form of compensation. See Opinion to the Honorable W. L. Lemmon, dated August 8, 1977, a copy of which is enclosed. The issue, then, is what constitutes the status of employee for State and federal social security purposes. Section 51-111.2(c) defines employee, for social security purposes, to include officers of the State. Section 51-111.2(e) defines State employee to mean "any person who is employed in the service of, and whose compensation is payable, in whole or part, by the Commonwealth or any department, institution or agency thereof, and shall include trial justices, . . ." Section 51-111.1 declares that the policy of the Commonwealth is to take those steps necessary "to provide social security protection to employees of the State and local governments on the basis now permitted under applicable federal law." [Emphasis added.] Retired justices, judges, and commissioners serving on recall are State employees, as defined in the Virginia social security provisions. These individuals are not acting as independent contractors.

Section 3121(d), I.R.C. (1954), 26 U.S.C. §3121(d), is the pertinent federal provision and declares that the term employee means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee . . . if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; . . ." Section 51-178 of the Virginia Code clearly contemplates personal service by the recalled individuals. Federal Income Tax Regulation § 31.3121(d) - 1(c) details the common law rules used in determining whether the legal relationship of employer-employee exists. Recalled justices, judges, and commissioners are subject to State control to the same degree as sitting justices, judges and commissioners who are employees of the Commonwealth.

The common law rules do operate to show that recalled individuals are not serving in the status of independent contractors. See also Regulation § 31.3121(d) - 1(c)(2), I.R.C. (1954).

Even if the result under State law were that recalled individuals are serving in the capacity of independent contractors, the Social Security Administration is not bound by such a classification. Regulation § 31.3121(d) - 1(a)(3), I.R.C. (1954), states that if the relationship of employer-employee exists, the designation of the relationship by the parties as something other than that of employer-employee is immaterial. Furthermore, I am advised that the Social Security Administration has also determined that individuals, recalled pursuant to § 51-178, are performing duties in the capacity of employees of the Commonwealth of Virginia.
REPORT OF THE ATTORNEY GENERAL

In summary, I am of the opinion that retired justices, judges, and commissioners, serving upon recall pursuant to § 51-178, are subject to social security deductions.

* *

STATE AGENCIES—Administrative Agency Heads Who Serve At Pleasure Of Governor—Section 2.1-41.2 lists exceptions.

ALCOHOLIC BEVERAGE CONTROL LAWS—Commission Serves At Pleasure Of Governor.

CONFLICT OF LAWS—Statutes In Apparent Conflict—Latter in time controls—Amendment to § 24.1-18 approved one day after approval of § 2.1-41.2.

ELECTIONS—Secretary And Members Of Board—Excluded from application of § 2.1-41.2 by 1977 amendment to § 24.1-18.

EMPLOYMENT COMMISSION—Commissioner Serves At Pleasure Of Governor.

GOVERNOR—Officials Who Serve At The Pleasure Of The Governor.

HEALTH DEPARTMENT—Commissioner Serves At Pleasure Of Governor.

HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF—Commissioner Serves At Pleasure Of Governor.

PROFESSIONAL AND OCCUPATIONAL REGULATION—Director Of Department Serves At Pleasure Of Governor.

SECRETARY OF THE COMMONWEALTH—Serves At Pleasure Of Governor.

December 21, 1977

THE HONORABLE PAT PERKINS
Secretary of the Commonwealth

This is in response to your inquiry whether the following State officials serve at the pleasure of the Governor: Commissioner, Virginia Employment Commission; State Health Commissioner; Commissioner, Department of Highways and Transportation; Director, Department of Professional and Occupational Regulation; Secretary of the Commonwealth; Virginia Alcoholic Beverage Control Commission; Virginia Parole Board. You further inquire whether the Secretary of the Board of Elections serves at the pleasure of the Governor.

Section 2.1-41.2 of the Code of Virginia (1950), as amended, Chapter 542 [1977] Acts of Assembly 819, provides in pertinent part:

"Notwithstanding any provision of law to the contrary, the Governor shall appoint the administrative head of each agency of the executive branch of State government except the following: the Director of the Virginia Institute of Marine Science, it being an institution of higher education, the Director of the State Council of Higher Education for Virginia, the Executive Director of the Commission of Game and Inland Fisheries, and the Director of the Virginia Supplemental Retirement System; provided,
however, that the manner of selection of those heads of agencies chosen by
election as of January one, nineteen hundred seventy-six, or as set forth in
the Constitution of Virginia shall continue without change. Each ad-
ministrative head appointed by the Governor pursuant to this section shall
be subject to confirmation by the General Assembly, shall have such
professional qualifications as may be prescribed by law, and shall serve at
the pleasure of the Governor . . . .”

Pursuant to § 2.1-41.2, all administrative agency heads except those (1) set
forth in the statute, (2) chosen by election as of January 1, 1976, or (3) provided
for in the Constitution of Virginia, serve at the pleasure of the Governor. It is my
opinion that the foregoing individuals are presently serving at the pleasure of the
Governor since they were not chosen by election as of January 1, 1976, their
terms are not set forth in the Constitution of Virginia, and they were not ex-
cluded by the language of § 2.1-41.2. The net effect of § 2.1-41.2 was to convert
the fixed terms of office into terms serving at the Governor’s pleasure.

It is further my opinion that the Secretary of the State Board of Elections is
excluded from the application of § 2.1-41.2 by virtue of an amendment to
§ 24.1-18, approved March 31, 1977, which provides, “The provisions of § 2.1-
41.2 shall not apply to this chapter.” See Chapter 576 [1977] Acts of Assembly
912. Whenever two statutes are in apparent conflict, the latter in time controls.
82 C.J.S. Statutes § 368, pp. 835-839 (1953). Since the amendment to § 24.1-18
was approved March 31, 1977, one day after the approval of § 2.1-41.2, § 24.1-
18 controls the appointment of members of the Board of Elections. The regular
term for members of the Board of Elections which includes the Secretary is for a
term of four years commencing February 1st after their appointment. Section
24.1-18. Terms for current members of the Board of Elections expire February,
1979.

STATE EMPLOYEES—General Salary Regrade Was Not Across-the-board
Pay Raise—Contingent on satisfactory job performance.

APPROPRIATIONS—Apportionment Of Item Supplementing Appropriations
For Adjusting Base Rates Of Pay Of State Employees—Subject to rules and
regulations prescribed by Governor and Director of Personnel.

GOVERNOR—Chief Personnel Officer—Final authority in all personnel
matters including salary and compensation.

PERSONNEL ACT—Salaries Of State Employees—Policy for processing
regrades—Within authority of Director of Personnel.

November 28, 1977

THE HONORABLE MADISON E. MARYE
Member, Senate of Virginia

This is in reply to your letter in which you inquire whether the State employee
general salary regrade in July, 1976, was an across-the-board pay raise for all
State employees regardless of performance, or whether it was properly con-
tingent on satisfactory job performance.

Section 2.1-113 of the Code of Virginia (1950), as amended, provides that the
Governor shall be the Chief Personnel Officer of the Commonwealth, while
§ 2.1-114.2 provides, inter alia, that the Governor shall have the power and duty to "[e]stablish and administer a compensation plan for all employees. . . ." Section 2.1-111 provides further, inter alia, that "[n]o establishment of a position or rate of pay, and no change in rate of pay shall become effective except on order of the appointing authority and approval by the Governor. . . ." Thus, unless a specific provision to the contrary is made in the legislative authorization for the pay increase, the Governor has final authority in all personnel matters including salary and compensation.

In accordance with these provisions, Item 35 of the Appropriations Act for the 1976-1978 biennium, Chapter 779 [1976] Acts of Assembly 1258, which concerns supplementing appropriations to State agencies to provide adjusting base rates of pay of wage and salaried employees, provides, in pertinent part, "[a]pportionment from this item shall be made when determined necessary by the Governor and subject to rules and regulations prescribed by the Governor."

Pursuant to the duty placed upon him by the Virginia Personnel Act, the Governor has promulgated "Rules for the Administration of the Personnel Act of 1942." Rule 12.3 provides, in pertinent part, that "[t]he service ratings of employees shall be considered . . . in making or approving changes in pay of an employee upward or downward within the limits of the scale of pay for the class of positions occupied. . . ." In addition, Rule 3.3 provides that the "Director [of Personnel] . . . shall initiate, prepare and issue statements of policy relating to personnel administration."

On June 11, 1973, the Director of Personnel issued a personnel policy memorandum to the heads of all State agencies regarding general step-for-step salary adjustments for State employees. This memorandum stated the general policy that "except where individual performance is concerned, employees should be adjusted to new scales on a step-for-step basis." On June 20, 1977, in instructions for processing regrades, the Director referred to this statement of policy and reiterated that "except in cases where the regrade cannot be given because of an exceptional salary action previously approved, only unsatisfactory service can be considered as a basis for denying the regrade to any employee." Such pronouncements by the Director of Personnel are within his authority.

For the foregoing reasons, I am of the opinion that the July 1, 1976, regrade was properly contingent on satisfactory performance.

STERILIZATION—Voluntary Sexual Sterilization For Personal And Medical Reasons Of Nineteen Year Old Married Woman Not Authorized Under § 32-423.


MINORS—Age Of Majority Established At Eighteen By § 1-13.42.

PHYSICIANS—Procedure To Be Followed To Grant Immunity To Physicians Who Perform Sterilization Operations.

STATUTES—Must Be Read Together To Make Them Harmonious And Sensible As A Whole.

STERILIZATION—Authority For—For therapeutic purposes, regardless of age
of person.

STERILIZATION—Parents Of Nineteen Year Old Married Woman Must Consent To Her Sexual Sterilization And Also Petition Court For Approval—Section 32-424.

STERILIZATION—Therapeutic Distinguished From Eugenic Or Purely Contraceptive; Medical Determination To Be Made By Physician.

STATUTES—Sterilization—Statutory laws do not regulate who may or may not receive; set forth procedures to be followed to grant physicians immunity from liability.

July 22, 1977

THE HONORABLE ELMON T. GRAY
Member, Senate of Virginia

This is in reply to your request for my opinion concerning the sexual sterilization of a person who has attained eighteen years of age, the age of majority in the Commonwealth, but who has not yet attained the age of twenty-one years. Specifically, your letter relates that a nineteen year old married lady and her twenty-one year old husband, who have two children, desired that the wife be sterilized for personal and medical reasons but that the operation was not performed because she was told that her parents were required not only to consent to the procedure but also to petition the courts for approval.

In 1972, the General Assembly enacted §1-13.42 of the Code of Virginia (1950), as amended, which established eighteen as the age of majority in the Commonwealth. See Ch. 824 [1972] Acts of Assembly 1472. Section 1-13.42(b), however, provides that:

"(b) For the purposes of all laws of the Commonwealth including common law, case law and statutory law, unless an exception is specifically provided in this Code, a person shall be an adult, shall be of full age and shall reach the age of majority when he becomes eighteen years of age."

(Emphasis added.)

The significance of this emphasized language is that the General Assembly has reserved the right to require age qualifications, other than eighteen, in appropriate situations. Thus, having attained the age of eighteen years, does not necessarily entitle or obligate a person to the same rights and responsibilities which an older person might have. Each statute must be examined to determine whether there is an age qualification.

The only statute which explicitly sets forth procedures to be followed for the sterilization of persons who have not attained the age of twenty-one is §32-424 of the Code. The other provisions of §32-423 to -427 of the Code relate to persons who have attained the age of twenty-one (§32-423 and §32-424.1), to immunity for licensed physicians (§32-426), and to therapeutic sterilizations for persons of all ages (§32-427).

Section 32-424 provides that:

"Any such physician or surgeon may perform a vasectomy, salpingectomy, or other surgical sexual sterilization procedure upon any person under the age of twenty-one years, provided that the circuit court of the county or city wherein such minor resides, upon petition of the parent or parents, if they be living, or the committee, guardian, or next friend of such
minor, shall determine that the operation is in the best interest of such minor and society; and further that said minor is afflicted with any hereditary form of mental illness that is recurrent, or with mental retardation, or that the health of such minor would be endangered by a pregnancy, and shall enter an order authorizing the physician or surgeon to perform such operation and such order has become final. In any such proceeding, the minor shall be made a party defendant and served with process, a discreet and competent attorney-at-law shall be appointed as guardian ad litem for such minor to faithfully represent and protect its interest, and to otherwise comply with the provisions of § 8-88 of the Code of Virginia. The judge of the court in which the petition is filed may, at his discretion, waive all fees and court costs in connection with such court proceeding.’’ (Emphasis added.)

Prior to a 1976 amendment which added, in part, the language emphasized above, this statute was considered to be an eugenic sterilization statute for persons under the age of twenty-one years who were afflicted with the conditions described. The question engendered by the 1976 amendment is whether the statute still continues to be eugenic in nature, directed solely towards persons under the age of twenty-one years who are mentally impaired.

Clearly, the amendatory language explicitly permits a sterilization for what has in the past been considered a therapeutic reason. See Report of the Attorney General (1972-1973) at 370. Historically, § 32-427 of the Code has been interpreted for many years to permit the therapeutic sterilization of persons regardless of age and regardless of the procedures required by § 32-423 to -427 of the Code. Id. Indeed, in my opinion, prior to the 1976 amendment, even a person who would have otherwise fallen within the scope of § 32-424 could have been sterilized without following the procedures proscribed by that statute if "sound therapeutic" reasons existed for the sterilization.

Remembering that statutes dealing with the same subject matters should be read and construed together so as to make them harmonious and sensible as a whole, if possible, see e.g., Dillard v. Thornton, 70 Va. 392 (1877), I am of the opinion that § 32-424 now ensures against the precipitous or unwarranted sterilization of persons who meet the requirements of that statute and who are alleged to have therapeutic need for a sterilization. Any other construction of the 1976 amendment renders it nonsensical in view of the established construction of § 32-427 of the Code.

Consequently, if the nineteen year old lady mentioned by you in your letter is afflicted with a hereditary form of mental illness that is recurrent, or with mental retardation, the procedures of § 32-424 of the Code must be followed even if she has a therapeutic need of the sterilization. Assuming that § 32-424 of the Code is inapplicable, she may obtain a sterilization pursuant to § 32-427 of the Code regardless of her age if a genuine therapeutic reason exists. Whether a sterilization is therapeutic is a medical determination to be made by the physician. For such a therapeutic sterilization, the only legal requirement would be the informed consent of the patient herself to the particular procedure. See Report of the Attorney General (1972-1973) at 370. If, on the other hand, no sound therapeutic reason exists for a sterilization, no statute explicitly prohibits a licensed physician from performing a sterilization procedure upon this young woman with her consent and the consent of her husband. A physician who performs such an operation, however, is not granted statutory immunity from civil or criminal liability, if any, because § 32-426 of the Code grants immunity only to physicians who perform those procedures authorized by the provisions of

In summary, the statutory laws of Virginia do not regulate who may or may not receive any one of the operations in question. Rather, the statutes in question set forth procedures to be followed to grant to physicians immunity from civil or criminal liability, if any. Section 32-424 sets forth procedures to be followed for sterilization for eugenic purposes of individuals who have not attained the age of twenty-one. Section 32-424.1 prescribes the procedures for the eugenic sterilization of persons adjudicated mentally incompetent. Section 32-427 sets forth the authority for sterilization for therapeutic purposes for individuals regardless of age. Section 32-423 sets forth procedures for sterilization for birth-control purposes, for individuals who have attained twenty-one years of age. There is no applicable statute regarding sterilization for birth-control purposes for individuals who have not attained age twenty-one.

SUNDAY CLOSING LAW—Prohibits Labor As Well As Sales—Furniture store could not be open for potential customers to window shop.

DEFINITIONS—“Work” On Sunday—Person who remains in store would be engaged in work, toil or service whether he be the owner or an employee.

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

September 13, 1977

This is in response to your recent request for an opinion concerning the applicability of the Sunday Closing Law to a furniture store which would remain open on Sunday. You indicate that the store, although open, would conduct no sales, but rather, one employee would oversee the store operation and allow potential customers the opportunity to “window shop.”

The Sunday Closing Law prohibits persons from engaging in work, labor or business on Sundays, or engaging others to do the same, with certain specific exceptions. Section 18.2-341(a) of the Code of Virginia (1950), as amended, provides as follows:

“On the first day of the week, commonly known and designated as Sunday, no person shall engage in work, labor or business or employ others to engage in work, labor or business except. . . .” (Emphasis added.)

I find no exception outlined which would allow a furniture store to operate on Sunday.

The Sunday Closing Law operates not only to prohibit sales on Sunday but also to prohibit labor. Labor is defined as “work, toil, or service.” Black’s Law Dictionary 1014 (Rev. 4th ed. 1963). That person who remains in the store on Sunday, in my opinion, would be engaged in work, toil or service whether he be the owner or an employee.

Although § 18.2-341(c) relieves the employee of liability if he were acting pursuant to the direction or authorization of his employer, the employer would, in my opinion, be engaging others in work, labor or business in violation of the statute.
SUPPORT ACT—Child Support Beyond Age Eighteen—Effect of Virginia Supreme Court decision in Meredith v. Meredith.

DIVORCE—Support Obligation In Virginia Ends When Child Becomes Eighteen, Absent Agreement In Final Decree Exhibiting Intent To Continue Support Beyond Age Of Majority.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Jurisdiction When It Receives Petition From Another State Under Revised Uniform Reciprocal Enforcement Of Support Act—Existing order or no prior order for child support.

SUPPORT ACT—Registered Foreign Support Order—Treated in same manner as support order issued by court of this State—Obligor's defenses same as in action to enforce foreign money judgment.

SUPPORT ACT—Uniform Reciprocal Enforcement—Order for child support entered by court of a foreign jurisdiction—Section 20-88.18 determines what duties of support may be enforced.

June 16, 1978

THE HONORABLE G. GARLAND WILSON, JUDGE
Juvenile and Domestic Relations District Court
Twenty-seventh Judicial District

You have asked what effect the Virginia Supreme Court decision in Meredith v. Meredith concerning the obligation for child support beyond age eighteen would have on the jurisdiction of the Juvenile and Domestic Relations District Court (juvenile court) when it receives a petition from another state under the Revised Uniform Reciprocal Enforcement of Support Act. I will deal with each of your questions in turn.

No Existing Order For Child Support

You first ask if a duty for support is enforceable where the initiating state files a petition for support of dependent children between the ages of eighteen and twenty-one. The petition alleges that the obligor has the duty to support each child until it attains the age of twenty-one. No court order for child support was entered in that state.

Where no order for child support has been entered, § 20-88.18 specifies what

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126 Va. 636, 222 S.E.2d 511 (1976). The Supreme Court held that the obligation of a parent under Virginia law to provide child support ends when the child becomes eighteen, absent some agreement in the final divorce decree which exhibits the parties' intent to continue support beyond the age of majority. As is discussed in the text of this opinion, where an order is issued in another state, but enforced by a Virginia court, the law of that state may apply.

2Chap. 5.2 of Title 20 of the Code of Virginia (1950), as amended.

2Section 20-88.18 of the Code provides:

"Duties of support enforceable under this law are those imposed or imposable under the laws of any state where the obligor was present during the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown."
duties of support are enforceable. If the petition from the initiating state establishes that the obligor was present during the period for which support is sought in a state other than Virginia, the jurisdiction of the Virginia juvenile court would be controlled by the law of the foreign state where the obligor was present. If, on the other hand, the petition is silent as to the location of the obligor, the duties of support enforceable against the obligor are those duties which may be imposed under Virginia law. The rule in Virginia is that the duty of support ends when the child becomes eighteen, absent some agreement otherwise which is a part of the final divorce decree. See Eaton v. Eaton, 215 Va. 824, 213 S.E.2d 789 (1975); Meredith, supra; Report of the Attorney General (1975-1976) at 335. Meredith holds that the agreement in the decree must exhibit the parties' intent to continue support payments beyond the age of majority, and therefore is consistent with Eaton. Accordingly, where there is no prior order, the juvenile court has no jurisdiction to compel future support payments against an obligor who resides in Virginia.

Existing Order For Child Support Entered By a Court of a Foreign Jurisdiction

You next ask if a duty of support is enforceable where the initiating state files a petition for support of dependent children between the ages of eighteen and twenty-one. Their parents have been divorced by final decree of that state which provides for support until the children attain the age of twenty-one. Section 20-88.18 would again determine what duties of support may be enforced. If the juvenile court found that the obligor was a resident of the foreign state during the period for which support is sought, the court would be required to apply the law of that jurisdiction to determine whether the decree providing for support of children to age twenty-one years is enforceable. This circumstance would only arise, of course, in actions to collect arrearages, because the obligor would have to be found in Virginia within the jurisdiction of the juvenile court before it could take any action against him. If, on the other hand, the petition seeks enforcement of the current obligations of the obligor under the decree, the juvenile court cannot require him to do more than Virginia law requires. Therefore, unless the order is registered as discussed below, the juvenile court has no power to require the obligor to pay child support beyond age eighteen, notwithstanding the provisions of the foreign decree to the contrary.

Effect of Registration

You finally ask if the result would be different in situation 2 if an existing order from the other state were registered under the Uniform Act in Virginia. Registration of the foreign decree may produce a different result. Under § 20-

4Lest a contrary impression be created, neither Eaton, Meredith, nor the more recently decided case of Mack v. Mack, 217 Va. 534, 229 S.E.2d 895 (1976), stands for the proposition that a parent may not, under any circumstances, be required to pay support and maintenance for his or her children until they reach the age of twenty-one. The Virginia Supreme Court in Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974), reversed the decision of the trial court relieving the husband from continuing to pay child support and maintenance until his three children reached the age of twenty-one under an agreement of the parties which had been affirmed and ratified by the court in the divorce suit. The Court found that the enactment of § 1-13.42, which lowered the age of majority from twenty-one to eighteen years of age, had no effect where it was the clear intention of the parties to the agreement that support and maintenance for the children be paid to the time fixed by the parties, twenty-one years of age. See Report of the Attorney General (1975-1976) at 335.
88.30:6,1 after the foreign decree is registered here, it must be treated just as if it were issued by a Virginia court.

Before the juvenile court confirms the registered order, the obligor may assert such defenses as would be available to him in an action to enforce a foreign money judgment. Those defenses would include the defense that the foreign court lacked subject matter jurisdiction to enter the registered order. The obligor would have the burden to show that the order would be unenforceable in the foreign jurisdiction because, under the law there, he would not be required to pay child support beyond age eighteen. If he did not prevail on that defense, or any other defense raised, the juvenile court must confirm the registered order and enforce it according to its terms, without regard to whether a Virginia court could enter a similar order. Therefore, under these circumstances, the child would be entitled to support beyond the age of eighteen as required by that foreign decree, just as if his absent parent had never left that jurisdiction. See W. Brockelbank and F. Infausto, Interstate Enforcement of Family Support (2nd Ed. 1971) at 83. Upon confirmation, the decree of the foreign jurisdiction would become the order of the Virginia juvenile court and it could enforce it according to its terms. The only defenses remaining to the obligor would be payment, satisfaction or release, or changed circumstances.

SUPPORT ACT—Notice Requirements For Reopening Cases Involving Arrearages On Judgment For Child Support.

GARNISHMENTS—Notice Provision Exception In § 20-78.1—Judgment for support arrearages—Person against whom support order entered is owed money by the United States.

NOTICES—Same Form Of Notice When Proceedings Reopened As Required In Original Action—Support cases; §§ 16.1-263 and -264 apply.

February 27, 1978

THE HONORABLE R. P. ZEHLER, JR., JUDGE
Charlottesville-Albemarle Juvenile and Domestic Relations District Court
Sixteenth Judicial District

This is in reply to your request for my opinion concerning notice requirements for reopening cases involving arrearages on a judgment for child support. Section 16.1-279I of the Code of Virginia (1950), as amended, provides, in part, as follows:

'Section 20-88.30:6 of the Code provides:
"(a) Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner.

"(c) At the hearing to enforce the registered support order the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment . . . ."
“Each juvenile and domestic relations district court may enter judgment for money in any amount for arrears of support and maintenance of any person in cases where (1) the court has previously acquired personal jurisdiction over all necessary parties or a proceeding in which such jurisdiction has been obtained has been referred or transferred to the court by a circuit court or another juvenile and domestic relations district court and (2) payment of such money has been previously ordered by the court, a circuit court, or another juvenile and domestic relations district court. Provided, however, that no such judgment shall be entered unless a petition of a party, a probation officer, a superintendent of public welfare, or on the court's own motion, is duly served on the person against whom judgment is sought, in accordance with the applicable provisions of law, relating to notice when proceedings are reopened...” (Emphasis added.)

After a review of the general statutes, I find no section which addresses the question of notice when proceedings in a juvenile and domestic relations district court are reopened. To answer your question, resort must be had to statutory construction. “The courts must often, in effect, consider what answer the legislature would have made as to a problem that was neither discussed nor contemplated.” Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), citing Montana Power Co. v. F.P.C., 144 U.S. App. D.C. 263, 445 F.2d 739 (1970) (en banc), cert. denied, 400 U.S. 1013 (1971). See Gandy v. Elizabeth City County, 179 Va. 340, 19 S.E.2d 97 (1942). In examining the Virginia statutes on similar matters, I find § 20-112, which provides that:

“...When the proceedings are reopened to increase, decrease or terminate maintenance and support for a spouse or for a child, the petitioning party shall give such notice to the other party by service of process or by order of publication as is required by law.” (Emphasis added.)

This statute does not apply to proceedings in a juvenile and domestic relations district court, nor does it apply to proceedings involving enforcement of support and maintenance orders. It is helpful, however, in answering your inquiry because it relates expressly to notice in reopened proceedings in circuit court where the terms of an order for maintenance and support are at issue.

Section 20-112 provides for the same form of notice when proceedings in the circuit court are reopened as was required in the original action that resulted in the order or decree at issue in the reopened proceedings. It is my opinion that, had the General Assembly answered your inquiry in the statute, it would have required the same form of notice required for the initial proceeding.

Therefore, when a petition is filed seeking a judgment for money in any amount for arrears of support and maintenance under the provisions of § 16.1-2791, the notice requirements of §§ 16.1-263 and -264 would apply. A summons, with a copy of the petition attached, must be served upon the person against whom the judgment is sought, either personally, by mail or by order of publication according to the conditions of § 16.1-264. The summons shall set forth the time fixed by the court at which such person shall appear personally before the court to answer the allegations of the petition.

The sole exception to these notice provisions is contained in § 20-78.1. That statute authorizes the court to enter final judgment for support arrearages and issue execution without further notice in any garnishment proceedings where the person against whom the support order had been entered is owed any money by the United States.
SUPPORT ACT—Order For Support And Maintenance Entered By Juvenile And Domestic Relations District Court—Enforceable for indefinite period; effective until amended or annulled by court of original jurisdiction, or appeal court.

JURISDICTION—Juvenile and Domestic Relations District Courts Have to Enter Order For Support And Maintenance—Civil and criminal proceedings.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Suspended Sentence—Limitations of time of court's jurisdiction to annul an indefinite suspension of sentence does not limit order for support and maintenance.

December 28, 1977

THE HONORABLE ROBERT M. YACOBI, CHIEF JUDGE
Newport News Juvenile and Domestic Relations District Court
Seventh Judicial District of Virginia

This is in reply to your letter requesting my opinion whether orders for support and maintenance entered by a juvenile and domestic relations district court pursuant to Title 20, Chapter 5, Code of Virginia (1950), as amended, must be limited in duration to one year since § 20-61 sets twelve months as the maximum period of confinement for failure to provide support and maintenance.

Jurisdiction is granted to juvenile and domestic relations district courts to enter an order for support and maintenance of a spouse or children pursuant to §§ 20-61, 20-67 and 20-72 of the Code. Jurisdiction is also extended to such courts to enter an order for support and maintenance on behalf of children pursuant to §§ 16.1-241A, paragraph 3, and 16.1-279F of the Code. Because of the criminal penalties authorized by § 20-61, a petition filed pursuant to the former provisions is treated as a criminal proceeding. See Report of the Attorney General (1974-1975) at 144. The latter statutory provisions, which have been incorporated into the revision of the Juvenile Code enacted by the 1977 General Assembly, are in the nature of a civil proceeding, id., and “the court may make any order of disposition to protect the welfare of the child and family as may be made by the circuit court” without any limitations of time as to the duration of such order. See § 16.1-279F of the Code.

Despite the potential for the imposition of a criminal penalty under Title 20, Chapter 5, of the Code, § 20-72 extends to the court the discretion to enter an order for support and maintenance which is clearly in the nature of a civil order. That section provides in pertinent part:

“Before the trial, with the consent of the defendant, or at the trial on entry of a plea of guilty, or after conviction, instead of imposing the penalties hereinbefore provided, or in addition thereto, the judge, in his discretion, having regard to the circumstances of the case and to the financial ability or earning capacity of the defendant, shall have the power to make an order, directing the defendant to pay a certain sum or a certain percentage of his or her earnings periodically, . . . and to suspend sentence and release the defendant from custody on probation upon his or her entering into a recognizance with or without surety, in such sum as the court may order and approve.” (Emphasis added.)

The term of any such order for support and maintenance entered by a juvenile
and domestic relations district court is controlled by § 20-74, which states, in pertinent part:

"Any order of support or amendment thereof entered under the provisions of this chapter shall remain in full force and effect until annulled by the court of original jurisdiction, or the court to which an appeal may be taken; provided, however, that such order of support or terms of probation shall be subject to change or modification by the court from time to time, as circumstances may require . . .."

Therefore, in answer to your specific inquiry, such orders are enforceable according to their terms for an indefinite period and remain in full force and effect until amended or annulled by the court of original jurisdiction, or by a court to which an appeal is taken.

It should also be noted that if, in addition to an order for support and maintenance, the court imposes criminal penalties authorized by Title 20, Chapter 5, there may arise limitations of time with respect to the jurisdiction of the court to annul an indefinite suspension of the imposition of a sentence to confinement. This in no way, however, operates to limit an order for support and maintenance. For a fuller discussion of these issues, I refer you to prior Opinions of this Office to the Honorable E. Preston Grissom, Judge, Chesapeake Juvenile and Domestic Relations District Court, dated July 21, 1975, and found in the Report of the Attorney General (1975-1976) at 336, and to the Honorable James H. Montgomery, Jr., Judge, Juvenile and Domestic Relations Court, dated October 18, 1956, and found in the Report of the Attorney General (1956-1957) at 152.

SUPPORT CASES—Juvenile And Domestic Relations District Court Has No Authority To Revise Divorce Decree Of Circuit Court To Increase Amount Of Support.

CHILDREN—Support And Maintenance—Procedure to increase amount of support.

DIVORCE—Circuit Court Has Exclusive Jurisdiction—Transfer of case to juvenile court to enforce, but not alter, terms of decree.

JURISDICTION—Support And Maintenance Of Children—Juvenile court has power to modify order of circuit court, if latter court authorized modification, where case transferred under § 20-83.1.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS—Support Cases—Section 16.1-243 relates only to venue; does not grant subject matter jurisdiction.

VENUE—Divorce Decree—May be transferred from one juvenile court to another for enforcement but not to alter terms of decree.

October 4, 1977

THE HONORABLE M. CROCKETT HUGHES, JR.
Commonwealth's Attorney for Tazewell County
This is in reply to your request for my opinion regarding the following situation:

"FACTS: Wife obtained a divorce by decree *a vinculo matrimonii* entered by the Circuit Court of [A] County. By decree entered by agreement of counsel, subsequent to the decree *a vinculo*, the Circuit Court of [A] County ordered that '... pursuant to Section 20-79(c) of the Code of Virginia, as amended, all applicable and cognizable matters pertaining to the said Final Decree be, and the same are, transferred to the Juvenile and Domestic Relations Court of [A] County for enforcement.' (Emphasis added.) Wife moved to [B] County.

"Wife filed a petition with the Juvenile and Domestic Relations Court of [B] County seeking an increase in the amount of child support. The Final Decree from [A] County Circuit Court ratified an agreement which contained the following language:

"'... said sum to be adjusted as the said infant children grow older and their needs greater commensurate with the husbands earnings.'

"Questions Presented:

"1. Under these facts, does the Juvenile and Domestic Relations Court of [B] County have jurisdiction to modify said Final Decree of the Circuit Court of [A] County in regard to child support?

"(a) Emphasis is placed on the referral order transferring the matter '... to the Juvenile and Domestic Relations Court of [A] County. ...' 

"(b) Further emphasis is placed on the language in said order '... for enforcement.'

"2. In the event your response to the questions is negative, I call your attention to Sections 16.1-241, -243 and -244 and ask whether the interpretation of these statutes would alter your negative response."

It is my opinion that the Juvenile and Domestic Relations District Court of [B] County has no jurisdiction to modify the final decree of the Circuit Court of [A] County with regard to child support.

The circuit court has exclusive jurisdiction of suits for divorce. See § 20-96, Code of Virginia (1950), as amended. That court may, by the divorce decree or subsequent decree, make provision for, *inter alia*, maintenance of minor children. See § 20-107. The entry by a circuit court of a divorce decree terminates the jurisdiction of the juvenile and domestic relations district court and makes any orders previously entered by the district court inoperative. See § 20-79(a). The circuit court may, however, in any decree of divorce *a vinculo matrimonii*, transfer to the district court responsibility to enforce the terms of its decrees pertaining to support and maintenance. See § 20-79(c).

From the foregoing, I conclude that the Circuit Court of [A] County transferred its decree to the Juvenile and Domestic Relations District Court for [A] County for enforcement purposes only. The latter court has no power to modify that decree. While the Juvenile and Domestic Relations District Court of [A] County has authority to transfer that case in appropriate circumstances to the Juvenile and Domestic Relations District Court of [B] County, the latter court could have no greater power over the case than the former court had, i.e., the power to enforce, but not to alter, the terms of the decree. See § 20-83.1.

The provisions of §§ 16.1-241, -243 and -244 do not alter my opinion. Section 16.1-241A is a grant of subject matter jurisdiction over cases involving, *inter alia*, support and maintenance of children. By virtue of this jurisdiction, the Juvenile and Domestic Relations District Court of [B] County would have the power to enforce the terms of the order of the Circuit Court of [A] County, or to
modify said order, if the latter court authorized modification, where the case had been properly transferred to it in accordance with § 20-83.1. See §§ 20-79(c) and 20-113. Section 16.1-243 relates only to venue and cannot be construed as granting subject matter jurisdiction. Finally, § 16.1-244 relates only to custody and guardianship of children, rather than support.

To obtain an increase in the amount of child support provided, the wife in the situation you present must petition the Circuit Court of [A] County to revise its decree to increase the amount of support or, in the alternative, petition that court to transfer to the Juvenile and Domestic Relations District Court of [B] County all matters pertaining to maintenance, support, care and custody of the child or children.

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**TAXATION**—Agricultural And Forestal Districts Act, And Land Use Act—Property tax deferral or relief.

**AMENDMENTS**—Land Use Act—1977 amendment does not eliminate ordinance requirement of Constitution.

**CONFLICT OF LAWS**—Statutes Should Be Construed So As To Avoid Conflict With Constitution.

**CONSTITUTIONAL LAW**—Taxation—All taxes must be uniform upon same class of subjects within territorial limits of authority levying the tax.

**COUNTIES, CITIES AND TOWNS**—Constitution Prohibits Local, Non-ministerial Determination That Some Land Qualifies For Use Value Assessment While Other Land Does Not.

**DEFINITIONS**—Meaning Of ‘Shall Be Eligible’ In Land Use Act—Also refers to Agricultural and Forestal Districts Act.

**GENERAL ASSEMBLY**—Tax Relief Or Deferral—General Assembly has sole authority to determine which classes of real property qualify for and its limits, conditions and extent.

**TAXATION**—Agricultural And Forestal Districts Act And Land Use Act Are Complementary—Locality need not enact one as requisite to valid enactment of other.

**TAXATION**—Special Assessments For Agricultural, Horticultural, Forest, Open Space Real Estate—Constitutional requirements.

January 6, 1978

THE HONORABLE FREDERIC LEE RUCK
County Attorney for Fairfax County

This is in response to your inquiry concerning § 58-769.6 of the Code of Virginia (1950), as amended. You request my opinion concerning the following inquiries to which I shall respond seriatim:

‘1) Does the phrase ‘shall be eligible’ mean that tax benefits automatically accrue upon the designation of a[n] [agricultural or forestal] district? Or does eligibility mean mere suitability and the choice remains with the governing body whether or not to grant tax relief?’
The phrase cited above appears in the second paragraph of § 58-769.6 and constitutes an important part of two statutory schemes, the Agricultural and Forestal Districts Act (AFDA) (§§ 15.1-1506 to -1513), and §§ 58-769.4 to -769.15:1 (popularly known as the Land Use Act). Both were enacted by the General Assembly to implement the property tax deferral or relief authorized under Article X, Section 2, of the Constitution of Virginia (1971), as to certain "classes" of real estate. The second paragraph of § 58-769.6 was added as an amendment in 1977, and was enacted contemporaneously with the AFDA. See Chapter 681 [1977] Acts of Assembly 1375, 1381. Section 15.1-1512A of the AFDA incorporates by reference portions of the Land Use Act, including § 58-769.6.

Additionally, your inquiry raises issues of constitutional law which must first be explored to respond adequately. Article X, Section 2, of the Constitution of Virginia (1971), provides with respect to assessments of real estate and tangible personal property at other than fair market value that:

"The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, . . . In the event the General Assembly defines and classifies real estate for such purposes, it shall prescribe the limits, conditions, and extent of such deferral or relief. No such deferral or relief shall be granted within the territorial limits of any county, city, town, or regional government except by ordinance adopted by the governing body thereof." (Emphasis added.)

The emphasized language of Article X, Section 2, vests the General Assembly with the sole authority to determine which classes of real property qualify for tax relief or deferral, and the "limits, conditions, and extent of such deferral or relief." Stated differently, Article X, Section 2, prohibits a local, non-ministerial determination to the effect that some land located within a taxing territory could qualify for use value assessment in accordance with the provisions of the AFDA and/or the Land Use Act while other land, similarly situated in the locality, could not so qualify. See Opinion of this Office to the Honorable J. E. Givens, Chairman, Commission of the Industry of Agriculture, dated August 21, 1972, and found in Report of the Attorney General (1972-1973) at 447.

Additionally, subject to an express exception irrelevant for present purposes, Article X, Section 1, of the Constitution of Virginia (1971), in pertinent part requires that "[a]ll taxes . . . be uniform upon the same class of subjects within the territorial limits of the authority levying the tax . . ." (Emphasis added.) Nothing in Article X, Section 2, quoted hereinabove, conflicts with, or impliedly waives, the "uniformity" requirement of Article X, Section 1. Any attempt by a locality to treat the same class of property within its territorial limits in a disparate manner, for tax purposes, would violate the uniformity requirement of Article X, Section 1. See, generally, Perkins v. Albemarle County, 214 Va. 240, 198 S.E.2d 626, opinion modified and aff'd, Perkins v. Albemarle County, 214 Va. 416, 200 S.E.2d 566 (1973); Fray v. Culpeper County, 212 Va. 148, 183 S.E.2d 175 (1971).

Applying the above constitutional principles to your inquiry manifests that if the phrase "shall be eligible" is interpreted to grant to a governing body of a locality the authority to take action that would permit some, but not all, owners of classes of land similarly situated within the locality to enjoy the tax relief or
deferral permitted under the AFDA, such an application would violate Sections 1 and 2 of Article X of the Constitution of Virginia (1971). That result, however, is not required in this instance. The principle that statutes should be construed so as to avoid a conflict with the Constitution has been applied by the Supreme Court of Virginia on numerous occasions and is applicable in this instance. See, e.g., Kohlberg v. Virginia Real Estate Comm'n, 212 Va. 237, 183 S.E.2d 170 (1971), and Board of Supervisors v. Chesapeake & Potomac Tel. Co., 212 Va. 57, 182 S.E.2d 30 (1971). The phrase "shall be eligible" is susceptible of an equally reasonable construction which does not produce an unconstitutional result.

The 1977 Amendment to § 58-769.6 provides:

"Land used in agricultural and forestal production within an agricultural and forestal district that has been established under § 15.1-1506 et seq., shall be eligible for the use value assessment and taxation whether or not a local land-use plan or local ordinance pursuant to § 58-769.6 has been adopted." (Emphasis added.)

The language immediately preceding the phrase "shall be eligible" contemplates that a "district" created under the AFDA shall have been "established" according to all statutory requirements of the AFDA, including requirements of the Land Use Act incorporated by reference into the AFDA pursuant to § 15.1-1512A, and all constitutional requirements in Sections 1 and 2 of Article X of the Constitution, in order for tax relief or deferral to result. The language following the phrase "shall be eligible" provides that a "district" created under the AFDA may enjoy the tax benefit of land-use assessment "whether or not" that same locality has satisfied all the requirements for tax relief or deferral under the Land Use Act found in the first paragraph of § 58-769.6. Since AFDA and the Land Use Act are complementary and a locality need not enact one as a requisite to the valid enactment of the other, the phrase "shall be eligible" is part of a sentence which underscores the legislative intent that the two Acts may exist alone or in conjunction in the same taxing jurisdiction.

Based upon the foregoing, it is my opinion that the phrase "shall be eligible" means that tax benefits provided for under the AFDA automatically accrue upon the designation of an agricultural and/or forestal district, provided such district is created pursuant to all statutory and constitutional requirements referred to in this Opinion. Additionally, the phrase does not mean "mere suitability" for tax deferral or relief. It is my opinion that, in accordance with a prior Opinion of this Office and judicial precedent cited herein, any action by a local government to permit some, but not all, similarly situated classes of property within a locality to enjoy the tax benefit possible under the AFDA would violate Sections 1 and 2 of Article X of the Constitution of Virginia (1971).

You further inquire:

"2) Even if eligibility means automatic tax relief, is this [1977 Amendment to] Section 58-769.6 of the Act constitutional under Article X, Section 2, of the Virginia Constitution which states that '[n]o such [tax] deferral or relief shall be granted within the territorial limits of any county, town, or regional government except by ordinance adopted by the governing body thereof'?

It is my opinion that the 1977 Amendment to § 58-769.6 does not eliminate the ordinance requirement of Article X, Section 2, of the Constitution of Virginia (1971) and, therefore, is constitutional. In this regard, see my Opinion to the

TAXATION—Assessments—County-wide general reassessment of real estate completed in March of 1977—Subsequent improvements; new buildings may be reassessed in 1977 if statutory conditions met; other improvements may not.

TAXATION—Assessments—First permissable date for assessing improvements other than buildings is first day of January of year next succeeding the improvements.

TAXATION—Assessments—Resolution mentioned in § 58-811.1 must be adopted by county governing body before new buildings substantially completed prior to November one may be assessed.

November 2, 1977

THE HONORABLE FOREST L. HAMILTON
Commissioner of the Revenue for Augusta County

This is in response to your request for my Opinion relating to the assessment of real estate. Your inquiry is as follows:

Several unimproved (raw) tracts of land were subdivided according to local law and were appraised in such unimproved condition at fair market value pursuant to a county-wide general reassessment which was completed in March of 1977. Subsequent to March of 1977, the subdivision was improved, to-wit: utilities were installed, roads built, lots landscaped and several new buildings were erected. Can the lots within the subdivision be reassessed and taxed in 1977 to reflect such improvements?

To adequately respond to your inquiry, it is necessary to segregate the improvements into two categories: (1) new buildings substantially completed and, (2) all other improvements.

First, in regard to new buildings, § 58-811.1 of the Code of Virginia (1950), as amended, provides that "all new buildings substantially completed or fit for use, occupancy and enjoyment prior to November one of the year of completion" shall be assessed by the Commissioner of Revenue at fair market value in relation to the most recent assessment or general reassessment when such new building is "so completed or fit for use, occupancy and enjoyment." The section, which contains a provision for prorating the tax assessed, is operative, however, only if the governing body of your county adopts the resolution mentioned in § 58-811.1. If your county has adopted the resolution mentioned above, it is my opinion that you may assess in calendar year 1977, in accordance with § 58-811.1, new buildings of a substantially completed nature erected on the various lots within the subdivision.

Second, in regard to all other improvements, I direct your attention to §§ 58-763 and 58-772.1, which grant the authority to make an assessment of taxes for all improvements made within the subdivision subsequent to the last previous assessment. Neither section, however, grants the authority to assess the property in question in the calendar year in which the improvements take place. Section 58-763 is silent as to the date on which improvements to real property may be
assessed by the Commissioner of Revenue. Consequently, the general rule enunciated in § 58-796 controls, to wit:

"The beginning of the tax year for the assessment of taxes on real estate shall be January the first and the owner of real estate on that day shall be assessed for the taxes for the year beginning on that day."

Section 58-772.1 provides, in pertinent part, that:

"... the commissioner of the revenue shall assess or reassess, as required, any lot, tract, piece or parcel of land upon or to which improvements have been made, such as hard surfacing of streets or roadways, installation of curbs, gutters, sidewalks and utilities, ..." (Emphasis added.)

The above quoted portion of § 58-772.1 does not explicitly indicate when "as required" means. A preceding sentence of this section, referring to the assessment of lots within a new subdivision, indicates that such newly subdivided lots "shall [be] assess[ed] ... at fair market value as of the first day of January of the year next succeeding the year in which such plat is recorded." Arguably, "as required" refers to the only date for assessment "required" within the context of § 58-772.1, i.e., the first day of January of the year next succeeding the improvements. Alternatively, "as required" refers to the date for the assessment of improvements pursuant to the general rule of § 58-796. In either case, the first permissible date for assessing the improvements is the first day of January of the year next succeeding the improvements.

Based upon the foregoing, it is my opinion that no authority exists to reassess and tax the "other improvements" in calendar year 1977.

TAXATION—Assessments—Status of taxpayer and property determined as of first day of tax year—No property tax consequences flow from act of recording plat—Subdivision of plat.

COMMISSIONERS OF REVENUE—Land Books—Subdivision of plat assessed and shown separately as of first day of January next succeeding.

TAXATION—Changes, Corrections, Adjustments—Not made until land book is made out in succeeding year utilizing January first frame of reference—Retroactive recording denied.

TAXATION—Assessments—Value of buildings as of date of substantial completion—This additional assessment does not include value of land.

TAXATION—Land Book—Plat subdivided; three houses shown on land book on date buildings substantially completed.

TAXATION—Real Estate Assessments—New construction assessed by standards of last general reassessment.

September 19, 1977

THE HONORABLE VICTOR J. SMITH
Commissioner of Revenue for the City of Harrisonburg

This is to acknowledge your letter in which you request guidance on how to make land book entries in the following situation:
1. In January, Mr. A. owns a tract of land of several acres.
2. In February, Mr. B. buys the tract and plats it into three (3) lots. The plat is recorded in the clerk’s office and Mr. B. begins to build three (3) houses.
3. By August 15th, Mr. B. has finished all three (3) houses and has sold all to three (3) new owners—Mr. C., D. and E."

Specifically, your letter posed the following inquiries:

"1. Is the new plat picked up by the Commissioner of the Revenue in February when recorded by Mr. B. under 58-811.1 as three (3) lots or must they be picked up in Mr. B.’s name the following year in three separate lots?
2. Is Mr. B., who did the subdividing, building and selling of the three (3) parcels assessed for any portion of the current year in any manner?
3. Is Mr. A., the owner on January 1st of the current year, assessed for the acreage for the whole year or for the portion of the year he owned the land?
4. How are Mr. C, D and E assessed for the house or house and lots they purchased in August of the current year?"

In responding to your inquiries, several assumptions, warranted by the facts given, will be made. It will be assumed that the tax day is January 1st, that none of the parties involved (that is, A, B, C, D, or E) enjoys a tax exempt status, and that the improvements made by Mr. B. are substantially completed before the sales to C., D., and E. You have stated that the City of Harrisonburg has adopted a local ordinance under §§ 58-811.1 and 58-811.2 of the Code of Virginia (1950), as amended.

It must be noted that no property tax consequences flow from the act of recording a plat. The status that is taxed is ownership of the plat on the first day of January, not the act of recording. See § 58-796. The one exception to this rule occurs when a county or city, pursuant to §§ 58-811.1 or 58-811.2, assesses new buildings substantially completed prior to November one of the year of completion. In that case, the buildings can be assessed in the name of the owner at the time of substantial completion. Of course, such assessment is limited to the value of the improvements made.

I am assuming that “picked up by the Commissioner of the Revenue” means when must Mr. B.’s ownership be entered in the land books. Sections 58-772, 58-772.1, and 58-773 state that when a plat is subdivided, the subdivision “shall be assessed and shown separately upon the land books . . . as of the first day of January next succeeding . . .” Sections 58-808 and 58-809 speak of changes and corrections being made when the Commissioner is “making out his land book.” Section 58-796 states that assessments are made against the owner of real estate as of the first day of January of each year. Such assessments are entered in the land books, and this process is considered to be “making out . . . [the] land book.” These provisions all demonstrate that the status of the taxpayer and property are determined as of the first day of the tax year. Changes in ownership, corrections of erroneous land assessments, and adjustments to valuation (permitted by §§ 58-810, 58-811, 58-812, and 58-813) have uniformly been denied retroactive recording in the land book (once the January 1st determinations are made). These changes, corrections, and adjustments have not been made until the land book is made out in the succeeding year, utilizing a January 1st frame of reference. See Report of the Attorney General (1967-1968) at 112 and 278.

Since Mr. B. is neither the owner of the land on January 1, 1977, nor on January 1, 1978, an entry in the land book in Mr. B.’s name would not be required, but for the operation of § 58-811.1. Section 58-811.1, when utilized by
a locality, requires an additional assessment on all new buildings substantially completed prior to November 1st of the tax year. This additional assessment does not include the value of the land, but is limited to the value of the improvements made on the land. Such additional assessment is not made in the name of the owner on January 1st; instead, it is made in the name of the owner as of the date of the additional assessment.

Section 58-811.1 requires that Mr. B.'s ownership be entered "in the books" on the date the buildings are substantially completed, which in your example is prior to the November 1st date. Sections 58-811.1 and 58-811.2 are the only two sections which do not have January 1st as their frame of reference (except for fiscal year electees). The answer to question 1. is, therefore, that each of the three houses should be shown on the land book in Mr. B.'s name on the date the buildings on the lots in question are substantially completed.

Section 58-811.1 limits Mr. B.'s assessment for the tax year to the value of the buildings as of the date of substantial completion. This additional assessment does not include the value of the land. Report of the Attorney General (1973-1974) at 398. It should be noted that Article X, Section 1, of the Virginia Constitution, requires that assessments be uniform. Because of this constitutional provision, an assessment of new construction must be made by employing the standards of value used at the general assessment, not at the projected completion value. See Report of the Attorney General (1974-1975) at 499.

Mr. A., the owner on January 1st of the tax year, is assessed for the acreage for the whole year. Mr. A. receives no proration, although he is not assessed for the value of improvements made subsequent to his sale of the land. Section 58-796 states that assessments are made against the owner of the real estate as of the first day of January of the tax year. Since none of the various relief provisions are applicable to Mr. A.'s situation, he is liable for the entire amount of the assessment. Of course, Mr. A's liability for the entire amount of tax is effectively prorated contractually. The same would be applicable to C, D, and E discussed below.

Mr. C., D., and E. are not statutorily assessed for the houses or the lots they purchased in August of the tax year. No section of the Code calls for a proration when a purchase, of the sort involved here, is made. If they are still the owners of the real estate on January 1, 1978, then they will be assessed for the real estate for the tax year 1978. Section 58-796 requires that assessments for the real estate tax be made on the first day of January of the tax year, and they are made against the owner of the real estate on that date.

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TAXATION—Bank Stock—County may not tax shares of stock of bank located in incorporated town within county, irrespective of whether shares are taxed by town.

April 18, 1978

THE HONORABLE ROBERT C. BOSWELL
Commonwealth's Attorney for Floyd County

You have asked whether a county may tax shares of stock of a bank located in an incorporated town within that county, where the incorporated town does not tax the shares.
Section 58-476.4 of the Code of Virginia (1950), as amended, provides that when a bank is not located inside any incorporated town within the county, that county may, by ordinance, impose the bank stock tax. Section 58-476.2 authorizes an incorporated town to impose a bank stock tax if the bank is located within the corporate limits of the town.

Section 58-476.4 provides further that

"if any such bank has any branch or branches located in any other county in this State or in any incorporated town anywhere in this State . . ., the tax imposed by such county shall be upon only such proportion of the taxable value of the shares of stock in such bank as the total deposits of the bank, minus deposits through any branch or branches so located in any other county in this State and/or in any incorporated town anywhere in this State . . ., bear to the total deposits of the bank as of the beginning of the tax year." (Emphasis added.)

Thus, it is my opinion that § 58-476.4 specifically excludes a county from taxing the shares of stock of a bank which is located within an incorporated town within that county, irrespective of whether the shares are taxed by the town.

TAXATION—Bank Stock Tax—Banks in process of formation and organization; corporate existence; soliciting stock subscriptions; not yet authorized to receive deposits from general public—Shareholders taxed.

BANKS—Capital Stock Subscriptions Are Not Shares Of Stock.

BANKS—Bank Stock Tax Imposed On Shareholders, Not On Banking Entity.

BANKS—Formation And Organization—Issuance of shares before authorized to receive deposits.

BANKS—Regulation—Differing State and federal regulation of banking industry—Delay issuance of stock until certificate of authority under § 6.1-13 granted.

BANKS—State Banks Treated Same As National Banks In Tax Matters.

DEFINITIONS—Bank As Defined In § 58-465.

February 6, 1978

THE HONORABLE GERALD L. BALILES
Member, House of Delegates

This is in response to your request for an opinion in regard to the bank stock tax imposed by Chapter 10 of Title 58 of the Code of Virginia (1950), as amended. Your inquiry poses three questions which I will paraphrase as follows:

1. Do the bank share tax provisions of §§ 58-465 through -485 apply to banks in the process of formation and organization where the bank has, under Virginia law, a corporate existence under Title 13.1 of the Code, and where the bank is soliciting and has received stock subscriptions (but not issued any shares), but has not yet been granted authority under § 6.1-13 to receive deposits from the general public?
2. Is the physical issuance of the shares before the granting of authority to receive deposits significant?

3. If the answer to question 2 is yes, does that result violate the requirements of § 58-466.1, since national banks receive their grant of corporate existence and the grant of authority to conduct a banking business by the same act?

I will answer your questions in order.

1. Section 58-466 states that "[n]o tax shall be assessed upon the capital of any bank but the stockholders in such banks shall be assessed and taxed on their shares of stock therein." [Emphasis added.] It is to be noted that capital stock subscriptions are not shares of stock. A share of corporate stock is "[a] proportional part of certain rights in the management and profits of a corporation during its existence, and its assets upon dissolution, and evidence of the stockholder's ratable share in the distribution of the assets on the winding up of the corporation's business." Black's Law Dictionary 1542 (4th ed. 1951). A subscription is a written contract between a person and the corporation by which the corporation binds itself to sell, and the person agrees to buy, a certain number of shares in the corporation, generally subject to certain conditions. 4B M.J., "Corporations," § 55-56. I am advised that the general practice in Virginia is that payments received for such subscriptions are placed in escrow and held subject to refund in the event that authority to receive deposits is not granted. Such contract rights do not rise to the level of shares of corporate stock and would not be subject to the reporting requirements of § 58-470 or to the tax imposed by § 58-473.

2. However, the physical issuance of shares of the corporation is of significant moment. Such a corporation has a corporate existence under Title 13.1 and can exercise the powers authorized by both its charter and by law. In the example you give, such a corporation is a "bank," as that term is defined in § 58-465. Section 58-465 provides that the word "bank" means "any incorporated bank . . . organized by or under the authority of the laws of this State. . . ." The issuance of the certificate of incorporation gives life to the corporate entity. Organization occurs on that date and although additional authority, in the form of the certificate required by § 6.1-13, is needed before deposits can be received, § 58-465 cannot be construed to require more than "organization." Doubts as to this conclusion are dispelled when the nature of the bank stock tax is examined. Shareholders are taxed upon their shares of stock, and this intangible asset comes into being upon issuance of the shares. That business has not yet commenced in no way alters the fact that the shares of stock are an intangible asset of the stockholders, and taxable as such. Furthermore, I am advised that this has been the consistent position of the Department of Taxation since at least the late 1950's.

3. Your third question deals with § 58-466.1, which states that if "any State or local tax is held by a court of competent jurisdiction to be invalid in its application to national banks, such tax shall not thereafter be assessed against State banks." This provision reflects the Commonwealth's policy of treating State banks the same as national banks in tax matters. See § 1-12, Virginia Retail Sales and Use Tax Rules and Regulations (1969). However, the bank stock tax is imposed on shareholders, not on the banking entity. If any inequality of treatment exists, it exists at the shareholder level and is not within the purview of § 58-466.1. This disparate treatment is the result of the differing State and federal regulation of the banking industry and cannot be construed as a violation of the spirit or letter of § 58-466.1. This result can be avoided by delaying
issuance of the stock until the certificate of authority under § 6.1-13 is granted.

TAXATION—Boat Owned By Lumber Manufacturing Corporation—Taxed as capital, not tangible personal property.

GENERAL ASSEMBLY—Authority—May define and classify taxable subjects—Tangible property as “capital.”

TAXATION—Intangible Personal Property—Taxed by State only—Capital of a trade or business.

TAXATION—Tangible Personal Property—Subject to local tax only.

November 15, 1977

THE HONORABLE C. HARDWAY MARKS
Member, House of Delegates

This opinion is addressed to your inquiry whether a boat owned by a lumber manufacturing corporation, having a weight in excess of five tons, should be carried for tax purposes under capital, or as personal property.

Article X, Section 4, of the Constitution of Virginia (1971), provides that tangible personal property is to be segregated and made subject to local taxation only. Article X, Section 1, provides, however, that the General Assembly may define and classify taxable subjects. Chapter 8 of Title 58 (§§ 58-405 to -441) of the Code of Virginia (1950), as amended, provides for the taxation of intangible personal property which is to be taxed by the State only.

Section 58-410 provides that the capital of a trade or business is deemed to be intangible personal property. Sections 58-411 and -412 set forth items of “capital.” A review of these sections indicates that the General Assembly has included many items of tangible property in the category of “capital,” and thus categorized these items as intangible personal property when owned by taxpayers subject to tax on capital. The last paragraph of § 58-412 provides, in part, that:

“Personal property, tangible in fact, used or employed in . . . a manufacturing, . . . business taxable on capital shall be included in capital as prescribed in § 58-411, except that machinery, tools and motor vehicles and delivery equipment used in such business shall be assessed and taxed locally as hereinabove provided.”

Accordingly, unless the boat in question is used as “delivery equipment,” I am of the opinion that the boat in question should be taxed as capital, if the corporation is in fact engaged in manufacturing. See generally Prentice v. City of Richmond, 197 Va. 724, 90 S.E.2d 839 (1956).

TAXATION—Delinquent—Single suit in equity to sell for delinquent taxes several hundred plots of land owned by numerous parties.

COURTS—Judicial Sale—Mode, manner, time and place governed by discretion of court.
REAL ESTATE—Sale En Masse For Delinquent Taxes Where Such Sale Will Bring Highest Price—Requirements of § 58-1117.4 must be complied with.

REAL ESTATE—Sale For Delinquent Taxes—Proceedings held under legal requirements to effect sale by creditor's bill in equity to subject real estate to lien of a judgment creditor.

May 24, 1978

THE HONORABLE JOHN F. DEEKENS
Treasurer of Amelia County

You have asked whether you may in a single suit, brought in equity to sell land for delinquent taxes, sell several hundred small plots which are owned by numerous parties and which comprise a certain subdivision created around the turn of the century. You say that, although there is a plat of record of the subdivision, there is no evidence on the ground as to the location of the lots. You also say that no single owner owns any parcel assessed at a value in excess of two thousand five hundred dollars.

Section 58-1117.1, et seq., of the Code of Virginia (1950), as amended, provide the authority and procedure for the sale of land for delinquent taxes. Section 58-1117.4 provides, in part, that "two or more parcels of real estate may be covered by one bill [in equity] . . . if they are assessed against and owned by different parties but each parcel is assessed at a value which does not exceed two thousand five hundred dollars." Consequently, a single bill in equity may be used, in this instance, to sell all of the delinquent land. Effective July 1, 1978, the assessed value of each parcel may not exceed twenty thousand dollars. Chapter 54 [1978] Acts of Assembly.

Section 58-1117.3 provides, however, that the "proceedings shall be held in accordance with the requirements, statutory or arising at common law, relative to effecting the sale of real estate by a creditor's bill in equity to subject real estate to the lien of a judgment creditor." With reference to such judicial sales, it is the general rule that the mode of sale which will bring the highest price is preferred. 11 M.J. Judicial Sales and Renting § 31 at 331. Although a sale in parcels is preferred, 47 Am. Jur. 2d Judicial Sales § 123, a sale en masse is proper where it appears that such a sale will bring the highest price. Fine Acres, Inc. v. Whitehurst, 206 Va. 66, 70, 141 S.E.2d 696, 699 (1965). While several tracts of a single owner may be sold en masse, I am unaware of any specific statutory authority to sell the land of several different owners en masse. Also, the method of sale which you suggest may present problems under § 58-1117.3, which provides that the former owner, his heirs or assigns, has the right, within two years from the date of confirmation of the sale, to claim the proceeds of the sale, after expenses of the sales and discharge of liens thereon are satisfied. In this instance it would appear a difficult task to accurately apportion the proceeds and expenses of the sale among the various land owners. However, under general authority, the mode, manner, time and place of a judicial sale is governed by the discretion of the court and its acts will not be disturbed unless plainly erroneous. Moore v. Triplett, 96 Va. 603, 32 S.E. 50 (1899); Johnson v. Wagner, 76 Va. 587 (1882).

Consequently, it is my opinion that § 58-1117.3 does authorize the en masse judicial sale of various parcels of land owned by various owners when the court concludes that such a sale will bring the highest price and the requirements of § 58-1117.4 are complied with.

I do point out, additionally, that your county may be the purchaser at any
such sale. Section 58-1117.6.

TAXATION—Exemption—Masonic Lodge exempt if transferred to mere title-holding company.

DEFINITIONS—"Belonging To" Not Defined in Constitution Or § 58-12—Given plain and ordinary meaning in tax exemption.

TAXATION—Exemption—All property exempt from taxation on effective date of 1971 Constitution continues to be exempt until otherwise provided by General Assembly.

November 1, 1977

THE HONORABLE FREDERIC LEE RUCK
County Attorney for Fairfax County

This is in response to your request for a clarification of the Opinion rendered to the Honorable Adelard L. Brault, Member of the Senate of Virginia, dated May 31, 1972, and found in Report of the Attorney General (1971-1972) at 392. You note that the 1972 Opinion relied upon the case of Citizens' Foundation v. City of Richmond, 207 Va. 174; 148 S.E.2d 811 (1966), for the proposition that indirect ownership of property was sufficient to qualify for the exemption under § 183(f) of our old Constitution. Your clarification request and the 1972 Opinion both involve the tax-exempt status of a lodge hall of a Masonic Lodge which has been transferred to a mere title-holding corporation.

The Citizens' Foundation case involved the exemption granted by § 183(a) of the 1902 Constitution:

"Property owned directly or indirectly by the Commonwealth or any political subdivision thereof, . . ." [Emphasis added.]

Article X, § 6(a) (1), of the Constitution of Virginia (1971) contains the same exemption [of course, under Article X, § 6(f), such express exemption is not necessary for exempt organizations under the Constitution of 1902 to retain that exempt status]; and § 58-12(1) of the Code of Virginia (1950), as amended, has utilized the identical language, under both the new and old Constitutions.

The issue decided in the Citizens’ Foundation case was what constituted indirect ownership by the Commonwealth as contemplated by § 183(a). If a lodge hall of the Masonic Lodge is entitled to a property tax exemption, it is clear that such exemption would not be derived from former § 183(a), but rather from former § 183(f):

"Buildings with the land they actually occupy, and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, . . ." [Emphasis added.]

This language is repeated in § 58-12(6), and was the terminology used prior to the adoption of the present Constitution in 1971.

The issue here is whether ownership of the lodge hall in a title-holding entity terminates the Masonic Lodge's tax-exempt status. It appears that the Masonic Lodge in question was in existence before the adoption of the Constitution of
Virginia (1971) and that the Masons' lodge hall would have been tax-exempt under § 183(f) of the Constitution of 1902. Article X, § 6(f), of the Constitution of Virginia (1971), states "that all property exempt from taxation on the effective date of this section [July 1, 1971] shall continue to be exempt until otherwise provided by the General Assembly as herein set forth." The Masons' lodge hall was exempt from taxation prior to the adoption of the Constitution of 1971, and the Virginia Supreme Court applies a liberal interpretation to the exemption provisions of § 183 of the 1902 Constitution. Department of Taxation v. Progressive Community Club, 215 Va. 732; 213 S.E.2d 759 (1975). Viewing the exemption contained in § 183(f) and § 58-12(6) in this light, I am of the opinion that a lodge hall "belonging to" a benevolent association (such as the Masons) and used exclusively for lodge purposes or as a meeting room was exempt under the language of the old Constitution and would continue to be exempt today under the "grandfather clause" of Article X, § 6(f).

"Belonging to" is not defined by the 1902 Constitution or by § 58-12 and, therefore, must be given its plain and ordinary meaning. Black's Law Dictionary 198 (4th ed. 1951) defines "belong" as follows:

"To appertain to; to be the property of. Property 'belonging' to a person has two general meanings: (1) ownership; . . . and (2) less than ownership, *i.e.*, less than an unqualified and absolute title, such as the absolute right of user."

The term "belonging to" was utilized in § 183(f) instead of "owned." Indirect ownership and the absolute right of use would constitute the status of "belonging to" the Masons, and because this property was exempt under the old Constitution it would continue to be exempt under the grandfather clause of Article X, § 6(f).

Since the Citizen's Foundation case was cited in the 1972 Opinion for the proposition that indirect ownership was sufficient for exemption under the Constitution of 1902, the Opinion, as it applies to the Masonic Lodge in Fairfax County, is correct. The lodge hall "belongs to" the Masons even though mere title is in a title-holding entity.

TAXATION—Exemption—Motor vehicles of Potomac Conference of Seventh-day Adventists.

May 11, 1978

THE HONORABLE ANNA LEE PULLIN
Commissioner of the Revenue for the City of Staunton

You ask whether certain vehicles owned by the Potomac Conference of Seventh-day Adventists, a State-wide organization, which are located in Staunton, are exempt from taxation under the laws of the Commonwealth of Virginia. Your letter and attachments mention three possible exemption provisions that may be applicable, §§ 58-12(2), -12(5), and -12.24.

**Background**

Section 58-12(2) of the Code of Virginia (1950), as amended, exempts certain real property and furniture and furnishings used within churches and parsonages...
from property taxation. Conference-owned vehicles would not fall within the purview of that provision.

An Attorney General's opinion rendered to the Honorable D. B. Hanel, Commissioner of the Revenue for the City of Martinsville, dated July 11, 1973, and found in Report of the Attorney General (1973-1974) at 384, held that church-owned motor vehicles used to transport members to services and for other general church purposes were not being used exclusively for religious purposes and stated that such vehicles were taxable. In 1974, § 58-12.24 was passed by the General Assembly which in very broad terms reversed that opinion.

In an Opinion to the Honorable Austin Embrey, Clerk of the Circuit Court of Nelson County, dated May 8, 1957, and found in Report of the Attorney General (1956-1957) at 253, a copy of which I have enclosed, this Office held that the Potomac Conference Corporation of Seventh-day Adventists was a religious body which qualified for the tax exemption found in § 58-64. The question of whether the religious organization uses these motor vehicles "exclusively on a nonprofit basis for charitable, religious or educational purposes" remains.

Exemption

Attached to your letter was a memorandum entitled: "VEHICLES OWNED BY AND TITLED TO POTOMAC CONFERENCE OF SEVENTH-DAY ADVENTISTS." It sets forth the uses of the nine conference-owned vehicles and says that all are used on a not-for-profit basis for charitable purposes and that none are used in competition with private enterprise. A camper is used in connection with the Conference's camp meetings as a field office and also to carry brochures and other Conference literature. One vehicle is employed in disaster relief, although the extent of such usage is not specified. Some of the vehicles are in a state of disrepair and are not being used at all. Three vehicles are "employed solely in moving teachers and/or ministers as required by the Conference in its operation of its schools and spiritual affairs." One vehicle is used for snow removal and other similar uses on the Conference grounds. Such vehicles are exempt from personal property taxation, assuming they are used as the Conference asserts, if the vehicles used in moving teachers and ministers are not available for use by them in their individual capacities.

TAXATION—Exemption—Senior Center, Inc., of Charlottesville.

TAXATION—Exemption—Grandfather clause in Article X, Section 6(f), of 1971 Constitution mandates that rule of liberal construction be applied retroactively to determine charitable or benevolent purpose and tax exemption.

TAXATION—Personal Property—Other than furniture and furnishings not exempt—Vehicles and other tangible personal property subject to State and local taxation.

"'Property owned by any church, religious association or denomination . . . , and used exclusively on a nonprofit basis for charitable, religious or educational purposes is hereby designated and classified as religious and charitable in the meaning of Article X, § 6(a) (6) of the Constitution of Virginia. Property so owned and used is hereby determined to be exempt from taxation.'" [Emphasis added.]
November 4, 1977

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

This is in response to your inquiries whether (1) the Senior Center, Inc., of Charlottesville, Virginia, is tax exempt as a "charitable or benevolent association" within the context of Article X, Section 6(a)(6), of the Constitution of Virginia (1971), and its implementing statute, § 58-12(6) of the Code of Virginia (1950), as amended, and (2) if so, which classes of property owned by Senior Center, Inc. are exempt from local property taxes.

I am advised that the Senior Center, Inc., (the Center), is a nonprofit, non-stock corporation organized in 1965 under the provisions of Chapter 2, Title 15.1, of the Code of Virginia (1950), as amended. Since 1965 the Center has been associated with the Thomas Jefferson Area United Way, (Charlottesville, Virginia), as an agency thereof, and has been supported by United Way since that date. The purposes of the organization as set forth in its constitution, include "the operation of the Center for the senior citizens of the community of Charlottesville and Albemarle, wherein recreational activities may be undertaken by the said senior citizens, under the direction of volunteer and paid employees, who manage and direct the said Senior Center."

In response to your first inquiry, a threshold determination must be made whether the Center engages in activities which predominantly promote a tax exempt purpose.

Article X, Section 6(a)(6), of the Constitution of Virginia (1971), exempts certain property, used for the following enumerated purposes, from State and local taxation:

"Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by a three-fourths vote of the members elected to each house of the General Assembly and subject to such restrictions and conditions as may be prescribed."

As required in Article X, Section 6(a)(6), the Center has not been designated specifically by the General Assembly as an association organized to perform a tax exempt purpose. This fact, however, is not wholly determinative whether the Center is an organization qualifying for tax exempt status. Analogous to the instant situation is a case recently decided by the Virginia Supreme Court involving an association organized prior to the effective date of the present Virginia Constitution which sought tax exempt status as a "charitable or benevolent association." Manassas Lodge No. 1380, Loyal Order of Moose, Incorporated, et al. v. County of Prince William, 218 Va. 220, Record No. 760456 (Sept. 1, 1977). Finding the date of organization of the association to be important, the Court in Manassas Lodge No. 1380 held that Article X, Section 6(f), of the present Constitution prescribes a rule of strict construction to apply prospectively to exemptions "established or authorized" by the new Constitution; but the grandfather clause contained in Article X, Section 6(f), mandates that a rule of liberal construction be applied retroactively to determine (1) whether a certain organization qualified as a charitable or benevolent association on July 1, 1971, and (2) whether certain property of an organization was exempt from taxation on July 1, 1971, pursuant to Section 183(f) of the Constitution of 1902, and, therefore, should continue to be tax exempt. 218 Va. 223, Record No. 760456, at 4. See Report of the Attorney General (1971-1972) at
Accordingly, since the Center was organized prior to July 1, 1971, it is entitled to a rule of liberal construction. Whether it qualifies as a tax exempt organization is dependent upon if, at the time of its organization and at all times thereafter, the Center engaged in activities which predominantly promote a "charitable or benevolent" purpose.

In order to be "charitable," in the sense the term is used in Article X, Section 6(a) (6), "an institution must be organized and conducted to perform some service of public good or welfare." Manassas Lodge No. 1380, supra; City of Richmond v. United Givers Fund, 205 Va. 432, 436, 137 S.E.2d 876, 879 (1964). Further, the word "benevolent" "should receive a reasonable interpretation to give effect to its accepted meaning: 'Philanthropic, humane, having a desire or purpose to do good to men, intended for the conferring of benefits, rather than for gain or profit.'" Manassas Lodge No. 1380, supra, 218 Va. 224, Record No. 760456, at 4, 5, quoting Black's Law Dictionary 201 (4th Ed. 1951).

In summary, a taxpayer organization is entitled to a liberal rule of construction concerning its status as a tax exempt association within the meaning of Article X, Section 6(a) (6), of the Constitution and § 58-12(6), if the following criteria are met:

(a) the association must have been organized prior to July 1, 1971, and
(b) at the time of its organization and at all times thereafter the association was engaged in activities which predominantly promote a "charitable or benevolent" purpose as defined in this Opinion.

Applying the above criteria to the Center requires a factual determination, which I am without sufficient information to make.

In response to your second inquiry, the General Assembly, implementing Article X, Section 6(a) (6), of the Constitution, reenacted § 58-12(6), which exempts from local and State taxation certain classes of property of qualifying associations, to-wit:

"Buildings with the land they actually occupy, and the furniture and furnishings therein belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes."

To be exempt, the property in question must be used "exclusively for lodge purposes or meeting rooms" by such association within the meaning accorded that phrase under § 58-12(6), and the property must be included among the classes of property exempted either under Section 183(f) of the Virginia Constitution (1902), or under § 58-12(6).

Applying the rule of liberal construction to property of charitable and benevolent associations, the word "exclusively," as used in tax exemption provisions, "has never been considered an absolute term." City of Richmond v. Richmond Memorial Hospital, 202 Va. 86, 91, 116 S.E.2d 79, 82 (1960). Further, "the controlling factor is the dominant purpose in the use of the property." City of Richmond v. United Givers Fund, 205 Va. 432, 438, 137 S.E.2d 879, 880 (1964).

Applying the rule of liberal construction outlined above, the issue whether the classes of potentially tax exempt property enumerated in § 58-12(6) are used "exclusively" by the Center for charitable or benevolent purposes, must be based on a factual finding. Neither Section 183(f) of the Virginia Constitution (1902), nor § 58-12(6), however, exempts from taxation tangible personal property other than furniture and furnishings located in an exempt building or
meeting room used exclusively for a tax exempt purpose. Therefore, it is my opinion that all vehicles and other tangible personal property not otherwise mentioned herein are subject to State and local taxation.

TAXATION—Forestal Land Portion Of Agricultural And Forestal District—Qualification for land use-valuation taxation—Locality has partially adopted Land Use Act.

STATUTES—Susceptible Of Two Constructions—Fundamental rule of statutory construction; court must adopt construction within legislative power.

TAXATION—Agricultural And Forestal District—May be adopted by locality which has failed to comply with requirements to adopt Land Use Act—Must comply with constitutional provisions.

TAXATION—Agricultural And Forestal Districts Act Extends Tax Relief Benefits Of Land Use Act.

January 3, 1978

THE HONORABLE HENRY LEE CARTER
Commonwealth's Attorney for Orange County

You request my opinion whether the "forestal land portion" of an agricultural and forestal district, created in a locality pursuant to the Agricultural and Forestal Districts Act, §§ 15.1-1506 through -1513 of the Code of Virginia (1950), as amended, can qualify for land use-valuation and taxation pursuant to the Land Use Act. See §§ 58-769.4 through -769.16, and § 15.1-1512A. Your inquiry arises within a locality which has partially adopted the Land Use Act—only lands devoted to agricultural and horticultural uses qualify for land-use valuation and taxation. (Emphasis added.)

The Land Use Act authorizes the various taxing jurisdictions within the Commonwealth to allow real property, put to agricultural, horticultural, forest and open space uses, to be valued for property tax purposes at its "use-value." The "use-value" is lower than fair market value and results in property tax relief or deferral to the owner of the real property affected. The Agricultural and Forestal Districts Act, (AFDA), enacted in 1977, extends the tax relief benefits of the Land Use Act to any parcel of land within a taxing jurisdiction which qualifies under the AFDA as an agricultural and/or forestal district. The interplay between the two Acts is what gives rise to your inquiry.

Section 15.1-1512A of the AFDA provides:

"Land used in agricultural and forestal production within an agricultural and forestal district shall qualify for an agricultural or forestal value assessment on such land pursuant to § 58-769.4 et seq., of the Code of Virginia, [Land Use Act], if the requirements for such assessment contained therein are satisfied." (Emphasis added.)

Assuming all other requirements of the AFDA are complied with, § 15.1-1512A makes it clear that the forestal land portion of an agricultural and forestal district created in a locality pursuant to the AFDA qualifies for forest land use-valuation and taxation under the Land Use Act if such forest land satisfies the
requirements of the Land Use Act, to-wit: § 58-769.5(c), (definition of land devoted to forest use); and § 58-769.7, [minimum size of such land and local assessing officer’s determination that land meets criteria of § 58-769.5(c)].

I am unaware of any provision in the AFDA which requires a locality to adopt the Land Use Act, as to any of the classifications of real property provided therein, as a condition precedent to the adoption of the AFDA in that locality. In fact, the General Assembly has expressed an opposite intention in this regard. The second paragraph of § 58-769.6 of the Land Use Act, enacted in 1977 as an amendment thereto and enacted contemporaneously with the AFDA, (Chapter 681 [1977] Acts of Assembly 1375, 1381), provides:

"Land used in agricultural and forestal production within an agricultural and forestal district that has been established under § 15.1-1506 et seq., [the AFDA], shall be eligible for the use value assessment and taxation whether or not a local land-use plan or local ordinance pursuant to [the first paragraph of] § 58-769.6 has been adopted."

The clear language of the 1977 Amendment to § 58-769.6 states that a locality may implement the AFDA “whether or not” the locality has adopted “a local land-use plan or local ordinance,” both of which are necessary conditions for implementation of the Land Use Act in any locality. Since the AFDA may be adopted in a locality which has failed to comply with all requirements necessary for the adoption of the Land Use Act, in whole or in part, a fortiori, the AFDA may be adopted in a locality which has adopted the Land Use Act as to one or more of the classifications of real estate defined in § 58-769.5, as is the case in this instance.

I must point out that in order to qualify for land use assessment and taxation under either the AFDA or the Land Use Act, the locality must comply with the requirements of Article X, Section 2, of the Constitution of Virginia (1971), which provides, in pertinent part:

“No such deferral or relief [from real estate taxes for real estate devoted to agricultural, horticultural, forest, or open spaces uses] shall be granted within the territorial limits of any county, city, town, or regional government except by ordinance adopted by the governing body thereof.” (Emphasis added.)

If the emphasized language of the 1977 Amendment to § 58-769.6, supra, is construed to allow land use-valuation and taxation under the AFDA without an “ordinance” as required under Article X, Section 2, supra, the Amendment contravenes the Virginia Constitution, and in this respect the amendment is unconstitutional. That result is not necessary in this instance. A fundamental rule of statutory construction provides that where a statute is susceptible of two constructions, one of which is plainly within the legislative power and the other without, the court must adopt the former construction. See Ocean View Improvement Corp. v. Norfolk & W. Ry., 205 Va. 949, 955, 140 S.E.2d 700, 704 (1965). It is equally reasonable that the 1977 Amendment should be construed in the following manner. The emphasized portion of the 1977 Amendment to § 58-769.6, supra, is immediately preceded by the phrase, “shall be eligible for the use value assessment and taxation . . . .” This phrase clarifies and limits the language which follows it. Thus, even though the locality may adopt the AFDA “whether or not” the locality has performed all acts necessary for adoption of the Land Use Act, it is merely “eligible” for tax deferral or relief. Accordingly, only if the locality conforms with all other requirements of the AFDA and the
Constitution, including the "ordinance" requirement of Article X, Section 2, does tax relief or deferral result.

Based upon the foregoing, it is my opinion that a locality may implement the AFDA without regard to whether the same locality has adopted the Land Use Act as to any or all of the classifications of real property provided therein, but tax deferral or relief accrues only if all requirements detailed in the AFDA and the Constitution of Virginia are met.

TAXATION—Graduated Tax Rate On Merchants' Capital Would Be Unconstitutional And Violate Terms Of § 58-851.

January 13, 1978

THE HONORABLE WILLIAM N. ALEXANDER, II
Commonwealth's Attorney of Franklin County

This is in response to your inquiry in which you asked whether Franklin County may impose a graduated tax rate on merchants' capital. As an example, you wish to know whether it would be permissible for the county to impose a tax of twenty percent on the assessed value of the first hundred thousand dollars of merchants' capital and ten percent on the next hundred thousand dollars of assessed value of merchants' capital.

You expressed the opinion in your letter that such a graduated rate of tax would not violate the constitutional requirements of Article X, Section 1, of the Constitution of Virginia (1971) which requires that all taxes shall be uniform upon the same class of subjects within a given jurisdiction. I cannot agree with this conclusion. The effect of imposing a tax rate in the manner which you have suggested would mean that a taxpayer owning a greater amount of merchants' capital would be paying a lesser effective tax rate on that capital than a taxpayer owning a smaller amount of merchants' capital. For example, a taxpayer owning $100,000 worth of merchants' capital would be taxed at a rate of twenty percent of the assessed value of that capital, whereas the effective tax rate on a taxpayer owning $200,000 worth of merchants' capital would only be fifteen percent—twenty percent of the first $100,000 and ten percent on the second $100,000. While the amount of tax would be the same as to two taxpayers with the same tax base, it would not be uniform as to the class of taxpayers, i.e., owners of merchants' capital. This result would, in my opinion, result in a nonuniform application of the tax, in contravention of the terms of Article X, Section 1.

Further, such a result is not permissible under § 58-851 of the Code of Virginia (1950), as amended, which provides in part:

"The governing body of any county, city or town in laying levies on all taxable real estate, tangible personal property and merchants' capital may impose one rate of levy on real estate, another rate of levy on tangible personal property and another rate of levy on merchants' capital or it may impose the same rate of levy on any two or all of these subjects of taxation. . . ."

Based on the foregoing, I am of the opinion that such a scheme of taxation would be unconstitutional and would also violate the terms of § 58-851. Cf., Report of the Attorney General (1965-1966) at 288.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Horticultural Products (Orchard Trees, Vineyards, Nursery Stock) Assessed As Real Estate For Land Use Taxation.

TAXATION—“Add On” Method Recommended By State Land Evaluation Advisory Committee For Use-value Assessment Of Certain Horticultural Lands—Not arbitrary and capricious exercise of authority of SLEAC.

TAXATION—Assessments—General Assembly recognized similarities between horticultural and agricultural industries; § 3.1-646.1.

December 12, 1977

THE HONORABLE W. H. FORST, CHAIRMAN
State Land Evaluation Advisory Committee

This is in response to your letter submitted on behalf of the State Land Evaluation Advisory Committee (SLEAC). I shall respond to your inquiries seriatim.

1. Are horticultural products, i.e., orchard trees, vineyards, and nursery stock, real property for the purpose of taxation pursuant to § 58-769.4, et seq?

   It is not necessary to decide whether all horticultural products, under all circumstances, constitute real property in the common law sense, for the purpose of assessing and taxing real estate. Sections 58-769.4 through -769.15:1 of the Code of Virginia (1950), as amended, provide inter alia, that “real estate devoted to horticultural use” may be assessed and taxed by the locality at a special land use-value. To determine the land use-value, § 58-769.9 directs the local assessing official to “consider only those indicia of value which such real estate has for . . ., horticultural, . . . use . . .” “In addition to use of his personal knowledge, judgment and experience as to the value of real estate in . . ., horticultural, . . . use, he shall, in arriving at the value of such land, consider available evidence of . . ., horticultural, . . . capability, and the recommendations of value of such real estate as made by the State Land Evaluation Advisory Committee.” (Emphasis added.)

   Section 58-769.9 clearly contemplates that the value of the various horticultural products located and grown on real property devoted to horticultural use is an important factor in determining the “horticultural capability” of the particular real estate, and ultimately, the land’s use-value. Consequently, for the purpose of determining land use-value, I concur with the position enunciated previously by this Office that if real estate is “devoted to horticultural use,” within the context of § 58-769.5(b), then the horticultural products located and grown thereon are, in the limited sense indicated in this opinion, “assessed as real estate for the purpose of land use taxation.” See Opinion of this Office to the Honorable Russell I. Townsend, Jr., Member, Senate of Virginia, dated February 23, 1976, and found in the Report of the Attorney General (1975-1976) at 358.

2. “Although not specifically authorized by law, is the ‘add on’ method recommended by the Committee [SLEAC] for use-value assessment [of certain horticultural lands] pursuant to Paragraph 58-769.4, et seq., permitted by law and sufficiently reasonable to withstand attack as being arbitrary and capricious?”

The reason for the adoption of the “add on” method of use-valuation and the
conditions under which it may be implemented were recently published by SLEAC in its Procedures For Determining Ranges of Use-Values, at 13 (Sept. 1977) (SLEAC, Procedures) as follows:

"Because of the complexity of determining the use-value of land devoted to vineyard and nursery use, the SLEAC recommends for the tax-year 1978 that use-values of land devoted to such use in the applicable jurisdiction be those values determined, suggested, and published for land in agricultural use in such jurisdiction. After the use-value of the land is determined, the use-value of the vineyard or nursery items on the land may, pursuant to authority in Section 58-769.9 of the Code, be appraised by the responsible officials in each of the several jurisdictions authorizing use-value taxation of real estate in horticultural use." (Emphasis added.)

"What constitutes arbitrary action is difficult to define, because it is dependent upon the purpose and subject of a particular act and the circumstances and conditions surrounding it." Newport News v. Elizabeth City Co., 189 Va. 825, 840, 55 S.E.2d 56, 64 (1949). Generally, administrative action is arbitrary and capricious where it represents the will or whim of the administrative body rather than its judgment or where it has no reasonable basis, no reasonable relation to a lawful purpose, or is without support in the evidence. See 2 Am. Jur. 2d, Administrative Law, § 651 (1962), and cases cited therein.

In the face of inadequate financial data upon which to determine the use-value of land devoted to nursery and vineyard horticultural uses, SLEAC recommends that the use-value of comparable agricultural land in the locality is a suitable starting-off place to determine such use-value.

Section 3.1-646.1, Code of Virginia (1950), as amended, provides in pertinent part:

"Whenever the terms 'agriculture, agricultural purposes, agricultural uses' or words of similar import are used in any of the statutes of the State of Virginia, such terms shall include horticulture . . ., horticultural purposes . . ., horticultural uses . . ., and words of similar import applicable to agriculture shall likewise be applicable to horticulture . . . ." (Emphasis added.)

The General Assembly has clearly recognized the many similarities between the horticultural and agricultural industries. It is not unreasonable, therefore, to utilize the use-value of comparable agricultural land as a framework upon which to ascertain the use-value of certain horticultural lands.

"After the [agricultural] use-value of the land is determined, the use-value of the vineyard or nursery items on the land may, pursuant to authority in Section 58-769.9 of the Code, be appraised by the . . ." appropriate local assessing official. SLEAC, Procedures, supra. The use of the word "may" clearly indicates that the "add on" of the use-value of the vineyard or nursery is discretionary with the local assessing official. The "add on" may be applied only in those instances where the local assessing official determines that the comparable agricultural use-value does not accurately reflect the total use-value of the particular horticultural land in question. See generally § 58-769.9.

Based upon the foregoing, it is my opinion that the "add on" method of valuation recommended by SLEAC for the valuation of land devoted to certain horticultural uses, as applied in the proper circumstance, is not an arbitrary and capricious exercise of the authority vested in SLEAC under § 58-769.4, et seq.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Land Use Assessments—Locality may not require annual revalidation fee for each application for taxation on basis of use assessment.

ORDINANCES—Personal Property Tax Penalty—Locality may, by ordinance, impose penalty for failure to file return when due and for late payment of such taxes.

TAXATION—"Failure To File Return" Does Not Mean Failure To File Accurate Or Perfect Return.

TAXATION—Land Use Assessments—Locality may not require reapplication or reapplication fee for land use taxation except where use or acreage of land previously approved changes.

TAXATION—Penalty—Locality may set minimum penalty if it acts under § 58-847.

TAXATION—Penalty—Maximum which can be assessed for failure to file personal property tax return when due—Amendment to § 58-847 effective July 1, 1978.

THE HONORABLE BENJAMIN L. PINCKARD
Commissioner of the Revenue for Franklin County

You have asked several questions concerning land use taxation and personal property tax penalties.

Land Use Taxation

1. You ask if it would be legal in a county which has adopted land use taxation as authorized by § 58-769.4, et seq., of the Code of Virginia (1950), as amended, to charge an annual revalidation fee for each application for taxation on the basis of use assessment.

Section 58-769.8 provides that, in order to enjoy land use taxation, the land owner "must submit an application for taxation on the basis of a use assessment to the local assessing officer" within a statutorily prescribed length of time.

It further provides that a locality may require an annual revalidation of previously approved applications for land use assessment. Moreover, the statute specifically provides that "[a]n application fee may be required to accompany all such applications" but, no fee is authorized for revalidation of an application. (Emphasis added.) I am advised that the Real Estate Appraisal and Mapping Division of the Department of Taxation, which assists in the local administration of the land use taxation laws, does not interpret § 58-769.8 to authorize a fee for the mere revalidation of an application.

Thus, it is my opinion that § 58-769.8 does not authorize a locality to require any fee upon the revalidation of an application for land use taxation.

2. You ask if it would be legal to require a reapplication fee each year for each parcel which has previously qualified for land use taxation.

"An application shall be submitted whenever the use or acreage of such land previously approved changes; provided, however, that the governing body of any county, city or town may require any such property owner to revalidate annually with such locality . . . any applications previously approved . . . . An application fee may be required to accompany all such applications." § 58-769.8.
There is no doubt that a locality may require an application fee to accompany all applications. Section 58-769.8 clearly provides, however, that an application is required in two circumstances only: 1) upon the initial application for land use taxation and, 2) "[a]n application shall be submitted whenever the use or acreage of such land previously approved changes. . . ."

Consequently, it is my opinion that a locality may not require reapplication or a reapplication fee for land use taxation, except where the use or acreage of the land previously approved changes.

**Personal Property Tax Penalty**

1. You ask under what circumstances may a locality, which exercises the local options authorized under § 58-847, impose a penalty for the failure to file timely tangible personal property tax returns and for the late payment of such taxes.

Section 58-847 provides, in part, that a locality "may provide by ordinance penalties for failure to file . . . [tangible personal property tax] returns and for nonpayment in time. . . ." Section 58-847, then, provides that a locality may, by ordinance, impose a penalty or penalties in regard to tangible personal property taxes upon either or both of two events: 1) when a taxpayer does not file a return when due and, 2) when a taxpayer does not remit the tax when due.

The phrase "failure to file a return" does not mean failure to file an accurate or perfect return. See *Plunkett v. Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941); *Petrarca v. Peck*, 159 Ohio St. 377, 112 N.E.2d 378, 379 (1953). In construing the Internal Revenue Code (§ 6651 IRC) the courts have consistently held that a taxpayer must sign the return, *Edward A. Cupp*, 65 T.C. 68, 79 (1975), and the return must contain sufficient data from which the liability with respect to a particular tax may be computed and assessed, *Commissioner v. Lane-Wells Co.*, 321 U.S. 219 (1944); *Edward A. Cupp*, supra, 65 T.C. at 79.

Consequently, it is my opinion that a locality may not impose the penalty authorized by § 58-847 merely upon the failure of the taxpayer to file a "complete" return, unless the taxpayer does not sign the return or does not provide sufficient data upon which to compute the tax without reasonable cause.

2. You ask if $10.00 is the maximum penalty which can be assessed for failure to file the tangible personal property tax return when due.

Section 58-847 provides that "[n]o such penalty shall exceed ten percent of the tax past due on such property or the sum of ten dollars, whichever shall be the greater." The statute provides further that the "[p]enalty for failure to file an . . . return may be assessed on the day after such return . . . is due." Since the penalty for failure to file has no relationship to the amount of the "tax past due," the maximum penalty for failure to file, in my opinion, is $10.00. This result does not govern the imposition of a penalty for nonpayment of the tax when "past due."

Be advised, however, that the General Assembly recently amended § 58-847 to provide that "[n]o penalty for failure to file a return shall be greater than ten percent of the tax assessable on such return or ten dollars, whichever is greater." Chapter 395 [1978] Acts of Assembly. The 1978 Amendment clearly provides that the penalty for failure to file a return may be based upon the amount of tax which could be assessed for that particular tax year.

Consequently, it is my opinion that effective July 1, 1978, the maximum penalty for failure to file timely a tangible personal property tax return is the higher of ten percent of the amount of tax ultimately determined to be due or the sum of ten dollars.

3. You ask if a locality may set a minimum penalty of less than $10.00 if it acts under § 58-847.
The penalty imposition portion of § 58-847 provides that "[n]o such penalty shall exceed ten percent of the tax past due on such property or the sum of ten dollars, whichever shall be the greater." (Emphasis added.) The statute sets forth two methods upon which to determine the maximum penalty. It further provides that the penalty imposed shall not exceed the greater of the two amounts.

Consequently, since the statute sets no minimum penalty, it is my opinion that a locality may provide for a minimum penalty of less than $10.00.

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CONSTITUTIONAL LAW — Authority For Imposing Tax, Required By Constitution, No Longer In Effect — Ordinance imposing license tax is not valid.

COUNTIES, CITIES AND TOWNS — Localities Specifically Authorized To Impose License Tax On Coin-operated Machines — Repeal of § 58-361 eliminates such authority.

February 1, 1978

THE HONORABLE ROBERT E. HICKS, JR.
Commissioner of the Revenue for Campbell County

This opinion is in response to your inquiry concerning the authority of Campbell County to impose a license tax on coin-operated machines after January 1, 1978. In 1937, the Board of Supervisors of Campbell County enacted an ordinance imposing a license tax upon coin-operated machines pursuant to the statutory authority which, prior to January 1, 1978, was found in § 58-361 of the Code of Virginia (1950), as amended. That section, which was repealed effective January 1, 1978, provided that a locality could "impose and collect a license tax upon slot machines." You wish to know whether Campbell County can continue to impose its license tax on coin-operated machines following repeal of the legislation which authorized the imposition of such a tax.

Article VII, Section 2, of the Constitution of Virginia (1971), requires that the General Assembly shall establish the powers of local government. Under § 58-361 localities were specifically authorized to impose a license tax on coin-operated machines. Since that section has been repealed as of January 1, 1978, the specific authority for imposing such taxes thereunder no longer exists. I am of the opinion that following January 1, 1978, the effective date of the repeal of § 58-361, no ordinance imposing license taxes on coin-operated machines passed pursuant to § 58-361 is valid, because the authority for imposing such tax, required by Article VII, Section 2, is no longer in effect.

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TAXATION — License — Coin-operated machines — Authority for imposing tax under § 58-361 repealed effective January 1, 1978—May have authority after April 1, 1978, under § 58-266.1A(11).
CONSTITUTIONAL LAW — Authority For Imposing Tax, Required By Constitution, No Longer In Effect — Ordinance imposing license tax is not valid.

COUNTIES, CITIES AND TOWNS—Localities Specifically Authorized To Impose License Tax On Coin-operated Machines—Repeal of § 58-361 eliminates such authority.

DEFINITIONS—“Definite Place Of Business”—Situs for local license tax.

DEFINITIONS—“Operator” Of Coin Machines.


TAXATION—Situs For Local License Taxation—Place where person has definite place of business.

February 2, 1978

THE HONORABLE IVAN D. MAPP
Commissioner of the Revenue for the City of Virginia Beach

This opinion is in response to your inquiry concerning revisions made by the 1976 Session of the General Assembly relating to the licensing of coin-operated machines. These provisions take effect on January 1, 1978. Among the changes made by the General Assembly in 1976 were the repeal of §§ 58-361 and -367.2 of the Code of Virginia (1950), as amended. These sections specifically authorized localities to impose license taxes on vending machines and merchants selling by way of vending machines. You inquire as to the extent to which the authority of localities to impose such taxes has been affected by the repeal of these sections. I enclose for your information a copy of an Opinion to the Honorable Robert E. Hicks, Jr., Commissioner of the Revenue for Campbell County, dated February 1, 1978, which is responsive to your inquiry.

Your second inquiry concerns the limitation on a locality's power to impose license taxes, under § 58-266.5. Section 58-266.5 sets forth situs guidelines for local license taxation. Subparagraph (a) provides that such situs shall be the locality in which the person engaged in a particular type of activity has “a definite place of business or maintains his office. . . .” Thus, while a locality may have authority after April 1, 1978, to impose the type of license taxes permitted by §§ 58-361 and -367.2, under § 58-266.1A(11), such authority exists only to the extent that the person sought to be taxed has a definite place of business or office in that locality.

The meaning of the term “definite place of business,” for purposes of imposing a license tax on coin machine operators or merchants placing vending machines, can be ascertained from language in § 58-367.2, repealed effective January 1, 1978. There, the meaning of the term “definite place of business” implies a definite place in the locality at which goods or merchandise are stored for the purpose of supplying vending machines. If coin machine operators or merchants placing vending machines have a definite place of business in a locality, within the terms of § 58-367.2, that locality may impose the types of taxes formerly authorized by §§58-361 and -367.2, pursuant to the terms of §58-266.1A(11). Localities in which an operator or merchant does not have a definite place of business or office, however, are no longer authorized to impose these types of license taxes, due to the limitation placed on the operation of § 58-266.1 by § 58-266.5.
In your opinion request you set forth two examples and request that a determination be made as to whether a license tax may be imposed in each instance. Your first example is as follows:

"A company has an office in City A but not in City B yet the company provides coin-operated machines within City B. Can City B then impose a coin-machine license tax on each machine being provided by the company into City B?"

Because this company does not have an office, and assuming that it does not have a definite place of business in City B, City B may not impose a tax on any machine located in City B.

Your second example is as follows:

"A company has an office in City A but not in City B yet the company provides merchandise to coin-machines being operated within City B. Can City B then impose a license tax on the merchandise being sold through the machines?"

I assume that this example contemplates that a locality would impose a license tax based on the gross receipts from the sale of the merchandise sold through the machines as provided for under subparagraph (12) of § 58-266.1A:

"[A]ny county, city or town may levy and provide for the assessment and collection of a gross receipts tax on any operator, as defined in paragraph (11) above, on the gross receipts actually received by the operator from coin machines or devices operated within that city, county or town."

Subparagraph (11) defines the term "operator" to mean a person "selling, leasing, renting or otherwise furnishing or providing a coin-operated machine. . .," with the exception that such a person owning less than three machines and operating these machines on property owned or leased by the person is not an "operator." Section 58-266.5 provides that the situs for local license taxation is the place where a person has a definite place of business or office, except as otherwise provided by law. The language of subparagraph (12) authorizes any locality to provide for the gross receipts authorized therein. Thus, if the company described in your second example is an "operator" as defined in subparagraph (11), City B may impose a gross receipts license tax, despite the fact that the company does not have an office or definite place of business in City B. Of course, this authorization will not take effect until at least April 1, 1978, under the terms of § 58-266.1B.

TAXATION—Mobile Homes—Taxed as real or personal property depending on common law doctrine of fixtures applied to each case.

DEFINITIONS—Mobile Homes Defined By Statute—Enclosed by walls; have lost their mobile characteristics.

MOBILE HOMES—Double Wide Mobile Homes—Classified as real property—Not considered vehicles.

This is in response to your recent letter from which I quote:

"As Commissioner of Revenue for Louisa County, Virginia, I have encountered a growing problem with regard to taxation of mobile homes. Traditionally, they have been taxed as personal property and are titled with the Division of Motor Vehicles. I also realize that a separate category of personal property has been established for them and this is simple enough in the case of a mobile home which is used as such.

"However, there remains an unanswered question in Louisa County, and perhaps in other places in our Commonwealth, as to when, if ever, a mobile home, single or doublewide, becomes an item of realty for the purposes of property assessment and taxation. This has become a particularly difficult question for me when these mobile homes have been completely enclosed on the outside by walls of brick and traditional roofs established over them so that they are no longer recognizable as mobile homes and certainly have lost their mobile characteristics."

Section 58-829.3, Code of Virginia (1950), as amended, provides in part:

"All vehicles without motive power, used or designed to be used as mobile homes as defined in § 36-71(4), are hereby defined as separate items of taxation and shall constitute a classification for local taxation separate from other such classifications on tangible personal property provided in this chapter; provided, however, that the ratio of assessment and the rate of tax shall be the same as that applicable to real estate." (Emphasis added.)

Section 36-71(4) defines the term "mobile home" to mean:

"... an industrial building unit constructed on a chassis for towing to the point of use and designed to be used, without a permanent foundation for continuous year-round occupancy as a dwelling; or two or more units separately towable, but designed to be joined together at the point of use to form a single dwelling, and which is designed for removal to, and installation or erection on other sites."

This definition is sufficiently comprehensive, in my opinion, to include the mobile homes about which you inquire. They should, therefore, be taxed at the same rate and ratio as real property whether they are in fact real or personal property. See Opinion to the Honorable Benjamin L. Pinckard, Commissioner of the Revenue, Franklin County, dated October 1, 1976 (copy enclosed). Other mobile homes would be taxed as real or personal property depending on how the common law doctrine of fixtures would apply to the facts and circumstances of each case. See Transcontinental Gas Pipe Line Corp. v. Prince William County, 210 Va. 550, 172 S.E.2d 757 (1970); and Report of the Attorney General (1971-1972) at 406.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Motor Vehicles—Student at Mary Washington College using dealer's automobile—Taxed as personal property.

TAXATION—Motor Vehicles—Situs for personal property taxes—Determined by length of time physical presence in locality.

TAXATION—Personal Property—Tax situs of automobiles operated by students during school year where college is located.

September 22, 1977

THE HONORABLE ALMA LEITCH
Commissioner of the Revenue for the City of Fredericksburg

I have received your letter from which I quote:

"A continuing problem in Fredericksburg is the use of dealer's automobiles by students attending Mary Washington College . . . [I]t would be most helpful to the Commissioners if your office would review this situation and let us have your opinion as to whether these vehicles should be listed for taxation as personal property, provided the other conditions of taxable situs are met."

You indicate that an example relating to your inquiry is a student whose father is an out-of-town automobile dealer. The student is full-time and lives on campus during the nine-month school year. During that time the student has the continuous use of an automobile which her father has removed from his showroom or lot. The vehicle bears dealer tags but is garaged in Fredericksburg during the school year.

Section 58-829 of the Code of Virginia (1950), as amended, provides that localities may impose tangible personal property taxation based on the aggregate number and value of automobiles. Section 58-833, however, removes certain tangible personal property from the purview of the personal property tax and makes it subject to a tax as merchants' capital. Merchants' capital includes "inventory of stock on hand" except that "tangible personal property not offered for sale as merchandise . . . shall be reported and assessed as" tangible personal property. [Emphasis added.]

The ultimate question is whether these automobiles retain their status as inventory or stock on hand, and thus are subject to the merchants' capital tax, or whether they are tangible personal property, and thus are subject to the personal property tax.

Sections 58-829 and 58-833 contemplate that the classification of an item of property can turn on the actual status of the property at a given point in time. If the item of tangible personal property is not being offered for sale as merchandise, then the property is to be reported and assessed as tangible personal property. The taxpayer's classification is not controlling; the Commissioner of Revenue is required by statute to act upon his or her own knowledge, and though the Commissioner should not arbitrarily disregard the lists of the returns and statements of property owners, he or she is not bound thereby. Union Tanning Co. v. Commonwealth, 123 Va. 610, 632, 96 S.E. 780, 786 (1918). Therefore, the Commissioner can look beyond the taxpayer's label to determine whether such automobiles are "inventory of stock on hand" or "tangible personal property not offered for sale as merchandise"; the mode of licensing, registration, and titling do not control that determination. See Report of the Attorney General (1964-1965) at 333, 335.
The long-standing administrative interpretation is that while an automobile so used will eventually be sold, it has, in fact, been withdrawn from the physical inventory of stock on hand for use on the streets and highways. Such property, therefore, is no longer properly classified as inventory, but rather should be classified as tangible personal property and subjected to personal property taxation. See The Department of Taxation's manual "Basic Training Program for Assessment Officials" at IV-38 and IV-39 (revised, 1977); § 58-857.

In my opinion, the position advanced by the Department of Taxation is reasonable and consistent with the statutory language. Where the administrative construction of a statute has been uniform for many years and has been acquiesced in by the General Assembly, the courts grant such construction great weight and do not disregard it unless it is clearly erroneous. Commonwealth v. Lucky Stores, 217 Va. 121, 225 S.E.2d 870 (1976); Norfolk v. VEPCO, 197 Va. 505, 90 S.E.2d 155 (1955).

The facts indicate that during the period of time when the automobiles are withdrawn from inventory, they are treated by the dealer-father as if they were his own, individually. Either the father or daughter has exclusive use of the automobile for a specific period of time and determines where it will be kept.

This office has previously opined that automobiles operated by students during the full school year within the jurisdiction where they reside while attending school are subject to personal property taxation in that jurisdiction. See Reports of the Attorney General (1973-1974) at 385; (1971-1972) at 410; (1967-1968) at 275. If the situs conditions set forth in those opinions and in § 58-834 are met, then such localities may properly subject student-operated automobiles to the local tangible personal property tax.

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TAXATION—Nonmotorized Trailers Attached To Motorized Cabs For Interstate Hauling—Subject to locality's tangible personal property tax.

STATUTE OF LIMITATIONS—Taxes Assessed For Last Three Years.

TAXATION—Collection For Prior Years—Not estopped because of past administrative rulings by previous commissioner of revenue.

TAXATION—Interest—Must be added to assessment for omitted taxes for last three years—Similar relief on interest as on penalty not provided.

TAXATION—Penalty—Taxpayer not relieved of penalty by acquiescence of prior commissioner of revenue to taxpayer's failure to report taxable property—Fact determination made at local level.

TAXATION—Penalty—No penalty imposed for failure to pay tax if failure not in any way fault of taxpayer.

December 28, 1977

THE HONORABLE L. WAYNE CARTER
Commissioner of Revenue for the City of Salem

This is in response to your inquiry in which you ask two questions:

1) whether nonmotorized trailers which are attached to motorized cabs for
the purposes of interstate hauling are subject to the tangible personal property tax, and 
2) if such vehicles are subject to the tax, may you collect the tax for prior years not barred by the Statute of Limitations or are you estopped from asserting such taxes because of past administrative rulings by your predecessor in office?

Article X, Section 1, of the Constitution of Virginia (1971) contains this requirement:

"All property, except as hereinafter provided shall be taxed.

* * *

"The General Assembly may define and classify taxable subjects. Except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes, may be levied."

Section 5 of Article X segregates tangible personal property for local taxation only and prohibits the imposition of State property taxes on such segregated property. *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 583, 58 S.E.2d 316, 325 (1950).

Absent some exemption in the Constitution or in §§ 58-12 through -12.82, nonmotorized trailers are subject to a locality’s tangible personal property tax, unless the taxpayer can demonstrate that such property is not tangible personal property. No such exemption exists. The relevant question is, therefore, whether the property in question is "tangible personal property." Section 58-829 assigns various types of tangible personal property to classifications, with subsection (5) being pertinent for purposes of your inquiry. The following language is used therein:

"The aggregate number and value of all automobiles other than antique automobiles as defined in § 46.1-1, motor trucks, motorcycles, and all other motor vehicles, except any vehicle without motive power used or designed to be used as a mobile home or office or for other means of habitation by any person."

This language clearly contemplates that, in general, nonmotorized motor vehicles are motor vehicles for purposes of the tangible personal property tax. The category of nonmotorized vehicles excluded from § 58-829(5) is covered by § 58-829.3, which classifies mobile homes "as separate items of taxation and shall constitute a classification for local taxation separate from other such classifications on tangible personal property provided in this chapter; provided" that real property assessment ratios and tax rates shall apply to such property. [Emphasis added.]

Furthermore, § 58-829 (15) provides for taxation of "[t]he aggregate value of all other tangible personal property not herein specifically enumerated, . . . ." The broadness of this language insures that the constitutional injunction of Article X, Section 1, is satisfied. If subsection (5), or any other classification, does not fairly encompass within its terms a particular type of tangible personal property, subsection (15) operates to classify it as taxable tangible personal property. The reporting forms reflect this catch-all category. I am not aware of any other provision providing for a different treatment.
REPORT OF THE ATTORNEY GENERAL

Accordingly, my answer to question 1 is that the nonmotorized trailers involved here are tangible personal property and subject to the locality's tax thereon.

If a commissioner of revenue ascertains that any person or property subject to local taxation has not been assessed for any tax year of the three years last past, § 58-1164 requires that he list and assess the same with such levies or taxes “adding thereto a penalty of five per centum and interest at the rate of six per centum per annum; . . . .” In an Opinion to the Honorable Benjamin L. Pinckard, Commissioner of Revenue for Franklin County, dated October 1, 1976, found in Report of the Attorney General (1976-1977) at 33, this Office previously dealt with § 58-1164 and the issue whether the actions of a prior commissioner of revenue hindered the current commissioner's ability to utilize § 58-1164 to its full extent. Noting that the former commissioner had acquiesced in the taxpayer's failure to report certain property, the Opinion concluded that the terms of § 58-1164 were to be followed.

Section 58-963, however, provides this mitigatory language: “No penalty shall be imposed for failure to pay any tax if such failure was not in any way the fault of the taxpayer.” [Emphasis added.] In the Pinckard opinion, a prior commissioner's acquiescence to the taxpayer's failure to list or report his taxable property did not relieve the taxpayer of the penalty. Your letter does not develop the details of the taxpayer's claim that its failure to pay tax was based on its reliance on previous commissioner's advice. Before a taxpayer can be relieved of the penalty contained in § 58-1164, the test of § 58-963 must be met to the satisfaction of the local governing officials. This is a fact determination that must be made at the local level.

I am not aware of any similar relief provision with regard to the interest required by § 58-1164, and, consequently, am of the opinion that it must be added to the assessment.

TAXATION—Penalty—Late filing of personal property return but tax paid by due date—Maximum penalty.

January 11, 1978

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This opinion is in response to your recent inquiry concerning the penalty provision set forth in § 58-847 of the Code of Virginia (1950), as amended. Section 58-847 authorizes localities to provide dates for filing local tax returns and paying local taxes. You raise the following question:

“If a taxpayer fails to file his personal property tax on time, by the deadline of May 1, but pays the tax on or prior to the due date of December 5, would not the maximum that could be charged be ten dollars?”

For purposes of this opinion, I am assuming that in this hypothetical the deadline for filing the personal property tax return is May 1.

Section 58-847 also authorizes localities to impose a penalty for the late filing of local tax returns. That section provides the following limitation on the amount of the penalty that may be imposed: “No such penalty shall exceed ten percent of the tax past due on such property or the sum of ten dollars, whichever
shall be the greater." Obviously, until December 5, the due date for payment of taxes, no taxes are "past due." Consequently, I am of the opinion that in the situation you have posed, the maximum amount of penalty that can be charged by the locality is ten dollars.

TAXATION—Personal Property—No authority for imposing different rate of tax on cars than on trucks.

November 3, 1977

THE HONORABLE J.W. GOODWIN, JR.
Commissioner of the Revenue for Nelson County

This is in response to your recent inquiry whether a locality may impose a different tax rate on cars than that imposed on trucks, for purposes of the tangible personal property tax. Section 58-851 of the Code of Virginia (1950), as amended, which is the operative section of the Code with respect to your question, provides as follows:

"The governing body of any county, city or town in laying levies on all taxable real estate, tangible personal property and merchants' capital may impose one rate of levy on real estate, another rate of levy on tangible personal property and another rate of levy on merchants' capital or it may impose the same rate of levy on any two or all of these subjects of taxation . . . ."

Based on the foregoing, I see no authority for imposing a different rate of tax on cars than that on trucks.

TAXATION—Personal Property Tax—Purchaser traded in old car before January 1 for another car; bill of sale for new car dated after January 1—Ownership interest.

DEFINITIONS—"Owning"—Not technical term but depends upon context in which used.

May 22, 1978

THE HONORABLE CLAUDE M. WELLS
Commissioner of Revenue for the City of Falls Church

You ask whether a purchaser can trade in his old car before January 1, for another car and avoid the tangible personal property tax because the bill of sale for the new car is dated some time after January 1.

Ownership Interest

Section 58-837 of the Code of Virginia (1950), as amended, requires every taxpayer owning a car on January first of any year to file a return with the commissioner of revenue. The term "owning" is not a technical term but a
general one and depends somewhat for its meaning upon the context in which it is used. Clearly, it may be defined to include a person’s possessing an interest in property though he is not the holder of legal title. See RCA Photophone, Inc. v. Huffman, 42 P.2d 1059, 1062 (Cal. 1935). For example, in Powers v. City of Richmond, 122 Va. 328, 335, 94 S.E. 803, 805 (1918), the Supreme Court of Virginia held that the word “owner” includes any person who has control or occupation of land, whether he has an absolute fee, or an estate less than fee. Under § 58-20 less than absolute ownership may result in tax liability on personal property, and the holder of a beneficial or equitable interest may be subject to tax.

Is the Taxpayer an Owner?

The issue in this case is whether the taxpayer has an ownership interest that will subject him to tangible personal property tax liability. There is no doubt that by selling one’s old automobile at the end of December and postponing the purchase of a replacement until after January first, one would successfully avoid personal property tax liability. However, when a taxpayer, under the guise of a conditional sales contract or some similar arrangement, at all times has the use of an automobile, then the transaction must be closely scrutinized. Here the taxpayer has the use, enjoyment, control, and possession of an automobile at all times. Possession creates the presumption of ownership and such presumption may be overcome only by a showing to the satisfaction of the commissioner of revenue that the automobile, in fact, was not owned by the taxpayer until a later date. See Report of the Attorney General (1966-1967) at 289.

Taxpayers’ Statements

It is the commissioner’s duty to receive and consider the statements of taxpayers; however, he is not bound thereby and is furthermore required by statute to act upon his own knowledge and information otherwise available. Union Tanning Co. v. Commonwealth, 123 Va. 610, 96 S.E. 780 (1918). While it is a well-settled principle that a taxpayer has a legal right to decrease or avoid altogether his tax liabilities by whatever means the law permits, the true nature of the transaction is not to be governed by the taxpayer’s characterization of the facts. Gregory v. Helvering, 293 U.S. 465 (1935). The use of a subsequent event to define the effect of a prior event is a well-recognized principle. See United Air Lines, Inc. v. Mahin, 410 U.S. 627, 628 (1973).

Facts and Inferences

The situation you describe involves a taxpayer’s “selling” his old car for $3,700 in late December, selecting a new car for use at that time, and executing a bill of sale for the same car with the dealer in early January, with the value of new car exceeding $10,000, less the payment of $3,700.

The taxpayer maintains that no sale has been consummated and that he was simply “trying out” the car during the old year. If such transactions are customary in the area and the dealer frequently purchases used cars without the coincidental requirement of buying a new car, the taxpayer may be right, especially if the dealer’s insurer bore the risk of loss should the car be damaged during this try-out period.

The taxpayer would not be right however, if the exchange was planned to occur in the sequence described, with the formalities of executing a bill of sale and titling postponed simply to evade payment of the personal property tax and if the taxpayer bore the risk of loss should an accident have occurred. Where the
taxpayer’s down payment equals the payment he received for his old automobile, the inference is that the transaction was a mere sham or subterfuge and the taxpayer should be deemed the “owner” on January one.

Resolving the considerations mentioned above requires a factual determination, which I am without sufficient information to make.

TAXATION—Property—Locality must adopt land-use plan pursuant to § 15.1-446.1 prior to enactment of ordinance assessing land on the basis of use.

ORDINANCES—Future Land Use Plan Satisfies Requirements Of § 58-769.6— County may enact ordinance to classify and tax agricultural, horticultural, forest and open space on basis of use value rather than fair market value.

PLANNING COMMISSIONS—Land Use Plan—Affirmative duty to periodically review the plan.

July 12, 1977

THE HONORABLE T. STOKELEY COLEMAN
County Attorney for Spotsylvania County

This is in reply to your recent letter requesting my opinion whether the Spotsylvania County Future Land Use Plan enables the county to qualify for adoption of a land-use tax ordinance pursuant to § 58-769.6 of the Code of Virginia (1950), as amended. You state that the Spotsylvania County Board of Supervisors enacted, on June 23, 1964, a ten-part Future Land Use Plan prepared by the Division of Industrial Development and Planning. The plan has not been updated since its adoption.

Section 58-769.6 authorizes local governing bodies to classify and assess agricultural, horticultural, forest and open space land for tax purposes on the basis of use.

"Any county, city or town in the Commonwealth which has adopted a land-use plan may adopt an ordinance to provide for the use value assessment and taxation, in accord with the provisions of this article, of real estate classified in § 58-769.5." Id. (Emphasis added.)

This office has previously stated in an Opinion to the Honorable Robert L. Gilliam, III, Commonwealth’s Attorney for Westmoreland County, dated September 13, 1972, and found in Report of the Attorney General (1972-1973) at 417, that the term “land-use plan” refers to a comprehensive plan adopted in accordance with § 15.1-446. See also Report of the Attorney General (1973-1974) at 383. Therefore, where a governing body has satisfied this planning precondition, it may adopt a use value ordinance.

Since those Opinions were rendered, however, § 15.1-446 was repealed and reenacted as § 15.1-446.1. See Chapter 641 [1975] Acts of Assembly 1316. That section provides, in pertinent part, as follows:

"The local commission shall prepare and recommend a comprehensive plan for the physical development of the territory within its jurisdiction.

* * *
“In the preparation of a comprehensive plan the commission shall make careful and comprehensive surveys and studies of the existing conditions and trends of growth, and of the probable future requirements of its territory and inhabitants. The comprehensive plan shall be made with the purpose of guiding and accomplishing a coordinated, adjusted and harmonious development of the territory which will, in accordance with present and probable future needs and resources best promote the health, safety, morals, order, convenience, prosperity and general welfare of the inhabitants.

“The comprehensive plan shall be general in nature, in that it shall designate the general or approximate location, character, and extent of each feature shown on the plan and shall indicate where existing lands or facilities are proposed to be extended, widened, removed, relocated, vacated, narrowed, abandoned, or changed in use as the case may be.

“Such plan, with the accompanying maps, plats, charts, and descriptive matter, shall show the commission’s long-range recommendations for the general development of the territory covered by the plan.”

Such a plan may designate areas for different types of public and private land uses, transportation system facilities, community service facilities, historic areas, and methods for implementation.

In view of the foregoing, I am of the opinion that the requirement for a comprehensive land-use plan, which was formerly embodied in § 15.1-446, is now set forth in § 15.1-446.1. Therefore, the governing body must satisfy the requirements of the latter statute as a precondition to adoption of a land-use tax ordinance.

The Future Land Use Plan enacted by Spotsylvania County in 1964 qualifies as such a plan. The document analyzes existing land use, natural resources, population, employment, community facilities and parks data. It contains estimates of future population growth and designates areas for future agricultural, residential, public, commercial, industrial and transportation facilities. Accordingly, I am of the opinion that it is a comprehensive plan contemplated by § 15.1-446.1.

The plan has become outdated since its adoption in 1964 and you advise that it has not been reviewed and amended since that time. You are advised that § 15.1-454 provides:

“`At least once every five years the comprehensive plan shall be reviewed by the local commission to determine whether it is advisable to amend the plan.”

The statute establishes an affirmative duty for the planning commission to periodically review the plan. Failure to review the plan, however, does not statutorily affect the legal status of the plan.

I conclude, therefore, that the Future Land Use Plan enacted by Spotsylvania County satisfies the requirements of § 58-769.6. As a result, the County may enact an ordinance to classify and tax agricultural, horticultural, forest and open space use on the basis of its use value, rather than its fair market value.

TAXATION—Real Estate—Shall be assessed at fair market value—Different tax rates; ceiling on increase.
PUBLIC SERVICE CORPORATIONS—Real Estate Assessments At One Hundred Per Centum Fair Market Value—Except for certain public service corporation property.

TAXATION—Real Estate—If locality elects to reduce tax rate to come within § 58-785.1A, must be in accordance with § 58-851.

TAXATION—Real Estate—Locality may not subclassify real estate into improved and unimproved land.

TAXATION—Real Estate—Political subdivisions not authorized to classify.

January 11, 1978

THE HONORABLE RICHARD R. G. HOBSON
Member, House of Delegates

This opinion is in response to your inquiry concerning real estate assessment methods in the City of Alexandria. You wish to know whether there is any provision of the Constitution of Virginia or the Code of Virginia which would prohibit the General Assembly from authorizing the City of Alexandria to impose a ceiling on the increase in the total assessed value of all real estate in the city, from one calendar year to the next, or to establish different real estate tax rates for different types of real estate.

As the opinion of the Assistant City Attorney, attached to your letter, correctly indicates, Article X, Section 2, of the Constitution of Virginia (1971) requires that all real estate shall be assessed at fair market value. In accordance with this constitutional mandate, § 58-760 was amended in 1975 to require that all general reassessments or annual assessments of real estate shall be made at one hundred per centum fair market value except certain public service corporation property designated therein. See Chapter 620 [1975] Acts of Assembly 1291, 1292. See also the Opinion of this Office to the Honorable Russell I. Townsend, Jr., Member, Senate of Virginia, dated February 23, 1976, and found in the Report of the Attorney General (1975-1976) at 358. Since both the Constitution and the Code of Virginia require the assessment of real estate at fair market value, I am of the opinion that a ceiling on the increase in the total assessed value of all real estate from one year to the next would not be permissible.

In response to your second inquiry, § 58-851 requires that only one rate of levy be imposed upon real estate. See Reports of the Attorney General (1971-1972) at 421, (1966-1967) at 295. I am informed that the City of Alexandria reassesses real estate on an annual basis. Section 58-785.1A requires a locality to reduce its rate of tax on real estate, where a reassessment and levy at the prior year’s rate would result in an increase of at least eight per centum in the total amount of real estate tax collected. An exception to this requirement is set forth in § 58-785.1B, if the procedure established therein is followed. If a locality elects to reduce the rate of tax to come within the terms of § 58-785.1A, it must do so in accordance with § 58-851.

TAXATION—Recordation—Exemptions—Amendments in 1977 on interspousal transfers, family and other gift situations.
REPORT OF THE ATTORNEY GENERAL

RECORDATION—Exemption—Spouse joins in deed merely to release his or her inchoate marital rights.

TAXATION—Exemption—Form of transfer; conveyance having two parties as grantors or grantees not exempt.

September 12, 1977

THE HONORABLE FORD C. QUINN
Member, House of Delegates

This is in reply to your inquiry pertaining to the meaning of the changes made in § 58-61, Code of Virginia (1950), as amended by the 1977 Session of the General Assembly, Chapter 418 [1977] Acts of Assembly 612. Section 58-61 provides various exemptions to the real estate recordation tax.

Your question concerns the meaning of the second section of the change made in § 58-61, containing the language, "or deed between husband and wife when no consideration has passed between the parties." Three particular applications of this new language to possible situations are sought:

1. Husband conveys by deed to his wife, one-half undivided interest with no consideration,
2. Husband conveys by deed to himself and his wife as tenants by the entirety or as joint tenants, and
3. Wife (in situations 1. and 2. above) joins in the deed to release her contingent right of dower.

You inquire if any of these situations require the payment of the recordation tax imposed by § 58-54.

Section 58-61 has been amended six times since its original enactment into the Code of Virginia (1950) in attempts to provide for fair treatment of interspousal transfers and family and other gift situations. The current language is similar to the language used in the 1970 version of the statute, Chapter 420 [1970] Acts of Assembly 639, "or for any deed between parent and child or husband and wife and no monetary consideration passes between the parties." In an Opinion to the Honorable Rhea F. Moore, Jr., Clerk of the Circuit Court of Tazewell County, dated June 11, 1970, and found in Report of the Attorney General (1969-1970) at 287, this language was held to exempt from all recordation taxes deeds of gift from husband to wife or from wife to husband. The language and intent of the 1977 amendment are sufficiently similar to the 1970 version that the same meaning should be attributed to the current language. Deeds from husband to wife or wife to husband will be exempt from the recordation tax imposed by § 58-54. Of course, in any such case where a gift has been made, the deed shall state that it is a deed of gift. See § 58-61. Therefore, under the quoted 1977 language, no additional recordation tax is imposed in a situation such as that posed in question 1.

In terms of the interests held after the transfer, questions 1 and 2 are the same; that is, in both cases, husband and wife will end up with one-half undivided interests in the property. Pursuant, however, to the quoted 1977 language, the form of the transfer produces a different tax result. Construing language substantially similar to the 1977 language (i.e., the 1970 amendment), this office previously opined that such language did not exempt any conveyance having two parties as grantors or as grantees. See Report of the Attorney General (1969-
REPORT OF THE ATTORNEY GENERAL

1970), at 287, 288. I am of the opinion that the same result obtains under the language of the 1977 amendment about which you inquire. The language reads "between husband and wife." It does not read "between husband and husband and wife as joint tenants." No provision is made for more than one grantor or grantee under that language.

Though the transfer posed in question 2 is not exempt under the language "or deed between husband and wife," it is exempt under the next to last sentence of § 58-61, "[n]or shall any additional recordation tax be required for admitting to record any deed of gift between an individual grantor or grantors and an individual grantee or grantees, irrespective of tenancy ..." Here, the deed must state that it is a deed of gift.

Where the other spouse joins in the deed merely to release his or her inchoate marital rights, § 58-61 exempts such transfers from the recordation tax. See Report of the Attorney General (1970-1971) at 380, 382. The answer to question 3, therefore, is that no additional recordation is imposed where the wife signs the deed simply to release her contingent right of dower.

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TAXATION—Recordation—Exemptions—Deed purports on its face to convey real property pursuant to § 351 of Internal Revenue Code—Corporation—Requirements of test.

September 30, 1977

THE HONORABLE RUDOLPH L. SHAVER, CLERK
Circuit Court of Augusta County

This Opinion is in response to your inquiry which requests guidance in ascertaining whether a certain deed which purports, on its face, to convey real property pursuant to § 351 of the Internal Revenue Code of 1954, should be accorded an exemption from State recordation tax pursuant to § 58-64 of the Code of Virginia (1950), as amended.

Section 58-64 states that the recordation taxes imposed by §§ 58-54 and 58-55 shall not be imposed "for admitting to record any deed conveying real estate to a corporation upon its organization by persons in control of the corporation in a transaction which qualifies for nonrecognition of gain or loss pursuant to § 351 of the Internal Revenue Code of 1954, as it exists at the time of the conveyance."

(Emphasis added.)

The above-quoted portion of § 58-64 sets out a three pronged test for a conveyance to be exempt from State recordation tax. First, the deed must convey real estate to a corporation upon the corporation's organization. The conveyance must thus be made within a period of time sufficiently close to the inception of the corporation so that it can be reasonably ascertained that the conveyance is an integral part of the formation of the corporation. Second, the transferor(s) must be in "control" of the transferee corporation immediately after the transfer. The transferor(s) must own: (a) at least 80 percent of the total combined voting power of all classes of stock entitled to vote, and (b) at least 80 percent of the total number of shares of all other classes of stock of the corporation. See § 368(c), Internal Revenue Code of 1954, hereinafter, IRC. (Emphasis added.) Third, the transaction must qualify in all other respects with § 351 IRC as it exists at the time of the conveyance. The main requirement here is that the transferor(s) convey(s) the real estate solely in exchange for stock or
long-term securities (generally obligations of ten years or more) of the transferee corporation. See § 351(a), IRC. (1954). (Emphasis added.) See also Campbell v. Carter Foundation Production Co., 322 F.2d 827, 12 AFTR 2d 5659 (5th Cir. 1963); Baker Commodities, Inc., 48 T.C. 374 (1967); George A. Nye, 50 T.C. 203 (1968), and cases cited therein, illustrating the “securities” classification.

The deed in question recites that the conveyance of real estate is made by “the sole shareholder” to the corporation which is variously described in the deed as “newly organized” and “recently organized,” for the “sum of One Dollar ($1.00) cash in hand paid and other good and valuable consideration” “pursuant to § 351 of the Internal Revenue Code of 1954.”

Applying the test outlined above and based upon the facts presented, it is my opinion that the recitations in the deed are sufficiently vague as to the following matters:

(a) the date of organization of the corporation in relation to the date of the conveyance, and

(b) whether consideration other than stock or long-term securities passed in exchange for the conveyance of the real estate.

Further inquiry of the party submitting the deed for recordation is thus required before an exemption under § 58-64 should be allowed.

In this instance, since the transferor is the sole shareholder of the transferee corporation, the matter of “control” is not in issue.

If, after making proper inquiry, you are satisfied that the transaction in question meets the other requirements of the test outlined above, the deed may be admitted to record pursuant to § 58-64.

TAXATION—Recordation—Land trust conveyances not expressly exempted; subject to recordation tax.

AMENDMENTS—Recordation Tax On Land Trust Conveyance—Previous opinion not overruled by 1977 amendments.

DEEDS—Recordation Tax—Deed of conveyance from husband and wife, holding as tenants in common, to trustee of a land trust.

DEFINITIONS—Term “Corporation” Does Not Include Partnership, Nor Land Trusts.

REAL PROPERTY—Partnership And Land Trust Are Different Entities—Husband and wife chose to use form of land trust; cannot now claim advantages of another form of transaction.

TAXATION—Exemption—Unless exemption is clearly granted, the exemption will not be allowed—Statutes strictly construed.

August 16, 1977

THE HONORABLE JOHN V. FENTRESS, CLERK
Circuit Court of the City of Virginia Beach

This will acknowledge your letter, in which you enclosed an inquiry pertaining

The question presented is whether a deed of conveyance from a husband and wife, holding as tenants in common, to the trustee of a land trust is exempt from additional recordation tax in light of the 1977 amendments to §§ 58-61 and 58-64.

Section 58-54 imposes a tax on every deed admitted to record, except for deeds exempt from taxation by law. Unless an exemption is clearly granted, the rule is well established that the exemption will not be allowed. The special characteristics of the land trust device and the applicability of § 58-54 to deeds of conveyance to a land trust were considered previously in an Opinion to the Honorable Eva W. Maupin, Clerk for the Circuit Court of Albemarle County, dated November 14, 1966, and found in Report of the Attorney General (1966-1967) at 298. Such deeds were found subject to the recordation tax imposed by § 58-54, and the exceptions set forth in §§ 58-61 and 58-64 were found to be inapplicable.

Section 58-61 has been amended several times since the 1966 Opinion was rendered. Those changes, however, related to gift situations between individuals, including husband and wife, or to conveyances where a husband and wife, as joint tenants or tenants by the entirety, transfer from themselves to themselves, solely for the purpose of a change in tenancy. These amendments are not applicable to a husband and wife transferring to a land trust because § 58-61, which governs such situations, requires both individual grantors and individual grantees. A land trust is not an individual grantee even though its beneficial ownership is in individuals. This is not a transfer from husband and wife to themselves; this is a transfer to a trust. The parties have interposed an entity between themselves and the land, and this conveyance is not one of the transfers exempted by § 58-61.

Section 58-64 has been amended twice since the rendering of the 1966 Opinion. The 1975 amendment exempted certain corporate-shareholder transactions, which received favorable federal tax treatment, from the recordation tax. In 1977 the General Assembly again amended § 58-64 to exempt certain conveyances to partnerships from the tax imposed by § 58-54. Though both a partnership and a corporation are entities that can be used to hold real estate for the benefit of partners or shareholders, the plain meaning of the term corporation does not include partnership, and the 1975 amendment did nothing to exempt partnerships from the recordation tax. Just as the meaning of corporation cannot be expanded to include partnership, neither can their meanings be expanded to include land trusts. Exemption statutes are to be strictly construed; if the General Assembly had intended to exempt conveyances to a land trust by a husband and wife from § 58-54, land trusts would be expressly mentioned in § 58-64. Since land trust conveyances are not expressly exempted, they are subject to the recordation tax.

If the transfer to a land trust is for the sole purpose of having their interest deemed to be personal property, pursuant to § 55-17.1, the grantors could have achieved the same result by transferring their land to a partnership, where they were the partners. Section 50-26 states that a partner's interest in partnership property is personalty, and § 58-64 expressly exempts such a conveyance from the recordation tax. However, the parties have chosen to use the form of land trust, for whatever advantages it may provide them. Having selected a form they cannot now claim the advantages offered by some other form of transaction. A partnership and a land trust, though they do have similarities, are different entities.
The 1977 amendments did not overrule the 1966 Opinion, which held that conveyances to a land trust are subject to the tax imposed by § 58-54. Accordingly, the recordation tax, in my opinion, must be applied to the transfer in question.

TAXATION—Roll-back Taxes—Land assessed under land use assessment program changed to nonqualifying use—Land owner liable for taxes and interest.

COMMISSIONERS OF REVENUE—Assessments—Roll-back taxes assessed by.

PENALTIES—Roll-back Taxes—Penalty only after taxes become delinquent—Interest.

TREASURERS—Roll-back Taxes—Collection is duty of treasurer.

January 13, 1978

THE HONORABLE CHARLES K. TRIBLE
Auditor of Public Accounts

This is in response to your inquiry in which you raised several questions concerning the imposition of roll-back taxes. Section 58-769.10 of the Code of Virginia (1950), as amended, provides for the assessment of roll-back taxes when the use of land assessed under a land use assessment program is changed to a nonqualifying use. The land owner becomes subject to a roll-back tax, which essentially is a tax consisting of the difference between the tax which would have been owing had the land been assessed at fair market value, and the tax which was paid under the use value assessment. In addition, the land owner is liable for interest on this difference.

I will answer your questions seriatim:

"(1) Is the Commissioner of Revenue or the Treasurer responsible for assessing the six percent per annum simple interest pursuant to § 58-769.10?"

Section 58-769.10 is silent as to the responsibility for computing and assessing the interest which is owed on the roll-back tax. Under the terms of § 58-769.10 the commissioner of revenue is to determine and assess the roll-back tax and the tax is to be paid by the taxpayer to the treasurer within thirty days of assessment. Under § 58-864, it is the duty of the commissioner of the revenue to assess local taxes. The treasurer then is charged with the responsibility of collecting such taxes and levies. There is no reason to believe that the General Assembly, in enacting § 58-769.10 intended that this division of responsibility be any different in the assessment and collection of roll-back taxes. Consequently, I am of the opinion that the commissioner of the revenue should assess the roll-back taxes and forward this assessment to the treasurer. The treasurer can then send the bill to the taxpayer, with interest added, and collect the tax from the taxpayer in accordance with the terms of § 58-769.10.

"(2) If the assessment is not paid within thirty days as required by the aforementioned statute, [§ 58-769.10] does an additional penalty attach similar to that provided for by § 58-963."
Where a taxpayer complies with the terms of § 58-769.10 and reports within sixty days a change in the use of his land to a nonconforming use, I am aware of no provision of law which would authorize imposition of penalty other than § 58-963. The penalty provided by § 58-963 is available when a person fails to pay a local levy on or before the fifth day of December. The amount of the penalty is five per centum of the outstanding tax liability. Under § 58-769.10, roll-back taxes are not delinquent until thirty days after they have been assessed. Thus, for any roll-back taxes assessed prior to November 5, the penalty provided by § 58-963 would be available only where such taxes remain unpaid after December 5.

“(3) Under the same facts as in number 2, does interest continue to run from the date of the original assessment of roll-back taxes at six percent per annum pursuant to § 58-769.10, or does the interest rate pursuant to § 58-964 apply after June 30 of the year next following the assessment year at eight percent per annum.”

The six per centum interest is to be computed and added to the amount of the roll-back taxes and becomes a liability which must be paid within thirty days following assessment, along with the roll-back taxes. Once the roll-back taxes have gone unpaid more than thirty days after assessment, they become delinquent taxes and should be treated in the same manner as other delinquent taxes. Thus, the provisions of § 58-964 providing for interest at the rate of eight per centum per annum from June 30 of the year following the assessment year are applicable to the delinquent roll-back taxes.

TAXATION—Sales And Use Tax—Applicable to all users of tangible personal property except where specifically exempt.

TAXATION—Exemption—Fairfax Unitarian Church not exempt from sales and use tax on its purchases.

TAXATION—Sales And Use Tax—Definition makes any person subject to this tax a “dealer.”

TAXATION—Sales And Use Tax—Sanctions for failure to meet requirements for dealers are applicable to purchasers who are users and consumers; liable to State for payment of use tax.

TAXATION—Sales And Use Tax—Use tax payable by purchaser if supplier, regardless of location, fails to collect sales tax.

July 5, 1977

The Honorable Dorothy S. McDiarmid
Member, House of Delegates

This is in response to your inquiry in which you have raised several questions concerning the application of the Virginia Retail Sales and Use Tax Act, §§ 58-441.1 to -441.52 of the Code of Virginia (1950), as amended. I will respond to your questions seriatim:

Question 1. “Is there provision within the Code of Virginia that ‘when a
supplier fails to collect the 4 percent Virginia sales tax, it is the legal responsibility of the purchaser to accrue and remit the complimentary 4 percent Virginia use tax directly (to the Department of Taxation) regardless of whether the supplier is located within or without Virginia?"

Section 58-441.5 provides in part as follows:

"There is hereby levied and imposed, in addition to all other taxes and fees of every kind now imposed by law, whether levied in the form of property, excise, license, franchise, or privilege taxes, and notwithstanding any other provision of law, a tax upon the use or consumption of tangible personal property in this State . . . ."

Section 58-441.5(d) provides a credit for the use tax imposed by §58-441.5, where a sales tax has been paid pursuant to §58-441.4. Conversely, where no sales tax has been paid, the use tax is due and owing. I am aware of no provision in the Code which would relieve the purchaser of the obligation to pay the use tax due to a failure on the part of a supplier, regardless of location, to collect a sales tax. Accordingly, I am of the opinion that the language imposing the tax in §58-441.5 is sufficiently broad to require this result.

Question 2. "Provided your response to the foregoing is affirmative, is such proviso uniformly applicable to all purchasers irrespective of type or class?"

The imposition of the use tax pursuant to §58-441.5 is uniformly applicable to all users of tangible personal property, except where such use is exempt under the United States Constitution, the Constitution of Virginia or §58-441.6, which provides exclusions and exemptions from the Virginia Retail Sales and Use Tax Act. You have directed your inquiries specifically to the liability for payment of the sales or use tax by the Fairfax Unitarian Church. I am of the opinion that imposition of a sales or use tax on purchases made by this organization is not constitutionally prohibited, and I am aware of no statutory exemption available to the Fairfax Unitarian Church.

Question 3. "Are the provisions of §58-441.27 et seq., applicable to purchasers who are users and consumers and not 'dealers' as defined by §58-441.27?"

Section 58-441.27 provides for the imposition of civil penalties for the failure by a "dealer" to make any return or pay the full amount of the tax due. Section 58-441.12 sets forth the definition of the term "dealer." It provides, in part, as follows:

"The term 'dealer,' as used in this chapter, shall include every person who:

* * *

"(j) Shall become liable to and shall owe this State any amount of tax imposed by this chapter, whether he holds, or is required to hold, a certificate of registration under §58-441.16 or not."

The effect of this language is that any person who is subject to a sales or use tax, becomes a "dealer," for purposes of the Virginia Retail Sales and Use Tax Act. Thus, the provisions of §58-441.27 to -441.39 setting forth requirements for dealers, and sanctions for failure to meet these requirements, would be ap-
applicable to purchasers who are users and consumers, and who become liable to the State for payment of the use tax.

TAXATION—Sales And Use Tax—Churches and religious societies liable for use tax when their suppliers failed to collect applicable sales tax.

TAXATION—Exemption—Constitution does not provide exemption of religious institutions from sales and use tax on their purchases of tangible personal property.

TAXATION—License Or Privilege Taxes Are Not Property Taxes—Sales and use tax.

November 14, 1977

THE HONORABLE DONALD G. PENDLETON
Member, House of Delegates

This is in response to your inquiry in which you ask if churches are subject to the Virginia Retail Sales and Use Tax Act, §§ 58-441.1 to -441.52 of the Code of Virginia (1950), as amended. In particular, you made reference to liability for the use tax imposed by § 58-441.5, where a church has purchased tangible personal property for its own use and consumption and has not paid any sales tax on such purchase. You also referred to a July 27, 1977, communication from the Department of Taxation to the First Christian Church in Lynchburg, Virginia, in which nonprofit organizations were informed of their liability for the use tax under § 58-441.5, when their suppliers failed to collect the applicable sales tax. You question the constitutionality of the use tax when such tax is sought to be applied to religious organizations.

It must be recognized that the real constitutional issue is not whether churches can be taxed, but rather can an exemption from taxation be authorized. Exemption from taxation occasions some degree of involvement with religion, and the constitutional question is thus whether the degree of involvement constitutes excessive entanglement with or an establishment of a religion. See Walz v. Tax Commission of City of New York, 397 U.S. 664, 674 (1970). In Miller v. Ayres, 214 Va. 171, 184, 198 S.E.2d 634, 643 (1973), the Supreme Court of Virginia considered the Establishment Clause of the First Amendment of the United States Constitution [See, also, Article I, Section 16, of the Virginia Constitution (1971)]; and found exemptions from taxation not to be in violation of the Establishment Clause, provided the State does not single out a religious organization. I need not decide, however, whether exemption of religious institutions from sales and use taxes would involve "excessive involvement" since I conclude that the Constitution provides for no such exemption.

Article X, Section 6(a), of the Constitution of Virginia (1971) states:

"... the following property and no other shall be exempt from taxation, State and local, including inheritance taxes:

* * *

"(2) Real estate and personal property owned and exclusively occupied or used by churches or religious bodies for religious worship or for the residences of their ministers." [Emphasis added.]
This provision concerns property tax exemptions. The concept of property includes the concept of ownership rights in property. 71 Am.Jur.2d *State and Local Taxation*, § 24 at 358 (1973). By its very terms, the Constitution limits the exemption to certain "property owned . . . by churches." Therefore, the constitutional exemption is applicable only if the tax sought to be imposed is a property tax, that is, a tax on the ownership of property.

Sections 58-441.4 and 58-441.5 impose a license or privilege tax upon "the business of selling at retail" and upon "the use or consumption of tangible personal property in this State." License or privilege taxes are not property taxes. *See Sullivan v. United States*, 395 U.S. 169 (1969). In *Sullivan*, the Court considered the Connecticut Sales and Use Tax Act and found that the sales tax was not imposed upon the property itself or its presence within the state, but rather was imposed upon the transfer of title for consideration (the sale). The Court considered the use tax separately, but also found that such a tax was an excise or privilege tax different in kind from a tax on property. *See, also, Toolen v. Alabama*, 277 Ala. 120, 167 So.2d 546 (1963).

Likewise, the Virginia sales and use tax is not a tax on property, but is a license or privilege tax. The General Assembly's characterization of the sales and use tax as a license or privilege tax is not conclusive, but is important and must be considered in construing the statute. *Breece Lumber Co. v. Mirabel*, 287 P. 699 (1930), *aff'd*, 283 U.S. 788 (1931); *Commonwealth v. Shell Oil Co.*, 210 Va. 163, 169 S.E.2d 434 (1969). The Virginia sales and use tax operates in the manner of a privilege or excise tax because it is imposed directly by the legislature without assessment; its sum is measured by the sale price of the items sold, irrespective of the nature or value of the taxpayer-buyer's assets. 71 Am.Jur.2d *State and Local Taxation* §§ 28, 29 at 360-61 (1973). This characterization of the sales and use tax is in accord with the Opinion rendered to the Honorable Henry E. Howell, Jr., Member, Senate of Virginia, dated November 25, 1966, and found in Report of the Attorney General (1966-1967) at 305, 306.

A review of the administrative and legislative history also supports this conclusion. When the Virginia Retail Sales and Use Tax Act was adopted by the General Assembly in 1966, no exemption was provided for churches. Sales and Use Tax Regulation § 1-74 (1969) specifically states that "[n]o exemption is granted to churches, religious, charitable, civic and other non-profit organizations . . . ." When the General Assembly and the people of the Commonwealth approved the revised Virginia Constitution in 1970, the sales and use tax had been in effect for nearly four years. It must be presumed that the legislature was cognizant of the Sales and Use Tax Act and the regulations thereunder when revision of the Constitution was begun in 1969. Yet, the General Assembly chose to exempt only church "'[r]eal estate and personal property owned and exclusively occupied or used by churches . . . , for religious worship or for the residences of their ministers,'" and the provision was approved, as proposed, by vote of the people of the Commonwealth.

Accordingly, in my opinion, the imposition of the sales and use tax to purchases made by churches is not prohibited by the Virginia Constitution because such taxes are not property taxes. Since no exemption for church purchases or uses is included in the Act; and, in fact, the regulations specifically deny such an exemption, churches are subject to the sales and use tax on their purchases of tangible personal property.
TAXATION—Sales And Use Tax—Whether church must collect on sale of tangible personal property donated to it—“Occasional sale.”

TAXATION—Sales And Use Tax—Whether church must collect on tickets it sells to public for suppers and other fund-raising activities—“Occasional sale.”

April 27, 1978

THE HONORABLE H. W. LOVE
Commissioner of the Revenue for Isle of Wight County

You have asked whether a church must collect the four percent sales tax (1) on the sale of tangible personal property donated to it and, (2) on tickets it sells to the public for suppers and other fund-raising activities.

1. Sale of Donated Property

As a general matter, churches and church groups are not exempt from the provisions of the Virginia Retail Sales and Use Tax Act, §§ 58-441.1 to 441.52 of the Code of Virginia (1950), as amended. See Opinion to the Honorable Donald G. Pendleton, Member, House of Delegates, dated November 14, 1977, a copy of which is enclosed.

Section 58-441.4 imposes a sales tax “upon every person who engages in the business of selling at retail . . . tangible personal property.” (Emphasis added.) Section 58-441.2 provides that the term “person” means, among others, “any . . . club, society, or other group or combination acting as a unit.” This Office has concluded previously that a church or church group is a “person” within the context of § 58-441.2. See Opinion to the Honorable Henry E. Howell, Jr., Member, Senate of Virginia dated November 25, 1966, and found in the Report of the Attorney General (1966-1967) at 305-306.

The term “business” is defined by § 58-441.3(i) to include “any activity engaged in by any person . . . with the object of gain, benefit or advantage, either direct or indirect.” There can be no doubt that a sale of donated goods is made with a view toward “gain, benefit or advantage.”

The term “retail sale” is defined by § 58-441.2(c) to include “a sale to a consumer or to any person for any purpose other than for resale in the form of tangible personal property or services taxable under this chapter.” In my opinion the sales about which you inquire constitute a “retail sale” within the meaning of § 58-441.2(c).

Furthermore, every person who “[s]ells at retail . . . tangible personal property” is a dealer, from whom the tax is collectible. See § 58-441.12(c). As “[a]ll sales . . . are subject to the tax until the contrary is established,” [§ 58-441.17(a)], it is my opinion that sales of tangible personal property by a church or church group are subject to the sales tax unless an exemption is available under § 58-441.6.

Section 58-441.6 provides no general sales tax exemption for churches or church groups; but, § 58-441.6(m) does provide an exemption for an “occasional sale,” which term is defined therein and in §1-75 of the Virginia Retail Sales and Use Tax Rules and Regulations as “a sale of tangible personal property not held or used by a seller in the course of an activity for which he is required to hold a Certificate of Registration . . . provided such sale or exchange is not one of a series of sales and exchanges sufficient in number, scope, and character to constitute an activity requiring the holding of a Certificate of Registration.” (Emphasis in original.) Whether a church sale constitutes an “occasional sale” is
essentially a factual determination which I am without sufficient information to make in this instance. It should be noted, however, that all statutory tax exemptions must be strictly construed against the taxpayer. *Commonwealth v. Community Motor Bus Co.*, 214 Va. 155, 157, 198, S.E.2d 619, 620 (1973).

2. *Ticket Sales*

   Except as provided in § 58-404.2, which is not applicable here, no sales tax liability accrues upon the sale of tickets to the public for admission to various entertainment activities. See Virginia Retail Sales and Use Tax Act *Rules and Regulations* at 4, issued by the Department of Taxation, a copy of which is enclosed.

   However, § 58-441.2(b) defines the term sale to include "the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property." See also §1-64 of the aforesaid *Rules and Regulations*.

   Thus, if the "occasional sale" exemption is not available to the church, it is my opinion that a ticket sold in exchange for a dinner is a taxable sale upon which the four percent sales tax must be collected.
2) whether "the failure of the law to provide for interest payments where the prepayment turns out to be in excess of the amount later collected" is valid.

In response to your first question, the new payment procedure is not the "prepayment by one party of taxes which it does not itself owe." Pursuant to § 58-441.4, the sales tax is "a license or privilege tax upon every person who engages in the business of selling at retail or distributing tangible personal property in this State, . . . ." Under §§ 58-441.4, -441.18, and -441.21, the tax is both owed and paid by the retailers. The levy of the sales tax is against the retailer, and the burden of remitting such revenues to the State falls upon the retailer. If a retailer fails to collect the tax from a purchaser, it has to pay the tax. The retailer's relationship to the State is that of taxpayer. *Williams v. Bear's Den, Inc.*, 214 Ga. 240, 104 S.E.2d 230 (1958).

Except as to sales on credit, the procedure adopted by § 58-441.21:1 is not a prepayment procedure. It is merely a convenient means of accelerating retailer sales tax remittances to the State at a minimum administrative cost to both the taxpayer and the tax collector. The method used previously had retailers reporting and paying sales taxes due and owing the State on the twentieth of the month following the month in which the sales tax was collected or charged to customers' accounts. Thus, when a retailer filed his monthly return on the twentieth of each month, in addition to the previous month's liability, the retailer also owed, but did not pay, twenty days of tax collected or charged during the current month. A one-time windfall in State revenues was found through accelerating the payment of sales tax from retailers to the State, based on an estimate to reflect those twenty days of tax collected or charged by the twentieth of a month, but not paid over to the State until the following month.

I am of the opinion that the accelerated sales tax collection procedure is valid. It is merely a method of accelerating the time in which the State receives its sales tax revenues. The procedure decreases the time State tax monies are in retailers' hands. Moreover, even if the acceleration procedure is considered a prepayment program, such a requirement is not illegal or unconstitutional. An analogous situation is presented by the Virginia and Federal income tax laws, which require certain individuals and corporations to pay estimated income taxes at a rate based on projected income for the year. See §§ 58-151.22 and -151.38 of the Code of Virginia (1950); I.R.C. §§ 6153-6154. These sections require certain individual and corporate taxpayers to estimate and pay in advance their yearly income taxes. In *Erwin v. Granquist*, 253 F.2d 26 (9th Cir.), *cert. denied*, 356 U.S. 950 (1958), the Ninth Circuit Court of Appeals considered the constitutionality of Int. Rev. Code of 1939, §§ 58-59, the predecessor of §§ 6153 and 6154, and held that they were appropriate means for collecting the income tax.

From the foregoing, it is apparent that requiring a taxpayer to estimate taxes to be incurred on future income and to remit payments based upon those estimates is not a deprivation of property without due process of law, nor in any other sense, violative of the mandates of the United States Constitution. The power to impose a tax necessarily implies reasonable methods for collecting such tax. The estimated income tax and withholding tax procedures are valid methods of collecting the income tax because they are reasonable approximations of income tax liability on a "pay as you go" basis. The same can be said of the accelerated sales tax procedure. The states of Georgia, Illinois, South Carolina, and New York have all implemented various methods of accelerating sales tax remittances to the State Treasury, and except for New York, none of those statutes has encountered any legal challenges. The Appellate Division of the New York Supreme Court (that state's intermediate court) found the New York tax

For these reasons, I am of the opinion that the Virginia accelerated sales tax procedure is valid. Though such a provision may work a hardship upon a retailer in certain circumstances, particularly where there is a large volume of credit sales, relief must be sought in the General Assembly, as the procedure is constitutionally valid.

The general rule is that absent specific statutory authorization for the awarding of interest, no interest can be awarded against the State. See *Railway Express Agency v. Commonwealth*, 196 Va. 1069, 87 S.E.2d 188 (1955), *Railway Express Agency v. Commonwealth*, 196 Va. 1059, 87 S.E. 2d 183 (1955), *Commonwealth v. The Safe Deposit and Trust Co.*, 155 Va. 458, 153 S.E. 897 (1930). The aforementioned cases all dealt with refund statutes that were silent on the issue of interest running against the State; yet the Supreme Court of Virginia held that the legislative intent in such instances was that no interest be awarded. Section 58-441.21:1 specifically states that "no refunds to dealers under this section shall bear or include interest." Where the General Assembly specifically states its intent that no interest be paid on refunds pursuant to § 58-441.21:1, such procedure is clearly valid.

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**TAXATION—Sales Tax—Nonprofit cooperative not exempt from accelerated payment of sales tax collections by retail dealers to the State.**

**DEFINITIONS—“Dealer” As Defined In § 58-441.12—Sales tax collections and payment to State by a nonprofit cooperative.**

**TAXATION—Sales Tax—Accelerated payment under § 58-441.21:1 allows payment in initial year to be made in two equal installments after notice from Tax Department.**

January 5, 1978

**THE HONORABLE FLOYD C. BAGLEY**

Member, House of Delegates

This is in response to your inquiry in which you ask whether a nonprofit cooperative could be excluded from complying with the provisions of § 58-441.21:1 of the Code of Virginia (1950), as amended. That section provides for the accelerated payment of sales tax collections by dealers to the State. Under its terms, a dealer is required to make an annual payment representing two-thirds of his average monthly liability. This payment is intended to approximate the tax collections of a dealer for the first twenty days of a month, which will have already been collected when the dealer pays his monthly liability by the twentieth day of the succeeding month.

Section 58-441.21:1 requires every "dealer" to make the payment described therein. Section 58-441.12 defines the term "dealer" in such a manner as to include any entity which makes sales at retail, as defined by § 58-441.2(c). Pursuant to that section a sale at retail is one "to any person for any purpose other than for resale." Consequently, a cooperative making such sales to its members is a "dealer" and is required to comply with the terms of § 58-441.21:1. I am aware of no provision of law which would provide an exemption from
compliance with the terms of § 58-441.21:1 by a nonprofit cooperative.

Information regarding a particular cooperative attached to your opinion request indicates that this requirement might pose a burden on a cooperative which has widely fluctuating sales tax collections. For example, if the average monthly liability of the cooperative was determined to be $1300, but the actual sales tax collections for the month in which the payment had to be made only amounted to $800, the cooperative, since it is a nonprofit organization, would be required to obtain the additional $500 from its members. Section 58-441.21:1 contains a provision which allows the payment thereunder, in the initial year, to be made in two equal installments—the first, within thirty days of the notice from the Tax Department and the second such payment, within five months of that notice. This provision should alleviate to some degree the hardship you have described.

TAXATION—School Age Population—Definition used in determining proportionate amount of local sales tax revenues payable to towns within county.

AMENDMENTS—School Age Population—Definition changed in only one of three subsections; implication that change was meant to affect all three.

SCHOOLS—School Age Population—Formulae under §§ 58-441.48(d), -441.49(g), and -441.49(h).

June 5, 1978

THE HONORABLE ELLIS D. MEREDITH
Treasurer of Montgomery County

You have asked what definition of the term “school age population” should be used in determining the proportionate amount of local sales tax revenues the county treasurer should pay into the town treasury of incorporated towns located within the county.

When the Virginia Retail Sales and Use Tax Act was enacted in 1966, § 22-223 of the Code of Virginia (1950), as amended, required a periodic census “of all persons between the ages of seven and twenty years, residing within each county or city,” and § 58-441.48(d) tracked that language in defining the term “school age population.” In 1968, § 22-223 was amended increasing the age range to between six and twenty years. Section 58-441.48(d) was not amended at that time to reflect this change, even though the Department of Education’s census remained the basis for distribution.

Section 58-441.48(d) was amended in 1976 and now refers to “the number of children in each county and city according to the most recent statewide census of school population taken...pursuant to §§ 22-223 and 22-228.” Sections 58-441.49(g) and -441.49(h) continue to refer to school age population, a term which is no longer explicitly defined in the Sales and Use Tax Act. By the terms of §§ 22-223 and -228, “school age” children now constitute that group of children between the ages of five and twenty, plus 1) handicapped and 2) deaf and blind children, between the ages of two and twenty-one. In the past the formulae under §§ 58-441.48(d), -441.49(g), and -441.49(h) were identical, and the Code clearly contemplated that result by using the same term in all those provisions. Section 58-441.48(d) provided the definition for all three provisions.
The 1976 amendment amended § 58-441.48(d) only; however, the logical implication is that the change in the definition was meant to affect all three subsections which had previously relied upon it. It would not be sound to rely upon a repealed definition when the language added provides a new definition, nor to assume that the General Assembly intended two different distribution formulae to apply unless such difference was expressly stated.

The proper proportionate amount of local sales tax revenues payable to incorporated towns located within Montgomery County is to be based on the following formula:

\[
\text{town school population} \div \text{total county sales tax revenues} = \text{X} \times \text{total county school population}
\]

School population means that group of children between the ages of five and twenty, plus 1) handicapped and 2) deaf and blind children, between the ages of two and twenty-one.

TOWNS—Council Has Designated Stanley Volunteer Fire Department As Town's Fire Department—If the company accepted designation, it is Town's fire department.

CHARTERS—Stanley Town Charter Grants Authority To Council To Establish, Maintain And Determine Personnel Of Fire Department.

TOWNS—Council Has Authority To Appoint Chief Of Stanley Volunteer Fire Department.

October 31, 1977

THE HONORABLE BONNIE L. PAUL
Member, House of Delegates

This is in reply to your letter concerning the Town of Stanley and the Stanley Volunteer Fire Department. You raise several questions regarding the relationship of these two entities, to which I will respond seriatim.

1. Is the Stanley Volunteer Fire Department the official fire department of the Town?

Section 48 of the Stanley Town Charter (Ch. 395 [1926] Acts of Assembly 689) provides, in part, that the Town Council of Stanley

"... shall have the power and authority to establish and maintain a fire department for the town, and all power necessary for the government, management, maintenance, equipment, and direction of such fire department, and the premises, property and equipment thereof." (Emphasis added.)

Section 6:30 of the Town Code of Stanley [Stanley, Virginia, Fire Protection Ordinance, Ch. 6, art. IV (1973)], provides:

"(a) The Stanley Volunteer Fire Department, previously established in accordance with state law, is recognized as the fire department of the town.
"(b) The fire department shall consist of such personnel, regular and
volunteer, and having such ranks, as may from time to time be authorized
by ordinance or resolution of the town council."

The Town Council has exercised its authority to designate the Stanley
Volunteer Fire Department as the Town's fire department. The agreement of
both the Town and the private volunteer organization was required, however,
before such a quasi-contractual relationship could be entered into. You have
presented me, however, with no information indicating that the volunteer
company has accepted this designation. If the company has accepted the
designation, it is the Town's fire department.

2. Does the Town have the authority to appoint the chief of the Stanley
Volunteer Fire Department?

If the Stanley Volunteer Fire Department is the official fire department of the
Town, an answer to this inquiry is governed by § 6-31 of the Town Code. That
section provides in part:

"(a) The chief and the assistant chief of the fire department shall each be
appointed by the town council from the membership of the fire depart-
ment." (Emphasis added.)

Should the volunteer company not have agreed to this designation and thus
not be the fire department of the Town, I am nonetheless of the opinion that the
governing body of the Town has the authority to appoint its chief. The Stanley
Volunteer Fire Department was organized pursuant to § 27-8 of the Code of
Virginia (1950), as amended. That section permits at least twenty persons to
form themselves into a volunteer company for extinguishing fires. Section 27-8.1
requires that the local governing body must agree to the organization of a
volunteer fire-fighting company.

Section 27-13 provides:

"In every city, town or county in which there is any such company, there
shall be appointed, at such time and in such manner as the governing body
of such city, town or county may prescribe, a chief and as many other offi-
cers as such governing body may direct." (Emphasis added.)

Pursuant to the authority granted by the general law, the governing body may
prescribe the manner in which the chief of the private volunteer fire company is
to be selected. The method of appointment may, obviously, include selection by
the governing body.

3. What agency of government is responsible for the provision of an orderly
and organized fire-fighting program for the Town of Stanley?

The Stanley Town Charter grants to the Council the authority to establish and
maintain a fire department and determine the personnel of that department. I am
of the opinion, therefore, that the Council is responsible for the provision of an
adequate and orderly fire protection program for the Town.

TOWNS—Fire Protection Provided Within Requirements Of § 58-587.1—
Scottsburg established volunteer fire department with approval of town
governing body—May impose utility tax.
REPORT OF THE ATTORNEY GENERAL

TAXATION—County Utility Tax Shall Not Apply To Town Imposing Utility Tax If Town Provides Police Or Fire Protection.

TOWNS—Fire Department—Town may designate volunteer fire company as official department of town.

VOLUNTEERS—Fire Department Of Town Of Scottsburg.

March 10, 1978

THE HONORABLE WILLIAM W. BENNETT, JR.
Commonwealth's Attorney for Halifax County

You have asked whether the Town of Scottsburg provides fire protection pursuant to the requirements of § 58-587.1 of the Code of Virginia (1950), as amended. You indicate that a volunteer fire department has been established in Scottsburg.

Section 58-587.1 states that a county utility tax shall not apply in a town imposing a utility tax if the town provides police or fire protection. A town provides fire protection if it undertakes, in a manner authorized by law, to secure its residents from the danger of fire. The method by which and extent to which protection is afforded are, under the statute, within the discretion of the local governing body.

The governing body of a town may establish a fire department and employ its officers and employees. See § 27-6.1. In the alternative, a group of private citizens may organize a volunteer “fire company” with the approval of the town governing body. See §§ 27-8, -8.1. The fire company may be dissolved by the town, and the governing body may appoint the chief and other officers of the volunteer fire company. See §§ 27-10, -13. The town may enact ordinances relating to the powers and duties of both fire departments and volunteer fire companies. See § 27-14. Therefore, although a fire company is not an instrumentality of the town, it is subject to control by the local governing body. This Office has previously ruled that a town may designate a volunteer fire company as the official department of the town. See Opinion to the Honorable Bonnie L. Paul, Member, House of Delegates, dated October 31, 1977, a copy of which is enclosed.

I am therefore of the opinion that a town “provides fire protection” within the requirements of § 58-587.1 if it has established a local fire department or approved the organization of a volunteer fire company. Since the town of Scottsburg has established a volunteer fire department with the approval of the town governing body, it may impose a local tax on consumers in the manner permitted by that statute and a county utility tax can not apply.

TRANSPORTATION—Peninsula Transportation District Commission Is Political Subdivision As Term Used In Intergovernmental Cooperation Act.

DEFINITIONS—Federal Intergovernmental Cooperation Act Defines “State” And “Political Subdivision.”

INTEREST—Grant Funds—Political subdivisions must remit to United States interest earned on grant funds pending their disbursement for program purposes.
REPORT OF THE ATTORNEY GENERAL

September 21, 1977

THE HONORABLE ALAN A. DIAMONSTEIN
Member, House of Delegates

This is in reply to your request for my opinion whether the Peninsula Transportation District Commission is an agency or instrumentality of the State, or a political subdivision thereof, within the meaning of the Intergovernmental Cooperation Act of 1968, Pub. L. No. 90-577. 82 Stat. 1098 (codified at 42 U.S.C. §§ 4201 to 4244 (1970). That Act expressly permits states to retain interest earned on grant funds pending their disbursement for program purposes. See 42 U.S.C. § 4213. You advise that that section has been interpreted by the Comptroller General to require political subdivisions to remit, to the United States, interest earned pending disbursement.

Whether the Peninsula Transportation District Commission has those characteristics and powers embodied in the term "agency or instrumentality of the State," on the one hand, or the term "political subdivision," on the other hand, is a question of State law. The Commission was created pursuant to, and derives all powers that it has, from the Transportation District Act of 1964, which is codified as Chapter 32 of Title 15.1 of the Code of Virginia (1950), as amended.

The federal Intergovernmental Cooperation Act contains the following definitions:

"The term 'State' means any of the several States of the United States... or any agency or instrumentality of a State, but does not include the governments of the political subdivisions of the State.

"The term 'political subdivision'... means a local unit of government, including specifically a county, municipality, city, town, township, or a school or other special district created by or pursuant to State law." (Emphasis added.) See 42 U.S.C. § 4201.

The answer to your inquiry depends upon the meaning ascribed at law to these terms.

A political subdivision is a political division of the sovereignty of a state created by general law to aid in the administration of government. 56 Am.Jur.2d Municipal Corporations § 12 (1971). Such a subdivision is created by action of the legislature to exercise some portion of the sovereignty of the State in regard to one or more specific governmental functions. Such functions may be general, such as municipal government; other functions assigned may be specific, such as the provision of water and sewer service, or the provision of public transportation. As the recipient of sovereignty, a political subdivision is independent from other governmental bodies, and may act, subject to applicable constitutional principles, within its discretion, to exercise those powers conferred by law without seeking the approval of a superior authority. Id., §10.

An instrumentality of a state, on the other hand, is a mere agent of the sovereign. It possesses no portion of that sovereignty itself; rather, it serves as a subordinate or auxiliary body to provide a means toward the fulfillment of a state purpose. In re Opinion of the Justices, 34 N.E.2d 527 (Mass., 1941); State v. Giessel, 60 N.W.2d 873 (Wis., 1953); 1 McQuillen, Municipal Corporations § 2.03(b) (1971). Examples of instrumentalities of the State include agencies, educational institutions, boards and commissions.

It is my opinion that the Peninsula Transportation District Commission has, as a matter of State law, those powers and functions which are embodied in the
term "political subdivision." It is a body corporate and politic. See § 15.1-1346. The Commission is charged with the authority and duty to provide transportation services within a specified transportation district. See § 15.1-1357. The Commission is comprised of members appointed by the governing bodies of the participating general purpose political subdivisions. It may arrange, without the prior approval of any governmental entity, for its financing, contracting, and rate-making. See §§ 15.1-1357(a)(4), 15.1-1357.1 and 15.1-1358.2. I conclude from the foregoing that the Commission is a political subdivision as that term is used in the Intergovernmental Cooperation Act.

TRANSPORTATION—Regulatory Powers Given To Transportation District Commissions By Transportation District Act.

CONFLICT OF LAWS—Regulatory Powers Of State Corporation Commission And Of Transportation Commission Conflict.

CONFLICT OF LAWS—Statutes In Apparent Conflict—Irreconcilable inconsistency required before a later act can repeal earlier act by implication.

DEFINITIONS—"Transit Facilities"—Common carriers by motor vehicle in transportation district.


STATE CORPORATION COMMISSION—Powers And Duties Of—Certificate of public convenience and necessity for special or charter party carrier.

STATE CORPORATION COMMISSION—Regulatory Authority And Powers Of Enforcement Of Its Regulations Over All Motor Carriers.

STATUTES—Construction Given To Statute By Public Officials Administering It Is Entitled To Great Weight—In doubtful cases, regarded as decisive.

March 15, 1978

THE HONORABLE STANLEY C. WALKER
Member, Senate of Virginia

You have asked whether Tidewater Transportation District Commission should consider an application for a certificate of public convenience and necessity by a certain special party carrier within its district. The carrier also has an application for a Type B certificate pending before the State Corporation Commission.

Powers of the SCC

The State Corporation Commission (SCC) is created by Article IX of the Constitution of Virginia (1971). Although Section 2 of Article IX, which sets forth the powers and duties of the SCC, does not specifically charge that agency with the duty of regulating and controlling transportation companies, the final sentence of that section provides that "[t]he Commission shall have such other
powers and duties not inconsistent with this Constitution as may be prescribed by law."

Title 56, Chapter 12.4, Code of Virginia (1950), as amended, grants the SCC power over special or charter party carriers. Section 56-338.52 of the Code states that "[e]xcept as otherwise provided in § 56-338.51, no person shall engage in the business of a special or charter party carrier of passengers by motor vehicle on any highway within the State unless such person has secured from the Commission a certificate authorizing such business." Section 56-338.51 exempts motor vehicles owned and operated by political subdivisions of the State; however, it does not exempt transportation by privately-owned special or charter party carriers regulated by a transportation district commission.

Section 56-338.53 sets forth the types of certificates of public convenience and necessity issued by the SCC for special or charter party carriers. Subparagraph (b) of that section provides that "if the Commission shall find the proposed operation justified it shall issue a 'B' certificate to the applicant, subject to such terms, limitations and restrictions as the Commission may deem proper. If the Commission shall find that the proposed operation is not justified, the application shall be denied."

In addition, § 56-275 of the general provisions regarding motor carriers in Chapter 12 of Title 56 provides that:

"No motor carrier, not herein exempted, shall operate any motor vehicle for the transportation of passengers or property for compensation on any highway in this State except in accordance with the provisions of this chapter, and every such motor carrier is hereby declared to be subject to control, supervision and regulation by the Commission."

Section 56-276 gives the SCC general regulatory authority and powers of enforcement of its regulations over all motor carriers.

Powers of Transportation Districts

The Transportation District Act gives transportation district commissions certain regulatory powers. Section 15.1-1357.1 states that:

"The Commission [Transportation District Commission] also shall have the power to exercise exclusive control, notwithstanding any provision of law to the contrary, of matters of regulation of fares, schedules, franchising agreements and routing of transit facilities within the boundaries of its transportation district; provided, however, that the provisions of § 5.1-8 of the Code of Virginia shall be applicable to airport commissions."

Conflict of Powers

On the one hand, the General Assembly has directed the SCC to issue certificates of public convenience and necessity to motor vehicle carriers and has not set forth an exemption for those carriers providing service within the boundaries of a transportation district. On the other hand, § 15.1-1357.1 provides that a transportation district commission shall have the power to exercise exclusive control over "transit facilities within the boundaries of its transportation district." (Emphasis added.) The Transportation District Act, § 15.1-1344(i), defines the term "transit facilities" broadly enough to include common carriers by motor vehicle because it includes "all those matters and things utilized in rendering transportation service by means of . . . bus," so long as the major part of the transportation service does not extend beyond the transportation district.
Section 15.1-1357.1 was enacted subsequent to the SCC statutes with which it conflicts and the general rule is that the earlier statute must yield to the later legislative enactment. It is only in the event of an irreconcilable conflict, however, that the latest statute must prevail. See Report of the Attorney General (1973-1974) at 221. Where two statutes present an apparent conflict, the proper approach is to ascertain the purposes underlying both enactments, not to dispose of the problem by mechanical rule. Fanning v. United Fruit Co., 355 F.2d 147 (4th Cir. 1966), reversing Rodriguez v. United Fruit Co., 236 F.Supp. 680 (E.D. Va. 1964). Moreover, repeal by implication is not favored and it is an established principle of law that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each. Richmond v. Board of Sup'rs. of Henrico Co., 199 Va. 679, 101 S.E.2d 641 (1958). A clear and irreconcilable inconsistency such that the two acts cannot, by a fair and reasonable construction, be reconciled is required before a later act can repeal an earlier act by implication. South Norfolk v. Norfolk, 190 Va. 591, 58 S.E.2d 32(1950).

Reconciling the Conflict

The primary purpose of the Transportation District Act was to provide necessary transportation planning facilities and services which could not be achieved by the unilateral action of counties and cities. See § 15.1-1343. In all sections of the Act which discuss transit facilities, other than § 15.1-1357.1, the Act limits its discussions to those facilities owned, operated, or leased by a transportation district. The SCC, on the other hand, is specifically given very broad regulatory authority over common carriers throughout the state, including special or charter party carriers by motor vehicle. Thus, while the purposes of the Transportation District Act would not be furthered by regulation of private transit facilities within the transportation district which are not owned, operated or leased by its commission, such regulation is essential to realization of the purposes of the SCC.

The SCC statutes are reconciled with § 15.1-1357.1 if one interprets the term "transit facilities," as used in the latter statute, to refer to those facilities owned, operated, or leased by the transportation district. Only by adopting this interpretation can effect be given to all applicable statutes.

Officials' Construction of Statute

The practical construction given to a statute by public officials administering a law is entitled to great weight and in doubtful cases will be regarded as decisive. Southern Spring Bed. Co. v. SCC, 205 Va. 272, 136 S.E.2d (1964). I am informed that the SCC staff has continued to issue certificates of public convenience and necessity to special and charter party carriers within the boundaries of transportation districts since the enactment of § 15.1-1357.1. I am further informed that transportation district commissions have never attempted to issue these certificates; they have regulated only the transit facilities which the district itself owns, operates, leases or otherwise exclusively controls. In fact, in 1975 the Supreme Court heard an appeal of right by competing carriers from an order of the State Corporation Commission awarding a bus company a "B" certificate of public convenience and necessity to operate as a special or charter party bus carrier within the Tidewater Transportation District, under Chapter 12.4 of Title 56 of the Code. The Supreme Court affirmed the SCC's order as to part of the service and reversed the order as to the other part of the service,
remanding that part of the order for further proceedings before the SCC. *See Atlantic Greyhound v. Jones Bus Co.*, 216 Va. 255, 217 S.E.2d 857 (1975). It is true that the issue presented in this opinion was not before the Court at that time; however, in that case neither the SCC, the Tidewater Transportation District Commission, the carriers involved, or the Supreme Court questioned whether the SCC was the proper entity to issue such certificates.

**Conclusion**

Construing the statutorily granted powers of the SCC and transportation district commissions with reference to each other, I am of the opinion that it is the SCC, and not the transportation district commission, which has the power to issue a certificate of public convenience and necessity to a privately-owned motor vehicle carrier for special or charter party service even if the majority of its transportation service is within the boundaries of the transportation district. This power, however, is subject to the transportation district commission’s authority to regulate transit facilities it owns, operates, leases or otherwise exclusively controls.

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**TRANSPORTATION—Transportation District Commissions—Requirements for action.**

**DEFINITIONS—Transportation District Commission's Procedure—Quorum.**

**STATUTES—Harmony Is Essential Ingredient Of Statutory Construction—Construction should be adopted that produces no conflict.**

April 19, 1978

THE HONORABLE ALAN A. DIAMONSTEIN

Member, House of Delegates

You have asked whether § 15.1-1353 of the Code of Virginia (1950), as amended¹, requires that any action by a transportation district commission be approved by a majority of the appointed members of each of the component jurisdictions comprising the district.

By the terms of this section before commission action can be taken, three conditions must be met, (1) a quorum must be present; (2) a question must be approved by a majority of the commission members present; and (3) there must be an affirmative vote from a majority of the jurisdictions represented. Your inquiry concerns the third of these requirements.

Section 15.1-1353 requires that a quorum be composed of a majority of the commission including "at least one commissioner from a majority of the component governments." A quorum has been defined as "such a number of the members of a body as is competent to transact business in the absence of the

¹§ 15.1-1353 "Quorum and action by commission.—A majority of the commission, which majority shall include at least one commissioner from a majority of the component governments, shall constitute a quorum. The Chairman of the State Highway Commission or his designee may be included for the purposes of constituting a quorum. The presence of a quorum and a vote of the majority of members present, including an affirmative vote from a majority of the jurisdictions represented, shall be necessary to take any action."
other members."' Black's Law Dictionary 1421 (rev. 4th ed. 1968) To interpret the statute of requiring an affirmative vote of a majority of the appointed members of each of the component jurisdictions, even though they were not present, would create an anomaly; a meeting might comply with the express quorum requirement and yet, the commission would be unable to transact business if a majority of the members from each component jurisdiction were not present. In statutory construction, harmony is an essential ingredient and where one construction would produce a conflict, while another construction would not, the construction that produces no conflict should be adopted. McDaniel v. Commonwealth, 199 Va. 287, 99 S.E.2d 623 (1957).

Accordingly, I am of the opinion that the majority requirement for a commission to take action refers to component governmental units and not to the total appointed membership representative of those units. Thus, while approval of a majority of members present is necessary, final action must be approved only by a majority of the jurisdictions comprising the district and not by a majority of each unit.

TRANSPORTATION—Transportation Planning Process Performed By Virginia’s Metropolitan Planning Organizations (MPOs).

LIABILITY—Agency Accepting Federal MPO Funds Also Accepts Responsibility For Those Funds.

PLANNING DISTRICT COMMISSIONS—Liable For Proper Administration Of Funds—MPOs' liability for misallocation of funds.

PLANNING DISTRICT COMMISSIONS—Not Liable For Actions Of MPOs, Independent Ad Hoc Organizations Acting For Governor And In Advisory Capacity To Highway Commission.

TRANSPORTATION—Penalties For Violation Of Federal Laws Regarding MPO Functions And Activities.

TRANSPORTATION—Three-C Agreements—Continuing, comprehensive and cooperative transportation planning process—MPOs.

May 5, 1978

THE HONORABLE CHARLES A. CHRISTOPHERSEN
Director, Department of Intergovernmental Affairs

You have asked several questions about the transportation planning process performed by Virginia's Metropolitan Planning Organizations (MPOs).

History of MPOs

In 1973, federal guidelines issued by the Federal Highway Administration

1The transportation planning process is outlined in 23 C.F.R. Part 450 which implements 23 U.S.C. § 134 and 49 U.S.C. §§ 1602(a) (2), 1603(a), and 1604(g) (1) and (1). Urban areas composed of contiguous interstate areas are the subject of 23 U.S.C. § 134(b) and are outside the scope of this opinion, which is limited to urban transportation planning processes solely within the Commonwealth of Virginia.
(FHWA), the Urban Mass Transportation Administration (UMTA) and the Federal Aviation Administration (FAA) requested Governor Linwood Holton to designate MPOs in Virginia. These original MPOs were to be planning bodies with no specific statutory authority. They were essentially organizations through which federal transportation planning money could pass. Planning District Commissions in the major urban areas of the State were designated as MPOs by Wayne A. Whitham, Secretary of Transportation for the Commonwealth of Virginia, on December 19, 1973.

On May 7, 1975, Secretary Whitham, on behalf of Governor Mills E. Godwin, Jr., redesignated MPOs for Virginia's urban areas, stating in his letter of redesignation that he was merely clarifying the 1973 designation which relied on established formal arrangements involving Planning District Commissions and Transportation Policy Committees (TPCs). These formal arrangements were the 3-C Agreements entered between the Virginia Department of Highways and Transportation (VDHT) and Planning District Commissions which stated that the TPCs, as committees of the Planning District Commissions, would guide transportation planning in the urban areas of the State. This 1975 redesignation named the TPCs to officially perform the MPO function. In performing this MPO function, the TPCs are not acting as committees of the Planning District Commissions because they do not derive their authority for this role from the Planning District Commissions.

In his letter of redesignation, Secretary Whitham explained that the purpose of his action was to ensure the effective participation of local governing bodies and agencies vested with transportation planning and implementation responsibilities. Secretary Whitham emphasized that responsibility for these functions rests ultimately with the Virginia Highway and Transportation Commission and is not delegable to local or regional agencies by either executive order or federal mandate.

In September, 1975, FHWA and UMTA issued regulations outlining the organizational requirements and functions of MPOs. It is clear that the present MPOs in Virginia do not have authority under the Constitution of Virginia or the statutes of Virginia to perform all the functions that a strict interpretation of the federal regulations would require of them. Virginia's MPOs are ad hoc organizations without any specific State enabling legislation. Consequently, these MPOs are currently operating within the framework of Virginia law as advisory bodies acting on behalf of the Governor and subordinate to the Virginia Highway and Transportation Commission, the only governmental organization empowered by the General Assembly to implement transportation plans. See § 33.1-12 of the Code of Virginia (1950), as amended. The regulations require the designation of statutorily created MPOs only "to the extent possible." See 23 C.F.R. § 450.106(c). To this date, the General Assembly has not enacted legislation creating local planning and implementing organizations of the nature described by the federal regulations. If such organizations were to be created, their functions would be, ostensibly, those of regional governments. Regional governments can only be empowered after the approval of such organizations by voters from the participating jurisdictions. See Article VII, Section 2, of the Constitution of Virginia (1971). No such organizations presently exist in the

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2Continuing, Comprehensive and Cooperative Transportation Planning Process Agreements, an example of which is attached hereto.

3TPCs provide for membership of representatives of VDHT, FHWA, UMTA, FAA, and other transportation agencies which are prohibited by statute from representation on the Planning District Commissions.
Commonwealth. Therefore, it appears that the federal agencies have exercised discretion in certifying Virginia's transportation planning processes, taking into consideration the State's legislative constraints which preclude the designation of statutorily created MPOs.

The lack of enabling legislation for the organizations thus designated does not appear to be a fatal defect. The attached memorandum of John J. Collins, Regional Counsel for UMTA, states:

"Nothing in this language [the definition of MPO in 49 C.F.R. § 450.104(b)] requires that MPO's be created pursuant to enabling legislation. The preamble to the regulations indicates that 'considerable flexibility will be afforded' in the designation of MPO's. In fact, it is estimated that 60% of the current MPO's are 'ad hoc' groups having no statutory status."

It should be noted that the United States Court of Appeals for the District of Columbia Circuit recognized approvingly the flexibility that has been applied in the administration of these MPO regulations in its decision of March 7, 1978, in County of Los Angeles, California v. Adams (No. 76-2089).

Questions

1. What are the penalties for violation of federal laws regarding MPO functions and activities?

Metropolitan Planning Organizations are created by authority of 23 U.S.C. § 134 to perform transportation planning functions in urban areas. The specific regulations which mandate the creation of MPOs are found in 23 C.F.R. Part 450. The penalty for failing to comply with these regulations is the denial of certification to an area's transportation planning process under 23 C.F.R. § 450.122 with the concomitant denial of federal aid for the area's transportation planning. Substantial compliance with the regulations is all that is required, according to 23 C.F.R. § 450.122(b). Without this certification, each project submitted by the Commonwealth of Virginia to either FHWA or UMTA for approval would be reviewed by those agencies to determine whether the proper planning had been employed for that project. If the planning for the project failed to comply with the regulations, the project would not be eligible for federal funds. The ultimate penalty for violation of federal laws regarding MPO functions and activities would be the denial of federal aid for urban system projects.

2. Who would be subject to legal sanctions if it were determined subsequently that the MPO's organization activities were not in compliance with federal laws?

As discussed earlier, the organization of the MPOs is in compliance with federal law. If their organization were determined to be defective, the result would be a loss of certification to the urban areas. For funds made available to the designated MPOs by VDHT pursuant to 23 U.S.C. § 104(f) (3), there could be no liability imposed on the Planning District Commissions or the MPOs. The Planning District Commissions have contracted with the State to perform limited administrative functions on behalf of the MPOs and would have a legal right to any funds received or earned pursuant to those funding contracts. The liability for defective organization of the MPOs would rest with the State, FHWA and UMTA and not the Planning District Commissions, the MPOs, or any of their respective members.
Another question is suggested by the one posed here, that is, who would be liable for any misappropriation of these planning funds by the MPOs. Liability could not be imposed on the Planning District Commissions for misappropriation of planning funds by the MPOs. The MPOs, operating as designees and on behalf of the Governor of Virginia in advising the Virginia Highway and Transportation Commission are not acting as committees of the Planning District Commissions. The MPOs would be responsible for any allocation of federal planning funds found to be in violation of federal law. Since the MPOs are not subject to suit, lacking any statutory authority, the individual members of the MPOs could arguably be exposed to individual liability. This liability would only arise in the unlikely event that the MPOs attempted to allocate funds for nontransportation planning activities. It is significant to note that the MPOs are only advisory to the Governor and the Highway and Transportation Commission; therefore, ultimate responsibility for misallocation of planning funds would rest with the organization having statutory authority over these expenditures, namely, the Virginia Highway and Transportation Commission.

3. Would the failure to execute federally required State-MPO and MPO-A-95 contracts constitute violations of federal law?

The failure to execute such contracts appears, at first glance, to violate the specific language of 23 C.F.R. §§ 450.108(a) and (b). Other language in the regulations and interpretations of those regulations by the agencies which promulgated them indicate, however, that such technical deficiencies would not be fatal to the transportation planning processes. Substantial compliance is all that is required by 23 C.F.R. § 450.122(b). Consequently, it would appear that certification of the processes in the Commonwealth's urban areas is a determination that the existing arrangements substantially comply with the regulations. The certifications of the planning processes are the result of FHWA's interpretation of their own regulations, an interpretation which is controlling unless plainly erroneous or inconsistent with the regulations. See Udall v. Tallman, 380 U.S. 1 (1965), reh. den., 380 U.S. 989 (1965).

In the memorandum from John J. Collins, referred to above, it is stated that executed contracts are not essential to comply with 23 C.F.R. § 450.108. That memorandum states in part, as follows:

"It is clear that the inability to contract does not preclude an ad hoc committee from entering into an agreement which is in the nature of a consensus or a memorandum of understanding. Therefore, the thrust of the Joint Regulations and the definition of the word agreement both allow the establishment of MPO's which are ad hoc groups, created by designation of the Governor without a state enabling statute."

Clearly the failure to execute contracts does not constitute a violation of federal law. Some form of agreement does appear to be required, but the specifics and formality of the agreements are subject to federal review and determination of whether they adequately satisfy the requirements of the federal regulations. This determination is part of the 23 C.F.R. § 450.122 certification process.

4. Are the 3-C Agreements entered into by the Planning District Commissions and VDHT in 1974 valid as between the signatories, or did the 1975 redesignation of TPCs as the MPOs constitute a withdrawal from
the cooperative transportation planning processes, thereby terminating those agreements according to Article II, § 2, of said Agreements?

Article II, § 2, of the standard 1974 3-C Agreement states as follows:

"The Agreement between the Commission and the Department will terminate only when . . . (2) The Commission or the Department withdraws from the continuing, comprehensive, and cooperative transportation planning process with not less than ninety (90) days written notice to the other party."

This language does not specify that designation of new MPOs will terminate the agreements. Rather, it makes termination dependent on withdrawal from the transportation planning processes. The existing funding agreements, referred to above, between the VDHT and the Planning District Commissions are evidence that the transportation planning processes continue to function, and that the Planning District Commissions have not withdrawn from the processes.

Further, the memorandum from UMTA's Regional Counsel referred to above speaks to the situation involving an agreement between the State and a statutorily created organization such as a Planning District Commission when the MPO lacks contracting authority. That memorandum states as follows:

"If the MPO does not have the ability to enter into contracts on its own behalf (i.e. it is not created by statute) there is no prohibition in the regulations which precludes a statutorily created entity (such as a regional planning agency) from receiving money from various governments and entering into contracts on behalf of the ad hoc MPO."

The 1974 3-C Agreements can be interpreted as the agreements pursuant to 23 C.F.R. § 450.108(a) because the MPOs designated in 1975 did not have the authority to enter into such contracts although less formal agreements could have been utilized. (See response to Question 3.) The 1974 3-C Agreements therefore do have effect and provide the authority for MPO funds to be made available to the State's urbanized areas.

5. Does an agency which accepts federal MPO funds also accept the responsibility for those funds, and is it liable for the manner in which those funds are used?

The memorandum from Regional Counsel for UMTA quoted above states that agencies with authority to contract may receive money and enter into contracts on behalf of MPOs who do not enjoy contracting authority. That memorandum goes on to state as follows:

"The regional planning agency would be liable under the terms of the contract and would get direction from the ad hoc MPO."

Clearly agencies which agree to administer the funds on behalf of the MPOs are liable for properly administering those funds and must act pursuant to the direction of the MPOs. The Planning District Commissions are liable only for proper administration of the funds, a liability they contracted to accept. The MPOs' liability for misallocation of funds is explained in response to Question 2.

In light of the laws of the Commonwealth and the interpretation of the federal regulations by the agencies which have promulgated these regulations and the certification of the urban transportation planning processes by these agencies, it
is my opinion that the designated MPOs have been properly constituted under federal law. Further, the liability of Planning District Commissions is limited to the responsibility they have contracted to accept for properly administering planning funds in accordance with the MPOs’ directions. Planning District Commissions are not liable for the actions of the MPOs, independent ad hoc organizations acting on behalf of the Governor and in an advisory capacity to the Virginia Highway and Transportation Commission.

TREASURERS—Agent For Division Of Motor Vehicles—Public funds appropriated for office of Treasurer may not be used to support motor vehicle agency in Treasurer’s office.

PUBLIC OFFICERS—Agent For Division Of Motor Vehicles Is Not Public Officer.

PUBLIC OFFICERS—Compatibility—Treasurer of Appomattox County may be appointed agent for Division of Motor Vehicles—May conduct Division’s business out of Treasurer’s office during normal working hours—Funds must not be intermingled.

November 7, 1977

THE HONORABLE WILLIAM S. KERR
Commonwealth’s Attorney for Appomattox County

This is in reply to your letter requesting my opinion whether the Treasurer of Appomattox County may be appointed as agent for the Division of Motor Vehicles and may conduct the business of that Division out of the Treasurer’s Office during normal working hours.

Your inquiry raises a question whether the activity proposed would create an incompatibility of public office. Section 15.1-50 of the Code of Virginia (1950), as amended, provides, in pertinent part, that, subject to certain exemptions not relevant to your question,

“(n)o person holding the office of county treasurer, sheriff, attorney for the Commonwealth, county clerk, commissioner of the revenue, superintendent of the poor, or supervisor shall hold any other office, elective or appointive, at the same time. . . .” (Emphasis added.)

The answer to your inquiry depends, therefore, on whether the position of agent for the Division is an office within the meaning of § 15.1-50.

Such positions are authorized by §§ 46.1-28 and 46.1-30. The Commissioner of the Division of Motor Vehicles “shall maintain his principal office and may appoint such agents and maintain branch offices in such places in the State as he deems necessary properly to carry out the provisions of this title.” See § 46.1-28. The duties of an agent for the Division of Motor Vehicles are set forth in § 46.1-30. That statute provides:

“(a) The personnel of each branch office and each agency shall be appointed by the Commissioner and shall be bonded in an amount fixed by the Commissioner. The person in charge of the branch office and each agency shall remit weekly, or at such other intervals as may be designated by the Commissioner, to the Commissioner all moneys collected, accompanied by
a complete record of what such remittance is intended to cover. The Commissioner shall not be held liable in the event of the loss of any moneys collected by such agents resulting from their failure to forward such moneys to the Division.

"(b) The compensation of the personnel of each branch office and each agency is to be fixed by the Commissioner. The compensation fixed for each agency shall not exceed an amount in excess of the aggregate of sixty cents for each set of license plates or decals issued or sold annually at each agency.

"In addition thereto, for each transfer of title and collection of the titling tax each agency shall be allowed an amount not to exceed fifty cents. For the purpose of maintaining adequate annual service at places established solely for the sale of license plates and decals, the Commissioner may, in his discretion, prorate the annual compensation fixed at each agency in such manner as will best secure adequate service at all times throughout each calendar year and no agent selling and issuing licenses or decals shall be entitled to the fees for each license or decal issued by him.

"(c) The compensation awarded shall belong to the agents for their services under this section, and the Commissioner shall cause to be paid all freight, cartage, premium on bond and postage, but not for any extra clerk hire or other expenses occasioned by their duties."

A public office is a position created by law with specified duties which involve the exercise of a portion of the sovereign power. To determine whether a position rises to the level of a public office, one must examine the law creating the position for the requirement of an oath, a fixed term of office, and a grant of authority conferred by law. See Reports of the Attorney General (1975-1976) at 288 and (1968-1969) at 201.

An agent for the Division of Motor Vehicles is not appointed for a fixed term of office, is not required to take an oath, does not have duties imposed by statute, and does not exercise a portion of the sovereignty. I am therefore of the opinion that such an agent is not a public officer. A county treasurer may thus be employed as an agent for the Division of Motor Vehicles without violating the provisions of § 15.1-50.

I am furthermore of the opinion that the activity of a licensing agent may be conducted out of the treasurer’s office during normal business hours. The treasurer’s office is a convenient location for the public to obtain licenses and pay titling taxes, since it is the traditional place for the conduct of similar public business. Obviously, the funds used to maintain these separate activities must not be intermingled. The treasurer’s office must be financed by funds appropriated for that purpose. Funds necessary to maintain the licensing agency must come from the compensation received by the agent. A licensing agent for the Division of Motor Vehicles is an independent agent whose compensation is dependent on the number of license plates or decals sold annually at each agency office, as well as the transfer of titles and collection of the titling tax. See § 46.1-30(b). None of the public funds, therefore, which have been appropriated for the office of the Treasurer may be used to support the maintenance of the agency.

TREASURERS—Constitutional Officer Elected By Voters—Not under control and jurisdiction of local governing body; not subject to county personnel system.
CONSTITUTIONAL OFFICERS—Employees And Deputies Of—Board of supervisors has no authority to impose personnel policies upon treasurer's office.

July 6, 1977

THE HONORABLE CHARLES A. REID
Treasurer for Greensville County

This is in reply to your recent letter requesting my opinion regarding personnel policies adopted by the Greensville County Board of Supervisors. You state that the Board has adopted administrative regulations to govern the hiring of new employees and the filling of vacant positions. Those policies require, inter alia, that all vacancies must be advertised, that the county administrator supervise the advertisement of all vacant positions, and that the supervisors must approve the hiring of any employee. You inquire whether a constitutional officer is required to comply with these administrative regulations.

The position of county treasurer is a constitutional office created pursuant to Article VII, Section 4, of the Constitution of Virginia (1971). The county treasurer is authorized to appoint one or more deputies, and by § 15.1-48 of the Code of Virginia (1950), as amended, that statute provides the sole authority for the appointment of such deputies. The Compensation Board determines the salary to be paid to deputies and employees of constitutional officers. See § 14.1-51 of the Code. There is no statute which prescribes the manner in which employees other than deputies of constitutional officers are to be hired.

As a constitutional officer, the treasurer is not subject to the control and jurisdiction of the governing body. See Report of the Attorney General (1974-1975) at 558. In addition, this Office has ruled consistently that it is the traditional view and the practice in Virginia 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." Report of the Attorney General (1966-1967) at 65.

Absent contrary statutory authority, a constitutional officer has the sole responsibility regarding the personnel policies of his office. It is not the prerogative of any local official to make personnel determinations for a constitutional officer. See Report of the Attorney General (1969-1970) at 59. A constitutional officer has, therefore, the sole appointing power with respect to deputies and personnel under his supervision. See Report of the Attorney General (1971-1972) at 367. Employees and deputies of constitutional officers are not subject to the county personnel system and the employment terms of those persons are not subject to the control of the governing body. See Reports of the Attorney General (1975-1976) at 50, 149, (1973-1974) at 67. Based on the foregoing, I am of the opinion that the supervisors have no authority to impose personnel policies upon your office.

TREASURERS—Investments—Neither authority nor duty to invest idle city funds under city charter or general law.
PUBLIC FUNDS—Treasurer's Duty To Safely Keep City's Revenue—Investment of idle city funds must be in manner prescribed in Title 2.1, Chapter 18.

TREASURERS—Duties Set By Charter Of City Of Emporia.

October 28, 1977

THE HONORABLE W. S. HARRIS, JR.
Treasurer of the City of Emporia

This is in reply to your recent letter in which you requested my opinion as to the following:

"Does the Treasurer of the City of Emporia, Virginia, have the responsibility for investing idle city funds" in view of a City Charter which is silent on this point?

In this response, I assume that you intend the word "responsibility" to be synonymous with "duty."

Section 54 of the Charter of the City of Emporia (Chapter 78 [1968] Acts of Assembly 129) states:

"Duties of Treasurer. The city treasurer shall collect and receive, all money due the city by the State and all taxes and levies due the State and collected within the city, and disburse same as provided by the general laws of the Commonwealth relating to city treasurers, and may be authorized by the council also to collect and receive all money, taxes and levies due the city and disburse the same according to this charter and the ordinances enacted by the city." (Emphasis added.)

Clearly, § 54 of the City Charter does not specifically answer the question you raise and I am advised that the City Council of Emporia has not authorized the City Treasurer to make disbursements with regard to investments. Accordingly, if any responsibility or duty exists to invest "idle" city funds, that duty must exist "as provided by the general laws of the Commonwealth relating to city treasurers." Charter of the City of Emporia, supra. (Emphasis added.)

The Virginia Constitution (1971), is silent concerning the duties of city treasurers, and I am unaware of any statutory authority which imposes upon city treasurers an affirmative duty to invest idle city funds. Virginia case law makes it clear, however, that the city treasurer "has imposed upon him the duty of receiving the revenue, safely keeping the same and paying it out according to law." Camp v. Birchett, 143 Va. 686, 693, 126 S.E. 665, 668 (1925). (Emphasis added.) While the Birchett decision makes it clear that a city treasurer is held strictly liable for monies coming into his control, 143 Va. at 694, 126 S.E. at 667, the case law does not explicitly impose an affirmative duty to invest idle city funds. As a trustee for the benefit of the public, however, a reasonable inference arises from the Birchett decision and general fiduciary principles that the treasurer's duty to "safely keep" monies coming under his control requires the treasurer at least to deposit city funds in an appropriate depository bank.

Based upon the foregoing, it is my opinion that a city treasurer, absent direct authority in the City Charter and without authorization from the City Council, is not imposed with an affirmative duty to invest "idle" city funds under the general laws of the Commonwealth. It is also my opinion that a city treasurer is strictly liable for the "safe keeping" of all city funds which come under his
control. This rule of strict liability can be avoided only if the treasurer takes due care to determine that all public deposits are properly secured pursuant to the Virginia Security for Public Deposits Act, Title 2.1, Chapter 23, § 2.1-359, et seq., Code of Virginia (1950), as amended. Further, if the treasurer does invest idle city funds he has the responsibility to invest such funds in the manner prescribed for the investment of public funds pursuant to Title 2.1, Ch. 18, § 2.1-327, et seq., of the Code.

To the extent that an Opinion of this Office to the Honorable C. B. Covington, Jr., Treasurer, City of Newport News, dated June 19, 1975, and found in the Report of the Attorney General (1974-1975) at 535, may be read to suggest that a city treasurer is imposed under the general laws of the Commonwealth with an affirmative duty to "invest," rather than "safely keep," idle city funds which come under his control, that Opinion is superseded.

UNEMPLOYMENT COMPENSATION—Substitute Teachers—Eligibility for determined on facts of each claim.

AMENDMENTS—Unemployment Insurance Coverage Under Virginia Act Extended To Employees Of Political Subdivisions, Including Teachers And Substitute Teachers, Effective December 31, 1977—Now paid from federal funds.

SCHOOLS—Teachers—Eligibility of substitute teachers for unemployment compensation.

November 7, 1977

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

This is in response to your request for an opinion regarding the eligibility of substitute teachers for unemployment compensation.

The 1977 amendments to the Virginia Unemployment Compensation Act, Title 60.1 of the Code of Virginia (1950), as amended, extended unemployment insurance coverage to employees of political subdivisions, including teachers and substitute teachers. This coverage is not effective until December 31, 1977. (See § 60.1-14 of the Code.) In the interim, payments are made by the Virginia Employment Commission to eligible claimants from federal funds pursuant to the Special Unemployment Assistance Program created by Title II of the Emergency Jobs and Unemployment Assistance Act of 1974, 88 Stat. 1845, 26 U.S.C. § 3304.

The Virginia Unemployment Compensation Act makes no distinction between teachers and substitute teachers concerning eligibility for unemployment compensation. Section 60.1-52.3 of the Code does provide, in pertinent part, as follows:

"A. Benefits based on service in an instructional, research, or principal administrative capacity for an educational institution shall not be paid to an individual for any week of unemployment commencing during the period between two successive academic years, or during a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual’s contract, if the individual performs

...
such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms."

Since substitute teachers perform work in an instructional capacity they are not eligible for unemployment compensation benefits for any week of unemployment during the periods stated above if there is a contract or a reasonable assurance that the substitute teacher will perform services in any such capacity for an educational institution in the second of such academic years or terms. The Virginia Employment Commission, pursuant to § 60.1-61 of the Code, issues a written determination on the basis of the facts of each individual claim. This decision may be appealed by either the claimant or the employing unit.

Substitute teachers who are unemployed and meet all the eligibility requirements of the Virginia Unemployment Compensation Act, such as being able and available to work (see § 60.1-52 of the Code) and who are not subject to the general disqualification provisions found in § 60.1-58 of the Code are eligible for unemployment benefits.

UNIFORM STATEWIDE BUILDING CODE—Enforcement Is Responsibility Of Local Governing Body.

DEFINITIONS—"Building Official" Is Local Official Charged With Administration And Enforcement Of Building Code.

UNIFORM STATEWIDE BUILDING CODE—Qualifications For "Building Official," "Inspectors" Or "Technical Assistants."


November 23, 1977

THE HONORABLE H. WOODROW CROOK, JR.
Commonwealth's Attorney for Isle of Wight County

This is in response to your inquiry concerning the Uniform Statewide Building Code. I shall answer your questions seriatim.

1. "... if the local governing body does not enter into an agreement with another local governing body to furnish a building official, is the local governing body required to appoint a building official?"

Section 36-105 of the Code of Virginia (1950), as amended, provides, in pertinent part, as follows:

"Enforcement of the Building Code shall be the responsibility of the local building department. ... Whenever a county or a 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. ..."

Under § 36-105, the responsibility of the governing body of any county, city or
town in Virginia is to enforce the Uniform Statewide Building Code by establishing a "local building department" or entering into an agreement with another State or local agency approved by the State Board of Housing to perform such enforcement functions within the territorial jurisdiction of the local governing body. Section 36-97(10) defines a local building department as follows:

"'Local building department' means the agency or agencies of any local governing body charged with the administration, supervision, or enforcement of building codes and regulations, approval of plans, inspection of buildings, or issuance of permits, licenses, certificates or similar documents prescribed or required by State or local building regulations."

The enforcement of the Building Code is the sole responsibility of each local governing body; however, the State Board of Housing, pursuant to § 36-99, has the authority to adopt rules and regulations for the administration and enforcement of the Building Code. Among these regulations is Section 107.1 which provides as follows:

"The administration and enforcement of the Building Code shall be the responsibility of the local governing body’s building official. Whenever a local governing body has no such official, they shall enter into an agreement with another local governing body able to furnish such an official, or with some other agency as provided in Section 128.0 of this Code, or a State agency approved by the State Board of Housing."

A "building official" is defined as the local official charged with the administration and enforcement of the Building Code. I am of the opinion that the use of the term "building official" in Section 107.1 of the Building Code does not alter or expand the requirement in § 36-105 that each local governing body establish a local building department or enter into an appropriate agreement with another agency for enforcement of the Building Code; rather, Section 107.1 requires that where such a local building department has been established, it shall have a "building official" in charge. Accordingly, if the local governing body has a local building department, the answer to your first question is in the affirmative.

2. "... is the local governing body required to appoint a building official pursuant to Section 107.2 of the ... Building Code with the qualifications as listed in Section 107.5 of said Code? That is, can the local governing body appoint a person to be in charge of the Department of Building Inspection who does not meet the qualifications required in Section 107.5?"

Section 107.5 of the Building Code sets forth certain qualifications for a "building official." Where a local governing body has established a local building department, I am of the opinion that a person meeting the qualifications set forth in Section 107.5 of the Building Code must be employed or designated as a "building official."

3. "Must the Building Inspectors or Assistants meet the qualifications of Section 107.6 and be appointed by the Building Official only under Section 107.3 of said Code, or, can the local governing body choose not to have a building official and employ building inspectors only?"

Section 107.3 of the Building Code provides that the "building official" shall
appoint all employees "as shall be necessary for the administration of the Code and as authorized by the appointing authority." Minimum qualifications for certain local building department employees are set forth in Section 107.6 of the Building Code. Accordingly, I am of the opinion that a local governing body which has established a building department has the authority to employ those persons it deems necessary, utilizing criteria established by the local governing body to determine the qualifications of such employees. Those persons performing as "technical assistants" or "inspectors" must meet the minimum qualifications set forth in Section 107.8 of the Building Code.

4. "...if the Board of Supervisors does not appoint a building official and does not enter into an agreement with another governing body to furnish such an official, who has the responsibility of enforcement of the Building Code under §36-105 of the Code of Virginia?"

Section 36-105 mandates that the local building department which has been established by the local governing body shall be responsible for the enforcement of the Building Code. By regulation, each such building department is required to have a "building official"; that is, a person qualified to administer the provisions of the Building Code. See Section 107.1 of the Building Code. A local governing body which either fails, refuses or is unable to employ a "building official" remains responsible for enforcement of the Building Code. Such responsibility can only be delegated pursuant to §36-105.

Where a local governing body has failed, refused or been unable to employ a "building official," I am of the opinion that the local governing body must take such measures necessary to properly enforce the Building Code. These measures are delineated in §36-105 and Section 107.1 of the Building Code and include delegation of a local governing body's responsibility for enforcement of the Building Code by "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" or "an agreement with another local governing body able to furnish such an official, or with some other agency as provided in Section 128.0 of this [Building] Code, or a State agency approved by the State Board of Housing."

UNIFORM STATEWIDE BUILDING CODE—Smoke Detecting Devices—Installation in all existing and occupied residential units.

DEFINITIONS—"Equipment" Subsequently Installed In Buildings Constructed Prior To Effective Date Of Building Code.

ORDINANCES—Fire Prevention Ordinance Superseded By Building Code To Extent It Pertains To Multi-family Dwelling Units.

ORDINANCES—Smoke Detection Devices—No distinction made between AC powered and battery powered devices.

UNIFORM STATEWIDE BUILDING CODE—Supersedes Building Codes And Regulations Of Counties, Municipalities And State Agencies (Fire Prevention Code)—Multi-family dwelling units.

UNIFORM STATEWIDE BUILDING CODE—Certain Buildings Exempt From.
REPORT OF THE ATTORNEY GENERAL

UNIFORM STATEWIDE BUILDING CODE—Fire Extinguishing Appliances And Fire-detecting Devices Within Term “Equipment” Used In § 36-103.

VIRGINIA FIRE SAFETY LAW—Buildings Remain Subject To When Exempt From Uniform Statewide Building Code.

February 3, 1978

THE HONORABLE GARY R. MYERS
Member, House of Delegates

This is in response to your recent letter inquiring as to the authority of the City of Alexandria to require the installation of smoke detecting devices in all existing and occupied residential units. You refer to an earlier Opinion to the Honorable Frederick T. Gray, Member, Senate of Virginia, dated September 20, 1977, a copy of which is enclosed, in which it was ruled that a Chesterfield County ordinance requiring fire extinguishing appliances and fire detecting devices in existing multi-family dwellings is superseded by the Uniform Statewide Building Code. You ask the following:

“[W]hether a battery powered smoke detector, which requires no structural change for installation would be considered ‘equipment’ within the meaning of § 36-103.”

The Opinion to Senator Gray concerned an ordinance which required “suitable fire extinguishing appliances and fire detecting devices, such as, but not limited to AC powered products of combustion detectors.” (Emphasis added.) In essence, the Opinion concluded that all “equipment” installed in buildings constructed prior to the effective date of the Building Code was subject to the applicable provisions of the Building Code. See § 36-97(13) of the Code of Virginia (1950). No distinction was made either in the ordinance or the Opinion between AC powered smoke detecting devices and battery powered smoke detecting devices.

The term “equipment” as used in § 36-103 is defined in § 36-97(13) to include, among other things, electrical and “other mechanical additions” as well as “installations.” Accordingly, and for the reasons stated in the Opinion to Senator Gray, I am of the opinion that the provisions of the Uniform Statewide Building Code would supersede an ordinance enacted by the City of Alexandria which required the addition or installation of battery powered smoke detecting devices in all existing and occupied residential units.
UNIFORM STATEWIDE BUILDING CODE—Fire Extinguishing Appliances
And Fire-detecting Devices Within Term “Equipment” Used In § 36-103.

VIRGINIA FIRE SAFETY LAW—Buildings Remain Subject To When Exempt
From Uniform Statewide Building Code.

September 20, 1977

THE HONORABLE FREDERICK T. GRAY
Member, Senate of Virginia

This is in reply to your letter in which you inquire about the validity of an
amendment, adopted on May 12, 1976, to the Chesterfield County Fire Preven-
tion Code. The ordinance in question reads as follows:

"Section 14.2 Survey of Premises and Specification of Equipment.
"The Chief of the Bureau of Fire Prevention shall survey each assembly,
educational, industrial, institutional, mercantile, storage, and residential
occupancy, except for detached one and two family dwellings, and shall
specify suitable fire extinguishing appliances and fire detecting devices, such
as, but not limited to AC powered products of combustion detectors, as
may be determined necessary by the Chief of the Bureau of Fire Prevention
to provide reasonable safety to persons and property."

It is my understanding that the amendment removed the phrase "multi-family
dwellings" from the exceptions contained in Section 14.2 in order to give the
Chief of the Chesterfield Bureau of Fire Prevention the authority to require the
installation of suitable fire extinguishing appliances and fire-detecting devices
in such dwellings. Your letter asks that the following question be resolved:

"[W]hether the County of Chesterfield, under its general police powers,
has the authority to . . . enforce the May 12, 1976 amendment to the
County Fire Code against multi-family dwelling units that have been
constructed and in existence prior to this amendment and prior to Sep-
tember 1, 1973, the effective date of the Uniform Statewide Building
Code."

The Virginia Uniform Statewide Building Code prescribes standards for the
construction, reconstruction, alteration, repair or conversion of buildings and
structures. It supersedes the building codes and regulations of counties,
municipalities and State agencies. See §§ 36-97 through -99 of the Code of
Virginia (1950), as amended. Fire prevention ordinances, such as the ordinance
quoted herein, are "building regulations" as that term is defined in the Building
Code.

When enacted, the Uniform Statewide Building Code exempted certain
buildings from its application, including buildings constructed prior to Sep-
tember 1, 1973. These buildings were to remain subject to the building
regulations in effect at the time of the issuance of the building permit or the
cordingly, in previous Opinions it was stated that the Building Code does not
affect the authority of a locality to adopt fire prevention ordinances applicable
to buildings not covered by the Building Code, if such ordinances meet or exceed
the minimum standards of the Fire Safety Law and the Virginia Fire Safety
Regulations of the State Corporation Commission adopted pursuant thereto. See
Report of the Attorney General (1973-1974) at 425. Section 36-103, however,
was amended in 1976 to provide that the reconstruction, renovation, repair or demolition of such buildings after the effective date of the Building Code would be subject to the pertinent provisions of the Building Code. Local fire prevention ordinances which require a property owner to reconstruct, renovate or repair a building constructed prior to September 1, 1973, therefore, are superseded by the Building Code.

The provisions of § 36-103 expressly apply to "equipment" which is defined as "plumbing, heating, electrical, ventilating, air-conditioning and refrigeration equipment, elevators, dumbwaiters, escalators, and other mechanical additions or installations." Section 36-97(13). Any "equipment" which is subsequently installed in buildings constructed prior to September 1, 1973, the effective date of the Building Code, is subject, therefore, to the applicable provisions of the Building Code. I am of the opinion that fire extinguishing appliances and fire-detecting devices fall within the term "equipment" as used in § 36-103. Accordingly, the fire prevention ordinance quoted herein would be superseded by the Building Code to the extent it pertains to multi-family dwelling units. Your inquiry, therefore, is answered in the negative.

VIRGINIA ANATOMICAL GIFT ACT—Section 32-364.3:1(b) Requires Opinions Of Two Licensed And Qualified Physicians (Attending Physician And Consulting Physician)—Regardless of specialty of attending physician, consulting physician must be qualified neurosurgeon or neurologist, or specialist in electroencephalography.

PHYSICIANS—Patient Pronounced Medically And Legally Dead—"Brain death"—Opinions of two qualified and licensed physicians required by § 32-364.3:1(b).

November 7, 1977

THE HONORABLE CALVIN W. FOWLER
Member, House of Delegates

This is in reply to your inquiry concerning § 32-364.3:1(b) of the Code of Virginia (1950), as amended. Specifically, you have asked whether that provision requires an attending physician, who happens to be a qualified neurosurgeon, to obtain the concurring opinion of another qualified neurosurgeon, who would be a consulting physician, before pronouncing a patient medically and legally dead. Section 32-364.3:1 provides in part:

"A person shall be medically and legally dead if . . . (b) in the opinion of a consulting physician, who shall be duly licensed and a specialist in the field of neurology, neurosurgery, or electroencephalography, when based on the ordinary standards of medical practice, there is the absence of spontaneous brain functions and spontaneous respiratory functions and, in the opinion of the attending physician and such consulting physician, based on the ordinary standards of medical practice and considering the absence of the aforesaid spontaneous brain functions and spontaneous respiratory functions and the patient's medical record, further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such spontaneous functions, and, in such event, death shall be deemed to have
occurred at the time when these conditions first coincide. Death, as defined in subsection (b) hereof, shall be pronounced by the attending physician and recorded in the patient's medical record and attested by the aforesaid consulting physician."

This provision of law is concerned with the situation known to non-medical personnel as "brain death." In such a case, there is no brain activity, and vital bodily functions, such as breathing, would cease naturally without the use of sophisticated medical technology and machinery to maintain those functions.

In my opinion, § 32-364.3:1(b) requires the opinions of two qualified and licensed physicians. Death must be pronounced by the attending physician, and the record of death attested by the consulting physician, who must be a licensed neurosurgeon, a neurologist, or a specialist in the field of electroencephalography. The fact that the attending physician also happens to be such a specialist does not, in my judgment, satisfy the clear requirement that the consulting physician be qualified and licensed in one of the designated specialties.


VIRGINIA ANTITRUST ACT—Three Requirements Make Tie-in Illegal—Actual tie-in; seller must have significant market power; tie-in must produce appreciable restraint.

VIRGINIA ANTITRUST ACT—Virtually Identical To Sherman Act—Activities illegal under § 1 of Sherman Act also violate § 59.1-9.5 of Virginia Act.

May 23, 1978

THE HONORABLE RICHARD L. SASLAW
Member, House of Delegates

You have asked whether the antitrust laws prohibit a real estate firm from refusing to sell a new home to someone unless he lists his existing home with that real estate firm.

A tie-in is "an arrangement whereby a seller conditions his sale of a product or service (the "tying product") upon a buyer's purchase of a separate product or service (the "tied product") from the seller or from a designated third party." ABA Section of Antitrust Law, Antitrust Law Developments 38 (1975).

The basic evils of tying agreements were stated by the Supreme Court in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6 (1958):

"[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products."

Three requirements must be met before an apparent tie-in is illegal on its face. First, there actually must be a tie-in; there must be an agreement involving the sale or lease of two separate and distinct products, and the buyer must be required to purchase one to obtain the other. Combining the sale of integral products or services is not illegal, but where two markets are present, with one being dominant (the tying product market), a tie-in can be found. See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), where the Court held that advertising in a morning paper and advertising in an evening paper were not separate products. But see *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (2d Cir. 1971), cert. denied, 405 U.S. 955 (1972), where the court held a trademark license to a franchisee to be separate from the sale of products or ingredients to which the trademark applied.

Second, the seller must have significant "market power" in the market for the tying product. The Supreme Court has stated that the test is "whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969) (*Fortner I*). Power over price appears crucial: "If the price could have been raised but the tie-in was demanded in lieu of the higher price, then — and presumably only then — would the requisite economic power exist." *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 620 n. 13 (1977) (*Fortner II*) (quoting Dam, 1969 Supreme Court Review 25-26). This power can be shown by such factors as the product's novelty or the dominant market position of the seller.

Third, the tie-in must produce an "appreciable restraint" in the market for the tied product. *Northern Pacific Railway Co., supra*. Normally the restraint is measured in terms of dollar sales of the tied product pursuant to the tying agreement. For example, in *Fortner I, supra*, sales of the tied product to only one buyer totaled $190,000 per year, and this was held sufficient to meet the requirement.

In analyzing the facts that you have furnished me, it appears that there are two separate services: the services of the real estate firm with respect to the purchase of a new home (the tying product) and the service of listing for sale the old home (the tied product). The purchase of the new home is related to the sale of the old only by the contingency clause in the sales contract. There is no natural in-separability. Further, the hinging of one upon the other in no way requires that the same agent, broker, or firm be responsible for both occurrences.

Here, however, the clarity ends. With respect to the second test, I have insufficient information to assess the seller's market power. "In short, [does the seller have] some advantage not shared by his competitors in the market for the tying product[?]" *Fortner II, supra*, at 620.

Moreover, I have insufficient information to ascertain whether there is an "appreciable restraint" placed on the market for the tied product. To decide this, it is necessary to examine the volume of sales in the tied product market.

Because a tie-in is not illegal on its face but must be judged only after an examination of the seller's economic power in the market for the tying product
REPORT OF THE ATTORNEY GENERAL

and the impact of the tie-in on the market for the tied product, I am not able to answer your question conclusively. The practice described in your letter should, however, be analyzed under the principles set forth.

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VIRGINIA CONFLICT OF INTERESTS ACT—Commonwealth Attorney’s Opinion To Employee Of Local Governmental Agency Reviewed By Attorney General.

CONTRACTS—“Contract” Includes Any Agreement To Which A Government Agency Is A Party.

DEFINITIONS—Contract—Promise enforceable at law—Placement Agreement for foster care.

VIRGINIA CONFLICT OF INTERESTS ACT—Employee Of Department Of Social Services May Not Enter Into Agreement With That Agency To Become Foster Parent Of Child In Custody Of Department And Under Supervision Of That Employee.

VIRGINIA CONFLICT OF INTERESTS ACT—Exemptions—Employee with ability to influence awarding of contract, not exempt from Act.

VIRGINIA CONFLICT OF INTERESTS ACT—Foster Care Provision Requires Formal “Placement Agreement” Between Foster Parent And Agency—Contract as defined by Act.

June 16, 1978

THE HONORABLE ROGER W. MULLINS
Commonwealth’s Attorney for Tazewell County

You have rendered an opinion to an employee of a local governmental agency concerning the Virginia Conflict of Interests Act. You concluded that the facts presented constitute a violation of the Act and the employee has requested, pursuant to § 2.1-356 of the Code of Virginia (1950), as amended, that I review your decision. I affirm your decision.

The issue is whether an employee of the Tazewell County Department of Social Services may enter into an agreement with that agency to become the foster parent of a child without violating the Virginia Conflict of Interests Act. The child is in the custody of the Department and is subject to the supervision of that employee, who is a child protective services officer. Since 1975, the employee has made numerous decisions directly affecting the child’s welfare.

Section 2.1-349(a)(1) provides that, unless he is exempted from the Act, an officer or employee of a governmental agency shall not contract with his agency. See Opinion to the Honorable Henry S. Hathaway, Commonwealth’s

Section 2.1-349(a)(1) provides that no officer or employee of a governmental agency shall

"[b]e a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant. . . ."
Attorney for Northumberland County, dated July 22, 1974, and found in Report of the Attorney General (1974-1975) at 364. Contracts are broadly defined by the Act to include "any agreement to which a governmental agency is a party." (Emphasis added.) Section 2.1-348(c)(1). See Opinion to the Honorable Carrington Williams, Member, House of Delegates, dated April 5, 1974, and found in Report of the Attorney General (1973-1974) at 435. Because the provision of foster care requires a formal "Placement Agreement" between the foster parent and the agency, it is a contract as defined by the Virginia Conflict of Interests Act.

Furthermore, the agreement contains each essential element of a contract. The offer by the employee to become a foster parent must be accepted by the Department. Consideration is present in the agreement because the Department of Social Services will permit the employee to become a foster parent if the employee, in turn, agrees to provide care for the child. The employee will enter into a promise to provide services and care for the child in return for approval as a foster parent. These mutual promises serve as the basis for the parties to be bound by the agreement, and although their monetary value is not quantifiable, are adequate consideration to support the agreement. The "Placement Agreement" thus satisfies the classic definition of a contract: a promise enforceable at law. Corbin, Contracts §§ 3, 109 through 151 (1963). I am therefore of the opinion that the employee, unless he is exempted, may not enter into the agreement with the Department of Social Services to provide foster care without violating the Virginia Conflict of Interests Act.

The issue thus becomes whether the employee is exempted from the Act. Section 2.1-349(b)(5) exempts nonsupervisory employees, who do not have the authority to participate in the procurement of contracts or to effect the approval or disapproval of their performance, from the anti-contracting provisions of the Act. See Opinion to the Honorable Richard Crawford Grizzard, Commonwealth's Attorney for Southampton County, dated July 17, 1972, and found in Report of the Attorney General (1972-1973) at 477. This employee has previously made decisions which significantly affected the welfare of the child. In so doing, he has participated in the procurement of the contract by virtue of his position in the Department and his relationship with the child. Although the decision to allow the employee to become the foster parent of the child will be made by another worker, the employee has the ability to influence the awarding of this contract. He is therefore not subject to the above-noted exemption.

I therefore must conclude that if the employee in question enters into an agreement with the Tazewell County Department of Social Services to provide foster care for a child in its custody, the employee will violate the Virginia Conflict of Interests Act.

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Section 2.1-349(b)(5) exempts an employee of a governmental agency whose duties are nonsupervisory and who does not on behalf of such agency participate in or have authority to participate in the procurement or letting of the contract or subcontract or in any manner effect the approval or disapproval of its performance, and provided, further, that the employee's interest in the contract or subcontract is disclosed in writing to such agency in advance. . . .
You ask whether a city council member is prohibited by the Virginia Conflict of Interests Act from voting on a proposed city budget if his spouse is employed in the city's personnel department and receives compensation in excess of five thousand dollars annually. You indicate that a portion of the proposed budget would increase the general salary levels of city employees. I am of the opinion that the member may vote on the proposed city budget without violating the Act.

The Virginia Conflict of Interests Act requires that an officer of a governmental agency who has a material financial interest in any transaction, not of general application, in which his agency is involved, shall not become involved in any way in the transaction. Section 2.1-348(f) of the Act provides that a material financial interest includes aggregate annual income accruing to an officer or employee or to his spouse in the amount of five thousand dollars or more. The council member thus has a material financial interest in the general salary level of city employees.

The determination of whether a transaction is "not of general application" must be made on a case-by-case basis. See Opinion to the Honorable Harry W. Garrett, Jr., Commonwealth's Attorney for Bedford County, dated November 7, 1973, and found in Report of the Attorney General (1973-1974) at 439. Your letter indicates that the city personnel department establishes salary classifications for its employees, and determines the salary level appropriate for individual employees of the department. Approval of an increase in the general salary level of city employees will affect all employees within the class equally. An increase in general salary levels is not directly related to the compensation paid to, or the identity of, any specific salaried employee. See Opinion to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, and found in Report of the Attorney General (1969-1970) at 310. See also Opinion to the Honorable Lloyd H. Hansen, Commonwealth's Attorney for the City of Hampton, dated June 10, 1971, and found in Report of the Attorney General (1970-1971) at 436.

I am of the opinion that the budgetary process by which the city council will determine the general salary level of city employees is a matter of general application. I therefore conclude that the council member need not disqualify himself from voting on the proposed city budget as a whole, or that portion thereof which relates to the salary level of city employees. Since the budgetary

1Section 2.1-352 of the Code of Virginia (1950), as amended, provides in pertinent part:

"Any officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, shall disclose such interest to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency."
process is a transaction of general application, the member’s full participation in
the process will not result in violation of the Virginia Conflict of Interests Act.

VIRGINIA FREEDOM OF INFORMATION ACT—Constitutional Officer (Treasurer) Is Citizen Under Terms Of Act—Same rights of access to official records as any other citizen—Budget records.

May 22, 1978

THE HONORABLE CHARLES A. REID
Treasurer for Greensville County

You have asked whether a constitutional officer, such as county treasurer, has
a right to inspect official records under the Freedom of Information Act (Act)
and whether it was a violation of the Act to deny you access to budget records.

Section 2.1-342(a), Code of Virginia (1950), as amended, provides that official
records of governmental agencies and offices of the State and its political
subdivisions shall be open to inspection and copying by “any citizens of this State.”

I am of the opinion that local constitutional officers are citizens under the
terms of the Act and may exercise the same rights of access to official records as
any other citizen. Accordingly, it was, in my opinion, a violation of the Act to
deny you access to the records in question if the facts are such that the records
were required by the Act to be made available for inspection and copying to any
citizen.

VIRGINIA FREEDOM OF INFORMATION ACT—County Administrator Permitted To Release Publicly Names Of County Employees Employed Under Comprehensive Employment And Training Act (CETA)—Federally financed employment program.

DEFINITIONS—“Personal Information” As Defined In Privacy Protection Act.

EMPLOYEES—List Of County Employees Under CETA Program—Official record of county as defined in Freedom of Information Act.

PRIVACY ACT—Federal Privacy Act Of 1974 Applies Only To Federal Agencies—No application to county’s dissemination of its records—CETA employees.

PRIVACY ACT—Personal Information Dissemination—Procedural steps to be taken.

May 24, 1978

THE HONORABLE CLAUDE V. SWANSON
Member, House of Delegates

You have asked whether the Pittsylvania County County Administrator is permitted
by law to release publicly the names of County employees employed under the Comprehensive Employment and Training Act (CETA), which establishes a federally financed employment program.

The Virginia Freedom of Information Act (F.O.I.) requires that, except as otherwise specifically provided by law, official records of State and local governmental bodies shall be available for public inspection and copying. See § 2.1-342(a), Code of Virginia (1950), as amended. Any list of County employees under the CETA program would constitute an official record of the County as defined in § 2.1-341(b) of the Code. Section 2.1-342(b)(3) exempts personnel records from required public disclosure, but disclosure of such records is not prohibited. See Opinion to the Honorable Jerry K. Emrich, County Attorney of Arlington County, dated January 12, 1978 (copy enclosed). Even if the records in question are personnel records within the meaning of § 2.1-342(b)(3), there is no prohibition against their disclosure.

The Privacy Protection Act of 1976 (Privacy Act) does not prohibit the dissemination of records containing personal information if dissemination of records is required or permitted by law. See § 2.1-380, paragraph 1; Emrich Opinion, supra. The F.O.I. exempts personnel records from required disclosure, but permits their disclosure if the custodian of the records, in his discretion, chooses to disclose them. Accordingly, the Privacy Act would not prohibit the disclosure of the records about which you inquire.

The federal Privacy Act of 1974 applies only to federal agencies and has no application to the County's dissemination of its records. See 5 U.S.C. § 552(e).

I am, therefore, of the opinion that the County Administrator will not violate applicable provisions of law by disseminating the records about which you ask.

VIRGINIA FREEDOM OF INFORMATION ACT—Honor Committee Elected By Student Body Annually To Administer And Enforce University Honor Code—Subject to requirements of Act, but trials and deliberations not subject to open meeting; trial transcript and other scholastic records exempt from public disclosure.

COLLEGES AND UNIVERSITIES—Family Educational Rights And Privacy Act (Buckley Amendments)—Identities of individuals not revealed in trial synopses submitted to Honor Committee.

RECORDS—Scholastic Records—Trial transcript of Honor Committee of University exempt from public disclosure of Freedom of Information Act.

VIRGINIA FREEDOM OF INFORMATION ACT—Trial Synopses Submitted To Honor Committee Prior To Trial Never Reveal Identities Of Individuals Involved—"Official records" subject to public inspection and copying.

March 22, 1978

THE HONORABLE JAMES B. MURRAY
Member, House of Delegates

You have asked (1) whether the Honor Committee is subject to the requirements of the Freedom of Information Act; and if it is subject to the Act, (2) whether trial synopses prepared by counsel appearing before the Committee
in honor violation trials are records subject to public inspection, and (3) whether correspondence, evidence, trial transcripts and other records compiled and submitted to the Committee in honor trials are records subject to public inspection. This last question raises the issue whether honor trials must satisfy the public meeting requirements of the Act.

(1) Honor Committee

You say that the Honor Committee is a continuing committee whose members are elected by the student body annually to administer and enforce the University honor code. The Committee is maintained by the University Board of Visitors and receives regular funding from the Board. Furthermore, it has the independent authority to dismiss any student from the University for violation of the honor code. In summary, the Board of Visitors has delegated to the Committee its authority to establish and enforce the University honor code.

The Freedom of Information Act requirements are applicable to "public bodies" as defined by §§ 2.1-341(a) and (e), Code of Virginia (1950), as amended. Section 2.1-341(a) sets forth the types of public bodies covered by the Act as follows:

"... any legislative body, authority, board, bureau, commission, district or agency 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.)

The University Board of Visitors is clearly a public body within the meaning of § 2.1-341(a), though it enjoys a qualified exemption with regard to open meetings under § 2.1-345(5). Since the Board funds and maintains the Honor Committee and has delegated to the Committee its power to establish and enforce the student honor code, I am of the opinion that the Honor Committee is subject to the requirements of the Act. See Opinion to the Honorable L. Douglas Wilder, dated April 21, 1975, and found in the Report of the Attorney General (1974-75) at 584.

(2) Trial Synopses

You say that trial synopses prepared by student counsel for the accused and accusors are submitted to the Committee prior to trial, at the Committee's request, and contain a brief statement of the issues presented and factual contentions of the accused and accusors involved in trial. You further indicate that synopses never reveal identities of any individuals involved.

Such synopses are "official records" of the Honor Committee within the meaning of § 2.1-341(b) since they are received by the Committee in the transaction of its official functions. See § 2.1-341(b). Accordingly, I am of the opinion that they are subject to public inspection and copying upon proper request under the terms of § 2.1-342(a), unless otherwise provided by law. Moreover, as long as such synopses do not contain information concerning identifiable individual students their disclosure will not violate the provisions of the Family Educational Rights and Privacy Act of 1974 (the Buckley Amendments). See 20 U.S.C. § 1232(g), et seq. For the same reasons, the Virginia Privacy Protection Act of 1976 would have no application. See § 2.1-379, paragraph 2. (If it is possible that in some cases the synopses, without naming a student, could contain personally identifiable information, release would then be prohibited by the Buckley Amendments.)
(3) Trial and Records

The trial transcript and other records must necessarily contain information about individually identifiable students. They are, therefore, "scholastic records" as defined by § 2.1-341(f). I am therefore of the opinion that they are exempt from required public disclosure under the provisions of § 2.1-342(b)(3).

Trials and deliberations of the Honor Council are not subject to the open meeting requirements of § 2.1-343. Such proceedings are student disciplinary proceedings. Section 2.1-344(a)(3) of the Act exempts personal matters unrelated to public business. Student disciplinary proceedings fall within that exemption. See Report of the Attorney General (1974-75) at 344.

VIRGINIA FREEDOM OF INFORMATION ACT—Meeting Of City Council With Colonial Heights Taxpayers’ Association Not Prohibited By Act—Requirements of § 2.1-343 must be fulfilled.

CITIES—Council Meeting Sites Provision In City Code.

ORDINANCES—Attorney General Not Authorized To Render Opinion Interpreting Local Ordinance.

September 27, 1977

THE HONORABLE GEORGE W. JONES
Member, House of Delegates

This is in reply to your letter of September 26, 1977, wherein you make the following inquiry:

"I have been requested by the president of the Colonial Heights Taxpayers’ Association to ask that your office render an opinion on the refusal of the City Council members to meet with the members of the Association and other citizens to discuss issues of importance with them. The refusal by the City Manager cited the ‘freedom of information act’.

* * *

"The question asked is: Would the acceptance by the Council members to the invitation of the Association be in violation of the ‘freedom of information act’? The Association’s meeting time and place has been publicized by leaflets and a letter in the local newspapers forum signed by the Association’s president."

The attendance of City Council members at the meeting of the Colonial Heights Taxpayers’ Association for the purpose of discussing matters relating to the Council’s official functions would constitute a meeting as defined in the Freedom of Information Act. See § 2.1-341(a), Code of Virginia (1950), as amended.

Pursuant to the requirements of § 2.1-343, all meetings must be public meetings, at which the public may be present, minutes must be recorded, and persons having previously requested individual notice of Council meetings must be notified of the time and place of such meeting.

No provision of the Freedom of Information Act would prohibit the City
Council from meeting with the Taxpayers’ Association, so long as the above-outlined requirements of § 2.1-343 are met. Accordingly, I am of the opinion that (1) City Council’s acceptance of the invitation to meet with the Taxpayers’ Association is subject to the Freedom of Information Act, and (2) that the requirements of § 2.1-343 must be fulfilled.

Though the provisions of the Freedom of Information Act, if complied with, would not prohibit the meeting about which you inquire, I must note that a basis for Council’s refusal to meet was also a provision of the City Code regarding the sites for a meeting of Council. This Office makes no determination regarding the proper applicability of a local ordinance. See Opinion to the Honorable Nathan H. Miller, Member, Senate of Virginia, dated March 17, 1977.

VIRGINIA FREEDOM OF INFORMATION ACT—Meeting Of Members Of City Council And Planning Commission Must Comply With Act—Meeting held outside of State does not affect.

VIRGINIA FREEDOM OF INFORMATION ACT—Joint Meeting Of Two Public Bodies Does Not Alter Public Meeting Requirements Of Act.

VIRGINIA FREEDOM OF INFORMATION ACT—Meetings Of Public Bodies; Minutes Must Be Kept; Notice Of Meeting Must Be Furnished To Any Citizen Who Requests Such Notice In Writing.

September 28, 1977

THE HONORABLE BERNARD G. BARROW
Member, House of Delegates

I am in receipt of your recent letter in which you inquire as follows:

"I wish to request your opinion concerning whether the Freedom of Information Act is applicable to a meeting recently held by several members of the Virginia Beach City Council and Planning Commission. Specifically, my inquiry is:

"‘Is it a violation of the Freedom of Information Act, § 2.1-340 et seq., Virginia Code for five members of the Virginia Beach City Council and six members of the Virginia Beach Planning Commission to attend a ‘workshop’ at a cottage, owned by the Chairman of the Planning Commission and located in Kitty Hawk, North Carolina, where during a period of two and a half hours the city’s growth and a proposed Comprehensive Plan to be adopted in accordance with state law were discussed?’

‘... According to newspaper reports following the meeting, a weekend gathering of members of the City Council and Planning Commission was planned six weeks prior to the weekend.’"

It is, furthermore, my understanding that minutes were not recorded at the aforementioned gathering and that certain individuals and organizations which had previously requested notice of each meeting of City Council, pursuant to § 2.1-343, Code of Virginia (1950), as amended, were not notified of these pro-
ceedings.

The gathering you describe did constitute a "meeting" of the Council and Planning Commission as defined in the Freedom of Information Act. See § 2.1-341(a). The 1977 General Assembly amended the definition of the term "meeting" to exclude therefrom gatherings of the membership of public bodies at social and other functions where such gathering was not prearranged for the purpose of discussing public business. Assuming the facts you have supplied that the gathering in question was prearranged with the purpose of discussing matters of public business, then this gathering would not fall within the terms of this exclusion.

All meetings of public bodies, except as otherwise specifically provided by law, are required to be held in compliance with § 2.1-343, which requires: (1) the meeting must be a public one, at which the public may be present, (2) minutes shall be kept, and (3) notice of the meeting must be furnished to any citizen who requests such notice in writing. You indicate that no minutes of the proceedings were recorded and that notice to individuals requesting the same was not provided. On the basis of this criteria alone, I conclude that the meeting did violate the requirements of § 2.1-343. In an Opinion to the Honorable A. Joseph Canada, Jr., Member, Senate of Virginia, dated November 5, 1975, and found in the Report of the Attorney General (1975-76) at 411-412, a similar conclusion was reached, where members of City Council met at a Council member's home and discussed public business without recording minutes or notifying persons who had requested notice of Council meetings. Accordingly, it is my opinion that both the City Council and the Planning Commission met in violation of the Act.

The fact that the meeting was a joint gathering of two public bodies does not alter the public meeting requirements of the Freedom of Information Act. See § 2.1-344(d). Further, the occurrence of the meeting outside the State does not affect my conclusion that the Act has been violated. Section 2.1-343 requires that all meetings be public meetings except as specifically otherwise provided.

VIRGINIA FREEDOM OF INFORMATION ACT—Newspaper Advertisement Paid For By Private Citizens; Coupons From It Received By Individual Board Members Are Not Official Records—Members need not retain or make available to public.

VIRGINIA FREEDOM OF INFORMATION ACT—Petition Presented To Board Of Supervisors Is Official Record—Must be made available to public.

January 13, 1978

THE HONORABLE H. BEN JONES, JR.
County Attorney of Fauquier County

I respond to your letter which reads as follows:

"This is to request that you render an opinion regarding interpretation of the Virginia Freedom of Information Act as the same applies in the following factual situation.

"The Thursday, October 27, 1977, edition of the Fauquier Democrat, a newspaper published and having general circulation in Fauquier County,
contained a full page advertisement, a copy of which is attached hereto. In
the lower right hand corner of said advertisement subscribers were en-
couraged to register their opinion by clipping and mailing a 'coupon' to
their individual Supervisors.

"Since that publication the individual members of the Board of Super-
visors of Fauquier County have received a number of coupons . . . . Ad-
ditionally the Board has received certain petitions bearing upon the question
of recent revisions to the County's Comprehensive Plan.

"In my opinion, any formal petition received by the Board would
doubtless be included in the definition of 'official records' set out in § 2.1-
341 of the 1950 Code of Virginia, as amended. Question has been raised as
to, first, whether coupons, a sample of which I have enclosed with this
letter, received by the Supervisors in their individual capacities should be
considered official records for the purpose of the Freedom of Information
Act, and second, if so, whether or not the individual Supervisors are under
an obligation under § 2.1-341 of said Code to maintain and preserve said
coupons for public inspection."

The newspaper advertisement containing the coupons in question was, I note,
placed and paid for by a group of private citizens.

The Virginia Freedom of Information Act requires that official records of
public bodies and agencies of the State and its political subdivisions shall be
made available for public inspection and copying upon proper request by any
citizen of this State. See § 2.1-342(a), Code of Virginia (1950), as amended. The
definition of "official records" is found in § 2.1-341(b) of the Code and reads as
follows:

" 'Official records' means all written or printed books, papers, letters,
documents, maps and tapes, photographs, films, sound recordings, reports
or other material, regardless of physical form or characteristics, made and
received in pursuance of law by the public officers of the State and its
counties, municipalities and subdivisions of government in the transaction
of public business."

Upon consideration of the foregoing statutory provision, I am of the opinion
that the newspaper coupons received by individual Board members under the
circumstances you describe are not official records "received in pursuance of
law" or "in the transaction of public business" within the meaning of § 2.1-
341(b). Your first inquiry is, therefore, answered in the negative.

Inasmuch as the newspaper coupons received by individual Board members
are not official records, I am of the opinion that there is no legal requirement
that Board members retain the coupons or make them available for public in-
pection.

With respect to any written petition which is presented to the Board of
Supervisors, I am of the opinion that such a document would clearly constitute
an official record of the Board within the terms of § 2.1-341(b). Accordingly,
such official records are required to be made available for public inspection
upon proper request in accordance with § 2.1-342(a).

VIRGINIA FREEDOM OF INFORMATION ACT—Official Records Of State
And Local Governmental Agencies Open To Public Inspection, Except As
Otherwise Specifically Provided By Law—Vital statistics.
CONFLICT OF LAWS—Freedom Of Information Act And Section Prohibiting

VITAL STATISTICS—Birth Records Not Matter Of Public Information Under

January 9, 1978

THE HONORABLE C. RICHARD CRANWELL
Member, House of Delegates

I am responding to your recent letter in which you submit the following inquiry:

"... Section 32-353.26 of the Code of Virginia makes it unlawful for any person to permit an inspection of, or disclosure of information contained in vital statistics records. It appears that this Section became law by Chapter 451 [1960] Acts of Assembly.

"You will note that this was prior to the enactment of the Virginia Freedom of Information Act, namely Chapter 479 [1968] Acts of Assembly, and particularly therein § 2.1-342.

"Please advise me as to your opinion, as to whether or not birth records would be a matter of public information under § 2.1-342 of the Code as being a subsequent enactment to § 32-353.26."

The Freedom of Information Act, specifically, § 2.1-342(a), Code of Virginia (1950), as amended, provides that official records of State and local governmental departments and agencies shall be open to public inspection and copying as follows:

"Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this State during the regular office hours of the custodian of such records. . . ." (Emphasis added.)

The general requirement of § 2.1-342(a), that official records be open to public inspection and copying, is, therefore, qualified so as to take into account other statutory provisions which may limit or prohibit public disclosure of specified records. See Opinion to the Honorable J. Howard Bryant, Director, Division of Automated Data Processing, dated October 15, 1974, and found in Report of the Attorney General (1974-1975) at 571, 572.

Section 32-353.26(a) of the Code deals specifically with public access to records of vital statistics, which includes birth records. See § 32.353.4(a). Section 32-353.26 provides in relevant part:

"(a) To protect the integrity of vital statistics records, to insure their proper use, and to insure the efficient and proper administration of the vital statistics system, it shall be unlawful for any person to permit inspection of, or to disclose information contained in vital statistics records, or to copy or issue a copy of all or part of any such record except as authorized by regulation of the State Board of Health or when so ordered by a court of competent jurisdiction."

The specific prohibition against public disclosure of birth records found in § 32-353.26(a) is, in my view, within the intendment of the language "except as otherwise provided by law" which modifies the disclosure requirement of § 2.1-
342(a). Accordingly, I am of the opinion that birth records are not subject to requirement of public disclosure under the Freedom of Information Act. I would, however, call to your attention the provisions of § 32-353.27 which provide for limited access to vital statistics records, including birth records. This statute provides that the State Registrar of Vital Statistics shall, upon request, issue certified copies of any certificate or record in his custody.

VIRGINIA FREEDOM OF INFORMATION ACT—Salaries Of Identifiable Employees—Act permits confidentiality of personnel records at discretion of agency maintaining such records; disclosure not required, but is permitted.

CLERKS—Freedom Of Information And Privacy Protection Acts—Financial interests disclosure records filed with Clerk of Circuit Court under County Code open to public inspection.

DEFINITIONS—“Personal Information” As Defined In Privacy Protection Act.

DEFINITIONS—Records Revealing Salary Of Identifiable Individuals Are Personnel Records Within Meaning Of § 2.1-342(b)(3).

PRIVACY ACT—Personal Information Dissemination—Procedural steps to be taken.

PRIVACY ACT—Salaries Of Individual School Board Employees—Personal information under Privacy Protection Act.

PUBLIC OFFICERS—Conflict Of Interests—Financial disclosure forms filed under County Code covering employees and realty not covered by Virginia Conflict of Interests Act.

SALARIES—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.

VIRGINIA FREEDOM OF INFORMATION ACT—Memoranda, Working Papers, Correspondence Of Chief Executive Officer Exempt From Disclosure Requirements—Disclosure forms filed with County Manager pursuant to County Code are within exemption; not required to make available for public inspection, but may in his discretion.

January 12, 1978

THE HONORABLE JERRY K. EMRICH
County Attorney of Arlington County

I am responding to your letter in which you inquire as follows:

"Arlington County has been requested, pursuant to the Freedom of Information Act, to provide access to records which show the specific salaries of identifiable employees. In addition, inquiry has also been made as to whether the financial disclosure forms that are filed in accordance with County Code Section 27-9, copy enclosed, and which cover some employees
and certain realty that is not covered by the Virginia Conflict of Interests Act may be publicly disseminated.

* * *

"Concerning the second inquiry, County Code Section 27-9(2) requires the heads of County departments, and such other employees as the County Manager deems advisable, to file a report of financial interests with the County Manager. . . .

"Furthermore, that County Code section requires, in Section 27-9(1), that certain County personnel file with the Clerk of the Circuit Court a financial interests report. . . .

"Your opinion is requested as to whether the disclosure of (1) the records which contain the specific salary information of identifiable County officers and employees, (2) the financial disclosure reports filed with the County Manager by County personnel pursuant to County Code Section 27-9(2), and (3) the financial disclosure reports required to be filed pursuant to County Code Section 27-9(1)(a)-(d) would violate the law."

I shall respond to your questions seriatim.

The Virginia Freedom of Information (FOI) Act provides that official records maintained by public officers of the State and its political subdivisions shall be open to public inspection, unless otherwise provided by law. See § 2.1-342(a), Code of Virginia (1950), as amended. Section 2.1-342(b)(3) of the FOI Act provides, however, that personnel records are not required to be disclosed to the public. The exemption from required disclosure provided for personnel records does not require that such records remain confidential, but permits such confidentiality at the discretion of the agency or public body which maintains such records. See Opinion to the Honorable Thomas A. Graves, President, College of William and Mary, dated December 3, 1973, and found in the Report of the Attorney General (1973-1974) at 454-456. Records revealing the salary of identifiable individuals are personnel records within the meaning of § 2.1-342(b)(3). See Opinion to the Honorable Mary A. Marshall, Member, House of Delegates, dated March 22, 1977, and found in the Report of the Attorney General (1976-1977) at 318; see also Report of the Attorney General (1975-1976) at 416. You note correctly that these Opinions superseded the Opinion to the Honorable Robert E. Gillette, Commonwealth's Attorney for Nansemond County, dated June 16, 1970, found in the Report of the Attorney General (1969-1970) at 317. The Gillette Opinion stated that records revealing salaries of county employees could be examined by citizens upon request as a matter of right under the FOI Act. The later opinions cited above, however, reject that interpretation, holding that records of salaries of named individuals may be disclosed but disclosure is not required.

The Privacy Protection Act, in § 2.1-380, paragraph 1, provides that records containing "personal information" shall be disseminated only if required or permitted by law, or in order to accomplish a proper purpose of the disseminating agency. Unless there is a prohibition against dissemination of salary records by virtue of some other statute, they may be disseminated; the Privacy Protection Act does not impose any general prohibition upon such dissemination. Records of individual county employee's salaries are "personal information" as defined in the Privacy Protection Act. See Marshall Opinion, supra. As stated previously, the FOI Act does not prohibit the release of salary records of individuals, but provides that governmental agencies may either
release or withhold such records. Section 2.1-342(b)(3). Furthermore, I am aware of no other statute which prohibits disclosure of such salary records. Accordingly, since disclosure of salary records is permitted by the FOI Act, the County of Arlington may disclose salary records of individual employees without contravening the provisions of the Privacy Protection Act. Section 2.1-380, paragraph 1. I am, therefore, of the opinion that public disclosure of salaries of identifiable County employees would not violate applicable laws. Your first inquiry is, therefore, answered in the negative.

Your second question deals with records of financial interest disclosure which Arlington County Code § 27-9(2) requires County department heads to file with the County Manager. You further indicate that the County Code § 27-9(2) provides that the County Manager may, in his discretion, require the same financial interests disclosure of any employee in addition to those specifically named in the Code provision itself. The FOI Act, in § 2.1-342(b)(4), provides that the memoranda, correspondence and working papers held or requested by the chief executive officer of any political subdivision are exempt from required disclosure. I conclude that the disclosure forms filed with the County Manager pursuant to § 27-9(2) of the County Code are within the exemption provided by § 2.1-342(b)(4). The County Manager, therefore, is not required to make such records available for public inspection, but he may do so in his discretion. Section 2.1-342(b)(4).

The information contained in such financial interests disclosure forms is clearly "personal information" as defined in the Privacy Protection Act. Section 2.1-379, paragraph 2. As indicated, the Privacy Protection Act does not generally prohibit the dissemination of information. Rather, the Act requires that if personal information is disseminated certain procedural steps be taken, all for the purpose of ensuring that the "data subjects" can: (1) check the accuracy of such information, and (2) know where or to what sources such information was disseminated. Section 2.1-382A, paragraphs 3-5. Information which can be disseminated is "only that personal information permitted or required by law to be so . . . disseminated, or necessary to accomplish a proper purpose of the agency." Section 2.1-380, paragraph 1. The FOI Act requires certain records to be made public. Certain records, including the disclosure forms referred to in your second inquiry, are exempted from required disclosure. Even those records exempt from required disclosure under the FOI Act, as I have stated above, however, may be or are permitted to be disclosed; they are not prohibited from being disclosed. I am of the opinion that § 2.1-380, paragraph 1, recognizes the implicit authority of the FOI Act that exempted records are permitted to be disclosed. Since neither the FOI Act nor any other statute of which I am aware prohibits disclosure of the records filed with the County Manager, the Privacy Protection Act does not impose any prohibition on their dissemination. Section 2.1-380, paragraph 1. I, therefore, am of the opinion that, although not required by law, the release of such records to the public would not be in violation of applicable laws. Your second inquiry is answered in the negative.

Your third inquiry concerns financial interests disclosure forms filed with the Clerk of the Circuit Court by the County Manager, County Real Estate Assessor, and Board of Supervisors members pursuant to § 27-9(1) of the County Code. Such records would be official records of the Court subject to required public disclosure under provisions of the FOI Act unless otherwise provided by law. Sections 2.1-341(b) and 2.1-342(a). I do not find any of the exemptions provided in the FOI Act, §§ 2.1-342(b)(1)-(6), applicable to such records. Further, § 17-43 of the Code requires that all records of the clerks of
courts of record shall be available for public inspection.

The Privacy Protection Act would not prohibit disclosure of such records since they are required to be disclosed under § 17-43 and the FOI Act. Section 2.1-380, paragraph 1. Accordingly, I am of the opinion that the financial interests disclosure records filed with the Clerk of the Circuit Court under County Code § 27-9(1) are required to be open to public inspection and that their public disclosure would not be in violation of applicable laws. Your third inquiry, therefore, is also answered in the negative.

VIRGINIA FREEDOM OF INFORMATION ACT—Voting Procedures Of Alexandria Traffic And Parking Board—Suspensions of taxicab drivers’ certificates for violation of City taxi regulations.


VIRGINIA FREEDOM OF INFORMATION ACT—Taxicab Drivers’ Certificate Revocations Not Effective Until Parking And Traffic Board Reaffirms Its Secret Ballot Vote By Individual Voice Or Hand Vote In Open Meeting.

August 9, 1977

THE HONORABLE RICHARD R. G. HOBSON
Member, House of Delegates

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

"I have received an inquiry regarding the application of the Virginia Freedom of Information Act as it affects certain voting procedures utilized by the Alexandria Traffic and Parking Board.

"This Board in the past has utilized the following voting procedures in acting on suspensions of taxicab drivers’ certificates for violation of City taxi regulations.

"The practice of the Board is to conduct the hearing in open public session with the vote on the motion suspending a certificate being taken by having the members write their decisions on pieces of paper which are then handed to the Chairman; the Chairman announces the final tally, but does not announce who voted on which side of the issue. Although the papers are retained and are available to the public for inspection, they do not contain identification of how each member voted.

"Will you please send me your opinion on the following:

"1. Is the foregoing procedure permitted under the Virginia Freedom of Information Act (Va. Code Sections 2.1-340 to 2.1-346.1)?

"2. Is the foregoing procedure otherwise legal?

"3. If the foregoing procedure is not legal, what is the status of past decisions made by the Board under these procedures and may a certificate holder whose certificate was suspended under this procedure obtain reinstatement?"

Your first inquiry must be answered in the negative. Clearly, the Board is a
public body governed by the provisions of the Freedom of Information Act. In an opinion to the Honorable Charles A. Christophersen, Director of the Division of State Planning, dated September 18, 1974, and found in the Report of the Attorney General (1974-1975) at 578, it was held that secret ballot voting by members of a public body constituted a violation of the open meeting requirements of the Freedom of Information Act. Accordingly, I am of the opinion that the Alexandria Traffic and Parking Board practice of secret ballot voting is similarly in violation of the open meeting requirements of the Act.

In view of my response to your first inquiry, there is no need to respond to your second question.

With respect to your final question, the Christophersen opinion holds that secret ballot voting by public bodies in an otherwise open meeting is tantamount to voting in executive session. See Christophersen opinion, supra at 579. Section 2.1-344(c) provides:

"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."

Accordingly, I am of the opinion that, in accordance with § 2.1-344(c), certificate revocations effected through secret ballot voting shall not become effective until such time as the Parking and Traffic Board reaffirms its secret ballot vote by individual voice or hand vote in an open meeting.

VIRGINIA FREEDOM OF INFORMATION ACT—Working Papers, Letters, Reports, Maps Or Other Documents In Possession Of Member Of City Planning Staff Pertaining To Proposed Zoning Ordinance Are Official Records Subject To Public Disclosure.

DEFINITIONS—"Official Records" Defined In Freedom Of Information Act.

VIRGINIA FREEDOM OF INFORMATION ACT—Public Disclosure—Statutory requirements for making request in proper form are set forth in § 2.1-342(a).

March 24, 1978

THE HONORABLE BERNARD G. BARROW
Member, House of Delegates

You have asked whether working papers, letters, reports, maps or other documents in the possession of a member of the Planning Staff of a city government, prepared by city employees and pertaining to a proposal to amend the city's zoning ordinances, are "official records" subject to the provisions of § 2.1-342 of the Virginia Code which requires that official records be open to inspection.

Section 2.1-342(a), Code of Virginia (1950), as amended, provides in part:

"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."
"Official records" are defined in § 2.1-341(b) to include:

"... all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, made and received in pursuance of law by the public officers of the State and its counties, municipalities and subdivisions of government in the transaction of public business."

Maps, letters, reports made or received by city planning officials pertaining to a proposed zoning ordinance amendment are, in my view, official records within the intendment of § 2.1-341(b). Accordingly, such records are subject to required public disclosure under the provisions of § 2.1-342(a), unless exempt under the provisions of §§ 2.1-342(b) (1)-(6) or other laws. Based upon the rather general description of the records you provide, I find none of the exceptions to the requirement of public disclosure set forth in §§ 2.1-342(b) (1)-(6) applicable. Further, I am aware of no other statute which would provide an exemption for such records.

Therefore, I am of the opinion that the records are official records subject to required public disclosure to any citizen of this State upon proper request. Statutory requirements for making a request in proper form are set forth in § 2.1-342(a).

VIRGINIA HOME SOLICITATION SALES ACT—Corporation Leases Real Estate In Bahamas—Realty and interests therein not included in goods covered by Act.

DEFINITIONS—"Goods" As Used In Home Solicitation Sales Act.

DEFINITIONS—Home Solicitation Sale.

September 29, 1977

THE HONORABLE JAMES M. THOMSON
Member, House of Delegates

In your letter of September 2, 1977, you have requested the Official Opinion of this Office whether a corporation falls within the purview of the Virginia Home Solicitation Sales Act, Title 59.1, Chapter 2.1, §§ 59.1-21.1 through -21.7 of the Code of Virginia (1950), as amended. The corporation leases real estate in the Bahamas. You further request if the corporation does fall within the coverage of the Act, what it must do to comply with the Act.

Section 59.1-21.2 defines a Home Solicitation sale as a consumer sale or lease of services or goods, other than farm equipment, in which the seller or person acting for him engages in a personal solicitation of the sale or lease at any residence other than that of the seller, and in which the buyer's agreement or offer to purchase or lease is there given. There are certain exceptions which are not relevant to this opinion. The same section defines the term "goods" as tangible personal property including certain merchandise certificates. Nowhere in this definition is any reference made to real property or any interest therein.

The business transaction which your letter describes involves the lease of an interest in real estate. Since realty and interests therein are not included within
the definition of goods covered by the Act, it is my opinion that the Virginia Home Solicitation Sales Act has no application to the transaction which you have described.

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT—Landlord Collecting Charges And Fees—Tenant's vacancy prior to expiration of lease or late payment of rent—Security deposit.

DEFINITIONS—Lease Fee—Security deposit retention must be in accordance with § 55-248.11.

USURY—Virginia Residential Landlord And Tenant Act—Collection of late charges by landlord—Unless lender-borrower relationship exists between landlord and tenant, usury statutes should not apply.

May 10, 1978

THE HONORABLE FREDERICK H. CREEKMORE
Member, House of Delegates

You have asked about the legality under the Landlord and Tenant Act of a landlord's collecting certain charges and fees in connection with a tenant's vacancy prior to expiration of his lease or a tenant's late payment of rent. You ask the following:

"1. In the event all parties agree to a late charge, in a sum certain, and this agreement is incorporated in a written lease, is this late charge collectible or is it to be construed to be usurious?

"2. The present law provides for a set formula pertaining to members of the Armed Forces in connection with giving notice, vacating, and the rent that should be paid for vacating prior to the expiration of the lease. In the event the written lease provides for a lease fee to be paid by the tenant and same is incorporated in the lease agreement, if the tenant desires to move prior to the expiration of the lease, would this lease fee be collectible under the Landlord-Tenant Act? This question presumes that the tenant, if in the military, is not transferred with the confines of the Landlord-Tenant Act."

1. Late Charge

The Virginia Residential Landlord and Tenant Act does not prohibit collection of late charges by the landlord, whether provided for in the written lease or not. Whether such charges would be considered usurious depends on whether a lender-borrower relationship exists between landlord and tenant. If not, the statutes related to usury should not apply. Accordingly, it is my opinion such a late charge is not in violation of the provisions of the Act, and it should not be considered usurious unless there exists a lender-borrower relationship between landlord and tenant.

2. Lease Fee

Section 55-248.4 of the Act defines "security deposit" or "security" as

"any deposit of money or property, whether termed security deposit or
'prepaid rent,' however denominated, which is furnished by a tenant to a landlord, lessor or agent of a landlord or lessor to secure the performance of any part of a written or oral lease or agreement, or as a security for damages to the leased premises."

Since the lease fee contemplated in your letter fits within this definition it is my opinion that it should be treated as a security deposit subject to the provisions of the Act governing handling of such deposits, and that any retention of such a fee must be in accordance with § 55-248.11 of the Code of Virginia.

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT—Ordinance Requiring Landlords To Attach Booklet To Leases Informing Tenants Of Their Rights—Impermissible enlargement of Act.

CITIES—Council May Act Affirmatively To Promote Distribution Of Booklet Informing Tenants Of Their Rights—May not impose additional duty on landlords.

GENERAL ASSEMBLY—Landlord And Tenant Relations—Ordinance may not enlarge upon provisions of statute which occupies field exclusively.

May 19, 1978

THE HONORABLE ROBERT C. SCOTT
Member, House of Delegates

You have asked whether a proposed local ordinance requiring landlords to attach a booklet to leases informing tenants of their rights under the Virginia Residential Landlord and Tenant Act, is valid.

In this case, the legislature has undertaken to occupy exclusively the field of landlord and tenant relations and the leasing of residential property.1 An ordinance may not enlarge upon the provisions of a statute where the statute specifically occupies the field exclusively. King v. Arlington County, 195 Va. 1084, 81 S.E.2d 587 (1954).

Accordingly, I am of the opinion that a local ordinance requiring landlords to attach a booklet to leases informing tenants of their rights under the Virginia Residential Landlord and Tenant Act is an impermissible enlargement of that Act.

This would not preclude the Council from acting affirmatively to promote the distribution of such booklets. For instance, Council could enact a resolution expressing its belief in voluntary distribution by landlords and directing the cooperation of the appropriate city departments. Other actions short of imposing an additional duty on landlords are undoubtedly available.

1 "The purposes of this chapter are to . . . establish a single body of law relating to landlord and tenant relations throughout the Commonwealth. . . . This chapter shall supersede all other local, county or municipal ordinances or regulations concerning landlord and tenant relations and the leasing of residential property." Section 55-248.3 of the Code of Virginia (1950), as amended.
REPORT OF THE ATTORNEY GENERAL

WARRANTS—Arrest Warrant Cannot Be Executed By Issuance Of Summons By Police Officer, Except In Certain Traffic Cases Pursuant To § 46.1-178.

MAGISTRATES—Arrest Warrant Issued By Magistrate Cannot Be Executed By Issuance Of Summons By Police Officer, Except In Certain Traffic Cases Pursuant To § 46.1-178—Bond hearing.

MOTOR VEHICLES—Arrest Warrant For Misdemeanor Violation Of Motor Vehicle Laws.

May 2, 1978

THE HONORABLE RICHARD H. BARRICK
Commonwealth's Attorney for the City of Charlottesville

You have asked whether a police officer executing a misdemeanor warrant of arrest may issue a summons for the defendant's appearance in court instead of bringing him before a magistrate for a bond hearing.

Warrants and summonses are generally alternate forms of arrest process. Section 19.2-74 of the Code of Virginia (1950), as amended, authorizes the issuance of a summons by an arresting officer for most misdemeanors, however it does provide that a warrant may be issued in the discretion of the magistrate as a valid and alternate process of arrest.¹

Section 19.2-80 and Rule 3A:5(a)(1) provide that an officer making an arrest under a warrant shall bring the arrested person before an appropriate judicial officer, and § 19.2-72 and Rule 3A:4(c)(1) require a warrant to command the officer to bring the arrested person before the court.

Section 46.1-178 was specifically amended in 1975 to allow an arrest warrant for a misdemeanor violation of the motor vehicle laws, Title 46.1, to be executed by issuance of a summons by the arresting officer. See Chapter 191 [1975] Acts of Assembly 367. In contrast to § 19.2-74, § 46.1-178 requires the issuance of a summons for misdemeanor arrests under Title 46.1, including arrests on a warrant. This section evidences the intent of the Legislature to authorize the issuance of a summons when executing an arrest warrant only for misdemeanors under Title 46.1.

Accordingly, I am of the opinion that a police officer may not execute a warrant by issuing a summons, except for violations of the motor vehicle laws; in all other cases he must bring the arrested person before a magistrate for a bond hearing.

WARRANTS—District Courts—Clerk should not forward warrants processed in district court from July 1, 1975 through June 30, 1976 to circuit court.


¹'Section 19.2-73, governing the issuance of a summons in lieu of a warrant, provides that in any misdemeanor case a 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."
DISTRICT COURTS—Authority To Transmit Civil Papers To Circuit Court—
Amendment to § 16.1-115 in 1976 does not have retroactive effect.

GENERAL ASSEMBLY—Statute Cannot Be Given Retroactive Effect Unless
Such Intent Expressed.

April 19, 1978

THE HONORABLE GLORIA H. MORGAN, CLERK
Circuit Court of the City of Suffolk

You have asked whether the Clerk of the General District Court of Suffolk can
forward warrants processed in the District Court from July 1, 1975 through June
30, 1976 to your office.

As you know, prior to 1975 the Clerk of the District Court of Suffolk had the
authority to transmit civil papers to the Circuit Court of that City, by authority
of Chapter 19 (1966) Acts of Assembly 61 which provided in part as follows:

"All papers connected with any civil action or proceeding in a court not
of record, except those in actions or proceedings (1) in which no service of
process is had, (2) which are removed or appealed, and (3) in which the
papers are required by law to be sooner returned to the clerk’s office of a
court of record, shall be disposed of as follows:

* * *

"(4) If in any other municipal court, they 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."

The authority of the District Court to transmit civil papers to the Circuit Court
of Suffolk derived from paragraph (4), since there were no charter provisions
providing otherwise.

The 1975 amendment to § 16.1-115, Chapter 228 (1975) Acts of Assembly 420,
repealed paragraphs (3), (4) and (5) of the statute. In an Opinion to the
Honorable Joseph S. James, Auditor of Public Accounts, dated July 23, 1975,
and found in Report of the Attorney General (1975-1976) at 131, this Office held
that the 1975 repeal of paragraphs (3) and (4) of § 16.1-115 had the effect of
eliminating the authority of certain district courts, including the District Court
of Suffolk, to transmit civil papers to circuit court clerks for filing and indexing.
In 1976 § 16.1-115 was further amended as follows:

"All papers connected with any civil action or proceeding in a district
court, except those in actions or proceedings (1) in which no service of
process is had, (2) which are removed or appealed, and (3) in which the
papers are required by law to be sooner returned to the clerk’s office of a
circuit court, shall be disposed of as follows:

"(1) Except as otherwise provided in this section, they shall be retained
for six months after the action or proceeding is concluded, and at the end of
such period they shall be delivered to the clerk of the circuit court where
they shall be properly filed, indexed and preserved, for which filing and
indexing such clerk shall receive a fee of one dollar and twenty-five cents
which shall be paid by the plaintiff as a part of the costs and transmitted to
the clerk of the circuit court with the papers."
REPORT OF THE ATTORNEY GENERAL

This amendment returned to the District Court of Suffolk, as well as certain other district courts, the authority to transmit civil papers to the circuit court. Specifically, the District Court of Suffolk is governed by paragraph (1). It is, nevertheless, my opinion that the Clerk of the District Court of Suffolk has properly retained warrants for the period of July 1, 1975 through June 30, 1976. For this Clerk to do otherwise would be to give § 16.1-115 a retroactive effect. No statute can be so interpreted unless the General Assembly expresses an intent that the statute should be given such an effect. I find no such expression of intent in this statute.

Therefore, it is my opinion that it would not be permissible for the Clerk to now forward these warrants to your Court.

WASTE DISPOSAL—Manufacturing Or Industrial Plants—County not forbidden by § 15.1-282 from using its dump to dispose of industrial waste; supplanted by § 32-9.1.

CONFLICT OF LAWS—Two Statutes In Irreconcilable Conflict—Latter statute will repeal by implication the earlier.

STATUTES—In Pari Materia Statutes Should Be Harmonized.

January 13, 1978

THE HONORABLE T. STOKELEY COLEMAN
County Attorney for Spotsylvania County

This is in reply to your request for my opinion concerning an apparent conflict between §§ 15.1-282 and 32-9.1 of the Code of Virginia (1950), as amended. Your inquiry is "whether or not § 15.1-282 forbids the county from using its own dump to dispose of industrial waste from the FMC Corporation, in view of the language used in § 32-9.1 which states that counties may accept solid waste from industrial sources for disposal of same in a system used for residential waste."

Section 15.1-282 authorizes counties to acquire dumping places for waste materials. It also contains the proviso that "[n]o deleterious substance . . . shall be deposited on such dumps nor any waste material from manufacturing or industrial plants."

Section 32-9.1 provides, in pertinent part, as follows:

"The Board shall regulate and prescribe the method or methods of disposition of garbage, refuse and other solid wastes or any combination thereof in this State to be utilized by each county, city and town. . . . On or before January one, nineteen hundred seventy-four, each county, which shall include all towns therein, and city of this State, which has not theretofore submitted a plan which has been approved by the Board, shall, upon written request by the Board when in its opinion such county or city has not provided for proper disposition of its solid wastes, submit to the Board for its approval a plan in a form to be prescribed by the Board, setting forth its plan for garbage and all other solid wastes disposal, which plan shall include the cost, the proposed method of financing, the site or sites to be used and the overall changes in such plan anticipated for the ensuing twenty years. Each county's plan must show the plans for facilities to be used by all towns located therein. Any combination of cities and
counties may submit a regional plan in lieu of an individual plan.

"Each county and city shall be responsible for the proper disposal of its solid wastes, including wastes from households, commercial establishments, manufacturing, industry, agriculture, and institutions. . . . Each county and city, or combination thereof shall first provide adequate disposal for its residential solid waste before providing facilities for disposing of other solid wastes. . . ."

The former statute was last amended by the General Assembly in 1962. The latter statute, which was enacted in 1970, has been amended on four occasions since that date. Further, it has been implemented by regulations, which provide:

"Each county, city, and town shall be responsible for the proper disposal of solid wastes within its jurisdiction, including wastes from households, commercial establishments, manufacturing, industry, agriculture, and institutions.

* * *

"Counties, cities, and towns may accept solid wastes from commercial, industrial, institutional, or agricultural sources within their jurisdiction for disposal in the same system used for residential wastes, or they may require such solid waste sources to operate separate disposal facilities. In the latter event, such disposal operations shall conform to the requirements outlined in these regulations, and each person shall be required to hold a valid permit, the same as a city or county."

Regulations of the Virginia Department of Health Governing Disposal of Solid Wastes, effective April 1, 1971, at p. 3.

Two statutes which cover the same subject matter are said to be in pari materia. Such statutes must be construed together reasonably to allow both to stand and to give force and effect to each. Kirkpatrick v. Board of Supervisors, 146 Va. 113, 136 S.E. 186 (1926). Where two statutes are in irreconcilable conflict, however, the latter statute will repeal by implication the earlier. Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938). Repeal of the statute by implication is not favored and is called for only where there is a substantial conflict between the two statutes being considered and the subject matter of the first statute is covered fully by the second.

I am of the opinion that §§ 15.1-282 and 32-9.1 can be harmonized under the foregoing principles without finding that § 15.1-282 must be repealed by implication. The subject matter of that statute is not covered fully by § 32-9.1; rather, only the proviso of § 15.1-282, which is quoted above, conflicts with § 32-9.1. The prohibition against industrial waste disposition in a county dump is superseded by § 32-9.1 and regulations promulgated pursuant thereto. Under this construction, § 15.1-282 remains in effect as a grant of authority to counties to acquire dumping places for solid wastes and a prohibition, which is punishable upon conviction as a misdemeanor, against dumping waste materials elsewhere. Accordingly, I am of the opinion that a county may accept solid wastes from industrial sources for disposal of same in its solid waste disposal facilities.

WATER AND SEWER AUTHORITIES—Board Of Supervisors May Guarantee Repayment Of Bonds Of Public Service Authority For Con-
REPORT OF THE ATTORNEY GENERAL

struction Of Water And Sewer Facilities.

BOARDS OF SUPERVISORS—Authority—May create water and sewer authority empowered to finance and construct those public improvements.

CONSTITUTIONAL LAW—Equal Protection Of Law—Water and Sewer Authority must not violate, in deciding which landowners, tenants and occupants shall be exempted from connection requirement.

CONTRACTS—Board Of Supervisors Guarantee Of Water And Sewer Authority's Bonds—Pledge of full faith and credit of county permits Authority, with concurrence of supervisors, to modify mandatory connection requirement.

REFERENDUM—Bonded Debt—Prior approval of voters—Bonds of Public Service Authority for construction of water and sewer facilities.

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—Independent Entities—Board of supervisors cannot impose bond guarantee upon Authority; its bonds are not bonds of the locality.

August 25, 1977

THE HONORABLE A. L. PHILPOTT
Member, House of Delegates

This is in reply to your recent letter requesting my opinion in regard to two questions concerning the Henry County Public Service Authority. Those questions are: (1) may the Henry County Board of Supervisors guarantee the repayment of bonds issued by the Authority for the construction of water and sewer facilities, (2) may the Board of Supervisors modify the mandatory connection requirement established by the Authority by providing that, before connection with the system could be required, the Authority must demonstrate that the water supply or sewer system of any individual landowner is inadequate or unsatisfactory?

1. Your first question involves three separate areas of inquiry: whether the Board of Supervisors has the authority to make the guarantee; upon what conditions that authority can be exercised; and what conditions must be satisfied to consummate the guarantee contract. I will discuss these matters seriatim.

Because they are creatures of the Commonwealth and thus subordinate, the powers of counties, like those of municipal corporations, can be no greater than those which the General Assembly has conferred upon them. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967). A board of supervisors may take action of the type your inquiry concerns only if it has been granted the power to do so, or if that power can be implied necessarily from those expressly granted. Any doubt as to the existence of a power must be resolved against the county. See 1 J. Dillon Law of Municipal Corporations (1911).

Since there is no express grant of authority which would empower a county to guarantee the bonds of a water and sewer authority, that power, if it is deemed to
exist, must be implied necessarily from those powers expressly granted to counties.

The nature of a bond guarantee was discussed in *Button v. Day*, 205 Va. 629, 139 S.E.2d 91 (1964). In that case, the Supreme Court rejected the contention that a bond guarantee would be a conditional indebtedness, and that, accordingly, it would not be subject to the constitutional limitations on local debt. The Court held that those limitations are applicable to all "obligations . . . or liabilities, which may directly or indirectly require the obligor . . . to discharge by the payment of money." *Id.* at 642. A local government cannot pledge any security whatever behind the issuance of bonds by an authority without thereby becoming subject to the constitutional limitations on local debt. II Howard *Commentaries on the Constitution of Virginia* 865 (1974). The constitutional provision to which these authorities have reference, Article VII, Section 10(b), of the Constitution of Virginia (1971), states, in part, as follows:

"No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt . . . unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt."

The General Assembly has enacted general laws which authorize counties to construct public improvements, including water and sewer systems, and to contract any bonded debt to underwrite all or part of the costs of such improvements. See §§ 15.1-172, 15.1-175, 15.1-185 and 15.1-292 of the Code of Virginia (1950), as amended. Since § 15.1-185 requires prior approval of the qualified voters at a referendum on the question of contracting the bonded debt, that statute conforms to the above-quoted constitutional provision.

If a county chooses, as Henry County has, it may create a water and sewer authority which is empowered to finance and construct those public improvements. See § 15.1-1241. That Authority is authorized to issue its revenue bonds to pay for those improvements. See § 15.1-1252. The Board of Supervisors is authorized to lend, advance, or give money, to the Authority without any limitation on the face of the statute. See § 15.1-1250(h1).

Since the Board of Supervisors is expressly authorized to underwrite water and sewer improvements by issuing its own bonds or by giving money to the Authority, it is my opinion that the Board has the power, by necessary implication, to contract with the Authority to guarantee the repayment of bonds issued by the Authority. This power may not be exercised, however, until the qualified voters have granted their approval on the issue of contracting that debt at a referendum. See Article VII, Section 10(b), of the Constitution of Virginia (1971) and § 15.1-185.

The Board of Supervisors cannot, however, impose such a bond guarantee upon the Authority. The Authority is an independent entity. II Howard, *supra*. Its bonds are not the bonds of the locality. *Farquhar v. Board of Supervisors*, 196 Va. 54, 68, 82 S.E.2d 577, 586 (1954). Accordingly, the bond guarantee contract can only be consummated if the Authority accepts the Supervisors' offer. See §§ 15.1-175(h) and 15.1-1250(b).

I am not in a position to determine whether the Supervisors must guarantee all, or only a part, of the Authority's bonds. Resolution of that matter depends...
upon a determination by the Authority of the additional coverage required for its bonds on account of changes in its revenue structure.

If the Authority defaults on its bond payments, the Supervisors may, at their option, make the required payments on the bonds from funds on hand, from funds produced from a tax increase, or from proceeds of bonds issued to liquidate that debt. If the Supervisors choose to issue bonds, no further referendum will be required. The qualified voters of the County, by voting to permit the Supervisors to contract to guarantee the bonds of the Authority, will have thereby agreed to assume that debt.

2. Your second question is whether the Supervisors and the Authority, having entered into a contract by which the Supervisors guarantee the Authority's bonds, may then modify the mandatory connection requirement to require such connection only where the Authority can demonstrate that an individual's water or sewer system is inadequate or unsatisfactory. This question must be subdivided into two issues: (1) can the Authority modify the mandatory connection requirement where, as here, bonds are outstanding; and, (2) can the mandatory connection requirement be made conditional?

This Office has previously held that a water and sewer authority may require any owner, tenant, or occupant of property to connect with its system, and charge for making the connection. See Opinion to the Honorable Virgil H. Goode, Jr., Member, Senate of Virginia, dated January 6, 1976, and found in the Report of the Attorney General (1975-1976) at 423. Before an authority may enact such a requirement, it must obtain the concurrence of the local governing body. This Office has also held that no authority may amend or repeal any provision of any contract relating to collection of fees, rates, or charges, or any ordinance or resolution, so long as any of its revenue bonds remain outstanding. See Opinion to the Honorable Wm. Roscoe Reynolds, Commonwealth's Attorney for Henry County, dated June 3, 1977. The latter Opinion was based upon the premise that such an amendment or repeal would threaten the position of the holders of the Authority's bonds, which pledge neither the full faith and credit, nor the taxing power, of the Commonwealth or of any political subdivision thereof. See § 15.1-1257. In the situation you present, however, that premise would be inapplicable because the Supervisors would have contracted with the Authority to guarantee the Authority's bonds. In that event, the Supervisors would be providing assurance to the bondholders that, in the event of default by the Authority, the bonds would be covered adequately and the bondholders' position would be protected. That contract would be, in my opinion, a pledge of the full faith and credit and of the taxing power of Henry County. I conclude, therefore, that the Authority may, with the concurrence of the Supervisors, modify the mandatory connection requirement after the bond guarantee contract has been consummated.

The statute is silent whether either the Authority or the Supervisors may impose conditions upon the mandatory connection requirement. I am of the opinion, however, that the governing body has the power to attach reasonable conditions to its concurrence in such a requirement. It would be reasonable, in my judgment, to require connection to the Authority's system where existing facilities are inadequate or unsafe, since, under the factual circumstances outlined, there is a means of guaranteeing payment of the bonds.

A final caveat is in order. In deciding which landowners, tenants and occupants shall be exempted from the connection requirement, the Authority must exercise care not to violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. That constitutional provision does not prevent a government from treating some individuals dif-
ferently from others. Any classification system employed, however, must be reasonably related to the purposes of the statutes under which a governmental entity operates, and the system must have a rational basis. See Opinion to the Honorable Raymond R. Guest, Jr., Member, House of Delegates, dated July 6, 1977. Having no classification system before me, I express no opinion concerning the constitutionality of any system the Authority may employ.

WATER AND SEWERAGE SYSTEMS—Costs Of Improvements—Assessments necessary to pay for may not include any costs borne by grants or donations from any source—Federal grant under Housing and Community Development Act.

TAXATION—Assessments—Local public improvements—Special impositions upon property benefited thereby—Construction of water lines and sanitary sewers.

WATER AND SEWERAGE SYSTEMS—Costs Of Improvements—Property owner not required to pay assessment in excess of peculiar benefits resulting from improvement.

August 18, 1977

THE HONORABLE BERNARD G. BARROW
Member, House of Delegates

This is in reply to your letter in which you state that the City of Virginia Beach is constructing water lines and sanitary sewers in a section of the city which is currently without such facilities. Part of the cost of these facilities has been underwritten by a federal grant made under the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 [codified at 42 U.S.C. §§ 5301-5317 (1977)]. Your specific inquiry is:

"In assessing abutting property owners for the cost of installing water lines and sanitary sewers, may a city include in its determination of costs, as provided for in § 15.1-241 of the Virginia Code, that portion of the costs of installing the water lines and sanitary sewers that has been paid for by grants from the United States of America required under provisions of the Housing and Community Development Act of 1974, 42 U.S.C. 5301, et seq?"

The facilities to which you refer are local public improvements for which the governing body may impose taxes or assessments upon abutting property owners. See § 15.1-239 of the Code of Virginia (1950), as amended. Assessments are special and local impositions, made upon the property benefited by the improvement, which are necessary to pay for the improvement. 14 McQuillin, Municipal Corporations, Public Improvements, § 38.01 (1970). The costs of such a local improvement, for assessment purposes, may not, in my opinion, include any costs which are borne by grants or donations from any source; rather, costs of the improvement refer to the costs which must be borne by the governing body and by the abutting property owners.

The abutting property owner, unless he agrees otherwise, is required to pay no more than one-half of the local cost of the improvement, unless that amount
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would exceed the "peculiar benefits" to the property resulting from the improvement. In no event is the abutting property owner required to pay an assessment in excess of the peculiar benefits resulting from the improvement. See § 15.1-241 of the Code and Article X, Section 3, of the Constitution of Virginia (1971).

WEAPONS—Security Personnel At Nuclear Power Plants—Possession of machine guns by.

DEFINITIONS—"Aggressive Or Offensive" As Used In § 18.2-293.

July 25, 1977

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

This is in response to your inquiry regarding the Uniform Machine Gun Act, §§ 18.2-288 to -298 of the Code of Virginia (1950), as amended. You ask whether security personnel at Virginia Electric and Power Company nuclear plants may possess machine guns "in connection with security duties at the nuclear plants." You further indicate that the question arises in the context of "requirements recently spelled out by the Nuclear Energy Commission for security of nuclear plants."

I assume that the requirements to which you refer are those contained in Part 73 of Title 10, Chapter 1, Code of Federal Regulations—Energy, entitled Physical Protection of Plants and Materials. Of particular application here is § 73.55, regarding protection against industrial sabotage, subsection (a) of which states in pertinent part:

"The licensee shall establish and maintain an onsite physical protection system and security organization which will provide protection with high assurance against successful industrial sabotage by . . . [a] determined violent external assault, attack by stealth or deceptive actions, of several persons with the following attributes, assistance and equipment: . . . (iii) suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long range accuracy . . . ." 10 C.F.R. § 73.55(a)(1977).

Nuclear plants must have security organizations capable of protection against attacks by several persons who are equipped with suitable weapons, up to and including hand-held automatic weapons.

The question then becomes what is to be used by the security personnel in providing such protection? Although the use of machine guns or automatic weapons is not mandated, it would appear that use of such weapons would be in keeping with the requirements of § 73.55(a), supra. In this regard I must note, however, that Proposed Rules published in the Federal Register on Tuesday, July 5, 1977, would require that personnel be trained as to and equipped with, or have ready access to, semiautomatic pistols, semiautomatic rifles, and shotguns, as opposed to automatic weapons. This would be a revision of 10 C.F.R. § 73.55(b) (4) (1977), which presently requires, generally, that the personnel be merely "properly trained and qualified." 42 Fed. Reg. 34321 (1977).

At this point, the question is, if it should so desire, could a plant lawfully

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utilize machine guns in Virginia? The Uniform Machine Gun Act, §§ 18.2-288 to 298, prohibits possession or use of machine guns in crimes of violence, and the unlawful possession or use of same for an offensive or aggressive purpose. (Machine gun is defined in § 18.2-288, as "any weapon which shoots or is designed to shoot automatically more than one shot, without manual reloading, by a single function of the trigger.") Particular instances are given wherein the possession will be presumed to be for an offensive or aggressive purpose. Section 18.2-293 provides, however, that nothing in the article "shall prohibit or interfere with . . . the possession of a machine gun for a purpose manifestly not aggressive or offensive."

Would such possession be for a purpose manifestly not aggressive or offensive? Since the statute does not define these words, one looks to the rule of construction that the intention of the legislature controls, such intention being found by "giving to the words the meaning in which they are used in ordinary speech." Tiller v. Commonwealth, 193 Va. 418, 420, 69 S.E.2d 441, 443 (1952); 17 M.J. Statutes § 61 (1951).

The following meanings are given in Webster's New Collegiate Dictionary 23, 797 (1974):

aggression 1: a forceful action or procedure (as an unprovoked attack) esp. when intended to dominate or master 2: the practice of making attacks or encroachments; esp: unprovoked violation by one country of the territorial integrity of another 3: hostile, injurious, or destructive behavior or outlook esp. when caused by frustration.

aggressive 1a: tending toward or practicing aggression [aggressive behavior] b: marked by combative readiness [an aggressive fighter] 2a: marked by driving forceful energy or initiative: ENTERPRISING [an aggressive salesman] b: marked by obtrusive energy.

offensive 1a: making attack: AGGRESSIVE b: of, relating to, or designed for attack [offensive weapons] c: of or relating to an attempt to score in a game or contest; also: of or relating to a team in possession of the ball or puck 2: giving painful or unpleasant sensations: NAUSEOUS, OBNOXIOUS [offensive odor of garbage] 3: causing displeasure or resentment.

In addition, the term "aggressor" has been defined by the Supreme Court of Virginia in Perkins v. Commonwealth, 186 Va. 867, 876, 44 S.E.2d 426, 430 (1947), as follows:

"One who begins a quarrel or dispute; one who brings on a conflict or affray by some overt act or demonstration calculated to precipitate the difficulty or conflict; one who provokes a difficulty."

Thus, the ordinary meaning of "aggressive" is tending toward a forceful unprovoked act toward others, and the meaning of "offensive" is tending toward the attack as opposed to the defensive.

Inasmuch as the Nuclear Regulatory Commission has promulgated rules requiring protection against attacks by persons who are equipped with "hand-held automatic weapons," which term encompasses certain types of machine guns, the possession of like weapons by security personnel in efforts to comply with these requirements would, in my opinion, be for a defensive, rather than an aggressive or offensive, purpose, and, therefore, permissible.
WELFARE—Child Care Centers Operated By Religious Institutions—Welfare Department standards for do not violate religious rights guaranteed by First Amendment.

CONSTITUTION—Tests When Laws Challenged As Violation Of First Amendment—Establishment Clause and Free Exercise Clause—Application of tests to child care center standards.

GENERAL ASSEMBLY—Child Care Centers—Authority delegated to State Board of Welfare to prescribe standards for.

HEALTH—Child Care Centers—Welfare Department’s standards are reasonable and permissible regulations to protect health, welfare and safety of enrolled children—Enforceable against centers operated by religious institutions.

March 23, 1978

THE HONORABLE WILLIAM L. LUKHARD
Commissioner, Department of Welfare

You have asked whether Welfare Department standards concerning child-care centers violate religious rights guaranteed by the First Amendment to the United States Constitution. After reviewing these standards, it is my opinion that they do not violate such rights and are generally enforceable against child-care centers operated by religious institutions.

Police Powers of the State

Under our federal constitutional scheme, the separate states retain general police powers to protect the health, safety, and welfare of their citizens. The General Assembly has enacted laws which generally require that child-care centers within the Commonwealth must be licensed by the State Department of Welfare. See Chapter 10 of Title 63.1 of the Code of Virginia (1950), as amended. In § 63.1-202 the General Assembly has delegated the authority to prescribe standards for the activities, services and facilities found in child-care centers to the State Board of Welfare.

First Amendment

The First Amendment of the United States Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” The United States Supreme Court has held that this amendment embraces both the freedom to believe and the freedom to act. But while freedom to believe is absolute, freedom to act is not. A state may by general and nondiscriminatory legislation safeguard the peace, good order, and comfort of society without invading liberties protected by the First Amendment. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940). But such regulation cannot amount to (A) the establishment of religion or, (B) unreasonable restraint on the free exercise of religion. Issues of alleged violations of the First Amendment must be analyzed in terms of both the Establishment Clause and the Free Exercise Clause.

Tests When Laws Challenged as Violation of the First Amendment

A.
Establishment of Religion

The purpose of the Establishment Clause of the First Amendment is to prevent governmental sponsorship of religion, active involvement of government with religion, and financial support of religion by the government. See *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970). To withstand a challenge under the establishment clause, governmental standards must meet a three-pronged test—the purpose of the standards must be secular, the principal effect of the standards must be neutral (i.e., its effect must not unduly advance or inhibit religion), and the standards must not involve excessive government entanglement. *Lemon v. Kurtzman*, 403 U.S. 602, 613-14 (1971).

B. Free Exercise of Religion

The guarantee of the free exercise of religion likewise does not prevent reasonable regulation. In examining a statute which is challenged on First Amendment grounds, the court must balance the interests of the individual against those of society. Where the purpose of the statute is to impede the exercise of religion or to discriminate against a particular religion, it is constitutional only if it is justified by a compelling State interest. See *Sherbert v. Verner*, 374 U.S. 398 (1963). Where the activity impedes observance or discriminates, the compelling interest test must be satisfied even if the effect on religion is only indirect. *Braunfield v. Brown*, 366 U.S. 599, 607 (1961). The fact that governmental standards of general applicability satisfy the Establishment Clause, does not remove the possibility of a violation of the Free Exercise Clause. *Gillette v. United States*, 401 U.S. 437 (1971). But in such a case, the test is whether the burden on First Amendment values is justifiable in terms of the government's valid aims. *Id.* at 462.

As a general rule, the fact that otherwise valid general regulations impact in some way on religion does not invalidate the regulations. *Ibid.* There is an exception to this rule, however. Even such a basic power of the state as to require public education may yield where the conflict with religious beliefs is fundamental, and there is no harm to the individual, or to the public safety, peace, order, or welfare. *Wisconsin v. Yoder*, 406 U.S. 205, 230, 235 (1972).

Among the factors the court must consider are: (1) whether the statute has a secular purpose; (2) how important that purpose is; (3) how broad is its scope; (4) whether the creation of an exemption to it would greatly inhibit the effectiveness of the overall regulatory process; (5) whether a person with a high degree of sincerity could not comply with the regulation; and (6) whether the regulation interferes greatly with an important religious practice. Cf. *Wisconsin v. Yoder*, supra; *Walz v. Tax Commission*, supra.

Application of Tests to Child-Care Standards

With these tests in mind, I turn now to the Department's Child-Care Center Standards.

Sections I-IV concern procedures by which licenses are issued, fiscal and operational prerequisites to licensure, and physical requirements for the structure in which the center is located. These provisions are designed to protect the health and safety of children and are applicable to all centers in Virginia. Where a standard may cause undue hardship, the Department may waive its application by granting an allowable variance.

Section V prescribes minimum standards for personnel and lists the qualifications required of all employees. These standards are designed to insure
that the center's staff is competent to care for children. Since credit is given for formal education, whether secular or religious, these standards do not discriminate against religious institutions. Further, the regulations permit the substitution of practical work experience for educational requirements. Part D of Section V lists the various ratios of supervisory staff needed for children of various ages. This will prevent situations where unlimited numbers of children could be kept in a center. These all relate to the concern for the health, welfare and safety of children.

Sections VI and VII of the standards establish enrollment procedures and records requirements. These, too, appear to be within the scope of the state's police power and interference with religious conduct, if any, would be permissible.

Section VIII establishes program requirements. It is here that the balancing tests for the First Amendment must be carefully applied. This section covers activities, planning, equipment and materials requirements, including disciplinary procedures. The secular basis for these types of standards is to avoid the mere "warehousing" of children while they are being cared for. It must be clearly understood, however, that such standards shall not include programmatic requirements which interfere with or restrict the teachings of religious principles and ethical standards. The current language in the standards does not allow any such interference or restriction on First Amendment Rights.

Section IX involves health matters and does not appear to involve any religious considerations.

Conclusion

The Welfare Department's child-care center standards are reasonable and permissible regulations to protect the health, welfare and safety of enrolled children. They do not violate First Amendment Rights and are enforceable against centers operated by religious institutions. The regulations are consistent with a valid governmental purpose. After applying the tests for determining possible violations of the Establishment Clause or the Free Exercise Clause, I have found no instance of an impact on religious belief and practice such as to negate these regulations of general application.

WILLS—Distinction Between Probate Of Will And Recordation.

TAXATION—Will Probated In Fairfax County; Recorded Also In Loudoun County—Clerk of Loudoun court may charge only recordation fee.


TAXATION—Only One State Probate Tax And One Local Probate Tax May Be Imposed.

TAXATION—Probate Tax—that Fairfax County does not impose such local tax does not permit Loudoun County to impose its own where Loudoun County not involved in probate of will.

TAXATION—Proration Of Recordation Tax Because Property Located In More Than One Location—Section on probate silent on proration.
REPORT OF THE ATTORNEY GENERAL

October 4, 1977

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

This is in response to your inquiry pertaining to local probate tax. See § 58-67.1 of the Code of Virginia (1950), as amended. I will quote from your letter in setting forth the facts:

"An attorney has requested that the will of a decedent be recorded in this office. An authenticated copy of the will was recorded in Fairfax County as the decedent had an interest in real estate lying in Fairfax and Loudoun Counties, said land having an estimated value of $2,000,000 and with 90% of the land being in Loudoun County. It is my understanding that Fairfax County charged a probate tax of $2,000 without charging any county tax which Loudoun County charges pursuant to § 58.67.1 of the Code.''

[Emphasis added.]

You ask whether you should charge the county probate tax on the portion of realty in Loudoun County or only the fee for recording the will.

A distinction between probate of a will and recordation of a will must be made. Probate is the judicial determination whether an allegedly testamentary paper is the Last Will and Testament of a decedent. Recordation is the ministerial act of placing a copy among the public documents of a county. Thus, probate and recordation are two distinct procedures; and Chapter 3 of Title 58 specifically recognizes this distinction by taxing the two procedures differently. Article 3 of Chapter 3 deals with recordation taxes while Article 4 of the Chapter imposes a tax on wills and administrations (or probate). The two Articles deal with different subjects and operate independently of each other. See Report of the Attorney General (1958-1959) at 302, 303.

The difference between Article 3 and Article 4 is demonstrated when the sections granting localities the authority to impose local taxes in addition to the State tax are compared. Sections 58-65.1 and 58-67.1 are comparable provisions under Articles 3 and 4. Section 58-65.1 contemplates that recordation of taxable instruments under Article 3 may be appropriate in more than one local jurisdiction, because the property involved is located in more than one jurisdiction. In such instances, § 58-65.1 calls for a proration of the recordation tax based on the proportion of the total amount of property situated in any one locality. See Report of the Attorney General (1975-1976) at 390, 391.

Section 58-67.1, dealing with probate, is silent on the subject of proration. "[T]he judgment of a probate court of competent jurisdiction admitting a paper to probate is in the nature of a judgment in rem, and as long as it remains in force binds conclusively all parties and all other courts." [Emphasis added.] In re Will of Bentley, 175 Va. 456, 460, 9 S.E.2d 308, 310 (1940); Harrison on Wills and Administration § 168, at 254 (1960). Section 64.1-75 provided Fairfax County with jurisdiction to probate the will in question, i.e., jurisdiction is in any county "wherein any real estate lies that is devised or owned by the decedent." By admitting the will to probate, the Circuit Court of Fairfax County determined that all the decedent's Virginia real estate would pass pursuant to the decedent's will. French v. Short, 207 Va. 548, 555, 151 S.E.2d 354, 359 (1966). Only one probate of a will is contemplated by § 58-67.1, and only one State probate tax and one local probate tax may be imposed under Article 4 of Title 58.
REPORT OF THE ATTORNEY GENERAL

That Fairfax County does not impose a local probate tax does not permit Loudoun County to impose its own, because Loudoun County was not involved in admitting the will to probate. What is desired to be done is the recordation of the will in Loudoun County pursuant to § 64.1-94. Upon proof of payment of the State tax under § 58-66, the clerk should record the will. For this act, the clerk may only charge his fee for recordation.

WILLS—Loan To Mount Vernon Of Wills Of George And Martha Washington—Remain property of circuit court.

CONSTITUTION—Special Legislation—Loan of wills of George and Martha Washington to Mount Vernon does not amount to.

July 6, 1977

THE HONORABLE VINCENT F. CALLAHAN, JR.
Member, House of Delegates


The Act provides:

"1. § 1. Notwithstanding any other provision of law, upon the order of the Circuit Court of Fairfax County, the wills of the late General George Washington and Martha Washington may be placed on loan to and kept at Mount Vernon under conditions approved by the court for their safekeeping. These documents may be temporarily removed from Fairfax County for their restoration and preservation, upon direction of the court, whereafter these documents shall be returned to said county. Such actions, whether taken singly or together, shall not to any degree diminish the right of the Circuit Court of the County of Fairfax to take immediate possession of such documents at any time and return them to the clerk's office in said county."

Article IV, Section 14 (18), reads as follows:

"The General Assembly shall not enact any local, special, or private law in the following cases:

* * *

"(18) Granting to any private corporation, association, or individual any special or exclusive right, privilege, or immunity."

The Act confers no enforceable right, privilege or immunity on the Mount Vernon Ladies Association of the Union, the private association which operates Mount Vernon. The wills remain the property of the court, subject at all times to the court's disposition. The Act merely makes it clear that the court, in exercising its discretion, will not run afoul of other provisions regarding the maintenance or removal of such documents. See generally §§ 8-279, 17-45, 64.1-94 of the Code of Virginia (1950), as amended. Accordingly, I am of the opinion that the Act is constitutional.
WILLS—Probate In Virginia Of Wills Initially Proved In Foreign Jurisdiction.

CLERKS—Will Initially Proved In Foreign Jurisdiction—Court or clerk in Virginia must be satisfied that will of lands complies with §§ 64.1-49 and 64.1-92 before admitting will to probate.

October 21, 1977

THE HONORABLE EDITH H. PAXTON, CLERK
Circuit Court of the City of Staunton

This is in response to your inquiry pertaining to the 1977 amendment to § 64.1-92 of the Code of Virginia (1950), as amended. Section 64.1-92 provides for probate, in Virginia, of wills initially proved in a foreign jurisdiction. The statute now reads as follows:

"When a will relative to an estate within this State has been proved without the same, an authenticated copy thereof and the certificate of probate thereof may be offered for probate in this State. When such copy is so offered, the court or the clerk thereof to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the state or country of the testator's domicile and shall admit such copy to probate as a will of personalty in this State. And if it appear from such copy that the will was admitted to probate in the foreign court of probate and was so executed as to be a valid will of lands in this State by the law of this State, such copy may be admitted to probate as a will of real estate. The probate of any such copy of a will before any such clerk shall have the same legal operation and effect as if such copy had been admitted to probate by the court." (Emphasis added.)

Prior to the amendment only one sentence was different from the language now used:

"And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this State by the law thereof, such copy may be admitted to probate as a will of real estate." [Emphasis added.]

Specifically your inquiry reads as follows:

"Is the mere fact that the will was admitted to probate in the foreign court and was signed by the testator and two witnesses sufficient for the probate of the authenticated copy thereof and the certificate of probate thereof in Virginia as a will of lands, or should the order show evidence of execution?"

The superseded language imposed two requirements before the foreign will of lands could be admitted to probate in Virginia. First, it was required that the authenticated copy of the will and the foreign certificate of probate expressly state that evidence was heard by the foreign probate court, and upon such evidence that the Virginia statute of will requirements (in § 64.1-49) were met. Secondly, the Virginia court or clerk had to examine these two documents to determine whether in fact the form and manner of execution of the will satisfied all the formalities required by § 64.1-49. See Lamb, Virginia Probate Practice (1957), § 48 at 128-130.
These two requirements were overlapping in that the statute (§ 64.1-92) required that two courts find the same elements — compliance with § 64.1-49. In addition, the statute required that the foreign court report its findings exactly as a Virginia court would, in the certificate of probate. If the foreign court did not use this form, additional delay and expense resulted as the foreign documents were returned to the foreign court for "enlargement" to show the requisite statements to the effect that the will had been executed as required by Virginia. Such duplication of effort is now unnecessary because of the 1977 amendment. Now, to satisfy the first requirement of § 64.1-92, the proponent of a foreign will need only present for probate, in this State, the foreign certificate of probate and an authenticated copy of the will. The proof offered in the foreign probate court no longer must be stated in the foreign probate certificate, and "enlargement" should not be necessary if the foreign documents appear on their face to be regular.

This change, however, neither eliminates nor diminishes the second requirement of § 64.1-92, that the will "was so executed as to be a valid will of lands in this State by the law of this State."

In summary, § 64.1-92 establishes two conditions that must be met before a will of lands probated initially in a foreign jurisdiction can be admitted to probate in Virginia. First, admission to probate in a foreign court; and secondly, there must be execution of the will in the form and manner required by § 64.1-49. The foreign probate certificate does not have to show that evidence of execution was heard. Neither does the fact of foreign probate mean automatic probate in Virginia. The will of lands must comply with the requirements of § 64.1-49, and the court or clerk must be satisfied that reasonable proof exists that all those requirements have been met.

WITNESSES—Exclusion Of All Witnesses From Courtroom Under § 19.2-265.1, Including Law Enforcement Officers.

COURTS—Courtroom Security—Compensation of security deputies in excess of specified number.

LAW ENFORCEMENT OFFICERS—Witnesses—Court may provide for its own security if witness is police officer, sheriff or deputy sheriff—Compensation of.

THE HONORABLE W. ROBERT PHELPS, JR., CHIEF JUDGE
Seventh Judicial District

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

"May a court permit a witness, who has testified and been subjected to cross-examination, to remain in the courtroom for the remainder of the trial or preliminary hearing, notwithstanding the fact that sequestration was ordered on motion of the attorney for the Commonwealth or defendant?"

Section 19.2-265.1 of the Code of Virginia (1950), as amended, states in pertinent part: "In the trial of every criminal case, the court, whether a court of record or a court not of record, may upon its own motion and shall upon the
motion of either the attorney for the Commonwealth or any defendant, require
the exclusion of every witness. . . .” This statute makes mandatory on the court
exclusion of all witnesses in the event that one party moves for their exclusion.

The Supreme Court of Virginia, in construing a comparable statute, reached
the same conclusion in *Johnson v. Commonwealth*, 217 Va. 682, 232 S.E.2d 741
(1977). There, the Court accepted defendant's contention that his right to ex-
clude witnesses was “absolute” under former § 8-211.1 (which, apart from the
fact that it applied to civil as well as criminal cases, was substantively identical to
§ 19.2-265.1).

In light of the mandatory language employed in § 19.2-265.1 and the analysis
used in *Johnson*, I conclude that your inquiry must be answered in the negative.
Once a motion has been made to exclude all witnesses, such motion must be
granted without exception. An individual who has testified, unless excused as
discussed *infra*, remains a witness and thus subject to sequestration.

You also inquire whether a court has any discretion or inherent power to
provide for its own security if the witness is a police officer, sheriff or deputy
sheriff.

As you know, the general procedure in Virginia's courts is that after a law
enforcement officer has finished testifying and both sides agree that there is no
longer any need for further testimony, the court is free to excuse such individual
from the remainder of the trial. At this point, said witness would be entitled to
remain in the courtroom. This practice clearly tends to have an ameliorative
impact on potential threats to courtroom security under the facts you pose.

In the absence of such an excused witness remaining in the courtroom, my
answer to your second inquiry must similarly be in the negative. Section 19.2-
265.1 affords a trial judge discretion in ordering the exclusion of all witnesses
only in the event that a motion to that effect has not been made either by the
Commonwealth or defendant. To conclude that a court possessed the inherent
power to allow prospective witnesses to remain in the courtroom after their
exclusion had been ordered would be to ignore the clear dictates of § 19.2-265.1.

Trial courts, of course, remain free to order additional security which would
be used in certain classes of cases. In this regard, however, I direct your attention
to my Opinion to the Honorable Fred G. Pollard, Chairman, Compensation
Board, dated August 3, 1977 (a copy of which is enclosed). There, I concluded
that in the absence of those “special cases when the judge specifically orders it,”
the Appropriations Act forbids the payment out of State funds for more than
one additional courtroom security deputy in criminal cases in district courts or
two such deputies in circuit courts. The compensation of security deputies
employed in excess of these specified numbers, while permissible, would have to
be paid solely from local funds.

WORKMEN'S COMPENSATION ACT—Attorney May Charge Potential
Workmen's Compensation Claimant For Investigation And Research
Necessary To Advise Whether He Should Proceed With Claim—Approval
and award of Industrial Commission not required.

January 26, 1978

THE HONORABLE C. RICHARD CRANWELL
Member, House of Delegates
This is in response to your letter enclosing the following inquiries concerning the Virginia Workmen's Compensation Act:

"May a licensed attorney properly charge and collect a fee for investigation and legal research necessary to advise a potential workmen's compensation claimant whether he ought to proceed with the claim?

"This question arises in circumstances when a potential claimant comes to the attorney's office having little more to offer than the fact that he was hurt on the job and that workmen's compensation is not paying him. Often, a detailed factual investigation, coupled with legal research, is necessary before a determination can be made as to whether or not the attorney believes a colorable claim exists. If the determination is in the negative, then is the attorney barred from charging any fee for the time spent? Or, is the attorney barred from collecting an investigation fee prior to commencing work on the question?"

Section 65.1-102 of the Code of Virginia (1950), as amended, provides as follows:

"Fees of attorneys and physicians and charges of hospitals for services, whether employed by employer, employee or insurance carrier under this Act, shall be subject to the approval and award of the Commission; but no physician shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Industrial Commission in connection with the case." (Emphasis added.)

In Merrimac Anthracite Coal Corporation v. Showalter, 158 Va. 227, 163 S.E.73 (1932), the Supreme Court of Virginia interpreted the underlined portions of § 65.1-102 to mean that the Industrial Commission ("Commission") has jurisdiction to award physician and hospital charges for services only if the employee is entitled to compensation under and by virtue of the Act. Id. at 232. Where the Commission has considered a claim for workmen's compensation, but awarded no compensation, the Commission in some cases has set the attorney fees to be paid by the claimant. See, e.g., Lee v. Benefit Group Administration, Inc., 54 Op. Indus. Comm'n 203 (1972).

The situation you describe, however, concerns services rendered by a licensed Virginia attorney where the provisions of the Act have not been invoked and, therefore, no compensation has been sought or awarded. In such instances, I am of the opinion that a licensed Virginia attorney is not required by § 65.1-102 to obtain the approval and award of the Commission in order to charge a reasonable fee for the investigation and legal research necessary to advise a potential workmen's compensation claimant whether to proceed with the claim. In such a case, the normal ethical considerations governing the general right of the attorney to charge a reasonable fee for investigation and research would apply. See Rule 6:11:EC 2-17 of the Rules of Court of the Supreme Court of Virginia, 216 Va. 941, 1070.

ZONING—"Conditional" Or "Contract" Zoning Ordinances—Conditional zoning is statutory device to control use of land—Contract zoning is illegal restriction on legislative discretion.

COUNTIES, CITIES AND TOWN—Police Power Is "Elastic" But Its Stretch
Is Not Infinite.

GENERAL ASSEMBLY—Authority To Enact Zoning Regulations Is A Legislative Power—May delegate power to adopt zoning regulations to counties, cities and towns.

ORDINANCES—Conditional Zoning—Constitutional if conditional provisions are reasonably related to purposes of zoning specified in § 15.1-489.

ORDINANCES—Zoning—Lawful exercise of State's police power, if reasonable and nonarbitrary.

July 28, 1977

THE HONORABLE FLOYD C. BAGLEY
Member, House of Delegates

This is in reply to your recent letter in which you state that a subcommittee of the House of Delegates Committee on Counties, Cities and Towns is considering a proposed statute which would enable all general purpose political subdivisions to adopt "conditional" or "contract" zoning ordinances. You have asked whether there is any constitutional impediment to the enactment of such legislation and whether such a statute would survive a constitutional challenge.

Contract zoning and conditional zoning are statutory devices to control the use of land. Contract zoning is a mechanism by which a local government "agrees" to rezone property upon condition that the landowner use his property in the manner prescribed by the local government. Contract zoning has been widely held to be illegal because it permits the local government to bargain away its police powers. Such an agreement with a private property owner would inhibit the ability of a local government to decide questions regarding the use of land on the basis of the public interest. 82 Am.Jur.2d Planning and Zoning 412 (1976). I am of the opinion that contract zoning is an illegal restriction on legislative discretion.

Conditional zoning, on the other hand, is not a device which predicates rezoning upon a prior agreement between a local government and the property owner. Rather, it permits the local government to establish conditions which the property owner must satisfy before rezoning will be considered. Hagman Public Planning and Control of Urban and Land Development 454 (1973). The conditions imposed usually are based upon the public costs which are, or will be, incurred as a result of the private development. If the conditions are not satisfied, the rezoning cannot be granted. If the conditions are met, however, the local government may consider whether rezoning is consistent with the public interest. Unlike contract zoning, the local government does not, by specifying zoning conditions, become bound to rezone the property if those conditions are satisfied. Hagman, Id.

The authority to enact zoning regulations is a legislative power vested in the General Assembly. If it enacts proper enabling legislation, the General Assembly may delegate the power to adopt zoning regulations to counties, cities and towns. Andrews v. Board of Supervisors of Loudoun County, 200 Va. 637, 107 S.E.2d 445 (1959). A legislature may also delegate the power to adopt conditional zoning regulations. Yokley Zoning Law and Practice § 5-4 (1965). Such a statute has been enacted in Virginia. Section 15.1-491 of the Code of Virginia (1950), as amended, provides, in pertinent part:

"A zoning ordinance may include, among other things, reasonable reg-
ulations and provisions as to any or all of the following matters:

(a) . . . for the adoption, in counties, or towns therein which have planning commissions, wherein the urban county executive form of government is in effect, or in a city completely surrounded by such a county, or in a county contiguous to any such county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.” (Emphasis added.)

This statute permits the adoption of conditional zoning ordinances in certain counties, cities and towns. These local governments may consider a property owner's agreement to meet specified conditions at the public hearing regarding a proposed rezoning. The local governing body would not be required to approve the rezoning when the conditions have been met. Its discretion is therefore not limited.

There is no reported case decision upon the constitutionality of this statute. Courts in other states, however, have weighed the constitutionality of different types of conditional zoning ordinances. While opinions have been divided on the constitutionality of these provisions, a review of pertinent decisions indicates that such legislation will be upheld when it has a valid purpose, establishes a reasonable method of setting conditions, and the local zoning authorities do not base their decision solely upon the satisfaction of conditions by the private landowner. 82 Am.Jur.2d, supra.

Courts of the Commonwealth do not substitute their judgment for that of the General Assembly regarding the purpose of a zoning ordinance. Such ordinances, if reasonable and nonarbitrary, are construed to be a lawful exercise of the State's police power, and if their reasonableness is fairly debatable, the legislative judgment will stand. County of Fairfax v. Parker, 186 Va. 675, 44 S.E.2d 9 (1947); West Brothers Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 881 (1937). If a local government can demonstrate that its police power regulation serves a purpose permitted by the State's enabling legislation, the court will not declare that regulation to be unconstitutional except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation. Maritime Union v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961). A zoning ordinance which requires a landowner to satisfy certain conditions before rezoning consideration would, in my opinion, be constitutional if the conditions imposed were reasonably related to the purposes of zoning specified in § 15.1-489. The Virginia Supreme Court has held that:

". . . the police power is 'elastic.' But its stretch is not infinite. There is nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development." Bd. Sup. James City County v.
I therefore conclude that, within the guidelines noted above, there is no constitutional impediment to the enactment by the General Assembly of a statute which would enable local governments to adopt zoning ordinances which include conditional zoning provisions. Questions may arise as to the constitutionality of certain local ordinances and their applicability to specific pieces of property. I express no opinion regarding the constitutionality of any such local zoning ordinance or application of it to a specific piece of property.

ZONING—Ordinance Restricting Erection Of Structures On Beaches And Shores Of A Locality.

GENERAL ASSEMBLY—Authority To Enact Zoning Regulations Is A Legislative Power—May delegate power to adopt zoning regulations to counties, cities and towns.

ORDINANCES—Zoning—Courts do not substitute their judgment for that of General Assembly regarding purpose of zoning ordinance.

ORDINANCES—Zoning—If application of zoning ordinance has effect of completely depriving owner of beneficial use of his property by precluding all practical uses, ordinance is unreasonable and confiscatory and unconstitutional.

ORDINANCES—Zoning—Lawful exercise of State's police power, if reasonable and nonarbitrary.

ORDINANCES—Zoning Ordinance Must Reasonably Relate To Promotion Of Public Health, Safety Or Welfare.

September 20, 1977

THE HONORABLE BERNARD G. BARROW
Member, House of Delegates

This is in reply to your letter inquiring whether a local government may enact a zoning ordinance which contains a provision that restricts the erection of structures on the beaches and shores of that locality.

The authority to enact zoning regulations is a legislative power vested in the General Assembly. If it enacts proper enabling legislation, the General Assembly may delegate the power to adopt zoning regulations to counties, cities and towns. Andrews v. Board of Supervisors of Loudoun County, 200 Va. 637, 107 S.E.2d 445 (1959).

Comprehensive zoning powers have been delegated by statute to counties and municipalities. See Title 15.1, Chapter 11, Article 8, of the Code of Virginia (1950), as amended. Section 15.1-486 authorizes local governing bodies to enact zoning regulations to regulate, inter alia:

"(a) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;

"(b) The size, height, area, bulk, location, erection, construction,
reconstruction, alteration, repair, maintenance, razing, or removal of structures;

"(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used;"

The purposes for which a zoning ordinance may be enacted include:

"... (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following; overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic or other dangers; and (7) to encourage economic development activities that provide desirable employment and enlarge the tax base."

See § 15.1-489.

Courts of the Commonwealth do not substitute their judgment for that of the General Assembly regarding the purpose of a zoning ordinance. Such ordinances, if reasonable and nonarbitrary, are construed to be a lawful exercise of the State’s police power, and if their reasonableness is fairly debatable, the legislative judgment will stand. County of Fairfax v. Parker, 186 Va. 675, 44 S.E.2d 891 (1947), West Brothers Brick Co. v. Alexandria, 169 Va. 271, 192 S.E. 891 (1937).

The Virginia Supreme Court has stated that the legal principles by which the validity of zoning ordinances is determined include: (1) any zoning ordinance shall have as its purpose the promotion of the public safety, health and welfare; (2) if the demonstrated purpose of a zoning ordinance is shown to relate reasonably 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 to show otherwise is placed upon the party attacking it; (4) where evidence is adduced which tends to show that the ordinance does not reasonably accomplish its public purpose, the presumption of reasonableness is not conclusive and must be supported by evidence of reasonableness; (5) if evidence of 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, 211 S.E.2d 48 (1975); Fairfax County v. Snell Corp., 214 Va. 655, 202 S.E.2d 889 (1974); Board of Supervisors of Fairfax County v. Davis, 200 Va. 316, 106 S.E.2d 152 (1959); Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959). Opinion to the Honorable Carrington Williams, Member, House of Delegates, dated July 23, 1975, and found in Report of the Attorney General (1975-1976) at 437. I am of the opinion that there is no constitutional or statutory prohibition on the enactment of a provision in a zoning ordinance which restricts the erection of structures on the beaches and shores of a locality. Such a regulation would be consistent with the purposes for which
zoning ordinances may be enacted. See §§ 15.1-486 and 15.1-489.

Since the zoning regulation serves a purpose permitted by the Commonwealth’s enabling legislation, a court will not declare that provision to be unconstitutional, except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation. Maritime Union v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961). A regulation which is properly authorized by enabling legislation may nevertheless be unconstitutional as applied to a specific piece of property. See Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated July 28, 1977, a copy of which is enclosed. If application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use of his property by precluding all practical uses, the ordinance is unreasonable and confiscatory as applied to that property, and is therefore unconstitutional. Boggs v. Board of Supervisors, 211 Va. 488, 491, 178 S.E.2d 508, 510 (1971). If, however, the ordinance would permit a landowner to use his private property in a reasonable manner, although it may be a manner other than that which he desires, the application of the ordinance to that specific property is not unconstitutional. Southern Railway v. Richmond, 205 Va. 699, 139 S.E.2d 82 (1969). I express no opinion regarding the constitutionality of an ordinance which prohibits the erection of structures on the beaches and shores of a locality as it may apply to a specific property.

ZONING—Residence—Member of board of zoning appeals not selected on basis of residence within particular portion of county.

ELECTIONS—“One Man-One Vote” Rules—Does not apply to members of local administrative boards which serve a non-legislative purpose for which no popular election is required.

ORDINANCES—Zoning—Reviewed by members of board of zoning appeals selected by circuit court to represent county as a whole.

December 1, 1977

THE HONORABLE DAVID R. THOMPSON
Commonwealth’s Attorney for King George County

This is in reply to your recent letter in which you ask:

“When only a portion of a county is subject to zoning, must a member of the board of zoning appeals reside within the area subject to zoning, or is residence within the county at large sufficient?”

Section 15.1-486 of the Code of Virginia (1950), as amended, provides that the governing body of a county may, by ordinance, divide the territory under its jurisdiction, or any substantial portion thereof, into districts of such number, shape and area as it may deem best suited to carry out the purposes of zoning. This Office has previously held that a county may enact a zoning ordinance which only applies to a portion of the county which encompasses the territory described in the proposed ordinance. See Opinions to the Honorable A. Dow Owens, Commonwealth’s Attorney for Pulaski County, dated July 18, 1972, and to the Honorable M. G. Anderson, Member, House of Delegates, dated January 31, 1964, found in Reports of the Attorney General (1972-1973) at 300
and (1963-1964) at 65.

Section 15.1-494 establishes the requirements for membership on a board of zoning appeals. That statute provides that in any locality which has enacted a zoning ordinance, "there shall be created a board of zoning appeals, which shall consist of no more than seven and no less than five residents of the county... but shall always be an odd number, appointed by the circuit court of the county or city." (Emphasis added.)

Boards of zoning appeals are authorized by § 15.1-495 to decide appeals from the administrative officer of the zoning ordinance, grant variances, interpret the location of the boundaries of zoning districts and to grant special exceptions. Boards of zoning appeals function to vary, within the confines of the law, the specific terms of zoning ordinances and furnish elasticity in the applicability of their regulatory measures. Gayton Triangle Land Co. v. Board of Supervisors, 216 Va. 764, 222 S.E.2d 570 (1976).

There is no statutory requirement that members of a board of zoning appeals be selected on the basis of their residence within a particular portion of the county. Such a requirement may not be implied when the zoning ordinance is applicable within only a part of a county. The ordinance remains a county ordinance, subject to all the requirements imposed on zoning regulations by the general statutes of Virginia. The ordinance may thus be reviewed by members of the board of zoning appeals who were selected by the circuit court to represent the interests of the county as a whole. These interests would be inadequately represented if only residents of that portion of the county within which the zoning ordinance is applicable were permitted to serve on the board of zoning appeals.

I am therefore of the opinion that when only a portion of a county is subject to zoning, members of the board of zoning appeals need not reside within the area subject to zoning. Individuals are qualified for membership on the board if they are residents of the county at large.

Although this conclusion will authorize members of the board of zoning appeals to be chosen from a portion of the county not subject to zoning, I am of the opinion that no violation results of the "one man-one vote" rule. The United States Supreme Court has held that the one man-one vote rule does not apply to members of local administrative boards which serve a non-legislative purpose for which no popular election is required. Sailors v. Kent Board of Education, 387 U.S. 105 (1967).
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