OPINIONS

of the

ATTORNEY GENERAL

and

REPORT

to the

GOVERNOR OF VIRGINIA

From July 1, 1978 to June 30, 1979

Commonwealth of Virginia

Office of the Attorney General

Richmond

1979
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LETTER OF TRANSMITTAL

July 1, 1979

The Honorable John N. Dalton
Governor of Virginia
State Capitol
Richmond, Virginia 23219

My dear Governor Dalton:

Enclosed is the Annual Report of the Attorney General for the fiscal year July 1, 1978, to June 30, 1979. 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 list of cases currently pending or completed since the transmittal of the 1977-1978 Report.

Much of the major litigation this year has involved efforts to stop the federal government from extending its authority into areas traditionally reserved for the State. The Office of the Attorney General has challenged federal actions in issues relating to criminal law, the environment, health and welfare regulations and transportation.

In the area of criminal law, federal courts extended their authority to review State court criminal convictions to the point of endangering the ability of the State court system to make a final determination in a criminal case. In Jackson v. Commonwealth, the U.S. Supreme Court set a new standard for federal habeas corpus review, requiring that on review, the evidence must prove guilt beyond a reasonable doubt.

While a State court criminal conviction has always required evidence and proof beyond a reasonable doubt, subsequent habeas corpus review by the federal courts has employed a lesser standard to uphold the trial court decision. Traditionally the federal courts have simply reviewed the trial transcript to determine whether some evidence exists to support a conviction. In the past they have not retried the case by transcript or sought to displace the judgments on evidence made at trial, so long as evidence on which those judgments could be made existed beyond a reasonable doubt.

We have petitioned the court for a rehearing in this case because of the substantial impact the decision could have on the State court criminal system. This new standard for federal habeas corpus review could ultimately make the federal courts the triers of fact, and thus further undermine the finality of the State judicial process. I believe this will encourage more mistrust of and disenchantment with our criminal justice system. The public already believes that justice is slow, that it is understated and that the victim, not the criminal, often becomes the "defendant."

In Jack F. Davis v. Roger Trenton Davis, the Fourth Circuit Court of Appeals overturned a lower court's decision to fine the defendant $20,000 and sentence him to 40 years for distribution and possession of marijuana with intent to distribute. The Fourth Circuit Court stated that the sentence for distribution of marijuana was disproportionate to the offense and constituted cruel and unusual punishment. Although the sentence fixed by the jury and pronounced by the judge was within the statutory limits set by law for the offenses, the court rendered its decision without invalidating the statute. Two other federal courts of appeals considering similar cases have taken the opposite view. As the dissent in Davis properly noted, this decision represents an unwarranted intrusion into a legitimate State court function. A petition for a writ of certiorari to the Supreme Court of the United States is pending.
In February, this Office, representing the Governor, intervened on the side of Virginia surface coal miners who were challenging the constitutionality of the Federal Surface Mining and Reclamation Act of 1977. The Commonwealth is asserting that the Federal Act violates the Tenth Amendment to the United States Constitution because it attempts to regulate land use, a power reserved to the states. Since those provisions require restoration of mined land to its original contour, surface mining becomes economically unfeasible in mountainous areas such as those in Southwest Virginia. A lengthy trial was held in March and April in the United States District Court in Big Stone Gap. The court has the case under advisement and a decision is pending.

In connection with the court challenge of federal surface mining regulations, the Department of Conservation and Economic Development Division of Mined Land Reclamation, represented by this Office, has challenged the permanent surface mining regulations issued by the Federal Office of Surface Mining (Department of Interior) under the Federal Act. That challenge, consolidated with others, is pending in the United States District Court in the District of Columbia.

Representing the Department of Welfare, the Attorney General's Office was successful in a lawsuit against the U.S. Department of Health, Education and Welfare which resulted in the approval of Virginia's State Plan for the Aid to Dependent Children program. My staff has also initiated another lawsuit against HEW contesting the manner in which that agency is attempting fund cut-offs. In addition, the Department was successful in several lawsuits which sought to change and expand its on-going assistance programs. All of these suits have resulted in substantial savings to the taxpayers of the Commonwealth.

In another federal case, the Commonwealth of Virginia challenged in Federal District Court the Secretary of Labor's determination that "heavy" wage rates be applied to an Interstate 66 construction project, on the grounds that the determination is not in accordance with the standards of the Davis-Bacon and Federal Aid Highway Acts. The Labor Department's ruling has added substantially to the cost of constructing I-66 and results in paying two rates for fundamentally the same work, depending on whether a worker is employed on the median strip or 15 feet away on the road surface. The District Court's finding that the question was moot, not subject to judicial review and not arbitrary and capricious, was reviewed by the Fourth Circuit. Although the Fourth Circuit affirmed the District Court's ruling on the wage rates, the court held, in Commonwealth of Virginia, ex rel. Commissioner, Virginia Department of Highways and Transportation v. Marshall, that the case was not moot and that Davis-Bacon wage determinations are subject to judicial review under the Administrative Procedure Act. This was a major victory in itself and could prove to be an invaluable ruling for use in future wage disputes with the U.S. Labor Department.

As a follow-up to this challenge of labor rates set for a portion of I-66, I submitted testimony to the House Subcommittee on Labor Standards calling for the repeal of the Davis-Bacon Act. This Act has a multi-million dollar inflationary impact on the construction industry nationwide. It is estimated that construction costs are inflated by as much as $715 million. The Davis-Bacon Act is a Depression era law which allows the Secretary of Labor to set construction rates on projects which are partially funded by the federal government. The net effect is that labor rates for projects coming under the Davis-Bacon Act are much higher than labor rates for other construction projects.
STATE PURCHASING PROCEDURES

Another major activity of the Attorney General's Office this year has involved a review of State purchasing practices. This year has also seen an unprecedented participation by my Antitrust Unit in coordinating and conducting an investigation into allegations of official misconduct and vendor fraud. In this investigation, the Attorney General's Office established a cooperative arrangement with the Richmond Commonwealth's Attorney and the State Police. The investigation has resulted in grand jury indictments and conviction of one former State purchasing official, and more indictments are expected.

In line with your action to improve State purchasing procedures, my office studied purchasing procedures for goods under $500 and for the purchase of services. The survey showed a general lack of uniform procedures in these areas. It is important to adopt uniform procedures, not only to prevent official corruption or the appearance of corruption, but also to make sure that the millions of taxpayers' dollars spent each year on these two categories are spent wisely.

The report, which was the result of four months of work by my Office, questions the way companies are selected for contracts; the inadequate competitive bidding procedures; the general absence of written procedures for agency purchases of goods and services; the lack of procedures for disqualifying vendors who fail to perform contracts adequately; the absence of standard form contracts; and the inadequate contract performance monitoring procedures. I commend you for the steps you have taken to correct these problems.

In an effort to correct any gross contract discrepancies, the Attorney General's Office is now participating in contract review for all State agencies. I am recommending that a written purchasing procedure be established and strictly followed for the purchase of goods under $500 and for the purchase of services. This would also result in compliance with your directive that administrative steps be taken to tighten the purchasing methods used by the Department of Purchases and Supply and other State agencies.

ENERGY

In this year of gasoline shortages, the Attorney General's Office reactivated the procedure for issuing permits for the production of industrial alcohol to be used in making gasohol. A Prohibition era law establishes the permit mechanism in the Attorney General's Office. Gasohol is a combination of 90% gasoline and 10% alcohol, and is considered by many as a means of conserving our gasoline supplies.

We acted quickly to establish the permit mechanism so that private sources, as they became interested in gasohol production, could receive the necessary permits without delay.

In spite of this, however, I believe that the permit process should be transferred to another State agency which has established systems for issuing permits and enforcing State laws governing the use of industrial alcohol. I will ask the General Assembly to place this permit issuing process with the Alcoholic Beverage Control Board, the Office of Energy and Emergency Services, or the Department of Agriculture and Commerce.

During the summer gasoline shortage experienced in several areas of the State, my Antitrust Unit brought successful suit against a Northern Virginia gasoline retailer to prohibit the retailer from requiring customers to buy a car wash in order to purchase gasoline. We also reached an agreement of voluntary compliance in a similar situation with a Richmond gasoline retailer.
I feel that these enforcement actions were important in alerting retailers and the public that we would not tolerate efforts to take advantage of consumers during the gasoline crunch through either the "tie-in" arrangements described above or through other violations of Virginia's Antitrust Act.

CONSUMER PROTECTION

Legal action under the Virginia Consumer Protection Act was taken after the conclusion of several investigations by the Division of Consumer Council. Two of these were actions against companies which were selling, on a nationwide basis, both business opportunity plans and alleged energy saving devices. One of these actions against IME, Inc. of Roanoke, was successful in forcing the company to cease its misrepresentations of the benefits and qualities of transient voltage surge suppressors, devices alleged to save electricity for homeowners. The Division worked closely with engineers of Virginia Polytechnic Institute and State University evaluating the claims made in selling the device. The company ceased operations immediately after this Office commenced action against it. The testing procedures and data developed by VPI and SU in this case have been used as a model for evaluating similar energy saving devices by the consumer protection agencies in other states.

Another legal action aimed at the nationwide sale of business opportunities and energy saving devices involved a device alleged to save gasoline for automobile owners. After an investigation, the Henrico based company collecting payments for distributorships and for the device called the "Ther Vac," signed an Assurance of Voluntary Compliance, agreeing to cease all unsubstantiated representations about the device and refund all money it had collected. When the refund provisions of the Assurance were not kept, this Office brought contempt proceedings against the company and its principals, and sought the appointment of a receiver and an order of involuntary dissolution. A receiver has been appointed for the company and it has ceased its sale of the unit and distributorships to consumers throughout the nation. Other actions, which have been concluded by sellers agreeing to the terms of an Assurance of Voluntary Compliance under the Consumer Protection Act show the range of problems which can be addressed through that Act. In a case against a Fredericksburg jewelry company, the Circuit Court entered a decree approving an Assurance of Voluntary Compliance in which the company agreed to cease and desist from all misrepresentations as to the value or quality of merchandise which it sells. The store refunded $570 to one customer. In another case, the Henrico Circuit Court approved an Assurance of Voluntary Compliance in which an insulation company agreed to cease all misrepresentations as to the availability or amount of government tax credits or rebates for the installation of insulation or storm windows. The Richmond Circuit Court approved an Assurance of Voluntary Compliance in which a Richmond stereo dealer agreed to cease and desist from holding or advertising "Lost Our Lease" sales for any location other than the store which has in fact lost its lease.

In addition to conducting formal investigations, the Division is empowered to conduct "studies related to enforcing consumer laws of the Commonwealth as deemed necessary to protect the interests of the consumer...." Consistent with this duty, the Division has conducted surveys of "dealer prep" charges in the sale of new automobiles and automobile repair charges. These studies have included large and small businesses in each geographic area of the Commonwealth. The surveys also have included a review of the complaints filed with the Office of Consumer Affairs. The findings were brought to the
attention of the Virginia Automobile Dealer's Association. The Association has decided to propose to its members guidelines providing for the itemization of the elements of the dealer prep charges.

A similar survey has been conducted on certain practices of automobile repair shops. Survey questionnaires were sent to shops in various parts of Virginia which asked whether oral or written estimates are routinely given; what procedures are used for adjustment of the estimate given; whether repair writers or mechanics are employed on a commission basis; whether a "flat rate manual" is used; what guarantee for the repair work is given; and whether replaced parts are returned to the customer. The results of this survey were used to assist the Division in recommending to the General Assembly legislation to treat the problems encountered in buying auto repair services.

In addition to litigation and enforcement efforts, the Division of Consumer Counsel presented and supported a series of legislative recommendations in the interests of consumers during the 1979 General Assembly. All were passed by the General Assembly. One of these was the Automobile Repair Facilities Act which applies to all auto repairs of more than $25. It requires that, if a consumer requests an estimate, a written estimate must be given and the final charge for the work performed cannot exceed the estimated charge by more than ten percent. The Act also requires repair facilities to provide a detailed final bill listing the work performed and charges for parts and labor. Consumers also may receive the replaced parts after the repair work is performed, so that they can assure that repairs were needed and were performed.

Another major enactment recommended by the Division was the Business Opportunity Sales Act. This statute applied to situations where, among other things, the seller of a business opportunity plan represents that income, in excess of the initial investment, will be realized by the purchaser of a business opportunity. The Act requires that the seller give the potential purchaser a "Disclosure Statement" about rights which the purchaser has under Virginia law. The Disclosure Statement also contains detailed financial and statistical information which helps the purchaser evaluate the business opportunity. The Act further requires sellers of business opportunities in Virginia to secure a bond and advise the purchaser of the surety company which has issued the bond. The passage of this Act made Virginia one of the first jurisdictions to pass legislation dealing with the increasing consumer losses from short-lived business opportunity schemes.

**UTILITY RATE CASES**

During the fiscal year, the Division of Consumer Counsel participated in approximately 25 proceedings before the State Corporation Commission, and in several appeals of SCC orders to the Virginia Supreme Court. These cases involved public utilities that provide electric, gas and telephone service in the Commonwealth.

The majority were requests by the utilities to raise rates for their services. The Division also participated in cases concerning fuel factor adjustments for electric utilities, gas curtailment procedures, requests for refunds of utility gross receipts tax, and proceedings under the Federal Public Utility Regulatory Policy Act of 1978 concerning the structure of electric rates. The most significant rate proceedings involving major investor-owned utilities in the Commonwealth were Virginia Electric and Power Company (VEPCO) and Appalachian Power Company (APCO).

VEPCO sought a total increase in rates of approximately $246 million. After a hearing in September 1978, in which the Division sponsored extensive testimony, the Company's request was reduced by the Commission by almost $100
million. To encourage the adoption of rate-making policy which would facilitate operational efficiency, the Division recommended that the Commission grant VEPCO an overall rate of return of 9.4%, the lowest rate recommended by the experts on cost of capital. As a productivity incentive, the Division further recommended that when an adequate demonstration of efficiency could be shown the rate of return should be increased to 9.66%. Unfortunately, the Commission did not include this efficiency incentive proposal in its decision; however, it stated that it would monitor VEPCO's performance in the future to assure that the Company was improving its efficiency of operation.

APCO requested an increase in rates of approximately $51 million. The Division opposed the size of APCO's request because the Division felt that the Company's proposed rate of return far exceeded that which was just and reasonable. Also at issue was whether APCO's Virginia consumers were paying more than APCO customers in other states. The Commission reduced APCO's request by approximately $23.5 million.

The Division has continued its participation in licensing proceedings before the Nuclear Regulatory Commission (NRC) concerning VEPCO's North Anna Power Station and in other NRC proceedings, as well as in proceedings concerning natural gas curtailment and supply before the Federal Energy Regulatory Commission (FERC). In September 1978 the FERC decided that the Columbia Gas Transmission Corporation should refund approximately $2 million to its customers because of its actions in managing its gas supply during the severe winter of 1976-1977. The Division supported a refund in the case, although it argued for a larger refund than was finally granted.

The Division continued to concentrate on solutions to long term energy problems. It has been a major proponent of moving ahead with experiments to test time of usage rates and load management techniques on electric utility systems. Under the Public Utilities Regulatory Policy Act of 1978, the State Corporation Commission has begun several proceedings to consider rate structures for public utilities which shall be applied in the future. The Division is participating in these proceedings.

CRIMINAL DIVISION

In addition to the precedent-setting Jackson and Davis cases, in the last year the Criminal Division has handled 1,111 petitions for writs of habeas corpus, 889 complaints filed by State prisoners under 42 U.S.C. § 1983, 44 petitions for writs of mandamus and writs of prohibition, and 107 appeals in State and federal courts. Although only 173 of these cases reached trial, the preparation of a vigorous defense in each case is essential to protect the interests of the Commonwealth as federal judges become increasingly involved in policy decisions affecting the State.

Since the re-enactment of the death penalty statutes in 1977, seven capital cases have been argued on appeal to the Supreme Court of Virginia by attorneys in the Criminal Division. The first capital case, Smith v. Commonwealth, was affirmed in October 1978; the Supreme Court of the United States denied certiorari on May 21, 1979, thereby upholding the constitutionality of Virginia's capital punishment statutes. Of the four cases decided, the Supreme Court of Virginia found reversible error in only one, where the defendant had been convicted of capital murder as a principal in the second degree. Decisions are pending in the three remaining cases.

The Criminal Division also provides legal advice and assistance to the Department of Corrections, the Department of State Police and the Virginia Parole Board. Representatives of the Attorney General participate in the State Crime Commission, the Division of Justice and Crime Prevention, the
REPORT OF THE ATTORNEY GENERAL

Criminal Justice Services Commission and the Federal-State Prosecutors Association. At your request, the Deputy Attorney General conducted 87 extradition hearings, making a finding of fact and a recommendation for disposition in each case. This year a simplified procedure for notice to the subject of the pending proceedings facilitated more efficient handling of requisitions for the return of offenders to stand trial in other states.

ENVIRONMENTAL PROTECTION

Federal litigation for the recovery of more than a million dollars in damages and cleanup costs incurred by the State from the February 1976, Chesapeake Bay oil spill is continuing. The environmental section has just won an important appeal in the case in the Fourth Circuit Court of Appeals and established that the limits to recovery for oil spill cleanup contained in the Federal Clean Water Act do not affect the State's ability to collect for cleanup costs under its own laws.

In a case challenging the State's authority to set standards governing water pollution control, air quality and health regulations, I have brought suit to enjoin construction of a sewage sludge composting facility by DANO Marine Resources, Inc., in King George County. Construction of this facility to handle sludge from the Washington, D.C., area was begun without obtaining necessary permits from the State Health Department, the State Air Pollution Control Board and the State Water Control Board. DANO officials contended they would not be subject to State permit requirements. I obtained a temporary injunction halting construction until the required permits are obtained. The action for a permanent injunction and for civil penalties is pending.

This year has seen a large number of cases for enforcement of the State Water Control Law and the National Pollutant Discharge Elimination System (NPDES), the major legal and administrative vehicles for the protection and restoration of the State's waters. Six enforcement actions for violations of the Water Control Law were settled before trial for a total of $195,000. A number of injunctions were obtained in State or federal courts, requiring compliance with NPDES permits. In suits brought by this Office, a $5,000 civil penalty was imposed by the U.S. District Court in Norfolk for an oil spill in the York River and full recovery was made for the July 1977 fish kill in the Piney and Tye Rivers.

The Environmental Section, representing the State Air Pollution Control Board, filed a petition in the United States Court of Appeals for the District of Columbia challenging the validity of the EPA air quality standard for ozone. It is the view of the Board that the EPA standard, if fully implemented, could cost citizens of Virginia millions of dollars under an automobile inspection/maintenance program and could retard industrial development in the Commonwealth—all with negligible benefits in terms of air quality.

A member of the Environmental Section represents the Attorney General on the False Cape Task Force, a gubernatorial committee established to find a satisfactory solution to the problem of access to False Cape State Park.

The Environmental Section continues to work closely with the staffs of the Air Pollution Control Board and the State Water Control Board in implementing the State law and in adapting the agencies' regulatory programs to the 1977 amendments to the Federal Clean Water Act and Clean Air Act. This Section has also cooperated in the prosecution of several criminal cases for falsification of records required by federal and State law.
HEALTH AND WELFARE

My staff has been instrumental in the Department of Welfare's increased efforts to monitor effectively the facilities it must license and regulate. A number of injunction actions were initiated and favorable results were reached in all. The Department's Support Enforcement program was assisted by the special assistant attorneys general assigned to the regional offices. The amount of support money collected by this program has increased considerably over the last year.

Among the principal activities involving the Health Department were numerous enforcement actions relating to water, sewage and solid waste, including the successful prosecution of the Health Department's marina pumpout facilities regulation, and the successful recodification of Title 32 of the Code by the 1979 General Assembly, which was the culmination of three years of concerted work by the two attorneys assigned to the Health Department. The recodification has necessitated an immediate redrafting and repromulgation of all regulations of the State Board of Health. In addition, the 1979 General Assembly has directed the recodification of Title 35 in which the attorneys assigned to the Health Department will play principal roles.

The assistant attorneys general assigned to the State Health Regulatory Boards have actively participated in the investigation and discipline of licensed health care professionals. In response to the increased public awareness and concern for the provision of health care services, I have realigned my staff to provide additional legal support for each of the health regulatory boards, including a prosecutor for actions brought before the respective boards.

In the area of Mental Health and Mental Retardation, in the past year, a particular area of concern has been the application of new federal laws and regulations regarding the education and rights of the handicapped. The office has continued to advise the department about the legal ramifications of the deinstitutionalization of mentally ill and mentally retarded individuals and has been involved in the overlapping concerns of employee rights versus patient rights.

TRANSPORTATION

In addition to the I-66 wage case before the federal court, another case was filed against the Commonwealth and against the U.S. Secretary of Transportation in an attempt to stop construction of I-66 on the grounds that the road is not being built in accordance with the conditions imposed upon its completion by the Secretary of Transportation or by the National Environmental Policy Act. The case was dismissed by the lower court and has been appealed by the plaintiffs to the Fourth Circuit where it is pending.

The Office's Transportation Division also handled 170 cases on the State and federal court level. The cases involved the full range of possible civil litigation including personal injury, Workmen's Compensation, property damage, contracts, injunction, mandamus, actions against employees and agents of the Department of Highways and Transportation, environmental concerns and eminent domain. These cases concerned issues which in monetary value ranged from hundreds to millions of dollars.

As reported last year, this Division has been pursuing recovery of damages arising out of the collision in February 1977 of the S/T Marine Floridian with the Benjamin Harrison Bridge, which spans the James River near Hopewell.

After the Commonwealth filed suit to recover damages, the owners and operators of the vessel brought a separate action pleading alternatively for the court to exonerate them completely or limit their liability to the value of the vessel.
The owners filed a counter-claim against the Commonwealth on the theory that the Commonwealth was negligent in salvaging the bridge. They also charged that the negligence in salvaging the bridge caused the damaged water tower to fall onto the Marine Floridian in March of 1977.

On August 21, 1978, the U.S. District Court for the Eastern District of Virginia denied the shipowners and operators of the vessel both their requests and dismissed their counter-claim against the Commonwealth. The denial of exoneration and limitation of liability has been appealed, and that appeal is now pending in the U.S. Court of Appeals for the Fourth Circuit.

In other matters, the Transportation Division supervised, reviewed and participated in the trial of 1,342 right-of-way condemnation cases for the Department of Highways and Transportation. There were 1,016 condemnation cases and the Division supervised and reviewed the legal steps in the Department's acquisition of $54.5 million worth of right-of-way property. In addition, 2,179 land titles were examined and 2,107 real property transactions were closed.

RAILROADS

The 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 by float 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 of bankruptcy by the former operator, the Penn Central Transportation Company. Legal assistance was rendered to the District Commission regarding many contracts, including the operating agreement with the Virginia and Maryland Railroad Company.

PORTS

As counsel to the Virginia Port Authority, the Transportation Division has provided legal assistance to the Executive Director and the Board of Commissioners of the agency in the management and development of Virginia's State-owned seaports. Legal services provided on a regular basis relate to the broad range of the Port Authority's activities, including the financing of capital improvements through bond issues, trade development, leases to individual port operators, port security and Port Authority Police, relationships with Federal agencies, conflicts of interests and personnel matters.

AVIATION

The Division was given complete responsibility for the legal representation of the new Department of Aviation, which replaces the Division of Aeronautics of the State Corporation Commission as the Commonwealth's aviation regulatory agency. Although the transition was not effective until July 1, 1979, the change required the Division to review and amend all existing contracts for that agency and to establish a regulatory scheme and draft rules and regulations for the new Department, including provisions for hearings and enforcement of the aviation laws of the Commonwealth. The Division supervised each aspect of the transition to insure compliance with Title 5.1 of the Code, as amended by Ch. 272 [1979] Acts of Assembly. All pending cases were transferred to this Division from the General Counsel's Office at the SCC, including Civil Aeronautics Board cases challenging the
determination of essential air service to small communities under the Airline Deregulation Act. Seven Virginia communities have already been severely affected by loss of air service under the Act.

As counsel to the Virginia Airports Authority, this Division also filed a number of pleadings with the CAB concerning fares and route schedules, all designed to bolster commercial aviation service to Virginia citizens. The Virginia Airports Authority was also engaged in a dispute with the Small Business Administration, which claims title to two parcels of land on Tangier Island which are vital to the safe use and development of the Authority-owned airport there. Since negotiations failed to resolve the problem, litigation is expected in the coming year.

MOTOR VEHICLES, TRANSPORTATION SAFETY AND STATE POLICE

Among the 94 cases handled for the Division of Motor Vehicles was a case involving the constitutionality of § 46.1-547(d) of the Code providing for a hearing before the Commissioner of the Division of Motor Vehicles if requested by an existing motor vehicle dealer in the same trade area, before an additional franchise is granted for a particular line make. This statute was held unconstitutional by the United States District Court, but, on appeal, was upheld by the Fourth Circuit Court of Appeals. Another case challenged the constitutionality of § 46.1-383 which authorizes the Division to examine a motor vehicle operator as to his physical or mental competency for any good cause shown. The constitutionality of this statute was upheld by the Circuit Court for the City of Norfolk. Several cases involving fuels tax assessed by the Division were successfully litigated in the circuit courts of the State. Also, several cases involving the appointment of State inspection stations by the Department of State Police were successfully defended during the past year.

TAXATION

The echoes of California real estate tax relief in the form of Proposition 13 continue to reverberate in the Commonwealth. The Office assisted in the preparation and review of numerous tax limitation provisions introduced in the 1979 General Assembly as well as special relief legislation for the elderly.

Corporate challenges to the income tax structure have demanded a significant amount of attention from the Tax Section attorneys. There are more than five pending suits brought by major multistate corporations challenging the Department's application of the allocation and apportionment of income statutes in the Code of Virginia. Most of the taxpayers are seeking to have certain taxable income removed from the reach of the Commonwealth of Virginia to the state of corporate domicile.

Among those issues upon which the Department prevailed during the past year were the taxability of the sale of meals to passengers on airlines. Although the Virginia Supreme Court ruled against the Department on a number of issues presented in the consolidated airline cases, the application of the sales tax to meals was the principal revenue-generating issue. This Office also secured a favorable decision for the Department in the lower courts under a judgment which found a corporation earning more than $2 million in the Commonwealth to be subject to income taxes for which it claimed it had no liability. The Office filed an amicus curiae brief in the United States Supreme Court concerning the ability of states to tax federal contractors.
This past year saw the filing of approximately 75 suits across the Commonwealth seeking refunds of bank stock taxes in excess of $40 million. The suits challenge the inclusion, in taxable assets of the bank, of certain federal obligations. The flood of cases was generated by a decision of the Montana Supreme Court concerning a similar bank stock tax.

The Office is presently defending the Department of Taxation in a challenge to the Virginia excise tax on slaughter hogs and feeder pigs brought by hog producers who are residents of the State of North Carolina. They object to paying the Virginia tax on hogs which they sell to Virginia meat packers. The tax attorneys are also very active in representing the Department in tax lien priority cases in the State courts with sales of land for delinquent taxes and in the federal courts in bankruptcy cases. The Department of Taxation also continues to find itself challenged by income taxpayers who dispute the Department's interpretation of the interaction between the United States Internal Revenue laws and the Code of Virginia.

Several charitable trust cases involving hundreds of thousands of dollars are currently in dispute. The cases seek to preserve charitable bequests for beneficiaries in the Commonwealth. We have requested the Department of Taxation to establish a claim for unpaid sales and use taxes upon a substantial sum of money recovered in a successful law enforcement raid on persons found to be in possession of large amounts of marijuana.

The Office continues to focus on streamlining management in an effort to achieve maximum efficiencies with a limited number of staff members. The time reporting system adopted by the Attorney General's Office last year promises to serve as a model for Attorney General's Offices in other states.

While this annual report cannot fully present a picture of the services provided by my staff, I hope it does give you an indication of the dedication and the high quality of legal counsel provided by the Attorney General's staff. I believe that in each case cited above, attorneys in the Office have demonstrated their commitment to you, to agencies of the Commonwealth, and to the citizens of Virginia.

Respectfully submitted,

Marshall Coleman
Marshall Coleman
Attorney General
## PERSONNEL OF THE OFFICE

(Post Office Address, Richmond)

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<td>John Garland Pollard</td>
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<td>*J. D. Hank, Jr.</td>
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<td>John R. Saunders</td>
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<td>Abram P. Staples</td>
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<td>Harvey B. Apperson</td>
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<td>§J. Lindsay Almond, Jr.</td>
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<td>**Kenneth C. Patty</td>
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<td>A. S. Harrison, Jr.</td>
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<td>***Frederick T. Gray</td>
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<td>Robert Y. Button</td>
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<td>Andrew P. Miller</td>
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<td>#Anthony F. Troy</td>
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<td>John Marshall Coleman</td>
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*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.

†Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. John 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. John Garland Pollard and served until February 1, 1918.

**Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.

***Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.

Cases Decided in the Supreme Court of Virginia

Ansell v. Commonwealth. From Circuit Court, City of Norfolk. Validity of applying increased punishment provisions of § 18.2-53.1 in trial on multiple violations of statute. Affirmed.


Blair 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. Appeal dismissed as improvidently granted.


Candea, et al. v. Carbaugh and VDACS. From Circuit Court, County of Loudoun. Injunction to stop spraying of Dimilin. Injunction dissolved.


Commonwealth v. Rozier. From Circuit Court, City of Richmond, Division I. Admissibility of hearsay evidence. Affirmed.


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


Dowdy v. Commonwealth. From Circuit Court, City of Richmond, Division II. Appeal from conviction of shooting into an occupied dwelling house. Sufficiency of jury instructions and evidence. Affirmed in part, reversed in part and remanded.


Fitzgerald v. Commonwealth. From Circuit Court, County of Campbell. Whether the trial court erred in admitting evidence of uncharged criminal activity in prosecution for related counterfeiting offense. Affirmed.


Horsley v. Department of Highways and Transportation. Appeal of Industrial Commission that stated that the Commission is without authority to enter judgment against a claimant who fraudulently obtains compensation payments. Decision adverse to Department. Writ of Appeal. Denied.

Hummell v. Commonwealth. From Circuit Court, County of Rockingham. Whether the Sixth Amendment of the Constitution and Article I, § 8, of the Virginia Constitution preclude eavesdrop evidence of a defendant in the absence of his counsel. Affirmed.


In re Bulger. From Circuit Court, County of Henrico. Petition for writ of mandamus. Petition dismissed.

In re City of Hampton, etc. From Circuit Court, City of Hampton. Petition for appeal from denial of writ of prohibition. Petition dismissed.

In re Cord. From Circuit Court, County of Warren. Suit seeking writ of mandamus requiring certification of plaintiff's good moral character for entry to Virginia Bar examination. Remanded.

In re Department of State Police. Writ of prohibition to prevent court from ordering State Police to serve civil process. Writ granted.

In re Department of State Police. Writ of prohibition to prevent court from ordering State Police to disclose investigative files. Writ granted.


Jenkins v. Commonwealth. From Circuit Court, County of Gloucester. Admissibility of wife's testimony against husband. Reversed.

Jenkins v. Commonwealth. From Circuit Court, County of Gloucester. Nature of relief when trial court refused to grant pre-sentence report; sufficiency of evidence in prosecution for automobile involuntary manslaughter. Reversed as to manslaughter, remanded for pre-sentence report and resentencing on remaining conviction.


Jordan v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of unlawful shooting with intent to maim. Exclusion of evidence as to victim's reputation for violence. Affirmed.
Kayh a/k/a Kiriluk v. Commonwealth. From Circuit Court, County of Chesterfield. Sufficiency of evidence in conviction for larceny by check. Reversed.

King v. Commonwealth. From Circuit Court, County of Franklin. Constitutionality of accommodation defense in Virginia, whether such issue was 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. Affirmed.

Lane a/k/a Lane v. Commonwealth. From Circuit Court, City of Virginia Beach. Whether evidence was sufficient to sustain conviction for involuntary manslaughter of infant; whether instruction was proper. Reversed.


Mendez v. Commonwealth. From Circuit Court, County of Southampton. Whether an actual bribe must be communicated to the party sought to be bribed to sustain a conviction of bribery. Affirmed.

Mendez v. Commonwealth. From Circuit Court, County of Southampton. Whether oath taken for affidavit is proper subject for perjury prosecution. Reversed.


New Hope Industries v. Commonwealth. From Circuit Court, City of Richmond. Claim against State Highway and Transportation Commissioner under a contract for the construction of a State highway. Decided in favor of the Commonwealth.

Ogu v. George Mason University, et al. From Circuit Court, County of Fairfax. Appeal from dismissal by University due to its governmental immunity. Writ denied.


Price v. Commonwealth. From Circuit Court, City of Norfolk. Appeal from conviction of statutory burglary and grand larceny. Refusal of trial court to allow defendant's retained attorney to represent both defendant and co-defendant at trial. Appeal dismissed as improvidently awarded.

Pritchard v. Commonwealth. From Circuit Court, County of Greene. Appeal from conviction of breaking and entering a storehouse while armed with a deadly weapon with attempt to commit larceny. Attack upon sufficiency of evidence. Affirmed.


Robinson v. Commonwealth. From Circuit Court, City of Richmond, Division II. Sufficiency of description in search warrant. Affirmed.

Ryan 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 instruction to the jury. Affirmed.

Sadoski v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from conviction of statutory burglary. Whether the prosecution can question the defendant about the number of prior felony convictions. Affirmed.


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

Simmons v. Department of Highways and Transportation. Appeal of Industrial Commission ruling held that manner of accident's occurrence was not necessary to determine. Writ of appeal. Denied.

Smarr v. Commonwealth. From Circuit Court, City of Richmond, Division II. Appeal from conviction of maiming. Admission of testimony regarding prior medical history of victim, sufficiency of evidence. Reversed and remanded.


Stewart v. Commonwealth. From Circuit Court, Stafford County. Propriety of spousal testimony against defendant in criminal prosecution; whether husband can commit grand larceny against wife. Affirmed.


Thompson v. Commonwealth. From Circuit Court, City of Portsmouth. Whether trial court erred in refusing proffered instruction on burden of proof; whether trial court erred in refusing to grant mistrial. Affirmed.

Trainham v. Commonwealth. From Circuit Court, City of Williamsburg and County of James City. Search and seizure. Improvidently awarded.

Troy v. Walker. Original jurisdiction. Mandamus granted to compel comptroller to issue funds relative to removing C&O Railway as operator of the Newport News Port.

United Air Lines, Inc. v. Commonwealth. From Circuit Court, City of Richmond. Reversed in favor of Commonwealth on one category of tangible personal property; affirmed in favor of taxpayer on three other categories of tangible personal property.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

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

Ashley v. Commonwealth. From Circuit Court, County of Isle of Wight. Hearsay evidence.

Barksdale v. Department of Highways and Transportation. From Circuit Court, County of Campbell. Appeal from award in a condemnation proceeding.
Brooks v. Commonwealth. From Circuit Court, County of York. Whether error to admit evidence of recent conviction for welfare fraud grand larceny in prosecution for same offense.

Bundy v. Commonwealth. From Circuit Court, County of Fauquier. Appeal from convictions of voluntary manslaughter and use of a rifle in the commission of murder. Issue is whether defendant could be convicted of latter offense when convicted of only voluntary manslaughter by use of the rifle, which appellant contends constitutes an invalid inconsistent verdict.

Chadwick's On the Strand v. Alcoholic Beverage Control Commission. From Circuit Court, County of Fairfax. Commission granted wine and beer-on-premises license and objectors filed a petition for review. Fairfax County Circuit Court dismissed the petition and objectors have filed notice of appeal to the Supreme Court.

Champion International v. Commonwealth. From Circuit Court, City of Richmond. Appeal of decision finding sale of §1231 assets as true capital gains within meaning of Code of Virginia.

City of Virginia Beach v. Virginia Employment Commission and Guizzetti. From Circuit Court, City of Virginia Beach. Unemployment insurance benefits.

Clark v. Commonwealth. From Circuit Court, County of Fairfax. Appeal from conviction of capital murder (murder for hire). Admissibility of confession; denial of instructions on lesser included offenses; admissibility of certain evidence at sentencing; constitutionality of death penalty statutory scheme.

Cogdill v. First District Committee of the Virginia State Bar. From Circuit Court, City of Newport News. Appeal from decision revoking petitioner's license to practice law. Sufficiency of evidence, admissibility of tape-recorded evidence, entrapment, previously disciplined for same offense.

Commonwealth v. Simon. From Circuit Court, County of Fairfax. Doctrine of collateral estoppel in involuntary manslaughter prosecution.

Coppola v. Commonwealth. From Circuit Court, City of Newport News. Issue is whether the death penalty verdict should be sustained.

Department of Mental Health and Mental Retardation v. Jefferson. From Circuit Court, County of Nottoway. Petition for appeal granted on issue whether prior uncollected accounts receivable for patient's care may be assessed and collected.

Dooley v. Ritchie. From Circuit Court, City of Richmond. Petition for appeal concerning dismissal of an action challenging the recovery of general relief payments from recipients by Department of Welfare.


Fink v. Ritchie. From Circuit Court, City of Richmond. An appeal from the decision dismissing the suit challenging recovery of general relief payments from recipients by the Department of Welfare.
Flow Research Animals v. State Tax Commissioner. From Circuit Court, County of Pulaski. Appeal of decision finding a corporation raising experimental animals to be processing in the industrial sense.

Fuller v. Commonwealth. From Circuit Court, City of Waynesboro. Appeal from conviction of murder. Refusal to grant a new trial because of incompleteness of the trial transcript.

Gordon, et al. v. Department of Highways and Transportation. From Circuit Court, County of Prince Edward. Appeal from order in a condemnation proceeding which ordered the payment of interest on the excess of the award over the amount on deposit at the judgment rate of eight percent.


Harrison v. Commonwealth. From Circuit Court, County of Henrico. Appeal from convictions of first degree murder and robbery. Whether defendant can be convicted of both robbery and murder during commission of robbery without violating the right against double jeopardy, and whether there was a waiver of the jeopardy claim in the trial court.

In re Cotton. Petition for writ of prohibition. Whether judgment of circuit court against a minor may be enforced when minor achieves majority after successive stays were granted pending review. See this report, Hailey v. Dorsey, United States Supreme Court.

In re 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.


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

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

Payne v. Commonwealth. From Circuit Court, County of Fairfax. Issue is sufficiency of the evidence.

Petska v. Slane. From Circuit Court, County of Chesterfield. Appeal pending by petitioner.

Schaaf v. Commonwealth. From Circuit Court, County of Henrico. Appeal from conviction of carrying a concealed weapon. Error of trial court in denying motion to strike Commonwealth's evidence.


Stamper v. Commonwealth. From Circuit Court, County of Henrico. Capital murder; sufficiency of the evidence, search and seizure, constitutionality of death penalty.

State Highway and Transportation Commissioner v. Baugher. From Circuit Court, County of Greene. Petition for writ of error from a condemnation case; error in denial of mistrial.

State Highway and Transportation Commissioner v. Donelson. From Circuit Court, County of Russell. Condemnation case.


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

State Highway and Transportation Commissioner v. Percy and Allmond. From Circuit Court, County of Isle of Wight. Appeal to set aside the award and grant a new trial or order a remittitur of an appropriate portion of the damages.

Upchurch v. Commonwealth. From Circuit Court, City of Newport News. Admission of allegedly hearsay testimony.

Vass v. State Board of Dentistry. From Circuit Court, County of Montgomery. Petition for appeal filed by plaintiff.

Weaver Bros., Inc. v. Commonwealth. From Circuit Court, County of Fairfax. Taxpayer appeals decision in favor of Commonwealth on "business" interest. Consolidated with Champion.

White Oak Lodge, Inc. v. Alcoholic Beverage Control Commission. From Circuit Court, City of Norfolk. Appeal from suspension order.


Wood v. Commonwealth. From Circuit Court, County of Nelson. Appeal from conviction of possession of marijuana with intent to distribute only as an accommodation to another individual. Attack upon sufficiency of evidence.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

Armstrong v. Zahradnick. Petition for a writ of certiorari to the court of appeals decision to deny relief. Issue is whether the State attorney assistance program provided by the Code of Virginia is an acceptable alternative to the provision of law libraries in providing prisoners with access to courts. Certiorari denied.


Cross v. Commonwealth. Petition for writ of certiorari to the Supreme Court of Virginia. Whether certain jury instructions should have been given; various constitutional arguments. Certiorari denied.

DiPaola v. Riddle. Petition for a writ of certiorari to judgment of Fourth Circuit Court of Appeals sustaining denial of habeas corpus. Issue of standing to raise search and seizure claim in federal court. Certiorari denied.


Fairfax County-Wide Citizens, etc. v. Fugate and County of Fairfax. Writ of certiorari from U.S. Court of Appeals for Fourth Circuit. Racial discrimination in maintaining roads. Writ denied.


Frazier v. Weatherholtz. 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. Certiorari denied.

Gibson v. Superintendent. Petition for writ of certiorari to judgment of Fourth Circuit Court of Appeals granting habeas corpus relief on grounds that admission of evidence of inculpatory statement made by defendant to State psychiatrist during court-ordered psychiatric examination violates right of self-incrimination. Certiorari denied.


Hudspeth v. Figgins, et al. Petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit by officers of the Virginia correctional system; whether an implied threat to an inmate denies him access to the courts or subjects him to cruel and unusual punishment under the Eighth Amendment. Certiorari denied.

Hummel v. Commonwealth. Petition for writ of certiorari to the Supreme Court of Virginia; whether the Sixth Amendment of the United States Constitution precludes eavesdrop evidence from a defendant in the absence of his counsel. Certiorari denied.

Mollins v. State Highway and Transportation Commissioner. Leave to file appeal to object to seizure of land. Dismissed.
Mundy v. Director, Department of Corrections. Petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Denial of extraordinary good time credit. Certiorari denied.

Patterson v. Riddle, et al. Petition for a writ of certiorari to judgment of Fourth Circuit Court of Appeals. The trial judge's denial of petitioner's court-appointed attorney's request for funds to investigate an alibi defense did not deprive the petitioner of the effective assistance of counsel. Certiorari denied.

Pierceall v. Commonwealth. Petition for writ of certiorari to the Supreme Court of Virginia; sufficiency of search warrant. Certiorari denied.


Reiter v. Sonotone, Inc., et al. Petition for writ of certiorari from U.S. Court of Appeals granted. Amicus curiae brief filed by Commonwealth. Supreme Court held that consumers forced to pay higher prices for goods purchased for personal use as result of antitrust violations sustain injury in their "business or property" within meaning of Section 4 of the Clayton Act.


Skinner v. Commonwealth. Petition for a writ of certiorari to judgment of the Supreme Court of Virginia; probable cause for arrest; comments of Commonwealth's Attorney to jury. Certiorari denied.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

American Motors Sales Corporation, et al. v. Division of Motor Vehicles of the State of Virginia, et al. Appeal from decision holding that § 46.1-547(d) is constitutional.


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, County of Henrico. Appeal from a ruling of the State Board of Pharmacy for declaratory judgment. Settled.

Allen's Lookout Corp. v. Alcoholic Beverage Control Commission. Circuit Court, City of Norfolk. Appeal from Commission's restriction regarding sale and consumption of alcoholic beverages and beverages. Affirmed.

Anderson v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond. Motion for judgment filed seeking reinstatement, back pay, and $25,000 punitive damages on the basis of discrimination. Demurrer filed. Pending.

Arlington Lodge #1315, Loyal Order of Moose v. ABC Commission. Circuit Court, County of Fairfax. Appeal from Commission's refusal to grant mixed beverage license. Pending.


Bardan, Inc. & Bede, Inc. t/a Hop-In Food Store #53 v. Commonwealth. Circuit Court, City of Roanoke. Appeal from denial of license. Remanded to Commission for rehearing.

Barfield v. Johnson. Circuit Court, City of Norfolk. Defendant's appeal from Juvenile and Domestic Relations District Court's decision that reimbursement be paid Bureau of Support Enforcement for child support. Finding for the Welfare Department. Amount of support raised.


Beverly v. Bureau of Support Enforcement, etc. Circuit Court, County of Campbell. Appeal of decision of Juvenile and Domestic Relations District Court to reverse decision of administrative hearing officer's finding of support obligation. Reversed.
Board of Supervisors of Accomack County v. State Water Control Board. Circuit Court, County of Accomack. Appeal of Board's decision not to remove Accomack County from the Eastern Shore Groundwater Management Area. Board's decision affirmed.

Board of Trustees of City of Norfolk v. Virginia Supplemental Retirement System. Circuit Court, City of Norfolk. Action to recover $61,000 alleged to have been wrongfully paid to the retirement system. Pending.


Brooking v. Schiltz. Circuit Court, City of Richmond. Action instituted by parent of former VCU student who drowned in VCU swimming pool. Negligence alleged on the part of the instructor of the swimming course in which the decedent was enrolled. Defendant's plea of sovereign immunity denied by the Circuit Court. Pending.


Bureau of Support Enforcement, etc. v. Miller. Circuit Court, County of Bedford. Appeal for Juvenile and Domestic Relations District Court's decision to reverse administrative hearing officer's finding of support obligation. Reversed.


Cabin Point, Inc. v. State Water Control Board. Circuit Court, City of Richmond, Division I. Suit challenging denial of 401 certification. Board decision reversed.

Caddy Corporation v. Alcoholic Beverage Control Commission. Circuit Court, City of Norfolk. Appeal from restriction against sale of alcoholic beverages on Sunday and license granted on probation. Affirmed.

Candea, et al. v. Carbaugh and VDACS. Circuit Court, County of Loudoun. Injunction to stop spraying of Dimilin. Appealed to Supreme Court of Virginia.

Carl Parkers Drive In, Inc. v. Alcoholic Beverage Control Commission. Circuit Court, City of Norfolk. Appeal from Commission revocation order. Pending.


Chadwick's On the Strand v. Alcoholic Beverage Control Commission. Circuit Court, County of Fairfax. Commission granted wine and beer-on-premises license and objectors filed a petition for review. Circuit court dismissed the petition and objectors have filed notice of appeal to the Supreme Court.

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

Club Fairfax, Inc. v. Alcoholic Beverage Control Commission. Circuit Court, County of Fairfax. Appeal from Commission's revocation of mixed beverage license. Appeal was voluntarily withdrawn by licensee.


Coleman v. Stanley. Circuit Court, County of Patrick. Suit seeking injunctive relief to abate and require the removal of a dam as a public nuisance. Pending.


Commonwealth v. Douglas, et al. (two separate actions) Circuit Court, County of King George. Actions by State Health Department to enforce waterworks regulations. Both pending.

Commonwealth v. Empire Granite Corporation. Circuit Court, City of Richmond, Division I. Action by State Health Department to obtain warrant to enforce occupational health regulations. Warrant issued.


Commonwealth v. Gordon. Circuit Court, City of Virginia Beach. Attorney General sought leave to file amicus curiae brief seeking dismissal of indictments for violations of § 20-122 and § 64.148. Leave of court was denied. Indictments were dismissed.


Commonwealth v. Padgett. Civil action brought under the Virginia Antitrust Act seeking civil recovery of moneys received and wrongfully paid by the Commonwealth. Presently 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. Dismissed without prejudice.


Commonwealth v. Williams Paving Company. Circuit Court, City of Hampton. Action by State Health Department to enforce solid waste regulations and abate nuisances. Final order entered.


Commonwealth, ex rel., State Water Control Board v. Barlow. Circuit Court, County of Henrico. Suit for injunctive relief for violation of § 62.1-44.16 of the Code; defendant enjoined to cease operations on or before July 1, 1978; injunction complied with; dismissed agreed.

Commonwealth, ex rel., State Water Control Board v. Cave. Circuit Court, County of Rockingham. Suit to enjoin compliance with special order; temporary injunction entered September 18, 1978; injunction complied with. Dismissed agreed.


Commonwealth, ex rel., State Water Control Board v. FMC Corporation. Circuit Court, County of Henrico. Suit for civil penalties for violation of special order; settlement offer accepted. Dismissed agreed.

Commonwealth, ex rel., State Water Control Board v. Graninger, et al. Circuit Court, City of Fredericksburg. Suit for injunctive relief and civil penalties for violation of a special order; pending, injunctions entered. Stafford County has acquired the system. Dismissed agreed.

Commonwealth, ex rel., State Water Control Board v. H & S Coal Company, Inc. Circuit Court, County of Buchanan. Suit for injunctive relief and civil penalties for violation of NPDES permit; injunction entered. Pending.


Commonwealth, ex rel., State Water Control Board v. Island Creek Coal Company. Circuit Court, County of Buchanan. Suit for injunctive relief and civil penalties for violation of no-discharge certificate; $10,000 civil penalty paid; injunction entered.

Commonwealth, 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 a special order. Pending.


Commonwealth, ex rel., State Water Control Board v. Perdue, Inc. Circuit Court, County of Accomack. Suit for civil penalties for violation of NPDES permit limitations. Settlement agreed upon, to be dismissed in conjunction with settlement.

Commonwealth, ex rel., State Water Control Board v. Perdue, Inc. Circuit Court, County of Accomack. Suit for injunctive relief and penalties for violation of a special order; pending; penalties awarded, temporary injunction denied. Parties have agreed to dismissal in conjunction with settlement of claims against Perdue for NPDES permit violations.

Commonwealth, ex rel., State Water Control Board v. Raven-Anchor Smokeless Coal Co. Circuit Court, County of Buchanan. Suit for civil penalties for violation of NPDES permit limitations; settlement agreed upon; to be dismissed in conjunction with settlement.


Commonwealth, ex rel., State Water Control Board v. Safeguard Automotive Corporation. Circuit Court, County of Henrico. Suit for civil penalties for violation of a special order; settlement agreed upon. Dismissed agreed.

Commonwealth, ex rel., State Water Control Board v. Smithfield Packing Co. Circuit Court, County of Isle of Wight. Suit for civil penalties for violations of NPDES permit limitations. Settlement offer accepted. Dismissed agreed.


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


Commonwealth, ex rel., State Water Control Board v. Wildcat Coal Company. Circuit Court, County of Tazewell. Suit for injunctive relief and civil penalties for violation of NPDES permit; injunction entered. Pending.


Cox v. Medical College of Virginia Hospital. Circuit Court, City of Richmond. Action by former patient of MCV Hospital Dental Clinic. Negligent treatment resulting in nerve damage alleged. Defendant's plea of sovereign immunity granted by Circuit Court.

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 State Milk Commission. Circuit Court, County of Albemarle. Declaratory judgment Orders 6 and 7 promulgated by the State Milk Commission are invalid. Plaintiff nonsuited.

Davis v. Davis. Circuit Court, County of Isle of Wight. Support matter remanded to Juvenile and Domestic Relations District Court.

Davis v. Virginia Commonwealth University and Wilson. Circuit Court, City of Richmond. Action instituted by estate of former MCV Hospital Emergency Room patient. Negligence in diagnosis and treatment which contributed to patient's death alleged. Complaint alleges that patient, after being advised that he would not be admitted to the hospital, stood up, sustained a seizure and fell to the floor of the emergency room, thereby sustaining fatal head injuries. Pending.

DeCapri t/a The Lamplighter v. Layman, et al. Circuit Court, City of Richmond, Division I. Appeal from suspension and probation orders. Pending.


Department of Highways and Transportation v. Marine Resources Commission. Circuit Court, City of Newport News. Appeal of decision denying a permit to construct a bridge over the North Fork of the Shenandoah River.

Dickens v. Tidewater Regional Office, Bureau of Support Enforcement, etc. Circuit Court, City of Hampton. Appeal from Juvenile and Domestic Relations District Court's decision on support. Pending.

Diller v. Diller. Circuit Court, County of Lancaster. Order for support payments and transfer of jurisdiction. Payment required and show cause order dismissed and case transferred.

Dobbins v. Board of Supervisors of Prince William County, Comptroller of Virginia and Attorney General. Circuit Court, County of Prince William. Motion for judgment and motion to join an additional party regarding seizure of parked automobile. Pending.


Dowdy v. Dowdy. Circuit Court, City of Richmond, Division II. Show cause and transfer of jurisdiction, support payments. Payment required and dismissed.

Dunn v. Dunn. Circuit Court, City of Williamsburg, County of James City. Remand from Juvenile and Domestic Relations District Court, City of Williamsburg.


Fairfax Circle Steak Ranch, Inc. t/a Renee's Supper Club. Circuit Court, County of Fairfax. Appeal from commission's suspension order. Pending.


Filmasters, Ltd. Circuit Court, City of Alexandria. Petition for an assurance of voluntary compliance pursuant to the Virginia Consumer Protection Act. Pending.


Fink v. Ritchie, et al. Circuit Court, City of Richmond. Suit challenging recovery of general relief payments from recipients by the Department of Welfare. Summary judgment for respondents.

Freeman v. Freeman. Circuit Court, County of York. Remand of support matters to Juvenile and Domestic Relations District Court, York County.


Goodall v. Medical College of Virginia Hospitals/Virginia Commonwealth University. Circuit Court, City of Richmond. Action instituted on behalf of infant plaintiff and former patient at Medical College of Virginia Hospital. Negligence alleged in the treatment of patient by the administration of a certain medication (streptomycin) which allegedly caused residual hearing loss. Defendant's motion to dismiss on plea of sovereign immunity granted by the circuit court. Plaintiff filed petition for appeal to the Virginia Supreme Court. No decision on plaintiff's petition for appeal has been rendered. Pending.

Grain Processing Corp. 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. Judgment for plaintiff, remanded to Board.
Grain Processing Corp. v. Virginia Department of Agriculture and Commerce. Circuit Court, City of Richmond, Division II. Administrative Process Act appeal. Court ordered new hearings.


Halliburton v. Irby. Circuit Court, County of Rockbridge. Suit for damages for alleged disapproval of housing loan program. Pending.


Hladys v. Commonwealth. Circuit Court, City of Richmond, Division I. Medicaid provider alleging the illegality of his contract termination with medicaid. Pending.


Hopkins v. State Board of Pharmacy. Circuit Court, County of Giles. Appeal of Board order following administrative hearing. Pending.

In re Agee. Circuit Court, County of Roanoke. Petition to open sealed adoption records. Settled.

In re Allison, Jr. Circuit Court, County of Amherst. Petition for appointment of guardian. Granted.

In re Aluma-Coverall Corporation, t/a Surfa-Shield Insulation. Circuit Court, County of Henrico. Assurance of voluntary compliance with consumer protection law filed.

In re Appliance Underwriters, Inc. Circuit Court, City of Alexandria. Petition for an assurance of voluntary compliance pursuant to the Virginia Consumer Protection Act. Pending.

In re Barnett. Circuit Court, City of Roanoke. Petition to open sealed adoption records. Settled.

In re Berry. Circuit Court, County Amherst. Petition for appointment of guardian. Granted.


In re City of Hampton, etc. Circuit Court, City of Newport News. Petition for writ of prohibition. Petition denied.

In re Estate of W. L. Harris. Circuit Court, City of Fredericksburg. Petition for appointment of trustee and approval of accountings of administrator c.t.a. Petition granted.

In re Hanks. Circuit Court, County of Roanoke. Petition to open sealed adoption records. Settled.

In re Howard. Circuit Court, County of Amherst. Petition for appointment of guardian. Granted.

In re J and J Ventures, Inc. t/a The Gramophone. Circuit Court, City of Richmond. Assurance of voluntary compliance with consumer protection laws filed.

In re Leonard. Circuit Court, County of Roanoke. Petition to open sealed adoption records. Pending.

In re Lisowski. Circuit Court, County of Dinwiddie. Petition for declaration of partial incapacity granted.

In re Lowery. Circuit Court, County of Amherst. Petition for appointment of guardian. Granted.

In re Mathews. Circuit Court, County of York. Petition to release information in adoption records of State Department of Welfare. Dismissed agreed.


In re Overman. Circuit Court, County of Amherst. Petition for appointment of guardian. Granted.

In re Regal Jewelers, Inc. Circuit Court, City of Fredericksburg. Petition for an assurance of voluntary compliance pursuant to the Virginia Consumer Protection Act. Pending.

In re Snyder. Circuit Court, County of Amherst. Petition for appointment of guardian.

In re Sotos. Circuit Court, City of Richmond, Division I. Petition for obtaining information from records on file with Virginia Department of Welfare, adoption proceeding. Release of information granted.

In re Speedwell Seven Springs Water System. Circuit Court, County of Wythe. Action to compel compliance with State Health Department waterworks regulations. Order compelling compliance granted.

In re Staley. Circuit Court, City of Williamsburg, County of James City. Petition to release information in adoption records of State Department of Welfare. Petition granted.
In re Tidewater Auto Dealers. Grand jury action to give access to records of federal grand jury in connection with a contemplated civil suit. Motion denied in the district court, presently on appeal.


Kellum and Simiele Funeral Home, Inc. v. State Board of Funeral Directors and Embalmers. Circuit Court, City of Virginia Beach. Appeal of Board order following administrative hearing. Judgment for defendant.

Kight v. City of Richmond, et al. Circuit Court, City of Richmond. Suit for monetary damages allegedly arising from medical malpractice in the failure to diagnose tuberculosis in a prisoner of the Virginia correctional system. Pending.


Levitt v. Hutto. Circuit Court, City of Richmond, Division II. Suit to enjoin the State to transfer prisoners from the Norfolk City Jail. Voluntary nonsuit.


Lukhard v. Ballard. Circuit Court, City of Norfolk. Suit for an injunction against attorney acting as a child-placing agency without a license. Pending.
Lukhard v. Bennett. Circuit Court, City of Danville. Suit seeking a permanent injunction against the operation of a home for adults without a license. Injunction entered.

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

Lukhard v. Brewer. Circuit Court, City of Richmond, Division I. Petition for injunction, child welfare agency, unlicensed operation. Injunction granted.

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

Lukhard v. Flythe. Circuit Court, City of Portsmouth. Suit seeking injunction for operating a home for adults without license under § 63.1-181. Injunction issued.

Lukhard v. Graham. Circuit Court, City of Roanoke. Suit seeking contempt citation for violation of a permanent injunction of a home for adults without a license. Fine of $300 and 10-day suspended sentence imposed.

Lukhard v. Harper. Circuit Court, County of King and Queen. Petition for injunction, home for adults, operating without a license. Injunction granted.

Lukhard v. Lowden, et al. Circuit Court, City of Alexandria. Suit seeking an injunction against operating a home for adults without a license. Petition withdrawn by agreement.


Lukhard v. Rupp. Circuit Court, City of Richmond, Division I. Petition for injunction, home for adults, operating without a license. Injunction granted.

Lukhard v. Threat. Circuit Court, City of Alexandria. Suit seeking an injunction against operating a family day home without a license. Injunction issued.

Lukhard v. Walker. Circuit Court, City of Norfolk. Suit seeking injunction for operating a home for adults without a license under § 63.1-181. Injunction issued.

Lukhard v. Wynn. Circuit Court, City of Portsmouth. Suit seeking injunction for operating a home for adults without a license under § 63.1-181. Injunction issued.


Martin v. Medical College of Virginia Hospital. Circuit Court, City of Richmond. Action instituted by estate of decedent. Negligence on the part of the staff of the Medical College of Virginia Hospital in failing to schedule a timely appointment for decedent who had been referred to MCV Hospital alleged. Decedent died prior to scheduled appointment at MCV Hospital. Nonsuited.
Martin, Licensee, Martin's Adult Home v. Lukhard, etc. Circuit Court, County of Powhatan. Appeal for denial of license. Death of petitioner.

Medicenters of America, Inc. v. Commonwealth. Circuit Court, City of Richmond. Suit for additional reimbursement from the medicaid program. Pending.

Meiggs v. State Water Control Board. Circuit Court, City of Virginia Beach. Appeal and petition to enjoin Board from holding a hearing. Injunction denied. Pending.

Meyers v. City of Richmond, et al. Circuit Court, City of Richmond, Division II. Suit over authority and jurisdiction of the City of Richmond and State Department of Housing under Title 36 and Uniform Statewide Building Code. Order entered dismissing Board and invalidating certain provisions of the Code of the City of Richmond.

Michael v. Stage and Paez. Circuit Court, County of Fairfax. Malpractice claim against physicians on the staff of the Northern Virginia Mental Health Institute. Plea of sovereign immunity pending.


Pierce v. State Board of Pharmacy. Circuit Court, County of Fairfax. Appeal of Board order following administrative hearing. Pending.
Poole v. Brandenberg. Circuit Court, City of Richmond, Division I. Suit seeking monetary damages by a prison inmate for libel, slander and harassment. Pending.

Pross v. Carbaugh v. Fidelity and Deposit Company of Maryland, Madison Livestock Market, Inc. and Farmville Livestock Market, Inc. Circuit Court, City of Richmond, Division I. Interpleader for disbursement of funds held by comptroller. Interpleader sustained. Disbursements completed.

Radcliffe v. Muncy. Circuit Court, City of Richmond, Division I. Suit for damages against the Superintendent of the Virginia State Farm because of allegations of libel and slander. Dismissed.

Ratcliff v. Johnson. Petition to determine grievance of promotion practices at Southampton Correctional Center. Pending.


Richardson v. CSH. Circuit Court, City of Richmond, Division I. Motion to dismiss by CSH granted. Plea of sovereign immunity on behalf of physicians. Pending.


Robins v. Virginia Voluntary Formulary Advisory Board. Circuit Court, City of Richmond. Appeal of certain entries into Virginia Voluntary Formulary. Board reversed and final order entered.


S. Galeski Optical Company v. State Board of Examiners in Optometry, et al. Circuit Court, City of Richmond, Division I. Action for declaratory and injunctive relief regarding the optometry and opticianry laws. Temporary injunction granted pending hearing.

Sa'Ad El-Amin v. College of William and Mary. Circuit Court, City of Richmond, Division I. Suit for damages for alleged breach of contract. Pending.


Schmidt v. Anjal. Circuit Court, City of Williamsburg and County of James City. Dismissed.

School Board of Albemarle County v. State Board of Education. Circuit Court, County of Albemarle. On appeal under the Administrative Process Act of the denial of a variance to the State Board's procedure for adjusting grievances. Pending.

See v. Roanoke Health Department. Circuit Court, City of Roanoke. Appeal of denial of septic tank permit by State Health Department. Pending.

Shelton v. Scalvo Biologicals, Inc., et al. Circuit Court, City of Norfolk. Complaint alleging malpractice in the administration of a drug at a public health department. Commonwealth's demurrer to complaint is pending.


Smith v. Board of Funeral Directors and Embalmers. Circuit Court, City of Fredericksburg. Appeal from Board order following administrative hearing. Pending.

Smith v. Dickerson. Circuit Court, City of Richmond, Division I. Suit seeking damages for injuries to prisoner at State Penitentiary. Pending.

State Board of Architects, Professional Engineers and Land Surveyors v. Chamberlain t/a Soils Engineering Analysis, Inc. Circuit Court, City of Virginia Beach. Action to enjoin unlicensed activity. Pending.

State Board of Health v. Saggese. Circuit Court, County of Floyd. Action for injunction to compel compliance with State Health Department restaurant regulations. Order compelling compliance entered.


Taliaferro v. Pross. Circuit Court, City of Richmond, Division I. Plaintiff's motion for summary judgment pending. Suit involves retirement dispute of teacher at Longwood College.


Teaster 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. Heard in October, awaiting decision.


Tosh t/a as Main Street Amoco v. Slane. Circuit Court, County of Franklin. Bill of complaint appealing violation of improper inspection of motor vehicles. Dismissed agreed.


Wells, et al. v. Lukhard. Circuit Court, City of Richmond. Creditors bill to sell certain real property in which Commonwealth had a security interest. Settled by assignment for value.


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

Aetna Casualty and Surety Co. v. Department of Highways and Transportation. Circuit Court, City of Richmond. Action to recover additional compensation under a highway construction contract.


Bennett Road Limited Partnership v. County of Fairfax and Department of Highways and Transportation. Circuit Court, County of Fairfax. Declaratory judgment. Pending.


Commonwealth, ex rel., Harwood v. Craven. Circuit Court, County of Fairfax. Sent to recover $5,000 due to improper entrance. Pending.

Commonwealth, ex rel., Walker v. Holloway Construction Co. Circuit Court, City of Richmond. Motion for judgment for failure to perform contract awarded. Pending.


County of Franklin v. Calloway, et al. Circuit Court, County of Franklin. 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. Department's motion to be dismissed as a party granted.


Doyle a/k/a Baber and Baber v. Department of Highways and Transportation. Circuit Court, County of Fairfax. Inverse condemnation. Pending.

Duncan, et al. v. Commonwealth, et al. Circuit Court, County of Buchanan. Court approval of settlement for an infant in Industrial Commission case was obtained.


Franklin County v. Galloway, et al. Circuit Court, County of Franklin. Eminent domain. Department's motion to be dismissed as a party granted.


Harlow v. Board of Supervisors of Albemarle County and Department of Highways. Circuit Court, County of Albemarle. Petition for declaratory judgment challenging county site plan disapproval and the constitutionality of the Virginia Department of Highways and Transportation's commercial entrance permit regulations and policies. Pending.


Haynes v. Robertson-Fowler Co. and State Highway and Transportation Commissioner. Circuit Court, County of Alleghany. Blasting damage due to construction project. Pending.

Higgerson-Buchanan v. Commonwealth, et al. Circuit Court, City of Richmond. Action to recover retainage held under a contract for construction of a highway project in James City County. Pending.

Holtzman Oil Corp. v. King. Circuit Court, County of Shenandoah. Suit to enjoin removal of outdoor advertising sign. Court determined sign to be lawful on premise sign within meaning of § 33.1-370.

Hudgins v. Harwood. Circuit Court, City of Richmond. Alleged negligence on the part of the Highway Department for injuries received in an accident. Pending.


In re Hagy, Grievance. Circuit Court, City of Bristol. Hearing on Commissioner's determination of non-grievability of grievance. Reversed the determination and ordered a panel hearing.


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


Keelan and Meredith v. Board of Supervisors of Surry County and Harwood. Circuit Court, County of Surry. For compensation for land taken and damages in widening of Route 654. Pending.


Kirtley v. Board of Supervisors of Albemarle County, et al. Circuit Court, County of Albemarle. Petition for declaratory judgment and mandatory injunction challenging county site plan disapproval. Motion to add Department as party defendant denied.


McCullough v. Hamilton and Department of Highways and Transportation. Circuit Court, County of Rockbridge. Claim for personal injury as a result of an automobile accident. Pending.

McDonough v. Woodhaven Property Owners Assoc., Inc. and Commonwealth. Circuit Court, County of New Kent. Inverse condemnation. Pending.

Meadows v. Claim No. 38-801, Commonwealth. Circuit Court, County of Buchanan. Request court to approve settlement of wrongful death and workmen's compensation claims relative to a minor heir. Settlement approved.

Medusa Aggregates Co. v. Conue Sand & Gravel Co. and Commonwealth. Circuit Court, County of Buchanan. Alleges that Conue owes an outstanding debt to plaintiff for supplying materials for a highway contract and that the Commonwealth owes Conue under the contract. Nonsuited.


Phillips, 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.


Robinson v. Middleburg Volunteer Fire Department, Inc. Circuit Court, County of Loudoun. Drainage dispute. Pending.


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


Smith v. Commonwealth. 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.


State Highway and Transportation Commissioner v. Chadwell and Powell Valley Trucking Co. Circuit Court, County of Lee. Motion for judgment. Settled.


Tilly v. Commonwealth. Circuit Court, County of Carroll. Inverse condemnation. Petition for declaratory judgment. Motion to dismiss granted.


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

Allemand v. Hill. Circuit Court, City of Virginia Beach. Petition of appeal of revocation of operator's license pursuant to § 46.1-421. Dismissed.


Arrington t/a Longwood Used Cars. Circuit Court, County of Franklin. Petition of appeal to reinstate dealer's license. Dismissed agreed.

Atkisson v. Hill. Circuit Court, County of Fairfax. Petition to establish ownership to volkswagen. Pending.


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


Brooks v. Hill. Circuit Court, City of Roanoke. Petition to restore operator's license suspended pursuant to § 46.1-514.11. Dismissed.


Cassell v. Adams, Michael, Commonwealth, Clerk of the General District Court of Hanover County, and Sheriff of Hanover County. Circuit Court, County of Hanover. Bill of complaint for damages and injunctive relief based on alleged malicious abuse of process and alleged unlawful judgment suspension order pursuant to § 46.1-442. Pending.

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


City of Alexandria v. Akers. Circuit Court, City of Alexandria. Notice of appeal to restore operating privileges pursuant to § 46.1-417(b). Dismissed.

Commonwealth v. A-1 Cars, Inc. Action seeking revocation of used car dealers and salesmen licenses pursuant to §§ 46.1-518, and 46.1-537 for odometer tampering. Two licenses revoked for four and five years. Two licenses revoked for 10 years, but revocations suspended pending strict compliance with agreement entered into between dealer and the Attorney General.

Commonwealth of Virginia acting by and through the Commissioner of the Division of Motor Vehicles v. Hitt. Circuit Court, County of Spotsylvania. Petition of appeal to restore operator's license pursuant to § 46.1-421. Dismissed.

Commonwealth, etc. v. Richmond Auto Corporation and Gibbs. Circuit Court, City of Richmond, Division II. Motion to show cause why dealer's and/or salesmen's licenses revoked. Plaintiff's motion denied.
Commonwealth, ex rel., Hill v. Manhattan For Hire Car Corporation. Circuit Court, City of Richmond, Division I. Motion for judgment against defendant in sum of $4,500.52 plus interest and costs. Nonsuit.

Commonwealth, ex rel., Hill v. National Cab Company, Incorporated. Circuit Court, City of Richmond, Division I. Motion for judgment against defendant in the sum of $7,278.66 plus interest and costs. Nonsuit.


Corvette Center, Inc. v. Pross and Hill. Motion for judgment for damages arising from sale of stolen vehicle. Pending.

Davis v. Hill. Circuit Court, County of Spotsylvania. Petition of appeal to restore operator's license revoked pursuant to §§ 46.1-421(b) and 46.1-418. Dismissed.

Dunbar v. Division of Motor Vehicles. Circuit Court, County of Prince William. Appeal of denial of operator's license pursuant to § 46.1-357.2 (defective vision--telescopic lenses). Commissioner's order affirmed.


Harvest Motors, Incorporated v. Hill. Circuit Court, City of Salem. Appeal of Division of Motor Vehicles' informal conference decision re additional jeep dealership in Roanoke pursuant to § 46.1-547. Pending.


In re Connelly. General District Court, County of Arlington. Petition for reinstatement of driving privileges pursuant to § 18.2-271(b1). 1950 Code of Virginia (1977) replacement volume to restore operator's license revoked pursuant to § 46.1-421(a). Dismissed.

In re Eagle. Circuit Court, County of Campbell. Petition to establish ownership of Willys Jeep. Pending.
In re Mason. Circuit Court, County of Fairfax. Notice of appeal to reinstate operator's license. Pending.

In re Montclair County Club, Incorporated. Circuit Court, County of Prince William. Petition to establish ownership of Triumph automobile. Dismissed.

In re the Estate of Edward Lionel Palmer. Circuit Court, County of Fairfax. Petition to establish ownership of a Royal H-Trailer. Pending.

In re Title to 1970 AMC Ambassador Sedan. General District Court, County of Chesterfield. Petition to establish ownership in name of Patricia Marie Bates instead of in the name of former husband, Kenneth E. Bates. Title awarded to petitioner.

In re Title to 1930 Model "A" Vehicle, Motor #3660864. General District Court, County of Chesterfield. Petition to establish ownership of automobile in the name of Herbert Perry Mann. Title awarded to petitioner.

In re Title to 1962 Sanman Mobile Home, Serial No. T5410FBR54154. General District Court, County of Chesterfield. Petition to establish ownership to mobile home. Dismissed.

In re Woolverton and Woolverton. Circuit Court, County of Arlington. Petition to establish ownership of 1974 Volkswagen. Title awarded to petitioner.

In the matter of Gruber. Circuit Court, City of Norfolk. Petition to restore operator's license revoked pursuant to §§ 46.1-421(a) and 46.1-418. Dismissed.

Johnson v. Division of Motor Vehicles. Circuit Court, City of Chesapeake (Great Bridge). Appeal from revocation of license pursuant to § 46.1-367 to restore operator's license. Pending.

Joynt v. Hill. Circuit Court, City of Virginia Beach. Order on appeal from revocation of automobile dealer's license and salesmen's license pursuant to § 46.1-535. Pending.


McCoy v. Winebarger and Hill. Circuit Court, County of Wise. Bill in chancery to establish ownership of Kent Mobile Home. Pending.

Meredith v. Commonwealth. General District Court, County of Pulaski. Petition pursuant to §§ 18.2-271(b1) and 46.1-421(c). Pending.

Modlin v. Commissioner. Circuit Court, City of Virginia Beach. Petition to restore operating privileges pursuant to § 46.1-387.9:2. Pending.

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

Murphy v. Commonwealth. Circuit Court, City of Virginia Beach. Appeal of medical suspension pursuant to § 46.1-367. Petitioner required to submit to medical examination. Dismissed.

Naval Air Norfolk Federal Credit Union v. Stephenson, individually and t/a Southern Body Works. Circuit Court, City of Norfolk. Petition to intervene from Division of Motor Vehicle's refusal to issue title certificate until question of lien resolved. Pending.


Richards v. Durkin and Aniceta and Hill. Circuit Court, City of Norfolk. Petition to obtain title to automobile. Pending.


Rogers v. Hill. Circuit Court, County of Fairfax. Petition for restoration of driving privileges pursuant to § 46.1-421(c). Dismissed.


Rule, Incorporated v. Chrysler Corporation. Circuit Court, County of Augusta. Notice of appeal of administrative decision granting franchise to Driver Sales and Service t/a Dodge City, pursuant to § 46.1-547(d). Pending.
Samaha v. Commissioner. Circuit Court, County of Arlington. Petition of appeal to restore operator’s license suspended pursuant to § 46.1-514.13. Pending.

Sanderson v. Hill. Circuit Court, City of Virginia Beach. Petition to restore operator’s license pursuant to § 46.1-421(c). Operator’s license restored subject to petitioner’s providing proof of financial responsibility and reinstatement fees. Commissioner dismissed as party defendant.

Schwarztrauber v. Hill. General District Court, City of Richmond. Petition to establish title to Mercedes Benz Automobile. Title awarded to petitioner.

Scott v. Corvette Center, Incorporated. Circuit Court, County of Pittsylvania. Motion for joinder of additional party. Motion denied.


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

Sims v. Hill. Circuit Court, City of Lynchburg. Petition to restore operator’s licenses suspended pursuant to § 46.1-431, et seq. Commissioner’s order affirmed—modified.


Stanley v. Peerless Insurance Company and Hill. Circuit Court, County of Roanoke. Motion to vacate judgment and grant temporary injunction requested restraining Division of Motor Vehicles from prohibiting plaintiff to drive. Remanded to General District Court.


Thorne v. Hill. Circuit Court, City of Norfolk. Motion for declaratory judgment, temporary injunction from medical suspension of operator’s license pursuant to § 46.1-383. Motion denied, injunction vacated, and Commissioner’s order affirmed.


Tidewater Imports, Incorporated v. McRae Rambler Corporation, t/a Riddle AMC Jeep Honda. Circuit Court, City of Virginia Beach. Notice of appeal of hearing pursuant to § 46.1-547. Dismissed.

Turner v. Hill. Circuit Court, City of Hampton. Petition of appeal for restoration of operator’s license revoked pursuant to § 46.1-421(b). Dismissed.
Umar v. Commissioner. Circuit Court, County of Fairfax. Notice of appeal to restore driving privileges suspended pursuant to § 46.1-417. Dismissed.


Williams v. Eanes and Wyatt Auto Sales, Incorporated. Circuit Court, City of Danville. Motion for joinder for additional parties to establish ownership of Chevrolet Corvette. Pending.

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

Wright v. Hill and Wright. General District Court, City of Richmond. Motion for judgment to establish ownership of 1974 Pontiac. Pending.

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

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


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


Central National Corp. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of bank stock tax assessment. Pending.


City of Richmond v. Ampey, et al. Circuit Court, City of Richmond, Division I. Suit to determine priority of claims. Pending.

City of Richmond v. 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.

City of Richmond v. Scott, et al. Circuit Court, City of Richmond, Division I. Suit to determine priority of claims. Pending.
City of Salem v. Compensation Board. Circuit Court, City of Salem. Mandamus proceeding to order Compensation Board to pay at higher rate. Pending.


Dominion Bankshares Corp. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of bank stock tax assessment. Pending.


Dunton, et al. v. Treakle, et al. Circuit Court, County of Lancaster. 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. Watts. Circuit Court, City of Richmond, Division I. Action seeking payment of securities of Summit Insurance Company held by Treasurer. Pending.

F&M (Gray's will) v. F&M, et al. Circuit Court, City of Richmond, Division I. Suit to construe a will. Pending.
F&M (Trustee under will of Clopton) v. University of Richmond, et al. Circuit Court, City of Richmond, Division I. Suit to construe a will. Pending.

Faye v. Troy. Circuit Court, County of Lancaster. 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.


First & Merchants National Bank v. First & Merchants National Bank, et al. Circuit Court, County of Sussex. Suit seeking guidance of the court in administering an estate so that Internal Revenue Service regulations are satisfied. Pending.

First & Merchants National Bank v. Sandstrom, et al. Circuit Court, City of Richmond. 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.


Fortna v. Fortna, et al. Circuit Court, City of Richmond, Division I. Suit to reform a will. Pending.

Fox v. Department of Taxation. Circuit Court, County of Accomack. Proceeding to restrain collection of assessed taxes. Pending.


General Electric v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of State income tax assessment. Pending.


Harman Mining Corporation v. Commonwealth. Circuit Court, County of Buchanan. 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.


International Paper Co. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of State income tax assessment. Pending.

International Weyerhauser Co. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of State income tax assessment. Pending.


Mead Corporation and its consolidated subsidiaries v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of assessment of corporate income taxes. Pending.


Moore v. 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.


Richmond Foundation v. 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.


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


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

Southern Bankshares v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of bank stock tax assessment. Pending.

State Board of Community Colleges 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. Settled.


United Virginia Bank, et al. v. Boy's Home Inc., et al. Circuit Court, City of Richmond. Bill of complaint seeking court approval to alter terms of irrevocable charitable remainder unitrust to meet Internal Revenue Service requirements, if necessary. Pending.

United Virginia Bank, et al. v. The Virginia Home, et al. Circuit Court, City of Richmond. Bill of complaint seeking court approval to alter terms of irrevocable charitable remainder unitrust to meet Internal Revenue Service requirements, if necessary. Pending.


Virginia Insurance Guaranty Association v. Watts, 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.

Virginia National Bank v. Owen, et al. Circuit Court, City of Richmond, Division I. Suit to reform a will. Pending.


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, Division II. Dismissed.

Anderson v. Virginia Employment Commission. Circuit Court, City of Richmond, Division I. Dismissed.


Binswanger Glass Co. v. Virginia Employment Commission and Coles. Circuit Court, City of Richmond, Division I. Pending.


Broadway Baptist Church, Calvery Baptist Church and Grace Baptist Church v. Virginia Employment Commission. Circuit Court, City of Petersburg. Pending.


Carey v. Virginia Employment Commission and Fairfax County School Board. Circuit Court, County of Fairfax. Affirmed.


City of Virginia Beach v. Virginia Employment Commission and Guizzetti. Circuit Court, City of Virginia Beach. Reversed.

City of Virginia Beach School Board v. Virginia Employment Commission and Mulligan. Circuit Court, City of Virginia Beach. Pending.


Collins v. Virginia Employment Commission and Winchester Memorial Hospital. Circuit Court, City of Winchester. Pending.

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

Commonwealth Packaging Corporation v. Virginia Employment Commission and Jefferson, Holmes and Turner. Circuit Court, City of Richmond, Division II. Affirmed.


Cunningham v. Virginia Employment Commission and Department of the Navy. Circuit Court, County of Arlington. Pending.


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


Foley v. Virginia Employment Commission and Hop-In Food Stores, Inc. Circuit Court, City of Roanoke. Reversed.


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


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


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


Hicks v. Virginia Employment Commission and Macke Vending. Circuit Court, City of Richmond, Division I. Dismissed.


In the matter of Reiley. Circuit Court, County of Fairfax. Pending.


Kirby Center of Newport News, Inc. v. Virginia Employment Commission. Circuit Court, City of Richmond, Division II. Dismissed.


Martin v. Virginia Employment Commission and Medical College of Virginia Hospital. Circuit Court, City of Richmond, Division I. Pending.


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


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

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


Schwartz v. Virginia Employment Commission and Purolator Courier Corporation. Circuit Court, City of Richmond, Division II. Pending.


Teates t/a Tastee Freeze v. Virginia Employment Commission and Sampson. Circuit Court, County of Frederick. Dismissed.

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

Tsantis v. Virginia Employment Commission and McDonald's (Pa-Tee, Inc.). Circuit Court, County of Fairfax. Pending.

Tyler v. Virginia Employment Commission and The United States Post Office. Circuit Court, City of Richmond, Division I. Reversed.


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


CASES BEFORE THE STATE CORPORATION COMMISSION

Appalachian Power Co. (Case No. 19984) Application for increase in rates. Granted in part.

CNG Transmission Co. (Case No. 20015) Application for rate increase. Pending.

Chesapeake and Potomac Telephone Co. (Case No. 20082) Application for rate increase. Pending.

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

Commonwealth, ex rel. State Corporation Commission v. Blue Cross and Blue Shield (Case No. 19829) Pending.

Ex Parte: In the matter of adopting rules governing credit life insurance (Case No. 19885).

General Telephone Co. of Southeast (Case No. 20003) Application for rate increase. Granted in part.

Hearings on Quarterly Fuel Factor Adjustment for Electric Utilities (Case No. 20068-79).

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

Northern Piedmont Electric Coop. (Case No. 19964) Application for rate increase. Granted.

Old Dominion Power Co. (Case No. 20106) Application for rate increase. Pending.

Potomac Edison Company (Case No. 20058) Application for rate increase. Granted in part.

Potomac Electric Power Co. (Case No. 20119) Application for rate increase. Pending.

Powell Valley Electric Coop. (Case No. 20109) Application for rate increase. Granted.

Roanoke Gas Company (Case No. 19985) Application for rate increase. Granted in part.

Shenandoah Telephone Co. (Case No. 19920) Application for rate increase. Granted in part.

Southside Electric Coop. (Case No. 20018) Application for rate increase. Granted.

Virginia Electric and Power Co. (Case No. 19960) Application for rate increase. Granted in part.


Virginia Electric and Power Co. (Case No. 19883) Investigation of prudence of fuel expenses. Pending.

Virginia Electric and Power Co. (Case No. 20108) Investigation of rate structure. Pending.
Virginia Electric and Power Company (Case No. 19982) Application for rate increase. Pending.

Washington Gas Light Co. (Case No. 19946) Petition for refund of gross receipts taxes. Pending.

Washington Gas Light Company (Case No. 19992) Application for rate increase. Granted.

CASES BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA

Cole, et al. v. Department of Highways and Transportation. Dependants sought compensation for death of employee who was murdered in Goochland County while in the course of his employment. Decided in favor of the Commonwealth.

Corson v. WSH. Claim for workmen's compensation denied.

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


Hale v. Hiram Davis Medical Center. Claim for workmen's compensation denied.

Hardy v. SVMHI. Claim for workmen's compensation compromised with lump sum settlement.


Mathews v. ESH. Claim for workmen's compensation death benefits denied.

Meier v. NVMHI. Employer's petition to terminate workmen's compensation based upon change in condition granted.


### Extradiation Hearings Conducted and Reports Submitted Pursuant to Request of the Governor

<table>
<thead>
<tr>
<th>Date of Hearing</th>
<th>Name of Defendant</th>
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<tbody>
<tr>
<td>July 17, 1978</td>
<td>Tyre Lathon a/k/a Reginald T. Lathon, Jr.</td>
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<tr>
<td>July 17, 1978</td>
<td>Dawn Elaine Hanshaw</td>
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<td>Michael Virgil Stevens</td>
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<td>July 17, 1978</td>
<td>Carole L. Young</td>
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<td>July 17, 1978</td>
<td>Susan Winters a/k/a Kay Bradley</td>
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<td>August 21, 1978</td>
<td>Coy W. O'Speights</td>
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<td>August 21, 1978</td>
<td>Yuell Coleman</td>
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<td>August 21, 1978</td>
<td>Antonio R. DeCarlo</td>
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<td>Freddie M. Singletary</td>
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<td>Alfred Toombs</td>
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<td>Isle Molnar a/k/a Isle Ursula Molnar</td>
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<td>Joanne Coleman</td>
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<td>Albert J. Fuston</td>
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<td>Gary Jacobs</td>
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<td>Joyce B. France</td>
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<td>Milton Ray Berry</td>
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<td>Gordon Whitley</td>
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<td>October 16, 1978</td>
<td>Hubert James Stokes a/k/a Jimi Billy Lowe</td>
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<td>Kermit Roberts</td>
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<td>Steven B. Allred</td>
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<td>Stephen Ray Pate a/k/a Floyd Ray Miller</td>
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<td>Stephen Allyn Morgan</td>
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<td>David Nelson Beard</td>
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<td>Levi Smith</td>
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<td>Larry A. Green</td>
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<td>James W. Cohn</td>
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<td>November 20, 1978</td>
<td>Robert Edward Broadway</td>
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<td>Joan Ruby Shaffer</td>
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<td>Edgar Preston</td>
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<td>Edward Eades</td>
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<td>December 18, 1978</td>
<td>James Tasker Preston, Jr.</td>
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<td>December 18, 1978</td>
<td>Lloyd Swain</td>
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<td>December 18, 1978</td>
<td>Nancy A. Fletcher</td>
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<td>December 18, 1978</td>
<td>Vickie Davis Brooks</td>
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REPORT OF THE ATTORNEY GENERAL

January 16, 1979  James Henry Cole
January 16, 1979  Danny Lee Garrett
January 16, 1979  James William Lowe
January 16, 1979  Frederick A. Carter, Jr.
January 16, 1979  Charles Taylor
January 16, 1979  Elisha James Montaigne
February 7, 1979  Paul Boucher
February 16, 1979  Arthur Bowyer
February 16, 1979  Edward Lee Williams a/k/a Lee Top
February 27, 1979  James Hollis Kimrey
March 7, 1979  Bernard W. Noble
March 7, 1979  Randy Johnson
March 7, 1979  Steven Lee Kennedy
March 8, 1979  Calvin Johnson
March 13, 1979  Leslie Earl Trower, Jr.
March 21, 1979  Kenneth Raymond Lee
March 21, 1979  Walter Dotson
March 21, 1979  David W. Murphy
April 13, 1979  Charles E. Stevens
April 13, 1979  Warren Dubreuil
April 13, 1979  Robert Walter Williams a/k/a Robert Walter Woltz
April 13, 1979  Herbert Jeremiah Gibson
April 13, 1979  Gerald Lucero
April 13, 1979  MiguelRodriques
April 13, 1979  Frederick Michael Taylor
April 13, 1979  Dwight E. Ganoe
April 13, 1979  Jim Grant
April 13, 1979  Walter Emmons
April 25, 1979  R. B. Culligan
May 9, 1979  Russell Ann Maten
May 9, 1979  Jimmy R. Hayes
May 9, 1979  Michael Davis
May 9, 1979  John C. Simpson
May 15, 1979  Claretha Jones a/k/a Rita Jones, Claretha Johnson, Rita Johnson
May 15, 1979  Marvin Elwood Giles
May 16, 1979  Priscilla Diane McRae
June 8, 1979  Alferd Winfred Kanney
June 14, 1979  John DeMello
June 14, 1979  Harvey Luther Bennett
June 14, 1979  Sara Alice Culligan
June 14, 1979  Angelina T. Musto
June 14, 1979  Mary Lynda Johnson
June 25, 1979  Wayne Allen Satterwhite
CASES DECIDED OR PENDING IN THE UNITED STATES COURTS OF APPEAL


Albin v. Albin. Commonwealth filed an amicus in the Ninth Circuit Court of Appeals on behalf of the appellee in this support action. The Ninth Circuit upheld the lower court's decision in favor of the appellee.


Blankenship v. Brennan. Appeal from grant of writ of habeas corpus on issue of attorney's duty when client refuses to allow presentation of insanity defense; whether denial of effective assistance of counsel results. Pending.


Coggins v. Richtmyer. Appeal by a prisoner of a denial by district court of his allegations that he was subjected to denials of due process of law in a disciplinary proceeding and a transfer. Pending after oral argument.


Copes v. Young. Appeal from denial of writ of habeas corpus on issue of alleged suppression of exculpatory evidence. Pending.


Crews v. Ryans. Motion for summary judgment granted by Federal District Court due to various immunity doctrines. Affirmed.

Davis v. Davis. Appeal from issuance of writ of habeas corpus on issue of length of prison term as cruel and unusual punishment. Affirmed on rehearing en banc.

Davis v. Zahradnick. Appeal from a denial by District Court of plaintiff's allegations under 42 U.S.C. § 1983 that he was subjected to cruel and unusual punishment by prison officials after an attack by another inmate. Pending decision after oral argument.


DiPaola v. Riddle, et al. Prisoner's appeal from judgment finding no standing for federal habeas corpus relief on search and seizure issue and dismissing the petition. Affirmed.


EPA v. Brown. Appeal from the Supreme Court of the United States. EPA seeking to enforce their regulations through mandate to States. Pending.


Fairfax County Wide Citizens, etc. v. Fugate and Courts of Fairfax. Appeal from United States District Court. Racial discrimination in maintaining roads. Remanded to District Court. Affirmed dismissal of Commonwealth as a party.


Freeman v. Lukhard. Suit involved a challenge to the method used by local department of welfare to determine deprivation of applicants for purposes of ADC grants. Pending.


Harris v. Walker, et al. Appeal by plaintiff from District Court order dismissing complaint alleging due process violations by Mary Washington College. District Court's decision affirmed.

Harris v. Young. Appeal from District Court denying petition for writ of habeas corpus. Double jeopardy. Pending.

Henningsen v. Dickerson, et al. Appeal by plaintiff from decision of Federal District Court for the Eastern District of Virginia favorable to the defendants. Pending.
Hudspeth v. Figgins. Whether an implied threat by a correctional officer to an inmate deprives him of his right of access to the courts, and subjects him to cruel and unusual punishment in violation of the Eighth Amendment of the Constitution. Reversed and remanded.

Hummer v. Hutto, et al. Appeal by a prisoner of a denial by District Court of his complaints that he was denied access to the Courts by an inadequate library at a correctional unit and the Court-appointed attorney who represented him. Pending after oral argument.

In re Crawford. Petition for a writ of mandamus by the plaintiffs and defendants in a civil action in District Court seeking the Court of Appeals to order the District Court to refrain from exercising further jurisdiction after the parties have dismissed the suit. Petition denied.

In the matter of the complaint of Marine Navigation Sulfer Carriers, Inc. and Marine Transport Lines, Inc. as Owners of the S/Y MARINE FLORIDIAN. Appeal from the U.S. District Court for exoneration and limitation of liability. Pending.

Joe v. Purvis, et al. Appeal by a prisoner from a decision of District Court denying his complaint alleging violations of due process in his disciplinary proceedings and transfers, as well as allegations that he was subjected to cruel and unusual punishment in the Mecklenburg Correctional Center. Reversed and remanded.

Jones v. Blankenship. Appeal from granting of habeas corpus. Whether doctrine of collateral estoppel precludes malicious wounding conviction when defendant was convicted of only involuntary manslaughter of second victim at earlier trial and both offenses were based upon single shotgun blast. Pending.

Jordan v. Commonwealth. Appeal from grant of a writ of habeas corpus in District Court. Double jeopardy. Pending.


Kibert v. Blankenship. Appeal by the Commonwealth from the grant of a writ of habeas corpus by the District Court to the petitioner on grounds that his guilty plea was involuntarily submitted and his counsel was ineffective. Pending after oral argument.

King v. Johnson. Prisoner civil rights action alleging an assault by a prison official upon an inmate amounting to cruel and unusual punishment. Prisoner has appealed District Court's dismissal of claim and the Fourth Circuit has appointed counsel to represent prisoner. Pending.

Lane v. Zahradnick, et al. Appeal by an inmate of an adverse decision from District Court denying his allegations that he was subjected to a denial of his Fourteenth Amendment rights by being placed in punitive isolation. Reversed and remanded.

Lee v. Downes. Appeal from the jury's verdict awarding damages to the plaintiff. Issue: constitutionality of a strip search of the plaintiff by correctional officers. Pending.
Los Angeles County v. Brock. Suit to enjoin enforcement of FHWA/UMTA regulations giving MPOs implementation authority. Virginia joined as amicus curiae. Pending.


Patterson v. Riddle, et al. Appeal from denial of a writ of habeas corpus in District Court. The trial judge's denial of petitioner's court-appointed attorney's request for funds to investigate an alibi defense did not deprive the petitioner of the effective assistance of counsel. Affirmed.

Pittman v. Hutto, et al. Appeal from a decision by District Court that prison inmates do not have a First Amendment right to publish a newspaper. Affirmed.


Shrader v. Horton. Appeal from District Court decision upholding constitutionality of statute authorizing counties and cities to require citizens to hook onto public water supplies and sewers. Pending.

Steuart Transportation Company v. Allied Towing Corporation, et al. Interlocutory appeal from District Court decision holding that federal limits on oil spill cleanup do not apply to State claims. Affirmed.
Turner v. Purvis. Whether Commonwealth breached its plea agreement, and whether defense counsel was ineffective by failing to assist petitioner in fulfilling his obligations under the plea agreement. Pending.


United States v. Department of State Police. Appeal and cross appeal from United States District Court; orders on liability and relief in civil rights action against the Department of State Police for alleged discrimination in employment. Pending.


Williams v. Zahradnick. Appeal from denial of writ of habeas corpus on issue of prosecutor's questioning petitioner on his silence after Miranda warnings. Pending.

Williams and Brown v. Leake, et al. Appeal from a denial by the district court of relief to plaintiff seeking damages under 42 U.S.C. § 1983 for various deprivations of medical care at the Richmond City Jail, as well as deprivations of his library privileges at that facility. Reversed and remanded.


Woe and Doe v. Kirven. Motion to dismiss Commissioner of Department of Mental Health and Mental Retardation from suit challenging commitment procedures in Virginia was granted. Appeal pending.


Wright v. Zahradnick. Prisoner's appeal from dismissal of habeas corpus petition. Whether State trial judge denied petitioner due process of law by finding him guilty of second degree murder and malicious wounding, whether State remedies were exhausted, and whether petitioner has standing to challenge the State judge's findings by federal habeas corpus. Pending.

Young v. Kenley, et al. Suit requesting payment of attorneys' fees under Title VII. Pending.

Young, et al. v. Godwin, et al. (Five consolidated cases.) Prisoners' civil rights action attacking general conditions at the Bland Correctional Center. Defendants and plaintiffs have appealed portions of court's order which mandated certain changes at the institution. Pending.

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. Decision in favor of Commonwealth.


Bates v. Lewis. Suit by an inmate under provisions of 42 U.S.C. § 1983 seeking monetary damages as a result of being stabbed and beaten by another inmate at the Whitepost Correctional Unit. Pending.


Boint v. Roberts. Suit contesting the constitutionality of § 64.1-21 of the Code. Pending.


Bush, et al. v. Bays, et al. Class action suit seeking expedited determination of eligibility of migrants on Eastern Shore for food stamps. A consent order was entered and plaintiffs' request for attorneys' fees was denied. Plaintiffs have filed a petition for a rule to show cause.


Clborne t/a B & J Citgo v. Department of State Police. Complaint for alleged unconstitutional action in suspending inspection station. Pending.

Cobbs v. Hutto, et al. Seeking monetary damages and injunctive relief by an inmate who was stabbed at the Powhatan Correctional Center in 1977. Pending.

Commonwealth, etc. v. Califano, et al. Suit challenging procedure by which HEW denied the Virginia Department of Welfare's earnings policy. Declaratory judgment and injunctions relief entered for the Commonwealth. Appeal noted by defendants.

Commonwealth, etc. v. Califano, et al. Suit challenging procedures by which HEW is withholding federal monies for Virginia for its ADC and medicaid program. Pending.


Commonwealth, ex rel. v. The S/T Marine Floridian, her engines tackle, etc. in rem, and Marine Navigation Sulphur Carriers, Inc. and Marine Transport Line, Inc., owners and operators, in personam. Action by Commonwealth to recover for damages to the Benjamin Harrison Bridge. Pending.

Cosby v. Warden. A prisoner civil rights action alleging inadequate library facilitie at the Mecklenburg Correctional Center. Pending.

Cox v. Medical College of Virginia Hospital. Medical malpractice claims. Dismissed.


Crews v. Hall and Wooding. Civil rights complaint seeking declaratory and monetary relief. Summary judgment granted in favor of defendants.


Donnovan v. Campbell, et al. Suit for damages and injunctive relief for failure to provide free appropriate public education. Pending.


Durkin v. Jordon. Suit seeking monetary damages for constitutional violations arising from plaintiff's suspension from the furlough program and the work release program. Pending.


Freeman v. Lukhard. Suit challenging the method of determining deprivation for participation in the ADC program. A decision upholding the department's procedure has been upheld.


Green, et al. v. Carbaugh, etc. Suit for injunction to require defendant to issue license. Judgment for plaintiffs.


Greer v. Alexander. Defendant is attempting to join Virginia Department of Highways and Transportation as an involuntary plaintiff. Pending.


Hamm v. Yeattes, et al. Declaratory judgment action to secure license and damages for denial of application for license. Pending.


Harris v. Campbell, et al. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of P.L. 94-142 and § 504 of Rehabilitation Act. Dismissed.


Hodges v. Caldwell. A prisoner civil rights action alleging assault by a correctional officer. Settled.


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

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

In re Bayside Hardware Inc. Suit to determine priority of claims in bankruptcy. Commonwealth's claim paid in full.


In re Davis. Petition for bankruptcy. Seeking to discharge liquidated damages assessed for overweight vehicle violation. Pending.

In re Foster. Petition in bankruptcy. Pending.

In re Kalm欠. Petition in bankruptcy. Pending.

In re Master Key Antitrust Litigation. Action brought under Sherman Act against manufacturers of master key hardware systems. Settled and funds distributed.

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

In re SMS, Inc. Petition in bankruptcy. Relief from debts. Surety paid all claims.

In re Scotti Muffler Centers. Suit to determine priority of claims in bankruptcy. Pending.

In re Southern Star Silo Corp. Suit to determine priority of claims in bankruptcy. Commonwealth's claim reinstated. Pending.

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

In re W. T. Grant Company. Bankruptcy. Trustee's objection to Commonwealth's claim for sales and use taxes. Compromised, judicially approved, but final settlement ongoing.

In re Williams. Petition in bankruptcy. Pending.
In re Woodward. Petition of bankruptcy. All debts discharged.

In the matter of the complaint of Allied Towing Corporation, as owner of the Barge ATC 133, for exoneration from or limitation of liability. Suit in admiralty for exoneration from litigation of liability in connection with February 1978, oil spill. State Water Control Board has filed claims for clean-up costs and damage to natural resources. Pending.

In the matter of the complaint of Allied Towing Corporation, as owner of the Tug TESTER, for exoneration from or limitation of liability. Suit to recover for civil penalties for oil spill. $5,000 awarded.


Keel v. Godwin, et al. Suit to enjoin State officials to transfer the petitioner from the Richmond City Jail, and to award damages pursuant to the provisions of 42 U.S.C. § 1983. Consolidated with all like cases seeking damages for failure of the Commonwealth to transfer prisoners from local jails to the Virginia correctional system. Pending.

Kiaurakis v. Zahradnick. Prisoner civil rights complaint alleging deliberate indifference to serious medical needs by prison officials and denial of sentence reduction. Tried and dismissed.

King v. Muncy. Two suits seeking monetary damages for denial of medical care and proper tuberculosis treatment at the Powhatan Correctional Center. Pending.


Lane v. Zahradnick. Suit remanded by the United States Court of Appeals for the Fourth Circuit. Inmate seeks damages for punitive isolation upon allegations that he has been denied due process of law. Pending.
Lee v. Downes. A prisoner civil rights action alleging cruel and unusual punishment. Tried and judgment awarded to plaintiff.


Lundy v. Johnson. Prisoner civil rights complaint alleging deliberate interference with prisoner's mail. Tried and pending.

Madden v. Virginia Commonwealth University. Action instituted by former student of School of Medicine who was dismissed and refused readmission. Discrimination on basis of race alleged. Pending.

Marshall v. Hutto. EEO complaint against Department of Corrections. Case is in discovery.

Matthews v. Campbell, et al. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of P.L. 94-142 and § 504 of Rehabilitation Act. Pending.


Miles v. Campbell, et al. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of P.L. 94-142 and § 504 of Rehabilitation Act. Pending.
Miller v. Taylor. Civil rights suit brought by visitor to prison alleging violation of Fourth Amendment rights by prison officials conducting an involuntary strip search. Settled out of court for a total of $8,500 in attorneys' fees and compensatory damages.


Morris v. Woolf. A prisoner civil rights action alleging denial of adequate medical treatment amounting to cruel and unusual punishment. Tried and dismissed.

Mundy v. Lewis. Prisoner civil rights action alleging prison conditions rising to cruel and unusual punishment. Tried and dismissed.

NAMH v. Califano. Suit seeking attorneys' fees against the Commonwealth for successful action releasing various federal funds to the states. Motion to dismiss pending.


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. Appeal by plaintiffs pending in Fourth Circuit.

Orpiano v. Hutto. Prisoner civil rights action alleging assault by four correctional officers resulting in physical and psychological damages. Tried and damage award of $25,000 recommended by United States Magistrate against seven of named defendants. Pending.


Owens v. Warden. A prisoner civil rights action alleging various constitutional deprivations by correctional officers. Tried and dismissed.


Poddar v. Madison College. Suit for declaratory injunctive relief and damages under Title VII. Dismissed.

Potomac Electric & Power Co. and Washington Gas Light Co. v. Fugate. Action seeking enforcement of order. Fourth Circuit Court of Appeals reversed District Court's order that the Commissioner was in violation of an order. Remanded for evidence on constitutional claims arising out of relocations of utility facilities.


Russell v. Ebbert. Prisoner civil rights action alleging a variety of constitutional claims relating to the conditions of confinement. Tried and dismissed.

Scruggs v. Campbell, et al. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of P.L. 94-142 and § 504 of Rehabilitation Act. Pending.

Sheffey v. Taylor. Prisoner civil rights action alleging conditions of confinement are cruel and unusual. Tried and dismissed. No relief granted to plaintiff, but attorneys' fees in excess of $7,000 awarded plaintiff's attorney. Appeal is planned.


Stevens v. Walton. Prisoner civil rights action alleging assault by a correctional officer upon plaintiff amounting to cruel and unusual punishment. Tried before United States Magistrate who has recommended dismissal. Pending.

Stinnie v. Fidler. Suit to enjoin the jails of the State of Virginia and to establish prisoner rights for jail prisoners, which has been pending since October 1970. Dismissed. Before the court again on attorneys' fees and costs.


United States of America v. Department of State Police. Civil rights action against the Department of State Police for alleged discrimination in employment. Judgement for plaintiffs, in part, for defendants, in part.


Valentine v. Blankenship. Prisoner civil rights action alleging assault by prison official amounting to cruel and unusual punishment. Tried and dismissed.

Vass v. Board of Dentistry. Suit challenging validity of license revocation proceedings before the Board. Case is in discovery.


Walters v. Matney. Prisoner civil rights action alleging violation of due process rights. Tried and dismissed.

Ward v. Johnson. Prisoner civil rights action alleging denial of due process rights in prison disciplinary proceeding and denial of adequate access to the courts. Tried and dismissed.


Washington v. Johnson. Prisoner civil rights action alleging assault by correctional officers rising to cruel and unusual punishment. Tried before a jury and dismissed.


Woe and Doe v. Kirven. Motion to dismiss Commissioner of Department of Mental Health and Retardation from suit challenging the commitment procedures for mentally ill persons. Granted.


Wright v. Ross. Suit to recover for injury to plaintiff as a result of being struck by a golf ball while incarcerated at the Moneta Correctional Center. Pending.


CASES BEFORE FEDERAL AGENCIES


Investigation to determine Priorities for available gas supplies (Case No. 20104). Administrative proceeding to consider gas curtailment priorities and addition of new customers by gas companies. Pending.


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.

In the Matter of Virginia State ADC Plan Amendment. Before the Department of Health, Education and Welfare. A hearing was held to determine if Virginia's ADC earnings policy conformed to the federal regulations. A favorable decision was rendered.

Washington Gas Light Co. (Case No. 20070). Application to revise tariffs to provide for standby emergency service. Pending.

Washington Gas Light Co. (Case No. 20100). Application to request permission to add new customers. Pending.
This year the format of the headnotes for the Opinions of the Attorney General has been changed. As in previous editions, the main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
ABORTIONS. CRIMES. PARENTAL CONSENT PROVISION OF § 18.2-76 IS UNCONSTITUTIONAL.

March 26, 1979

The Honorable Aubrey M. Davis, Jr.
Commonwealth's Attorney for the
City of Richmond

You have asked my opinion whether parental consent can be required before a minor may obtain an abortion in Virginia. You refer specifically to § 18.2-76 of the Code of Virginia (1950), as amended.1

In my opinion, the parental consent provisions of § 18.2-76 of the Code constitute a blanket parental consent statute. The United States Supreme Court ruled in 1976 that a "State may not impose a blanket provision...requiring the consent of a parent...The State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976). Therefore, insofar as § 18.2-76 would require parental consent before a minor may obtain an abortion, it is unenforceable.

The 1979 Session of the General Assembly passed, and the Governor signed, an amendment to § 18.2-76, which conforms that statute to the ruling in Danforth. The amended statute, which will become effective on July 1, 1979, eliminates the present requirement for parental or spousal consent. However, the statute does require a patient's physician to inform her of the proposed procedure to be used and its risk to her health. Before the physician may perform an abortion, the patient's informed written consent is required.2

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1 Section 18.2-76 provides:
"Before performing any abortion or inducing any miscarriage or terminating a pregnancy as provided for in §§ 18.2-72, 18.2-73 or 18.2-74, the physician shall obtain the written consent of the woman if legally competent to give such consent; provided, however, if such woman shall be a minor or incompetent as adjudicated by any court of competent jurisdiction or if the physician knows or has good reason to believe that such woman is a minor or incompetent as adjudicated by a court of competent jurisdiction, then only after permission is given in writing by a parent, guardian, committee, or other person standing in loco parentis to such minor or incompetent, or if married by her husband, may the physician perform such abortion or otherwise terminate the pregnancy."

2 Chapter 250 [1979] Acts of Assembly, approved March 15, 1979:
"Before performing any abortion or inducing any miscarriage or terminating a pregnancy as provided for in §§ 18.2-72, 18.2-73 or 18.2-74, the physician shall obtain the informed written consent of the pregnant woman; provided, however, if such woman shall be incompetent as adjudicated by any court of competent jurisdiction or if the physician knows or has good reason to believe that such woman is incompetent as adjudicated by a court of competent jurisdiction, then only after permission is given in writing by a parent, guardian, committee, or other person standing in loco parentis to such incompetent, may the physician perform such abortion or otherwise terminate the pregnancy."
The physician shall inform the pregnant woman of the nature of the proposed procedure to be utilized and the risks, if any, in her particular case to her health in terminating or continuing the pregnancy."

ADOPTION. NATURAL PARENT OR GUARDIANS MAKING DIRECT PLACEMENT OF A CHILD FOR ADOPTION MUST EXECUTE CONSENT BEFORE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT.

February 14, 1979

The Honorable C. Vincent Hardwick, Judge
Hanover Juvenile and Domestic Relations District Court
Fifteenth Judicial District

You have asked whether § 63.1-204(C)(2) of the Code of Virginia (1950), as amended, conflicts with § 63.1-225(A). The first statute requires a natural parent or guardian of a child who is making a placement for adoption directly with the adoptive parents to execute a consent to the proposed adoption before a juvenile and domestic relations district court.1 The second, which deals with the issue of consent for adoption generally, requires that such consent shall be signed and acknowledged before an officer authorized by law to take acknowledgements.

Section 63.1-204(C)(2), along with other relevant statutory sections, was amended in 1978 to deal with the issue of direct placement for adoption by a natural parent or guardian. See Ch. 730 [1978] Acts of Assembly 1202-1212. 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).

By its terms, § 63.1-225 controls consents for adoptions. However, I am of the opinion that in those situations where a natural parent or guardian of a child desires to place the child for adoption directly with the adoptive parents of his or her choice, § 63.1-204(C)(2) restricts those officers authorized by law before which the natural parent or guardian can execute consent. Therefore, in such a direct placement, the natural parent or guardian may only execute his or her consent before a juvenile and domestic relations district court of competent jurisdiction.

You also inquired whether the authority to appoint guardians for a child involved in a direct placement by the natural parent or guardian for purposes of adoption has been extended to the juvenile and domestic relations court. The recent amendment to § 63.1-204(C)(2), referenced earlier, clearly requires the juvenile and domestic relations district court to appoint the proposed adoptive parents as guardian of the child at the time of the execution of a valid consent by the natural parent or legal guardian.
Section 63.1-204(C)(2) states as follows:

"The natural parent or legal guardian of a child may place the child for adoption directly with the adoptive parents of his or her choice only after executing a valid consent to the proposed adoption before a juvenile and domestic relations district court of competent jurisdiction. Prior to the court's acceptance of the required consent of the natural parent, the court shall ascertain whether the natural mother, or, if reasonably available, both natural parents, have had an opportunity for counseling concerning the disposition of the child. At the time of the execution of such consent, the court shall appoint the proposed adoptive parents guardians of the child who shall be responsible for the case of the child until such time as the court order is modified. The juvenile court shall review such orders of appointment at least annually until such time as a final order of adoption is entered in the circuit court."

ADOPTION. WHEN LOCAL BOARD OF WELFARE MAY PLACE CHILD FOR ADOPTION.

April 20, 1979

The Honorable F. T. Wheeler, II, Chief Judge
Newport News Juvenile and Domestic Relations
District Court
Seventh Judicial District

You have asked whether a court order which grants permanent custody of a child to a local board of public welfare for purposes of adoptive placement must also indicate that residual parental rights and responsibilities of the natural parents have been terminated. If so, you ask what effect such an order would have on the inheritance rights of the child and the natural parents prior to the entry of a final order of adoption.

A local board of public welfare or social services has express authority to place a child in an adoptive placement. See §§ 63.1-56 and 63.1-204(C) of the Code of Virginia (1950), as amended. This authority derives either from a voluntary entrustment agreement between the local board and the natural parents or from a commitment order entered by a court of competent jurisdiction. See § 63.1-204(A). Section 63.1-204(C)(1) specifically requires that the entrustment agreement or the order of commitment for adoptive placement provide for termination of all parental rights and responsibilities. In addition, any court order which terminates residual parental rights and grants custody of a child to a local board of welfare must indicate whether the local board has the authority to place the child for adoption. See § 16.1-283(A). Therefore, your initial inquiry is answered in the affirmative.

In response to your second inquiry, the effect of a termination of parental rights and responsibilities on the inheritance rights of a child, the natural parents and the adoptive parents must be determined from a review of the applicable statutes of adoption and descent and distribution. 2 Am.Jur.2d Adoption §§ 101 and 103 (1962); 2 C.J.S. Adoption of Persons §§ 150 and 151 (1972). Because adoption was unknown at common law, an inheritable interest was deemed to follow the bloodline in all situations and it is only by statute that the common law rule of descent and distribution may be changed. Statutes
in derogation of common law are strictly construed in the light of the purposes for which they were enacted and should not be enlarged in their operation by construction beyond their express terms. Such statutes are given effect only to the extent clearly indicated by the terms used. 17 M.J. Statutes § 60 (1950).

The applicable statutes for adoption and descent and distribution are found in § 63.1-233 and in Ch. 1 of Title 64.1 of the Code. Section 63.1-233 provides generally that "[t]he natural parents...shall, by such final order of adoption, be divested of all legal rights and obligations in respect to the child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them." Section 64.1-5.1(1) states generally, that "an adopted person is the child of an adopting parent and not of the biological parents...." By reading these two statutes in pari materia and by applying a strict construction to them, I am of the opinion that an order terminating parental rights and responsibilities would not effect the inheritance rights of the child and natural parents prior to the entry of a final order of adoption. A similar result is found in the case of Maurer v. Becker, 26 Ohio St. 2d 254, 271 N.E.2d 255 (1971).3

1Section 63.1-204(C)(1) states, in part, as follows:
"A...local board of public welfare may place for adoption, and is empowered to consent to the adoption of, any child who is properly committed or entrusted to its care when the order of commitment or the entrustment agreement between the parent or parents and the agency or board provides for the termination of all parental rights and responsibilities with respect to the child for the purpose of placing and consenting to the adoption of such child." (Emphasis added.)

2Am.Jur.2d Adoption § 101 (1962) states, in part, as follows:
"In the absence of any explicit statutory provision giving adoptive parents the right to inherit from an adopted child, or by necessary implication excluding the right of the natural parent to inherit from such child, many courts, applying the principle that adoption varies the incidents of the natural relationship between the adopted child and its kindred by blood only as the statute explicitly so provides, have held that the right of inheritance from an adopted child who dies intestate without having a surviving spouse, children, or descendants, is in its natural parents, to the exclusion of the adoptive parents and their kindred, even as to property derived by such child from its adoptive parents."

2 Am.Jur.2d Adoption § 103 (1962) states, in part, as follows:
"Consanguinity is fundamental in statutes of descent and distribution, and the right of a child to inherit from his natural parents or to share in the intestate personality of their estates is affected by the legal adoption of the child by another only to the extent that such rights are taken away or limited by the terms of the applicable statutes of adoption and descent and distribution, or by necessary implication therefrom."

3"We conclude that a child surrendered by its parents into the permanent custody of an institution established for the purpose of aiding, caring for and placing children in homes....agreement provides that the institution may appear in any legal proceeding for the adoption of such child and consent to the child's adoption, continues as an heir of such parent, either natural or adoptive, until such time as the child has been legally adopted...." Id. at 257 and 258.

For the effect of the termination of parental rights on the inheritance rights in other cases, see Wright v. Wysowatcky, 147 Colo. 317, 363 P.2d 1046 (1961) and Franklin v. White, 263 Ala. 223, 82 S.2d 247 (1955).
You have asked whether the Milk Commission may permit a milk producer or association of milk producers to negotiate a deduction from the regulated price for raw producer milk supplied to the distributor on Saturday and Sunday. You state that your concern is based upon the following language in the case of Southside Milk Producers Association v. State Milk Commission, 198 Va. 108, 120 (1956):

"We construe the regulation fixing the minimum price as a definite and specific price for milk supplied by the producer to the distributor, and it has been so construed and accepted by the Commission and the industry. The right of the parties to bargain between themselves for a price is denied by the powers granted to the Commission in the exercise of the police power of the State."

The Virginia statutes which are pertinent to your question are as follows:

"§ 3.1-430. Powers in general. --The Commission is declared to be an instrumentality of the Commonwealth, vested with the power:

(c) Supervision and control. --To supervise, regulate, and control the production, transportation, processing, storage, distribution, delivery and sale of milk for consumption within the State.

(g) Rules, regulations and orders. --To make, adopt and enforce all rules, regulations or orders necessary to carry out the purposes for this article...."

§ 3.1-437. Fixing prices generally. --The Commission, after public hearing and investigation, may fix the prices to be paid producers or associations of producers by distributors in any market or markets.... In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the Commission shall be guided by all pertinent economic factors relevant to production, processing, and distribution of milk as they affect the public interest in maintaining an adequate supply of milk within Virginia, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and the welfare of the general public...."

These sections have been interpreted by the Supreme Court in the Southside case. The facts of that case are instructive as to the answers to the question you present. In 1947, Birtcherd Dairy, which is located in Norfolk, Virginia, established a receiving station in Amelia County for the purpose of receiving milk from producers in that area. From 1947 to 1949, Birtcherd established a
rate for transportation costs of taking the milk from Amelia to Norfolk and deducted that amount from the price owed to the Amelia farmers. In 1949, the farmers requested that the Milk Commission fix the rate by order, and subsequently the Commission did so. In 1955, the Amelia farmers acquired equipment which would allow them to transport the milk directly to Birtcherd's plant in Norfolk at a lower cost than the rate Birtcherd was authorized to charge for shipment. They petitioned the Commission to assign some of their milk directly to the Birtcherd plant and require Birtcherd to pay the Norfolk delivered price. After an extensive hearing, the Commission voted to allow certain of the Amelia farmers to make their deliveries directly to Norfolk and others to continue delivering their milk to Amelia. The price differential was set to account for the costs of hauling.

The Supreme Court found that the Commission was within its authority in establishing hauling allowances, which are cost-based deductions from a set price.\(^1\)

The Commission now has proposed to adopt a regulation which would allow a producer cooperative and a distributor to negotiate or bargain for a credit up to $0.20 per hundred pound unit of milk delivered on Saturday and Sunday. The rationale behind the regulation is that, because so little milk is taken on Saturdays and Sundays, a cooperative incurs additional handling and storage costs which could be saved if additional milk was received by distributors on Saturdays and Sundays. Storage costs, like transportation costs, are within the Commission's power to regulate under § 3.1-430(c) and (g) and to fix prices under § 3.1-437.

The issue presented, therefore, is whether the credit in question is inextricably part of the price set for milk, on the one hand, or whether it is, on the other hand, a cost-based deduction from an established price. As noted above, the credit is proposed to account for the shift of handling and storage costs from the producer to the distributor, so it would be reasonable to infer that it is a cost-based deduction from price, like the hauling allowance. Even if it were inextricably linked to the established price, however, the Southside decision would not prohibit individual bargaining for this credit from price. Close examination of the holding in that case reveals that the Commission had promulgated a regulation fixing the minimum price which was accepted by all as the established price. The court held that individual bargaining for price was prohibited where the Commission had acted to fix the price. In those cases where the Commission had not fixed the price, or, presumably, where the Commission expressly permitted negotiation, bargaining for price would not be prohibited. Therefore, even if the credit were not deemed a cost-based deduction, such bargaining for Saturday and Sunday sales could be authorized by the Commission.

\(^1\)"In view of the very broad powers conferred upon the Commission to make, adopt, and enforce all rules, regulations, or orders necessary to carry out the provisions of the Act, § 3-352(g), we do not think that the designation of places for delivery of milk to the distributor, and the regulation of hauling allowances to distributors for transporting such milk to their processing plants are beyond the authority of the Commission." Id. at 119. Section 3-352(g) is now codified as § 3.1-430(g).
AGRICULTURE AND COMMERCE. WEIGHTS AND MEASURES LAW. USE OF AVOIRDUPOIS AND METRIC SYSTEMS.

July 18, 1978

The Honorable A. Victor Thomas
Member, House of Delegates

In your letter of May 12, 1978, you stated that a grocery store is using a metric device which weighs and labels consumer packages according to the metric system of weights and measures rather than the avoirdupois system. You have requested my opinion on two questions:

You have asked (1) whether the Rules and Regulations for the Enforcement of the Virginia Weights and Measures Law prohibit the exclusive use of the metric weights and measures system for retail sales, and (2) if the regulations do prohibit the sale of packages labeled solely in metric units, whether § 3.1-920 of the Code of Virginia (1950), as amended, which recognizes the use of both systems, preempts these regulations.

Rules and Regulations

Section 6.4, Regulation No. 1 of the Rules and Regulations for the Enforcement of the Virginia Weights and Measures Law requires that consumer packages be labeled in the avoirdupois system of weights and measures. Section 6.8.2 allows a further declaration of weights and measures in the metric system. Nonconsumer packages may be labeled in either system or both. See Regulation No. 1, § 7.3.

A consumer package is defined in Regulation No. 1, § 2.2 as follows:

"A "consumer package" or "package of consumer commodity" shall be construed to mean a commodity in package form that is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for the purpose of personal care or in the performance of services ordinarily rendered in or about the household or in connection with personal possessions."

Since food and meat packages fall within the definition of consumer package, I am therefore of the opinion that the regulations prohibit the use of labels which state the weight of a package in metric units only.

Preemption

Section 3.1-920 of the Code provides that

"Both the system of weights and measures in customary use in the United States and the metric system of weights and measures are recognized, and one or the other, or both, of these systems shall be used for all commercial purposes in the State...."
There are two possible interpretations of these sections of Virginia law. It could be said that the Board of Agriculture and Commerce may regulate the method of sale of commodities but in its regulations must recognize the use of both systems. These two sections could also be read to say that both systems are recognized in Virginia, but the Board may by regulation require the use of one or the other of the two systems in particular cases.

The resolution of this question can be found in federal law. The United States Constitution, Art. I, § 8, gives Congress the power to "fix the standard of weights and measures." On July 28, 1866, Congress authorized the use of the metric system in the United States. 15 U.S.C. § 204 codifies this act of Congress as follows:

"It shall be lawful throughout the United States of America to employ the weights and measures of the metric system; and no contract or dealing, or pleading in any court, shall be deemed invalid or liable to objection because the weights or measures expressed or referred to therein are weights or measures of the metric system."

Congress has also enacted the Fair Packaging and Labeling Act, 15 U.S.C. § 1451, et seq., and the Wholesome Meat Act, 21 U.S.C. § 601, et seq. The Fair Packaging and Labeling Act gives the Secretary of Health, Education, and Welfare regulatory authority over labeling of food other than meat or poultry, 15 U.S.C. §§ 1454, 1459(a)(1), and the Wholesome Meat Act gives to the United States Department of Agriculture the authority to regulate the labeling of meat, 21 U.S.C. § 607. The Food and Drug Administration requires that "statements of weight shall be in terms of avoirdupois pound and ounce." See 21 C.F.R. § 101.105(b)(1). The agency's regulations also provide that "a separate statement of the net quantity of contents in terms of the metric system...may also appear on the principal display panel or on other panels." 21 C.F.R. § 101.105(p). Likewise, the United States Department of Agriculture requires the use of avoirdupois labels on meat products. See 9 C.F.R. § 317.2(h)(4). There is no provision for the use of the metric system for labeling in USDA regulations. I am informed, however, that USDA, as a matter of administrative policy, does allow the use of the metric system as an additional label declaration.

The United States Supreme Court has held that regulations regarding labeling under the Fair Packaging and Labeling Act and the Wholesome Meat Act preempt State law and regulations to the contrary. See Jones v. Rath Packing Company and Jones v. General Mills, 430 U.S. 519 (1977). The Board of Agriculture and Commerce acknowledged the limits of its authority in the Preamble to the Rules and Regulations for the Enforcement of the Virginia Weights and Measures Law, p. 3, where it stated:
The Virginia Supreme Court has ruled that "[t]here is a well recognized canon of construction that when a statute or an ordinance is susceptible of two constructions, one of which is within the legislative power and the other without, the courts are required to adopt the former construction." See Improvement Corp. v. Railway Company, 205 Va. 949, 955 (1965). Because of the clear mandate of the Virginia Supreme Court to give statutes of the Commonwealth only such constructions as would be within the legislative power, § 3.1-920 of the Code cannot be read to conflict with federal law. Section 3.1-926 gives the Board power to provide by regulation which system of weights and measures shall be used for the labeling of meat and food packages, provided such regulations do not conflict with federal law.

I am of the opinion, therefore, that §§ 6.4 and 6.8.2 of Regulation No. 1, Rules and Regulations for the Enforcement of State Weights and Measures Law, are not preempted by § 3.1-920 of the Code which recognizes the use of both systems, and cannot be construed to countenance the use of the metric system only.

1This authority has been delegated to the Assistant Secretary for Health and redelegated to the Commissioner of Food and Drugs, 21 C.F.R. § 5.1(a)(1).

ANNEXATION. MORATORIUM LEGISLATION NOT APPLICABLE TO TWO FORMS OF "VOLUNTARY" ANNEXATION. CONDITIONAL STATUS OF MORATORIUM REPEAL NOT APPLICABLE TO "VOLUNTARY" ANNEXATION.

May 25, 1979

The Honorable S. Vance Wilkins, Jr.
Member, House of Delegates

You ask whether a city and county may agree to a "voluntary annexation" in view of the annexation moratorium and the conditional status of the amendment that would end the moratorium. The moratorium appears in § 15.1-1032.1 of the Code of Virginia (1950), as amended. The provision to end the moratorium is a conditional amendment to that section, appearing in Ch. 85 [1979] Acts of Assembly.

I am of the opinion that there is no prohibition against annexation of the type you describe. Section 15.1-1032.1.A, both in its present form and in its conditionally amended form, expressly does not prohibit institution of an annexation proceeding for the purpose of implementing an annexation, the extent, terms and conditions of which have been agreed upon by a county and a city. Furthermore, § 15.1-1032.1.A, both in its present and conditionally amended form, expressly does not prohibit institution of annexation proceedings under § 15.1-1034. Section 15.1-1034 covers petitions for annexation by voters of the territory to be annexed, or by the governing body of the county or town subject to annexation.
The conditional amendment of § 15.1-1032.1, ending the moratorium July 1, 1980, is effective only if House Bill No. 599 from the 1978 Regular Session of the General Assembly, is enacted and funded in the 1980-1982 biennial budget. Many of the remaining provisions of Ch. 85, but not all, are effective July 1, 1979. Accordingly, two forms of "voluntary annexation" are presently possible, even if § 15.1-1032.1.A. is never amended.

APPROPRIATIONS. THIRTY-FIVE MILLION DOLLARS TRANSFERRED TO HIGHWAY MAINTENANCE AND CONSTRUCTION FUND.

October 10, 1978

The Honorable Richard C. Cranwell
Member, House of Delegates

You have asked whether 35 million dollars transferred to the Highway Maintenance and Construction Fund by the 1978 General Assembly\(^1\) makes it subject to expenditure by the Highway and Transportation Department.

The 35 million dollars is the repayment of highway user funds transferred to the General Fund by the 1977 Assembly.\(^2\) The 1977 Assembly provided that the sum should be transferred back on July 1, 1978.

Article X, § 7, of the Constitution of Virginia (1971) provides that "[n]o money shall be paid out of the State treasury except in pursuance of appropriations made by law...." Section 4-1.01 of the 1978 Act at 1860 provides that:

"It shall not be lawful for the State Comptroller to pay any State agency any money, except as is provided for in this act, or in pursuance of any other act of the General Assembly making an appropriation thereto during the current biennium."

Further, appropriations under the Appropriations Act for the last biennium, Ch. 779 [1976] Acts of Assembly 1249, as amended, must have been made on or before the 30th day of June, 1978; accordingly, that Act is not applicable to the present situation.

In light of the foregoing, it is my opinion that § 2-1 of the 1978 Act does no more than transfer the 35 million dollar fund to the State Highway Maintenance and Construction Fund. All monies which are appropriated from that fund are dealt with in Items 615 through 629 of § 145 of the Act. Those items designate the division to be made of the Maintenance and Construction Fund for various highway related purposes and, so far as I can ascertain, constitute the only appropriations whereby such funds may be expended. Section 2-1 does not purport to be an appropriation over and above those made in § 145; it is merely a transfer to make funds available to be appropriated for purposes relating to highways.

I should point out, however, that there is one other manner in which it is possible that the 35 million dollars may be expended. As you know, the 1978 Act contained an unique provision in Item 622.1 of § 145. Under former Acts the Governor could have increased the highway appropriation to match all revenues accruing to the Highway Maintenance and Construction Fund beyond
those anticipated by the Appropriations Act. However, by adoption of Item 622.1, the 1978 Assembly restricted such increases in highway appropriations to a maximum of 10 percent and then only if the "highway construction index" increases by 10 percent beyond the index prevailing at the effective date of the Act. If such index has increased since July 1, 1978, the Governor may authorize the expenditure of an amount in excess of the total appropriation equal to the percentage by which the index increased. Thus, there is a possibility that the 35 million dollars transferred by virtue of § 2-1 could be expended under this provision.

In summary, it is my opinion that the 35 million dollars cannot be expended unless one of the following criteria applies: (1) the appropriations set out in Items 615 through 629 were calculated so as to include the 35 million dollars in the totals of the items, and I understand they were not, or (2) there is a revenue shortfall which would allow the 35 million dollars to be used to cover the lack of revenue anticipated under Items 615 through 629, or (3) the "highway construction index" increases so that the provisions of Item 622.1 are invoked.

1Section 2-1(a) of Ch. 850 [1978] Acts of Assembly 1528, 1794, the Appropriations Act, provides as follows:
"Pursuant to Section 196.2, Chapter 685, Acts of Assembly of 1977, there is hereby transferred from the general fund of the State treasury the following amounts to the fund groups listed:

<table>
<thead>
<tr>
<th>Amount</th>
<th>Fund Group</th>
<th>Former Account Code and Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>$35,000,000</td>
<td>Highway Maintenance and Construction Fund</td>
<td>501-20 State Highway Maintenance and Construction Fund</td>
</tr>
</tbody>
</table>

3"Notwithstanding the provision of § 4.3-05 of this act, or any other provisions of law, no appropriation set forth in Items 615 through 622 of this act shall be exceeded; provided, however, that the Governor is authorized to increase the appropriation in Item 618, 619 and 620 not more than the percentage by which the highway construction index increases above that reflected in the appropriation, but in no event more than 10%, and to increase other of the items restricted herein if required to effect the purpose of Item 33."
4This index uses prices paid within the construction industry in 1967 as its base. The Department of Highways and Transportation determines the rise or fall of the index on a quarterly basis. Having established the position of the index on June 30, 1978, it will determine each quarter thereafter if the index has risen or fallen. Thus, it can determine if the Governor can increase the appropriations in accordance with Item 622.1.
July 26, 1978

The Honorable Ruth J. Herrink, Director
Department of Commerce

You have asked what powers of arrest a registered employee of a private security business now has under § 54-729.33 of the Code of Virginia (1950), as amended by Ch. 560 [1978] Acts of Assembly 861. As you point out, a prior Opinion to you, dated August 24, 1977, concerning the arrest powers of such personnel, was issued before the 1978 amendment.

Section 54-729.33 empowers a registered employee of a private security business to effect an arrest on the premises he is contracted to protect for any offense occurring in his presence on those premises. He is also authorized to arrest a person for the misdemeanors of shoplifting or willful concealment of goods not occurring in his presence. However, in order to make such an arrest the offense must have been committed in the presence of the "merchant, agent, or employee of the merchant" and such person must have probable cause to believe that the suspect had shoplifted or committed willful concealment. Prior to the 1978 amendment, the registered guard could only use the "detention" procedure of § 18.2-105.1 in this situation.

Section 54-729.33 now further provides that a registered employee of a private security business shall be considered an "arresting officer" for the purposes of § 19.2-74. I interpret this to mean that a misdemeanor arrest for an offense committed in the presence of the registered guard and made pursuant to § 54-729.33 must be perfected in accordance with § 19.2-74, which makes it mandatory (1) that an officer arresting a person for a violation in his presence of a local ordinance or any provision of the Code punishable as a misdemeanor, with certain enumerated exceptions, 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 and (2) that, upon the giving of such written promise to appear by the arrestee, the officer shall forthwith release him from custody. Nevertheless, under § 19.2-74, an arrestee shall be taken before a magistrate (1) if he refuses to give a written promise to appear, (2) if he is believed by the arresting officer to be likely to disregard a summons, or (3) if he is reasonably believed by the arresting officer to be likely to cause harm to himself or another person. When a shoplifting or willful concealment arrest is made and such offense was not committed in the registered guard's presence or for any felony, the arrestee must be taken before a magistrate.

While the arrest powers of a private security employee under § 54-729.33 do not extend to felonies not "occurring in his presence" on the premises or to offenses committed off the premises, he may effect an arrest, as any private citizen can, for a felony which in fact has been committed, if he has probable cause to believe that the suspect was the perpetrator of that felony, or for affrays or breaches of the peace committed in his presence. See Report of the Attorney General (1976-1977) at 11; 6A C.J.S. Arrest §§ 14-15 (1975); 5 Am.Jur.2d Arrest §§ 34-36 (1962).

1Section 54-729.33, as amended by Ch. 560 of the Acts of Assembly, effective July 1, 1978, provides in part as follows: "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 in his presence on such premises or in the presence of a
merchant, agent, or employee of the merchant the private security business has
contracted to protect, if such merchant, agent, or employee had probable cause
to believe that the person arrested had shoplifted or committed willful
concealment of goods as contemplated by § 18.2-105. For the purposes of §
19.2-74, a registered employee of a private security services business shall
be considered an arresting officer."

ARREST. SHERIFF MAY ARREST, WITHOUT WARRANT, PERSON OBSTRUCTING SERVICE OF
CIVIL PROCESS OUTSIDE BOUNDARIES OF HIS JURISDICTION.

July 17, 1978

The Honorable O. S. Foster
Sheriff of Roanoke County

You have asked whether a sheriff, while serving process outside his
jurisdiction pursuant to § 8.01-295, Code of Virginia (1950), as amended, may
arrest, without a warrant, a person who is unlawfully interfering with such
service. Under § 18.2-409, resisting or obstructing execution of legal process
constitutes a class 1 misdemeanor. You point out that § 8.01-295 authorizes a
sheriff to execute civil process throughout the political subdivision in which
he serves "and any contiguous county or city."

This Office has previously held that as a general rule a county law
enforcement officer has no authority to make an arrest outside his
jurisdiction, except in his status as a private citizen to arrest for a
felony, affray or breach of the peace. See Opinion to the Honorable Dabney W.
Watts, Commonwealth's Attorney for the City of Winchester, dated December 21,
1976, and found in Report of the Attorney General (1976-1977) at 203, a copy
of which is attached. In the situation you pose, however, the officer is
acting pursuant to a specific statutory grant of authority to serve process in
his capacity as a sheriff but outside his usual jurisdiction.

It is my opinion that § 8.01-295 implies that a sheriff remains clothed
with those powers of his office incidental to perfecting the service of
process outside his usual jurisdiction, and this would include the authority
to arrest, without a warrant, a person who is unlawfully interfering with or
obstructing the sheriff's performance of that duty.

ARREST. WARRANTLESS ARREST AT SCENE OF MOTOR VEHICLE ACCIDENT FOR ARREST
RESULTING FROM ACCIDENT. § 19.2-81.

March 13, 1979

The Honorable James A. Cales, Jr.
Commonwealth's Attorney for the City of Portsmouth

You have asked whether, under § 19.2-81 of the Code of Virginia (1950),
as amended, a police officer can make an arrest without a warrant at a place
other than at the scene of a motor vehicle accident when the arrest results
from the accident. In my opinion he cannot.
The general provision of § 19.2-81 essentially codifies the common law in providing for warrantless arrest by peace officers of "any person who commits any crime in the presence of such officer and any person whom he has reasonable grounds or probable cause to suspect of having committed a felony not in his presence." 2

The portion of § 19.2-81 about which you inquire follows the general provision and provides that "any such officer may, at the scene of any motor vehicle accident, upon reasonable grounds to believe, based upon personal investigation, including information obtained from eyewitnesses, that a crime has been committed by any person then and there present, apprehend such person without a warrant of arrest." (Emphasis supplied.)

To the extent that the crime involved is a misdemeanor, this provision creates an exception to the common law rule, incorporated into the preceding general provision of § 19.2-81, that a peace officer cannot arrest without a warrant for a misdemeanor not committed in his presence.

The exception is stated in plain and unambiguous terms, and I find no authority suggesting that it be interpreted so as to allow such warrantless arrest for a misdemeanor other than "at the scene" of a person "then and there present." Moreover, the Virginia Supreme Court has stated that a statute "will not be construed as changing the common law rule beyond what is expressly stated or necessarily implied, and in doubtful cases the presumption is that no change was intended." Strother v. Lynchburg Bank, 155 Va. 826, 833 (1931). 3

1Section 19.2-81 specifies members of the State Police, sheriffs and their deputies, members of county, city and town police forces, and special policemen of counties as provided by § 15.1-144.
2The common law, unlike § 19.2-81, limited warrantless misdemeanor arrests by peace officers to breaches of the peace occurring in their presence. I C. Torcia, Wharton's Criminal Procedure § 63 (12th ed. 1974); 2A M.J. Arrest § 9, at 127 (1969).
3Of course, if the crime involved is a felony, a warrantless arrest other than at the scene may be justified.

AUTOMOBILE GRAVEYARDS. ORDINANCES. ANY ORDINANCES REGULATING JUNKYARDS AND AUTOMOBILE GRAVEYARDS MUST BE ENACTED IN ACCORDANCE WITH § 15.1-28.

December 20, 1978

The Honorable Kermit L. Racey, Judge
General District Court of Shenandoah County

You ask three questions regarding the authority of local governments to enact ordinances regulating automobile graveyards and junkyards.

Enabling Authority

You ask whether § 15.1-28 of the Code of Virginia (1950), as amended, is the sole enabling authority for the enactment of such ordinances, or whether
such ordinances may be enacted under the general police power. Section 15.1-28 authorizes the governing body of a county, city or town to adopt ordinances imposing taxes and otherwise regulating the maintenance and operation of automobile graveyards, and to prescribe fines and other punishments for violations of such ordinances. See Opinion to the Honorable John F. Ewell, Commonwealth's Attorney for Warren County, dated June 16, 1971, and found in Report of the Attorney General (1970-1971) at 91. See also Opinion to the Honorable E. Eugene Gunter, County Attorney of Frederick County, dated January 15, 1971, and found in Report of the Attorney General (1970-1971) at 247.

Section 15.1-28 is an example of legislation enacted under the police power. While §§ 15.1-522 and 15.1-839 also authorize localities to enact "police power" regulations to protect the health, safety and welfare of a community, recognized principles of statutory construction provide that where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed manner, the latter will prevail. Therefore, although a locality which seeks to regulate junkyards and automobile graveyards has, as the source for its authority, both the police power and the authority provided by § 15.1-28, any ordinance seeking to regulate these areas must be enacted in accordance with the provisions of § 15.1-28.

License Taxes

You ask whether § 15.1-28 is the enabling authority for the adoption of ordinances imposing license taxes upon junkyards and automobile graveyards without necessarily regulating them in other ways, and for the adoption of ordinances regulating such places without imposing license taxes.

Section 15.1-28 authorizes the enactment of ordinances "imposing license taxes upon and otherwise regulating" junkyards and automobile graveyards. (Emphasis added.) The nature of the other regulations which may be adopted is not specified, and a locality may therefore enact a license tax for these facilities without regulating them in other ways. There is, however, no authority to enact an ordinance regulating the facilities without also imposing license taxes upon them.

Procedure for Enactment

You ask whether the procedures for adoption of ordinances pursuant to § 15.1-28 apply to ordinances imposing license taxes and otherwise regulating such places, or whether the procedures apply to ordinances regulating junkyards and automobile graveyards in any manner.

As indicated in my response to your second question, localities may not enact ordinances regulating these places without imposing license taxes. The procedures for adoption required by § 15.1-28 are, however, applicable to all ordinances authorized by that statute.

1Section 15.1-28 provides:
"(a) The governing body of each county, city and town in this State may adopt ordinances imposing license taxes upon and otherwise regulating the maintenance and operation of places commonly known as automobile graveyards and junkyards and may prescribe fines and other punishment for violations of such ordinances."
No such ordinance shall be adopted until after notice of intention to propose the same for adoption shall have been published prior to its adoption once a week for two successive weeks in some newspaper published in such county or city or, if there be no newspaper published therein, then in some newspaper having general circulation in such county or city and no such ordinance shall become effective until it shall have been published in full for two successive weeks in a like newspaper.

As used in this section the terms 'automobile graveyard' and 'junkyard' shall have the meaning ascribed to them in § 33-279.3.

(b) Any ordinance adopted by any county, city or town which was enacted in conformity with § 33-279.3 as it existed prior to April four, nineteen hundred sixty-six, is hereby validated.

BANKING AND FINANCE. MORTGAGES PROVIDING FOR GRADUATED-PAYMENTS. FEDERAL HOUSING ADMINISTRATION GRADUATED-PAYMENT PROGRAMS.

May 25, 1979

The Honorable James F. Almand
Member, House of Delegates

You have asked whether banks in Virginia, consistent with State statutes, may extend to residential purchasers the same type of graduated-payment mortgages now made available by the Federal Housing Administration.

It is my opinion that such graduated-payment mortgages may be made by banks in Virginia, providing they are authorized by the Federal Housing Administration. After July 1, 1979, Virginia law will permit the Commissioner of Financial Institutions to authorize such loans.

Section 6.1-63 of the Code of Virginia (1950), as amended, provides in pertinent part:

"No bank shall make any loan secured by real estate when such loan together with all prior liens and encumbrances on such real estate exceeds fifty percent of the appraised value of the real estate securing such loan, unless such loan is (a) amortized by level or substantially level payments of principal and interest due at least as regularly as annually in amounts which would pay the loan in full over a period of thirty years and two months or less, or (b) amortized by payments of principal due at least as regularly as annually, which are not less than three and one-half percent per annum of the original principal of the loan and in either of such events, the amount of the loan, together with all prior liens or encumbrances on such real estate shall not exceed ninety percent of the appraised value of the real estate securing such loan."

As you have stated in your letter, a graduated-payment mortgage provides for regularly increasing mortgage payments by deferring interest accrued during the first five to ten years of the loan contract and by adding the deferred interest to the original and deferred interest being amortized over the balance of the loan contract at the stated interest rate. This would not be permitted under the current provisions of § 6.1-63.
However, the Federal Housing Administration does make such graduated-payment mortgages available to facilitate home purchases by those whose full earning potential has not yet been realized. The statutory section authorizing such mortgages, 12 U.S.C. § 1715Z-10, provides in pertinent part, that:

"Any mortgage or loan insured pursuant to this section which contains or sets forth any graduated mortgage provisions (including but not limited to provisions for adding deferred interest to principal) which are authorized under this section and applicable regulations, or which have been insured on the basis of their being so authorized, shall not be subject to any State constitution, statute, court decree, common law, or rule or public policy (1) limiting the amount of interest which may be charged, taken, received, or reserved, or the manner of calculating such interest (including but not limited to prohibitions against the charging of interest on interest), if such statute, court decree, common law, or rule would not apply to the mortgage or loan in the absence of such graduated payment mortgage provisions, or (2) requiring a minimum amortization of principal or otherwise relating to the amortization of principal under the mortgage or loan."

Therefore, § 6.1-63 does not apply to graduated-payment mortgages insured by the Federal Housing Administration.

Section 6.1-63 was amended by the enactment of Ch. 375 [1979] Acts of Assembly, which adds the following provision:

"The Commissioner of Financial Institutions may authorize, upon such terms and conditions deemed appropriate by him, investment in loans secured by real estate, providing for lesser payments during the early periods of maturity of such loans."

A similar provision was added to § 6.1-195.34 by the enactment of Ch. 81 [1979] Acts of Assembly, to allow savings and loan associations to make graduated-payment mortgages, provided such mortgages comply with regulations of the Federal Home Loan Bank or the State Corporation Commission. Both of these provisions become applicable on July 1, 1979.

Therefore, until these amendments become effective, or unless the mortgage is extended pursuant to a Federal Housing Administration program authorizing graduated-payment provisions, such graduated-payment mortgages are prohibited by § 6.1-63.

**BANKING AND FINANCE. SERVICE CHARGES AND FEES. § 6.1-330.24 NOT CONSTRUED TO REQUIRE PAYMENT OF APPRAISAL FEES TWICE.**

December 27, 1978

The Honorable George H. Heilig, Jr.
Member, House of Delegates

You have asked my opinion regarding an apparent conflict between § 6.1-330.16 of the Code of Virginia (1950), as amended, and § 6.1-330.24, both of which provide for charges that second mortgage lenders in Virginia may impose upon borrowers.
Section 6.1-330.16 provides in part that the "lender may also impose a service charge including the cost of obtaining the credit report and appraisal not exceeding two per centum of the amount of the loan...." Section 6.1-330.24 provides in part that any "lender making a loan secured by a subordinate mortgage may require the borrower to pay, in addition to the service charge and interest permitted by § 6.1-330.16, the actual cost of... appraisal fees."

A literal interpretation of § 6.1-330.24 yields the result that a lender may require the borrower to pay the appraisal fees twice. However, courts must construe a statute so as to avoid absurd and inconsistent results. Thus it is my opinion that this statute would be construed not to authorize a charge for appraisal fees where the charge already is made as a part of costs.

You have also asked whether unlicensed lenders, making loans secured by subordinate mortgages, may pay a broker's fee or finder's fee out of their own proceeds, in addition to the amounts allowed for such fees under § 6.1-330.24. That statute states in part that "[b]roker's or finder's fees may be paid by the lender from the service charge or interest permitted under § 6.1-330.16 or a broker's fee, finder's fee or commission may be paid by the borrower not to exceed two per centum of the amount of the loan if the total interest, service charge, broker's fees, finder's fees or commissions do not exceed the amount of service charges and interest permitted under § 6.1-330.16."

In my opinion, the statute provides the maximum amount which a lender may charge the borrower for broker's fees or finder's fees. It is my opinion that such lenders may pay additional broker's or finder's fees as long as such additional fees are not passed on to the borrower above the maximum amounts allowed under § 6.1-330.24.

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1 Section 6.1-330.16 applies to persons other than lenders licensed by the State Corporation Commission or listed in §§ 6.1-330.25 and 6.1-330.48; whereas § 6.1-330.24 applies to all lenders licensed or otherwise. This has no effect upon the analysis herein.


BEVERAGE CONTAINERS. § 3.1-382.1 COVERS ALL TYPES OF METAL BEVERAGE CONTAINERS, NOT JUST BEER AND SOFT DRINKS, WITH METAL OPENING DEVICE.

The Honorable Calvin W. Fowler
Member, House of Delegates

October 27, 1978

You have asked (1) whether § 3.1-382.1 of the Code of Virginia (1950), as amended, covers all consumable liquids (including fruit juice and like products) contained in metal beverage containers, or whether it is restricted to beer and soft drinks, and (2) whether it covers metal beverage containers which have an opening device that is not metal, but might, for example, be foil, paper or plastic.

(1) Beverage Defined: Section 3.1-382.1 provides that no person shall sell at retail any metal beverage container designed and constructed with an opening device that detaches from the container. The key to your initial question is the definition of the word "beverage." The Supreme Court of Virginia held that:
"It is our duty to take the words which the legislature has seen fit to employ and give to them their usual and ordinary signification, and having thus ascertained the legislative intent, to give effect to it, unless it transcends the legislative power as limited by the Constitution." Saville v. Virginia Ry. & P. Co., 114 Va. 444, 453 (1913).

This principle has been consistently followed in Virginia. See Commonwealth v. Sanderson, 170 Va. 33, 38 (1938).

"Beverage" is defined in Webster's New Collegiate Dictionary in the 1961 edition as "a liquid for drinking; drink." It is defined in the 1975 edition as "a liquid for drinking; esp: one that is no water." Roget's International Thesaurus, Third Edition, 1962, lists in § 306a.48. under the term "beverages" some fifty-six items, including: fruit juice, orange juice and pineapple juice. I am of the opinion, therefore, that § 3.1-382.1 covers all "liquids for drinking," not just beer and soft drinks.

(2) Metal Opening Device: The answer to your second question is covered by the same legal principles which applied to your first question. Although the term "opening device" is not modified, the words "beverage container," of which the opening device is necessarily a part, is modified by the word "metal." I would hold, therefore, that the opening device itself must also be all metal, and not plastic or paper. Foil openers would be covered, however. Foil is defined as "a leaf or very thin sheet of metal; as, tin foil." Webster's New Collegiate Dictionary.

"On and after January one, nineteen hundred seventy-nine, no person shall sell or offer for sale at retail within the State any metal beverage container designed and constructed with an opening device that detaches from the container when the container is opened in a manner normally used to empty the contents of the container." See § 3.1-382.1.

BINGO. INSTANT BINGO. WHEN AUTHORIZED.

July 24, 1978

The Honorable Joseph H. Campbell
Commonwealth's Attorney for the City of Norfolk

You have asked for an interpretation of § 18.2-335 of the Code of Virginia (1950), as amended, concerning the playing of "instant bingo."

"Instant bingo" is usually played by an individual purchasing a card containing concealed colored numbers. The object of the game is to achieve a "bingo" sequence by exposing the concealed numbers. If such a sequence is achieved he is awarded a prize; if not he wins nothing. "Instant bingo" is closely akin to what is commonly known as punchboard. See the Opinion to the Honorable Ralph L. Axselle, Jr., Member, House of Delegates, dated February 7, 1977, and found in Report of the Attorney General (1976-1977) at 88.

Your inquiry raises a question of when "instant bingo" may be conducted. In 1977, the legislature amended § 18.2-335, to authorize the playing of
"instant bingo" and "bingo in any rotation." The language authorizing "instant bingo" is significant; § 18.2-335 states:

"Nothing in this article shall apply to any bingo game, including as a part of such bingo game to playing of 'instant bingo'." (Emphasis added.)

The language of the statute authorizes the playing of instant bingo, and it implies that "instant bingo" is to be played as a part of the regular bingo game authorized by the statute. It is my opinion, therefore, that "instant bingo" may be played only during those occasions when regular bingo games are conducted and not separately.

You have asked whether "instant bingo" may be played by a machine described as follows:

"The machine is a coin-operated mechanical (or electronic) machine with five reels and a vertical view of five spaces, thereby permitting a view of twenty-five squares with each play. Each reel contains the letters B, I, N, G, O, and some stars (free - any desired letter). A quarter is inserted into the slot in order to activate the machine; a lever is pulled or a button depressed; the reels spin and spell out various letters.

The object of the game is to spell out BINGO on any of the five horizontals or the two left to right diagonals, exactly like a normal bingo card except that there can be no vertical winners.

The machine pays winners by dropping the proper number of coins into a receptacle in the machine. The amount of the various payoffs is flexible and adjustable and, as an example only, might be 20 coins for any horizontal winner and 50 coins for any diagonal winner."

Section 18.2-325 defines a gambling device as:

"Any machine, apparatus, implement, instrument, contrivance, board or other thing, including but not limited to those dependent upon the insertion of a coin or other object for their operation, which operates, either completely automatically or with the aid of some physical act by the player or operator, in such a manner that, depending upon elements of chance, it may eject something of value or determine the prize or other thing of value to which the player is entitled...."

The device about which you inquire contains all of the elements of a gambling device. Although § 18.2-335 authorizes bingo, raffles, "instant bingo" and "bingo in any rotation," the machine about which you inquire is nothing more than that which is commonly known as a "slot machine." The fact that the winner is determined by a spelling of the word "BINGO" rather than by having like objects appear in a window, is not a substantial difference. Although § 18.2-335 authorizes "instant bingo," it does not authorize the playing of "instant bingo" by coin operated devices, nor does it authorize playing bingo by use of "slot machines." I am of the opinion, therefore, that the device about which you inquire would not be authorized by the statute.
BINGO. RENTAL OF EQUIPMENT FOR BINGO GAMES.

August 24, 1978

The Honorable C. Dean Foster, Jr.
County Attorney for Roanoke County

You have asked whether a charitable organization authorized to conduct bingo games may lease equipment and supplies needed to conduct such games as a part of the rental agreement with the landlord of the premises. Section 18.2-335 of the Code of Virginia (1950), as amended, prohibits rental payments for use of premises for bingo games from being in excess of the fair market rental value. The statute is silent as to where an organization may obtain its bingo supplies and equipment. Certainly an organization allowed to conduct bingo games must be able to obtain the equipment and supplies it needs from some source. It is my opinion, therefore, that, since the source of the equipment and supplies is not restricted by the statute, such equipment may be leased from the landlord in conjunction with the lease of the premises.

You have also asked how the fair market rental value of a premises let for bingo is to be determined. The rent paid for the use of a premises may not exceed its fair market rental value. Section 18.2-335 provides:

"No person shall pay or receive for use of a premises devoted, in whole or in part, to the conduct of bingo games or raffles consideration in excess of the current fair market rental value of such property...."

The fair market value is the "[p]rice at which a willing seller and a willing buyer will trade." Black's Law Dictionary 716 (Rev. 4th ed. 1963). In determining the fair market rental value of real estate, one must consider the uses that can be made of the premises. The rental value of other commercial establishments of similar size and use in the area are factors to be considered, as well as rents paid by other lessees for similar uses of premises. The highest and best use of the premises is a factor to consider. In the final analysis, the fair market rental value depends to a great extent on what a willing purchaser is willing to pay and for what amount a willing seller is willing to sell. It is my opinion, therefore, that fair market rental value is determined by evaluation of all premises in the area judged by the above criterion, and is not to be determined by a comparison of those premises used exclusively for bingo.

BINGO. USE OF PROCEEDS. BY ORGANIZATIONS ALLOWED TO CONDUCT BINGO GAMES UNDER § 18.2-335. CHURCH; EDUCATIONAL ORGANIZATION, COLLEGE SCHOLARSHIP FUND; TUITION FOR NEEDY PEOPLE TO SCHOOL SPONSORED BY CHURCH OR OTHER CHARITABLE ORGANIZATION.

July 14, 1978

The Honorable Robison B. James
Member, House of Delegates

You have asked three questions regarding the use of proceeds by organizations allowed to conduct bingo games as provided in § 18.2-335 of the Code of Virginia (1950), as amended.
You first ask about the use of proceeds from bingo games by a church. Section 18.2-335 prohibits the use of proceeds from inuring directly or indirectly to the members of the charitable organization and directs that the proceeds be expended for eleemosynary or charitable purposes. It is my opinion that the religious activity of churches is charitable in nature and proceeds could be spent for this activity. This would include, for example, the cost of the sanctuary, operating expenses incidental to conducting worship services or religious activities, Sunday schools, and the like. I realize that the members of the church may receive indirect benefits from the use of proceeds in this manner, however, I am of the opinion that the indirect benefit received by such members is so remote that the spirit of the statute would not be violated.

You next ask whether an educational organization allowed to conduct bingo games may use the proceeds of such games to establish a college scholarship fund; and if so, whether the eligibility criteria for the recipients may be limited to the members of the organization and the relatives, primarily sons and daughters.

As I have said, the statute prohibits the use of proceeds from inuring directly or indirectly to the benefit of any member of the charitable organization. In my opinion the overriding legislative intent was to insure that the funds be used for charitable purposes. Thus the primary eligibility criterion for receipt of proceeds from bingo is whether the individual is in need of charity. The fact that he is a member, or a relative of a member, of the charitable organization is sufficiently remote as not to violate the spirit of the statute. Therefore, it is my opinion that the proceeds of bingo games may be used to establish a scholarship fund, but the eligibility criteria for the recipients of such fund must be primarily based on whether the recipient is a charitable object.

Lastly you have asked whether the proceeds from bingo games may be used to defray tuition expenses to a school sponsored by a church or other charitable organization for needy people, some of whom may be members of the church or charitable organization. This would, in my opinion, be permissible under the statute because needy people would be legitimate subjects of charity. The mere fact that members of the charitable organization may receive benefits of the proceeds of bingo does not constitute a prohibited use. A member would benefit as an object of a charitable project, and not because he is a member of the charitable organization. Thus the spirit of the statute is not violated. That the object of the charitable project also happens to be a member of the organization sponsoring bingo games is not the evil which the provision against a member's receiving benefits directly or indirectly sought to prevent.

1Most activities of a church, like those of a voluntary fire department or voluntary rescue squad, probably are charitable in nature. However, those activities engaged in by churches which are not strictly charitable in nature may not be supported by proceeds from bingo games.

BINGO USE OF PROCEEDS ONLY PERMISSIBLE IF THOSE WHO RECEIVE BENEFIT OF PROCEEDS ARE LEGITIMATE OBJECTS OF CHARITY.
August 10, 1978

The Honorable Wiley F. Mitchell, Jr.
Member, Senate of Virginia

You have asked two questions regarding the use of proceeds by organizations allowed to conduct bingo games as provided in § 18.2-335 of the Code of Virginia (1950), as amended.

You first ask whether a nonprofit school may use the proceeds from bingo to reduce tuition costs of its students, to purchase real estate for school purposes and to help defray operating expenses of the school.

Section 18.2-335 prohibits the use of bingo proceeds from inuring directly or indirectly to the members of a sponsoring organization and directs that the proceeds be expended for eleemosynary or charitable purposes. In an Opinion to the Honorable Robison B. James, Member, House of Delegates, dated July 14, 1978, a similar question about proceeds was considered. As pointed out in that opinion, nonprofit schools may not use proceeds from bingo for educational purposes unless the recipients are legitimate objects of charity. Thus, use of bingo proceeds for schools would not be authorized unless those receiving the benefit of the proceeds are needy or legitimate objects of charity.

You have also asked whether proceeds of bingo games may be used to purchase uniforms, equipment and to defray expenses of youth engaged in community athletics. As I have previously stated in this connection concerning the use of proceeds by schools, the same criteria would be applicable to other organizations. Thus, use of proceeds in this situation would only be permissible if those who receive the benefit of the proceeds are legitimate objects of charity.

BINGO. USE OF PROCEEDS. TO PAY BABYSITTERS.

August 28, 1978

The Honorable Joseph H. Campbell
Commonwealth's Attorney for the
City of Norfolk

You have asked whether an organization authorized to conduct bingo games under § 18.2-335 of the Code of Virginia (1950), as amended, may use a portion of the proceeds derived from such games to pay the babysitters of the children of those who volunteer their services to the organization for the operation of the games.

The legislature, in authorizing bingo games, intended for the games to be conducted by volunteers and that such volunteers not be paid for their services. Section 18.2-335 provides that the organization authorized to conduct bingo games "shall not enter into a contract with any person...for the purpose of organizing, managing or conducting bingo games..." and that only those who are bona fide members of the organization may conduct such games. This section also prohibits the proceeds from bingo games from inuring directly or indirectly to any member of the organization. See Report of the
Attorney General (1972-1973) at 138. It is my opinion that paying the babysitter of a member would be a use of proceeds in a manner which the member would be receiving a direct or indirect benefit of such proceeds.

BINGO: USE OF PROCEEDS. VOLUNTEER FIRE DEPARTMENTS AND RESCUE SQUADS TO PURCHASE BUILDINGS TO HOUSE THEIR EQUIPMENT.

August 28, 1978

The Honorable William H. Harris
County Attorney for Stafford County

You have asked whether volunteer fire departments and rescue squads may use the proceeds from bingo games to purchase buildings to house their equipment.

Section 18.2-335 of the Code of Virginia (1950), as amended, prohibits the use of proceeds of bingo games from inuring directly or indirectly to the members of a charitable organization and directs that the proceeds be expended for eleemosynary or charitable purposes. In an Opinion to the Honorable Robison B. James, Member, House of Delegates, dated July 14, 1978, I concluded that use of proceeds by a church could be used to finance those activities which are strictly religious in nature because those activities are charitable. Similarly, those activities of a volunteer fire department or rescue squad, such as aid for victims of fire and accident and the like, are charitable. Consequently, use of proceeds from bingo games supporting these activities would be permissible under the statute. Additionally, expenses for purchase and maintenance of equipment, operations, purchase of locations for storage of such equipment and the like could be paid for from proceeds of bingo games as these relate directly to the charitable purpose. I realize that the members of such organizations may receive a certain benefit from such proceeds because they are members of a community served by such organizations and may in fact on occasion receive the services provided; but it is my opinion that such benefit is so remote as not to violate the spirit of the statute.

You also ask whether an organization allowed to conduct bingo games may conduct them in a jurisdiction other than that in which its principal business office is located.

Section 18.2-335 requires that those organizations authorized to conduct bingo games obtain a permit from the governing body of the local political subdivision in which the principal business office is located. The statute provides that the permit is valid only in the jurisdiction where obtained. Thus it is my opinion that an organization authorized to conduct bingo games may do so only in the jurisdiction in which its principal business office is located.

BOARDS OF SUPERVISORS. BACK SALARY. INDIVIDUAL PLACED ON COUNTY PAYROLL BY COUNTY ADMINISTRATOR WITHOUT AUTHORIZATION FROM BOARD.

August 31, 1978

The Honorable T. Stokley Coleman
County Attorney for Spotsylvania County
You ask whether the Board of Supervisors is obligated to pay back salary to an individual placed on the county payroll by the County Administrator without authorization from the Board.

Spotsylvania County is a traditional form county. The authority vested in a County Administrator under that form of government can vary from being merely the clerk to the Board of Supervisors to doing essentially everything of an administrative nature for the county. See § 15.1-117 of the Code of Virginia (1950), as amended. The answer to your question turns upon what authority the Board has delegated to its Administrator, especially in matters of personnel, and what his apparent authority is.1

You advise that your Board has delegated those powers set forth in § 15.1-117 to your County Administrator, with certain limitations relating to purchases, settlement of claims and employment of personnel. Thus, your County Administrator is vested with some discretion and serves as the agent of the Board.

You further advise that the Board has adopted a personnel system for county service, as required by § 15.1-7.1. The Administrator, or his personnel officer, is required to make changes in the classification plan as work assignments are changed. Further, he is authorized to recruit, select, appoint and remove employees "with the advice and consent of the Board," subject to the provisions of the annual budget. See § 3C. Thus, the Administrator had no lawful authority to appoint an employee where, as here, the Board had not granted its consent.

However, as general agent for the Board of Supervisors, the Administrator may have had apparent authority sufficient to bind the Board in this contract of employment. Unless a prospective employee has actual or constructive knowledge that theAdministrator had no authority to appoint persons to positions in county service, he may safely rely on the Administrator's apparent authority to make such appointments, which is incident to his responsibilities to administer the county's government. Hawthorn Coal Corporation v. Blair, 134 Va. 44, 113 S.E. 742 (1922).

The answer to your question, therefore, depends upon whether, as a matter of fact, the employee knew that the Administrator had no authority to appoint persons to positions in county service without the advice and consent of the Board.

1Apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. A third person dealing in good faith with an agent is entitled to rely upon such apparent authority, even though it is not the same as the agent's lawful authority. Apparent authority is a question of fact. 1A M.J. Agency §§ 19 and 20.

BOARDS OF SUPERVISORS. BOARD OF SUPERVISORS OF A COUNTY DOES NOT ACQUIRE COMPLETE JURISDICTION OVER PERSONNEL OF A CONSTITUTIONAL OFFICER WHERE OFFICER AGREES TO PUT HIS PERSONNEL UNDER COUNTY'S PAY PLAN.

June 25, 1979

The Honorable H. W. Love
Commissioner of Revenue for Isle of Wight County
You have asked whether the Board of Supervisors of Isle of Wight County acquires jurisdiction over the personnel of a constitutional officer, where the officer agrees to put his personnel under the county pay plan.

This Office has ruled consistently that, absent specific statutory authority to the contrary, a constitutional officer has the sole responsibility regarding the personnel policies of his office. See Opinion to the Honorable Charles A. Reid, dated July 6, 1977, and found in Report of the Attorney General (1977-1978) at 466-467. Thus, it is generally not the prerogative of any local official to make personnel determinations for a constitutional officer, and employees and deputies of constitutional officers are not normally subject to a county's personnel system.

This traditional view of a constitutional officer's authority over his personnel is embodied in § 2.1-114.5:1(C) of the Code of Virginia (1950), as amended, which gives employees of constitutional officers access to the State grievance procedure under certain circumstances. That section specifically states that such personnel "shall be excluded from the locality's personnel system unless their inclusion in such local personnel system is agreed to by both the constitutional officer and the locality."

Thus, by mutual agreement a constitutional officer's employees could be brought within a locality's personnel system. Moreover, nothing in § 2.1-114.5:1(C) would seem to prohibit an agreement for inclusion in only a part of the system, such as the pay plan. In such a situation, the constitutional officer's employees would be governed by the locality's pay plan, subject to the exercise of authority in these areas by the Compensation Board. See Opinion to the Honorable J. Madison Macon, Jr., Commonwealth's Attorney for Charles City County, dated October 3, 1974, and found in Report of the Attorney General (1974-1975) at 34, 35; § 14.1-51 of the Code. In all other personnel matters, however, it is my opinion that the constitutional officer would retain jurisdiction and control over the personnel of his office.

BOARDS OF SUPERVISORS. MEMBERS OF BOARD OF SUPERVISORS MAY SERVE ON BOARD OF WATER AND SEWER AUTHORITY.

February 16, 1979

The Honorable Joseph A. Johnson
Member, House of Delegates

You ask whether members of a county board of supervisors may serve on the board of a water and sewer authority.

Section 15.1-50 of the Code of Virginia (1950), as amended, provides that no person holding the office of county supervisor shall hold any other elective or appointive office. The statute contains several specific exceptions to this rule, none of which are relevant to a water and sewer authority.

Section 15.1-1249 provides, however, that the powers of a water and sewer authority shall be exercised by members, and that "One or more members of the governing body of a political subdivision may be appointed members of the authority, the provisions of any other law to the contrary notwithstanding."
(Emphasis added.) This express language clearly indicates that it is intended to control conflicting provisions of law.

Thus, I conclude that § 15.1-1249 controls the appointment of members of a board of supervisors to a water and sewer authority and that therefore members of the board of supervisors may serve on the board of a water and sewer authority.

BOARDS OF SUPERVISORS. SCHOOL APPROPRIATIONS. BOARD MAY NOT FUND OR ALTER INDIVIDUAL LINE ITEMS; MAY INCREASE OR DECREASE LUMP SUM OR MAJOR CATEGORIES.

July 10, 1978

The Honorable James F. Almand
Member, House of Delegates

You ask whether a local governing body may seek to control the line item in the school board's budget relating to employee salaries. You also ask whether the local governing body may condition the release of money from a contingency fund of the general budget to the school system upon the school board's action with regard to a particular line item of the school board's budget.

You state the facts to be as follows. A local school board requested sufficient funds in their budget to provide a 7 percent pay increase for their teachers. The local governing body believed that pay increases for all county and school board employees should be limited to a 5 percent pay increase. When the school board refused to agree, the governing body reduced the school board budget by $1.2 million and established a $1.2 million contingency fund to cover any school revenue shortages. The result was to limit the funds available for teachers' pay increases.

Line Items

Section 22-127 of the Code of Virginia (1950), as amended, restricts appropriations by local governing bodies for school purposes to either a lump sum appropriation or one designating the sums appropriated under the major categories of expenses as prescribed by the State Board of Education. Accordingly, a local governing body may not fund individual line items, while refusing to fund others, nor may it alter individual line items, either by way of an increase or a decrease. The governing body may, however, fund by major classification and may increase or decrease appropriations for major classifications. See Report of the Attorney General (1975-1976) at 23, 296; Report of the Attorney General (1971-1972) at 25. Teachers' salaries are a line item within the major classification "Instruction" and may not be altered, increased or decreased by a local governing body. A local governing body may, however, establish the total expenditures for major classifications at a level which would have the practical effect of limiting pay increases. See Report of the Attorney General (1975-1976) at 296. Thus, a local governing body legitimately may seek to affect line items by limiting the funds available for each major classification.
Contingency Fund

Article VIII, § 2, of the Constitution of Virginia (1971), requires local governing bodies to provide their portion of the cost of maintaining educational programs which meet the standards of quality established by the Board of Education. The amounts which local governing bodies must provide to maintain their local public schools are established by the General Assembly. See Appropriation Act, Ch. 850 [1978] Acts of Assembly 1528, 1609-1613.

Once the local governing body has apportioned funds in the specified amount to the local school board, it may, but is not required to, provide additional funds for the operation of the local schools. There is no constitutional provision or statute which prohibits a local governing body from placing additional funds in a contingency fund rather than appropriating such funds to the school board. Accordingly, a local governing body, once it has appropriated sufficient funds to the school board to satisfy its constitutional obligation, may refuse to provide any additional funds requested by the school board and may establish a contingency fund to provide additional funds should they be necessary.

Virginia law restricts the authority of local governing bodies over matters involving operation of the schools. However, as noted above, the power of appropriation does rest with the local governing body. In this case, establishment of the contingency fund represents a statement by the governing body that, if needed, it is prepared to appropriate that amount in addition to the approved budget. Admittedly, this gives the governing body a mechanism by which to affect school policy, but it is a mechanism allowable under the law.

BOARDS OF SUPERVISORS. TAXATION ASSESSMENTS. MAY NOT CONTROL METHODS.

December 18, 1978

The Honorable Frederic Lee Ruck
County Attorney for Fairfax County

You have asked whether the Fairfax County Board of Supervisors may, under its urban county executive form of government, direct and control the method of assessment of tangible personal property used by the supervisor of assessments. It is my opinion that the supervisor of assessments may consider the position taken by the Board of Supervisors but he is not bound by its position. Moreover, the supervisor of assessments is required by law to exercise his independent judgment in arriving at the fair market value of tangible personal property.

Background

Your letter states that:

"The Supervisor of Assessments of Fairfax County has recently revised his methodology of assessment of automobiles which were manufactured prior to 1972 and, therefore, are not addressed in any of the currently used automobile dealer value guides. This revision in methodology has resulted in the assessed values of many older vehicles to be increased from the assessed values in the preceding tax year. All assessed values have not increased; in fact many assessments have decreased from the previous tax year."
As a result of taxpayer complaints after receipt of tax bills based upon increased value, the Board of Supervisors has voted to direct the Supervisor of Assessments to roll back the assessment of the older model automobiles where the assessment for the current tax year exceeds the assessment for the prior tax year. Alternatively, the Board has directed that the Supervisor of Assessments reverse the decision on methodology and return to the assessment procedure used prior to the current tax year, but has directed the Supervisor not to increase the assessment of any older model automobiles where the use of the prior methodology requires an assessment larger than that currently billed to the taxpayer.

The Supervisor of Assessments believes that the revised methodology achieves a greater degree of uniformity and more accurately reflects the fair market value of automobiles to be taxed. The Board of Supervisors believes that it has the ultimate control over assessment methodology to be used by the Supervisor of Assessments. In this belief, the Board is aware that in the urban county executive form of government the government official directly responsible for the setting of assessment is the Supervisor of Assessments, an official appointed by the Board of Supervisors presumably under the administrative control of the Board and the County Executive. The Board believes that this status is substantially different from the status of an elected Commissioner of Revenue, the assessment official in other forms of county government. The Board believes that to determine otherwise would be to deny the electorate the ability to hold the Supervisor of Assessments accountable for individual or systemic errors in assessments.

Analysis

Fairfax County has adopted the urban county executive form of government, established a department of assessments and appointed a supervisor of assessments. Under this arrangement, there is no commissioner of the revenue and all of the obligations and penalties imposed by general law on that office are conferred upon the supervisor of assessments. However, unlike a commissioner of the revenue, the supervisor of assessments is subject to suspension or removal from office by the board of supervisors. Thus, the supervisor of assessments can be held accountable for errors in assessments. The accountability is extended and enlarged by the provision of additional administrative and judicial remedies in Title 58, Ch. 22, Art. 2, §§ 58-1141 et seq. which provide aggrieved taxpayers relief from erroneous assessments.

The supervisor of assessments is charged with the duty to ascertain and assess, at fair market value, all the personal property not exempt from taxation and subject to taxation in his county on the first day of January in each year. Thus, there is no legal distinction which may be drawn between the supervisor of assessments and a commissioner of the revenue with respect to their powers, duties and obligations.

This Office has taken the position consistently that boards of supervisors may express their views to the person performing the duties of the commissioner of the revenue, but the boards are without authority to exert any control over the method of assessment. Further, this Office also has held that once established, the assessed value of tangible personal property may not be changed after the beginning of the county's tax year. The assessed values would, of course, be subject to the administrative and judicial remedies mentioned above for correction of an erroneous assessment.
Section 58-864 requires only that the supervisor of assessments ascertain and assess, at fair market value, all personal property not exempt from taxation. In the case of R. Cross, Inc. v. City of Newport News, 217 Va. 202, 288 S.E.2d 113 (1976), the Supreme Court of Virginia held that nothing in that section prescribed the procedure to be followed in determining taxable values or prohibited the use of multiple methods. Following this decision, the 1978 General Assembly amended § 58-829 to read, "Methods of valuing property may differ among [categories of personal property], so long as each method used may reasonably be expected to determine actual fair market value." You have indicated in your letter that the "Supervisor of Assessments believes that the revised methodology achieves a greater degree of uniformity and more accurately reflects the fair market value of the automobiles to be taxed." It would appear that he has done nothing more nor less than is required of him by the Code.

1Authorized by Title 15.1, Ch. 15, Art. 1, §§ 15.1-722 et seq. of the Code of Virginia (1950), as amended. The urban county board of supervisors has no greater general rights and powers than those conferred on boards of supervisors by general law. Section 15.1-730.
2Section 15.1-765.
3Sections 15.1-734, 15.1-773.
4Sections 15.1-756, 15.1-766(c), (j), and 15.1-773.
5Section 15.1-735.
6Section 58-864. As noted above, the supervisor of assessments under the urban county executive form of government acts in the same official capacity as a commissioner of the revenue. See Footnote 4. Note also that the supervisor of assessments would be guilty of malfeasance in office if he were found to have knowingly made a false entry on any of his books. Section 58-889.

BONDS. COURT MAY NOT IMPOSE BOND AS CONDITION OF DEFERRED JUDGMENT WHICH MAY BE FORFEITED AT DISCRETION OF COURT REGARDLESS OF DEFENDANT'S COMPLIANCE WITH OTHER CONDITIONS.

August 23, 1978

The Honorable J. C. Snidow, Jr., Judge
Twenty-Seventh Judicial District

You have asked whether as a "condition" of deferred judgment under § 18.2-251 of the Code of Virginia (1950), as amended, a defendant may be required to post a bond that will be subject to forfeiture at the discretion of the court regardless of whether the defendant fulfills all other conditions of probation imposed under that section. You have also asked whether you may employ a similar procedure in other misdemeanor cases.

Section 18.2-251 provides that in a prosecution for possession of a controlled substance under § 18.2-250 the court may defer judgment against an accused who has not previously been convicted of any drug related offenses,
and may place him on probation upon terms and conditions. The section further
provides that upon violation of a term or condition, the court may enter an
adjudication of guilt and proceed as otherwise provided, and that upon
fulfillment of the terms and conditions, the court shall discharge the accused
and dismiss the proceedings against him.

Clearly, § 18.2-251 authorizes a court to defer judgment in first
offenses involving controlled substances and to place the defendant on
probation upon terms and conditions pending imposition of judgment or
dissmissal of the proceedings. It is my opinion, therefore, that you may
require a defendant to post bond as a condition of probation under
§ 18.2-251.

Bond has been defined as "[a]n instrument with a clause, with a sum fixed
as a penalty, binding the parties to pay the same, conditioned, however, that
the payment of the penalty may be avoided by the performance by some one or
more of the parties of certain acts." Black's Law Dictionary 224 (Rev. 4th ed.
1968). Indeed, in an analogous situation the Supreme Court of Virginia has
recognized that where a defendant's non-compliance with the conditions of his
bond is no fault of his own, the bond should not be forfeited. Bowling v.
Commonwealth, 123 Va. 340, 96 S.E. 739 (1918). Implicit in this decision is
recognition of the principle that bond should not be forfeited if the
defendant complies with all terms of the bond. I am of the opinion, therefore,
that a bond imposed by a court as a condition of deferred judgment under
§ 18.2-251 may not be subject to forfeiture when the defendant has fulfilled
all conditions of probation.

Additionally, because it is my opinion that a court may not impose a bond
which will be subject to forfeiture at the discretion of the court regardless
of whether the defendant has met all conditions of the bond, it necessarily
follows that it is also my opinion that such a bond may not be imposed in
misdemeanor cases other than those covered in § 18.2-251.

CHARTERS. AMENDMENT TO CHANGE FORM OF GOVERNMENT. PROCEDURE MAY NOT BE USED TO
CHANGE CHARTER RESPECTING TAXATION OF REAL ESTATE.

August 17, 1978

The Honorable Vance Wilkins, Jr.
Member, House of Delegates

You say that a group of residents of the City of Lynchburg support an
amendment of the city charter placing limitations on the taxation of real
estate, but that this amendment does not have the support of City Council. You
ask whether the Change of Form of Municipal Government Act may be used to
request such a charter amendment, or whether its use is limited to requests
for change in the "form" of city government. You also inquire whether any
other method can be used to seek such a charter amendment if the City Council
opposes it.

Municipal Charters Are Granted By
General Assembly

A municipal corporation is a creature of the Commonwealth. It exists
under the sovereignty of the Commonwealth and possesses only such powers as
are conferred upon it by the General Assembly. City of Lynchburg v. Dominion Theaters, 175 Va. 35, 7 S.E.2d 157 (1940). The General Assembly may specify the organization and government of, and delegate powers to, municipal corporations by general law or special act. See Art. VII, § 2, of the Constitution of Virginia (1971). A municipal charter is conferred by special act. Town of Narrows v. Board of Supervisors, 128 Va. 572, 105 S.E. 82 (1920). The General Assembly has provided by general law for optional plans of government for municipal corporations, an integrated body of powers which may be delegated by special act to the council of the municipal corporation, and procedures for requesting changes in the corporation's charter. See Chaps. 17, 18, 19 and 20 of Title 15.1 of the Code.

Amendment of Charter Through Change In Form of Government

The procedures for changing the form of municipal government are contained in Chap. 20 of Title 15.1. Section 15.1-946, to which you referred, is the first statute in that procedure. It authorizes voters in cities of 50,000 or more inhabitants to petition for a referendum on the question, "Shall this city take the necessary steps to frame and request the General Assembly of Virginia to grant it a special form of charter?" If the required number of signatures are obtained, council shall provide by ordinance for the election to be held within a certain time. Therefore, support of council is not necessary to begin this process for charter amendment. The charter commission elected shall prepare "a special charter or form of government" and it shall be submitted to the voters for their approval. If a majority of those voting favor it, the result shall be certified to the General Assembly. See §§ 15.1-946 through 15.1-949.

While the term "special charter or form of government" is not defined, it is clear that the statutes in this chapter constitute the procedure by which a municipal corporation may request the General Assembly that its form of government be changed from one of the forms authorized by general law to another. Among those forms are the general council-mayor, and the modified commission plan, or the city manager plan. 13 M.J.2d Municipal Corporations § 18 (1951). I am of the opinion from this and the language of the statutes discussed below that the charter commission is authorized only to frame charter amendments which relate to the structure of the city's governmental organization. Accordingly, this procedure may not be used to change the charter respecting the taxation of real estate.

Other Charter Amendment Procedures

The Uniform Charter Powers Act, which is codified as Chap. 18 of Title 15.1, provides an integrated set of powers that may be conferred upon the council of a municipal corporation by charter granted by the General Assembly. No charter amendment which involves one of the powers enumerated in that Act may be requested except in accordance with the procedure outlined in Art. 10 of that Chapter.

Among the powers granted in that Act is the power to raise revenues annually on property by taxes and assessments in amounts necessary in the judgment of council to pay the debts, defray the expenses, and accomplish the
purposes of the municipal corporation. See § 15.1-841. An amendment which operates to limit this power may be suggested to the General Assembly through the procedure set forth in Art. 10. However, this charter amendment process cannot be instituted without the support of city council, which must determine whether the voters "desire that it request the General Assembly...to amend its existing charter," and pass an ordinance calling an election on that matter. See § 15.1-911. In the alternative, council may call a public hearing on that issue. See § 15.1-912. There is no statute that would permit the citizens to compel council to call a charter election or hold a public hearing on the matter. The sole remedy available is to elect a council which favors such an amendment.

If the amendment in question relates to a power not included within the Uniform Charter Powers Act, nor to the "form" of government, the procedure for requesting such an amendment is codified as §§ 15.1-833 through 15.1-836. These statutes are identical in all material respects to those in Art. 10 of Chap. 18 which are discussed above. Therefore, this process cannot be instituted without the support of council.

1Chapter 20 of Title 15.1 of the Code of Virginia (1950), as amended.

CHARTERS. WHERE CHARTER PROVISIONS AND GENERAL LAW CONFLICT, LATER ENACTED GENERAL STATUTE PREVAILS.

January 23, 1979

The Honorable H. Harrison Braxton, Jr.
Commonwealth's Attorney for the
City of Fredericksburg

You ask whether a provision of the Charter of the City of Fredericksburg or a statute in the Code of Virginia (1950), as amended, controls the manner in which the City must approve an annual budget for educational purposes. I believe the Code is controlling.

Section 24(b) of the Charter of the City of Fredericksburg, Ch. 481 [1942] Acts of Assembly 933, requires the preparation of an annual budget at least fifteen days before the end of each fiscal year. Section 22-127 of the Code provides that "[n]otwithstanding any other provision of law,..." an annual budget for educational purposes shall be prepared by May 15 or within thirty days of the receipt of estimates of State funds.1

The purpose of § 22-127 is to establish timetables for the preparation of school budgets apart from the timetables for other local agencies or departments. The statute requires that a budget, for informative and fiscal planning purposes only, be accepted and adopted by the governing body within the specified deadline. See Opinion to the Honorable Calvin W. Fowler, Member, House of Delegates, dated August 6, 1976, and found in Report of the Attorney General (1976-1977) at 228.

It is a well-recognized principle of statutory construction that where a charter and a statute conflict, the charter controls. See Opinion to the Honorable D. B. Marshall, Judge, Sixteenth Judicial District, dated July 21,
1976, and found in Report of the Attorney General (1976-1977) at 43. An exception to this rule occurs where the statute clearly indicates that the General Assembly intended it to control conflicting charters. The language in § 22-127 "[n]otwithstanding any other provision of law,..." is evidence of such an intent. In addition, when a charter provision and a more recently enacted general law conflict, the later-enacted general statute prevails. See Opinion to the Honorable Thomas A. Williams, Jr., Chief Judge, Richmond General District Court, dated October 14, 1974, and found in Report of the Attorney General (1974-1975) at 415. The portion of § 22-127 relevant to your inquiry was enacted in 1975, § 24(b) of the Fredericksburg charter was enacted in 1942.

Since § 22-127 was the more recently enacted statute and is clearly intended to control the timetable by which annual school budgets should be prepared, I am of the opinion that the City of Fredericksburg should follow the Code of Virginia in establishing an educational budget.

1Section 22-127 provides in part:
"Notwithstanding any other provision of law,...the governing body of a county shall prepare and approve an annual budget for educational purposes by May first or within thirty days of the receipt by said county of the estimates of State funds, whichever shall later occur, and the governing body of a municipality shall prepare and approve an annual budget for educational purposes by May fifteen or within thirty days of the receipt by said municipality of the estimates of State funds, whichever shall later occur."

CHILDREN. CHILD CARE CENTER. PROGRAM OPERATED BY PARENT-TEACHER ASSOCIATION. LICENSURE OF.

March 30, 1979

The Honorable Charles J. Colgan
Member, Senate of Virginia

You have asked whether child-care services provided by the Occoquan Elementary School Parent-Teacher Association (PTA) at the Occoquan Elementary School would require licensure by the Virginia Department of Welfare as a child-care center. Such licensure would be pursuant to Section 63.1-195 of the Code of Virginia (1950), as amended. You have provided material which indicates that trained staff, meeting Welfare Department requirements, is available for before and after school hourly care activity and that a school board employee is present at all times in case of emergency. Hourly rates are charged and the services are only provided to children attending Occoquan School. Snacks are provided during the afternoon and emergency data sheets for each child are kept. Parental use of the hourly care ranges from daily to less than once a month.

The background material described above indicates that the Parent-Teacher Association is providing care, protection and guidance to a group of children separated from their parents during a part of the day. Under § 63.1-195, therefore, licensure would be required unless the facility qualified for one of the exemptions outlined in that statute.
REPORT OF THE ATTORNEY GENERAL

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With respect to whether a county school board may operate a day-care center, I refer you to the Opinion to the Honorable Vincent F. Callahan, Jr., Member, House of Delegates, dated December 11, 1978, a copy of which is attached. That opinion holds that a local school board is not statutorily authorized to operate a day-care center. Therefore, the fact that a school board employee is present would not exempt the facility from licensure.

Under the facts presented, the activities and program offered at the school by the PTA are used by some parents daily and the services provided are available each day if desired by the parents. The statutory exemption for occasional care, found in the definition of a child-care center, would therefore not apply. The other exemptions in § 63.1-195 do not relate to the day-care center you have described. In light of this, I am of the opinion that the operation of the child-care services conducted by the PTA at the school would require licensure by the Department of Welfare as a child-care center.

That statute requires, in part, that a license to operate a child-care center be obtained from the State for

"[A]ny facility operated for the purpose of providing care, protection and guidance to a group of children separated from their parents or guardian during a part of the day only except (1) a facility required to be licensed as a summer camp under §§ 35-43 through 35-53; (2) a public school or a private school unless the Commissioner determines that such private school is operating a child-care center outside the scope of regular classes; (3) a school operated primarily for the educational instruction of children from two to five years of age at which children two through four years of age do not attend in excess of four hours per day and children five years of age do not attend in excess of six and one-half hours per day; (4) a facility which provides child care on an hourly basis which is contracted for by a parent occasionally only;...."

CHILDREN. PETITION FOR CUSTODY OF CHILD INITIATED IN COUNTY WHERE CHILD WAS PRESENT CAN BE TRANSFERRED TO ANOTHER VIRGINIA JURISDICTION AFTER DECISION ON MERITS OF PETITION.

July 11, 1978

The Honorable G. Garland Wilson, Judge
Juvenile and Domestic Relations District Court
Twenty-Seventh Judicial District

You have asked whether a petition for custody of a child which has been initiated in one county where the child was present and attending school can be transferred to another Virginia jurisdiction where the child has established legal residence. I am of the opinion that such a transfer can occur only after a decision on the merits of the petition has been made.

Venue requirements for the type of proceeding you described are found in § 16.1-243 of the Code of Virginia (1950), as amended. Section 16.1-243.A.2 provides that this type of proceeding may "be commenced in the city or county where the child resides or in the city or county where the child is present...." Section 16.1-243.B. provides, in part, as follows:
"If the child resides in a city or county of the State and the proceeding is commenced in a court of another city or county, that court, on its own motion...made at any time prior to final disposition may, after adjudication, transfer the proceedings to the city or county of the child's residence...." (Emphasis added.)

The term "adjudication" is defined as "the giving or pronouncing a judgment or decree in a cause; also the judgment given." Black's Law Dictionary (Rev. 4th Ed. 1968). It implies a hearing by a court, after notice, of legal evidence on the factual issue involved. Genzer v. Fillip, 134 S.W.2d 730, 732 (1939). "Adjudication" in its strict judicial sense implies final judgment of court, that is, an exercise of judicial power in hearing and determining issues and rendering judgment thereon. State v. Hoffman, 236 Ore. 83, 103, 385 P.2d 741, 743 (1963).

Given those legal definitions, I am of the opinion that § 16.1-243.B. requires that the court where the petition was initiated must hear and decide the matter on its merits. Once that has been accomplished, the matter may then be transferred to the city or county in the State where the child resides for appropriate disposition.

CITIES. CONSTRUCTION OF COMMUNITY RESIDENTIAL CARE FACILITY FOR JUVENILES. CREDIT TO CITY FOR CITY-OWNED LAND AGAINST ITS SHARE OF COST.

August 1, 1978

The Honorable Robert M. Yacobi, Chief Judge
Newport News Juvenile and Domestic Relations District Court
Seventh Judicial District

You have asked whether the City of Newport News may receive a credit for its contribution of city-owned land against its share of the cost of a new community residential care facility for juveniles.

Section 16.1-313 of the Code of Virginia (1950), as amended, requires that the Commonwealth shall reimburse a city for "[u]p to one half the cost of construction, enlargement, renovation, purchase or rental of a...residential care facility...." This section does not define the term "cost."

However, the cost of the land on which a facility is to be located would necessarily be part of its purchase price. I am not aware of any reason why this should not hold true merely because the land is already owned by the city. I would note, however, that § 16.1-313 bases such reimbursement on the approval of the State Board of Corrections and the Governor.

I am of the opinion, therefore, that the fair market value of city-owned land, used in the construction of a community residential care facility, may be figured in the overall cost of the facility if approved by the State Board of Corrections and the Governor, the city may receive a credit against its share of the cost for reimbursement.

CIVIL PROCEDURE. § 8.01-229(E)(3) DOES NOT APPLY TO ACTIONS PENDING 10-1-77.
December 15, 1978

The Honorable Thomas W. Moss, Jr.
Member, House of Delegates

In your recent letter you ask:

If at the time of the enactment of Title 8.01, an action was pending which had been filed within the applicable statute of limitations (under Title 8), would the statute of limitations have been tolled in accordance with § 8.01-229(E)(3), in the event a nonsuit were taken?

Section 8.01-229(E)(3)\(^1\) of the Code of Virginia (1950), as amended in 1978, provides that a statute of limitation is tolled by the commencement of an action where a plaintiff suffers a nonsuit if certain conditions are met.

As you have pointed out, there are two statutes dealing with the applicability of Title 8.01 to causes of action arising before the enactment of Title 8.01. Section 8.01-1 states: "Except as may be otherwise provided in § 8.01-256 of chapter 4..., all provisions of this title shall apply to causes of action which arose prior to the effective date of any such provisions...." Section 8.01-256, which is a part of Chapter 4, dealing with limitation of actions, states in part: "No action, suit, scire facias, or other proceeding which is pending before October one, nineteen hundred seventy-seven, shall be barred by this chapter, and any action, suit, scire facias or other proceeding so pending shall be subject to the same limitation, if any, which would have been applied if this chapter had not been enacted...."

In my opinion it is clear that this statute is controlling in the situation you have outlined in your letter. Therefore, since the action was pending at the time of the enactment of Title 8.01, § 8.01-229(E)(3) does not apply, and we must resort to the law previous to that section's enactment.

Section 8-34,\(^2\) the predecessor of § 8.01-229, provided for the tolling of a statute of limitations where a suit was abated, in only four instances. In Jones v. Morris Plan Bank, 170 Va. 88, 195 S.E. 525 (1938) the Supreme Court of Virginia held that § 8-34 was not applicable where a plaintiff suffered a voluntary nonsuit.

Therefore, in the situation you have outlined, when the plaintiff suffers a voluntary nonsuit, the statute of limitation is not tolled by the commencement of the suit and it cannot be recommenced if the statute of limitations has expired at the time of the attempted recommencement.

\(^1\) Section 8.01-229(E)(3) provides: "If a plaintiff suffers a voluntary nonsuit as prescribed in § 8.01-380 the statute of limitation with respect to such action shall be tolled by the commencement of the nonsuited action, and the plaintiff may recommence his action within six months from the date he suffers such nonsuit, or within the original period of limitation, whichever period is longer."

\(^2\) Section 8-34 states: "If an action or suit commenced within due time in the name of or against one or more plaintiffs or defendants abate as to one of them by the return of no inhabitant or by his or her death or marriage, or if in an action or suit commenced within due time judgment or decree for the
plaintiff shall be arrested or reversed upon a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, or such arrest, or reversal of judgment or decree, or such loss or destruction, but not after."

CIVIL PROCEDURE. SERVICE OF PROCESS ISSUED TO SHERIFF MUST ACCOMPANY FULL NAME AND ADDRESS OF PARTY TO BE SERVED.

February 23, 1979

The Honorable Robert W. Legard
Sheriff for the County of Loudoun

You have asked three questions about service of process which I shall answer in order.

First, you have asked if a plaintiff can be made to comply with § 8.01-290 of the Code of Virginia (1950), as amended, when supplying information to the clerk of court for purposes of service of process. That section requires a plaintiff to provide a full name and last known address of each defendant to be served, if available, and if not, "such salient facts as are calculated to identify with reasonable certainty such defendant."

For example, if only the name of a town is given, the plaintiff could be required to provide additional facts to assist in the identification of the party to be served. The use of initials or nicknames may not be sufficient for identification, and if the full name is available to the plaintiff it should be used. A request for service of process at a post office box or general delivery address need not be considered a full address and additional information to identify the location of the party to be served could be required.

In a prior Opinion found in Report of the Attorney General (1974-1975) at 64, it was ruled that, pursuant to § 15.1-79, it is the mandatory duty of the sheriff to execute civil process issued by the courts. Nevertheless, the law requires only that the sheriff do his duty in good faith and with due diligence."

If your office is asked to make service of process in a case where an incomplete name or address is given, your return should indicate your inability to execute service owing to the inadequacy of the information supplied. The Supreme Court of Virginia held in Rowe v. Hardy, 97 Va. 674, 676, 34 S.E. 625 (1899), that a sheriff's return "may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ."

Second, you have asked whether a plaintiff may withhold the address of a defendant's usual place of abode, and provide only the address where the defendant is employed. Section 8.01-290 provides that the plaintiff is to furnish the last known address of the defendant and only if he is unable to
furnish such address should he furnish other information (such as his place of employment) calculated to reasonably identify or locate the defendant.

Section 8.01-296, providing for the manner of serving process upon natural persons, does permit service of process to be obtained by delivering the process to the defendant in person. Nevertheless, Burk's Common Law and Statutory Pleading and Practice states, on page 73, that "personal service may be on the defendant anywhere he may be found in the officer's bailiwick, but the officer is not required to search for him at but one place and that is his usual place of abode,..."

Thus, it is my opinion that, if personal service is not otherwise required by law, the plaintiff may not insist upon personal service at the defendant's place of employment unless he is unable, under § 8.01-290, to provide the full address of the defendant's usual place of abode.

Third, you have asked whether once a document is issued for service and returned "not found" that same document, carrying the same docket number but with a later court date, can be issued to you for service as an "alias summons." An alias summons is "a summons issued when [the] original has not produced its effect because defective in form or manner of service and when issued, which supersedes the first writ." Black's Law Dictionary. Such summonses should be issued by the clerk just as original summonses. The Virginia Supreme Court held in Danville & Western R.R. Co. v. Brown, 90 Va. 340, 342, 18 S.E. 278 (1893) that "the simple circumstance that it is characterized as an 'alias writ' and that it runs, 'We command you as we have before,' or 'at another time commanded you,' etc., cannot possibly affect or change its essential character or render it less effectual as a process for bringing the defendant before the court, and this is all that any original summons does." (Emphasis supplied.) Thus, in the circumstances you describe, issuance of an alias summons is proper.

1"Where a sheriff has in his hands a summons to serve or a writ to execute, he must in good faith make all reasonable effort and use due diligence to find [the] defendant, or discover property subject to the writ, and serve or execute such process in the most effective manner, but he is not required to use all possible efforts to execute process in any particular case, since he might thereby lose the opportunity of executing other process in his hands." 80 C.J.S. Sheriffs and Constables § 44 (1955).

2Section 8.01-296 provides that "Process for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. By delivering a copy thereof in writing to the party in person; or
2. By substituted service in the following manner

a. If the party to be served be not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or
b. If such service cannot be effected under subdivision 2., then by posting a copy of such process at the front door of such place of abode, provided that not less than ten days before judgment by default may be entered, the party causing service mails to the party served a copy of the pleading and thereafter files in the office of the clerk of the court a certificate of such mailing;..."
Former § 8-48 of the Code, in effect at the time of this decision, stated in part that "If, at the return day of any process, it be not returned executed, it shall be the ex-officio duty of the clerk...to issue an alias or other proper process...." This statute was later repealed in 1954. Nevertheless the court stated in Danville & R.R. Co., that "The only limitation in law upon the power of the plaintiff in a suit to have issued as many writs as he may deem proper, is that he is not to harass or vex the defendant with unnecessary costs." Supra, 90 Va. at 342. Therefore the only effect of the repeal of the statute is that it is no longer the ex-officio duty of the clerk to issue such summonses, but rather he is to do so only at the request of the plaintiff, pursuant to Rules 3:3 and 2:4 of the Supreme Court Rules.

CLERKS. COLLECTION OF DELINQUENT REAL ESTATE TAXES. § 14.1-155.2 CONSTRUED.

June 13, 1979

The Honorable Robert C. Oliver, Jr.
Commonwealth's Attorney for
Northampton County

You ask several questions concerning certain payments received by your county treasurer for delinquent real estate taxes.

Facts

Real estate taxes for years 1970 through 1976 inclusive were not paid when due because of the bankruptcy of the Penn Central Transportation Company. Delinquent taxes for the years 1970 through 1975 and liens arising therefrom have been recorded in the clerk's office, in accordance with §§ 58-983 and 58-984 of the Code of Virginia (1950), as amended. Delinquent taxes for 1976 remain in the county treasurer's office for collection. As a result of the reorganization of Penn Central, and in accordance with the plan of reorganization as approved by the United States District Court for the Eastern District of Pennsylvania, the taxes due to your county for the entire seven years are being paid directly to the county treasurer, the party in whose name the county's proof of claim was filed.

Clerk's Commission

You first ask if the clerk of the circuit court is entitled to a five percent commission upon the receipt by the county treasurer of any portion of the delinquent real estate taxes which are due.

The controlling statute is § 14.1-155.2 which provides that "[t]he clerk of every circuit court shall be entitled to a commission of five per centum on local collections received by such clerk on which a commission is not otherwise provided for by law. Such commissions shall be deducted by the clerk before such collections are paid into the county, town or city treasury."

In the instant case, delinquent taxes for the year 1976 remain uncollected and in no event is the clerk now entitled to a commission on them. With respect to tax years 1970 through 1975, the question presented is whether the payments received by the county treasurer constitute "collections received by...[the] clerk..." within the meaning of § 14.1-155.2.
Several authorities require a negative response to this question. First, it is a fundamental rule of statutory construction that words ought to be given their plain and ordinary meaning. Board of Supervisors v. Boaz, 176 Va. 126, 10 S.E.2d 498 (1940). Here, the key word is "received." The facts clearly indicate that the tax payment was "received" and deposited by the county treasurer, not the clerk of the circuit court.

Second, we need not infer that the taxes were constructively received by the clerk because the clerk is not the only person authorized or required under Virginia law to receive or collect delinquent taxes, even those which have been previously recorded in the clerk's office. See § 58-985 and Report of the Attorney General (1972-1973) at 443.

Third, this Office has previously ruled that delinquent taxes subsequently collected must "pass through the clerk's hands" in order for the five percent commission to accrue to the benefit of the clerk. See Reports of the Attorney General (1940-41) at 30 and (1936-1937) at 33-34.

Based upon the foregoing, it is my opinion that the clerk is not entitled to a commission upon the collection of delinquent real estate taxes unless the amount so collected actually passes through the clerk's office.

Payments to Town of Cape Charles

You next ask if Cape Charles, a town located in Northampton County which has a separate school division, is entitled to a share of the delinquent tax receipts under § 22-141.2 and, if so, (1) the proper base amount upon which the share is derived and (2) the proper percentage of the base amount to which the town is entitled.

Because Cape Charles has its own school division, § 22-141.2 mandates that the county treasurer pay into the general fund of the town an amount determined by the following formula:

"From the amount derived from a general or unit levy for all county purposes, a sum equal to such town's pro rata share of the general or unit levy receipts derived from the taxable property within the town, including real estate, tangible personal property, merchant's capital and machinery and tools. The pro rata share of the town shall be determined by allocating to the town the same percentage of general or unit levy receipts as is appropriated by the county governing body for the support of county public schools and/or for educational purposes."

You have advised that the county funds the county public schools from general levy receipts which are derived from the classes of taxable property enumerated in § 22-141.2. Consequently, the town is entitled under that statute to a pro rata share of the taxes derived from the taxable property located within the town.

Amount Due

You last ask what amount is due the town. This sum is computed by multiplying the town's pro rata share times the general and unit levy receipts of the town. The pro rata share is a fraction. Its numerator is the total amount of general or unit levy receipts appropriated by the county for county
educational purposes from those classes of taxable property enumerated in § 22-141.2. The denominator is the total amount derived from general or unit levy receipts for all county purposes from classes of taxable property enumerated in § 22-141.2, exclusive of the taxes derived from town property. The denominator must also include all delinquent real estate taxes received in the current fiscal period, including all interest and penalties earned thereon, exclusive of those taxes, interest and penalties which relate to real estate located in the town.

This pro rata share is multiplied times the total general or unit levy receipts derived by the town from taxable property (real estate, tangible personal property, merchant's capital and machinery/tools) located therein. These total receipts include the interest and penalty derived from delinquent real estate taxes on property located in the town.¹


¹To illustrate, assume that the county funds all county projects from real estate taxes only. Assume the county receives $800,000 in current real estate taxes (exclusive of all real estate taxes derived from realty located in the town). Assume also that delinquent taxes (including interest and penalty) are collected in the current year by the county in the sum of $300,000, of which $100,000 is derived from realty located in the town. The town produces current real estate tax revenues of $50,000. From county general and unit levy receipts the county appropriates $200,000 for county educational purposes. The town is entitled to $30,000 which is determined as follows:

1. \[
\frac{800,000 + (300,000 - 100,000)}{200,000} = \frac{1,000,000}{200,000} = 20\%
\]

2. \[
20\% \times ($50,000 + $100,000) = $30,000
\]

CLERKS. FEES. CLERK OF CIRCUIT COURT TO RECEIVE FEE FOR DOCKETING JUDGMENT RENDERED BY GENERAL DISTRICT COURT.

October 11, 1978

The Honorable Roger W. Mullins
Commonwealth's Attorney for Tazewell County

Fee for Docketing Judgment Rendered by General District Court of Same Jurisdiction

You ask whether the clerk of a circuit court may charge a fee for docketing a judgment rendered by the general district court of the same jurisdiction.

Section 14.1-112(22) of the Code of Virginia (1950), as amended, provides that the clerk of a circuit court may charge a fee of two dollars "[f]or docketing and indexing a judgment from any other court...." The general rule of statutory construction is that a word shall be given its ordinary meaning.

The word "court," as it appears in § 14.1-112(22), is not limited in any manner. On the contrary, the provision applies to "any other" court. The
word "court" refers sometimes to the judicial institution, at other times to
the judicial officer, and still other times to the place where a court is
being held. Alexandria Gazette Corp. v. West, 198 Va. 154, 162, 93 S.E.2d
274, 281 (1956). In this instance, it is my opinion that "court" refers to a
"judicial institution." Clearly, the circuit and general district courts in
Virginia constitute separate and distinct tribunals. See generally
§§ 16.1-69.1 to 16.1-69.52 and 17-1 to 17-231.

Consequently, it is my opinion that the clerk of a circuit court may
charge a two dollar fee for docketing a judgment rendered by the general
district court in his jurisdiction.

CLERKS. MAGISTRATES. PERSON WHO HOLDS THE OFFICES OF CLERK OF GENERAL DISTRICT
COURT AND ALSO AS CHIEF MAGISTRATE OF JUDICIAL CIRCUIT IS NOT ENTITLED TO
RETIREMENT AND LIFE INSURANCE BENEFITS ACCRUING TO BOTH POSITIONS.

March 28, 1979

The Honorable Robert N. Baldwin
Executive Secretary
Supreme Court of Virginia

You ask whether a person who holds the offices of clerk of a general
district court and also as chief magistrate of a judicial district is entitled
to retirement and life insurance benefits accruing to both positions.

Section 51-111.27(b)1 of the Code of Virginia (1950), as amended,
prohibits dual membership in the Retirement System with respect to any of the
benefits. This section further provides that any persons employed in more than
one position resulting in membership must elect one membership on which his
retirement is to be based.

In an Opinion to the Honorable James F. D'Alton, Jr., Assistant
Commonwealth's Attorney for the City of Petersburg, dated July 17, 1973, and
found in Report of the Attorney General (1973-1974) at 60, it was ruled that
§ 19.1-385(b)2 prohibits an individual from serving both as magistrate and
clerk of a general district court.

However, in an Opinion to the Honorable Hubert D. Bennett, Executive
Secretary, Supreme Court of Virginia, dated November 7, 1974, and found in
Report of the Attorney General (1974-1975) at 256, it was ruled that an
individual who holds the positions of clerk and magistrate prior to the
enactment of § 19.1-385 is eligible to continue in office as a consequence of
the grandfather clause. The Opinion does not hold that such individuals also
may retain both memberships in the Retirement System.

In 1973, § 51-111.27(b) was amended to prohibit dual membership in the
Retirement System. At that time no grandfather clause was provided for any
group of persons who had earlier benefited from the grandfather clause in
§ 19.1-385. The obvious interpretation of § 51-111.27(b) is that persons may
only hold one membership in the Retirement System for benefit purposes.

Therefore, in my opinion, a person who is employed in more than one
full-time capacity may not gain the retirement and life insurance benefits of
both positions. In accordance with § 51-111.27(b), he must elect one position on which his membership shall be based.

1Section 51-111.27(b) of the Code provides:

"No person shall hold more than one membership in the retirement system at any one time with respect to any of the benefits, including group insurance coverage, provided under this title. Any person employed in more than one position resulting in membership shall elect one position on which his membership shall be based by written notification thereof to the Board."

2Section 19.1-385(b) of the Code provided:

"A person shall be eligible for appointment to the office of magistrate under the provisions of this title ...(b) if his spouse is not a clerk, deputy or assistant clerk, or employee of any such clerk of a court not of record or police department or sheriff's office in any county or city with respect to appointment to the office of magistrate of such county or city; provided...."

CLERKS. SUBDIVISION ORDINANCES. SUBDIVISION ORDINANCES MAY NOT REQUIRE CLERKS TO SEARCH RECORDS TO ASSURE COMPLIANCE OF PLAT, BUT MAY REQUIRE REFUSAL TO RECORD PLAT THAT HAS NOT BEEN APPROVED IN ACCORDANCE WITH § 15.1-473.

May 2, 1979

The Honorable William J. Walker, Jr., Clerk
Circuit Court of Franklin County

You ask whether the clerk of a circuit court may be required by a county subdivision ordinance to refuse to record a subdivision plat until that plat has been approved by the county's agent under that ordinance or until the clerk searches his records to ascertain compliance with that ordinance.

Section 15.1-473(b) of the Code of Virginia (1950), as amended, provides that no plat of a subdivision1 shall be recorded unless and until it has been submitted to and approved by the local commission or by the governing body or its duly authorized agent. See Report of the Attorney General (1968-1969) at 39. Subsection (e) of the same statute specifically provides that "[n]o clerk of any court shall file or record plat of a subdivision...until such plat has been approved as required." Accordingly, it is my opinion that when the deed shows on its face that it is a subdivision plat, the clerk may not record the plat until it has been approved as required by § 15.1-473.

Section 15.1-474 places the burden of enforcing and administering the subdivision ordinances of a county or municipality upon the local governing body. In addition § 15.1-475 sets out the manner in which the owner or proprietor of any tract of land to be subdivided gets approval of the plat and plainly places the burden of reviewing the plat for compliance with the ordinances on the planning district commission or other agents of the governing body. Accordingly, it is my opinion that the county may not require the clerk to search his records to assure compliance with the subdivision ordinance before recording the subdivision plat.

1A subdivision is defined in § 15.1-465 as three or more lots or parcels of less that five acres each or where any new street is involved, any division at all.
The Honorable William E. Fears  
Member, Senate of Virginia  

December 21, 1978  

You ask if it is proper for an individual to campaign for the General Assembly while serving full-time as an affirmative action officer and administrative assistant to a president of a State college. You also ask if it is proper for such an individual to serve in the General Assembly while holding his full time college position.

I am of the opinion that it would be proper for such an individual to campaign for the General Assembly and to serve if elected, provided the campaign activity does not interfere with the duties expected of him as a college employee. The campaign activity must be undertaken in accord with applicable lawful college policies. See Reports of the Attorney General (1973-1974) at 336; (1962-1963) at 248; (1965-1966) at 141; (1969-1970) at 138; and (1972-1973) at 212.

The Honorable Elise B. Heinz  
Member, House of Delegates  

November 3, 1978  

You ask whether our State-supported colleges and universities have the authority to allow gifted secondary-school students to take a course without payment of tuition.

Such a practice would constitute an unfunded scholarship. Unfunded scholarships are prohibited except as allowed by § 23-31 of the Code of Virginia (1950), as amended. Applicable to your inquiry is § 23-31(3) which provides that the scholarships shall be awarded "only to undergraduate students in the first four years of undergraduate work."

I am of the opinion that the students you describe may be regarded as eligible for unfunded scholarships. No guidance is given in the statute as to any special definition of the term "undergraduate," and I therefore adopt the customary definition as meaning any student "who has not taken a first degree ..." Webster's New Collegiate Dictionary (1976).

This opinion, however, does not affect any existing discretionary power of the respective governing boards to award funded scholarships or control over any gifts or donations made to their respective institutions for scholarship purposes. See § 23-31(d).
REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES. VIRGINIA COLLEGE SCHOLARSHIP ASSISTANCE PROGRAM LIMITING LOANS TO VIRGINIA STUDENTS ATTENDING VIRGINIA INSTITUTIONS OF HIGHER EDUCATION IS CONSTITUTIONAL.

July 21, 1978

The Honorable Frank W. Nolen
Member, Senate of Virginia

You ask whether the Virginia College Scholarship Assistance Program, which limits loans to Virginia students attending institutions of higher education in Virginia, is constitutional.

Article VIII, § 11, of the Constitution of Virginia (1971), authorizes the General Assembly to provide financial assistance to Virginia students attending private institutions of higher education located within the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training. The Virginia Supreme Court held in Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261 (1972), that Art. VIII, § 11, does not unduly discriminate against students who attend out-of-state institutions, and thus does not violate the Equal Protection Clause of the Fourteenth Amendment. Nor does the distinction between students attending in-state and out-of-state schools violate other provisions of the federal Constitution.

In my opinion, therefore, neither Art. VIII, § 11, nor the statutes enacted to implement that section1 are in violation of the United States Constitution insofar as they limit financial assistance to students attending institutions of higher education located in Virginia.

1See Tuition Assistance Loan Act, § 23-38.11, et seq. (private colleges); College Scholarship Assistance Act, § 23-38.45, et seq. (public and private colleges). Article VIII, § 10, which authorizes the General Assembly to provide financial assistance to students attending public and private nonsectarian colleges, does not require recipients of such assistance to attend institutions located within the Commonwealth.

COMPENSATION. COMPENSATING VICTIMS OF CRIME. INDUSTRIAL COMMISSION MAY NOT AWARD MORE MONEY THAN THERE IS IN CRIMINAL INJURIES COMPENSATION FUND; MAY NOT APPORTION AWARDS.

January 26, 1979

The Honorable M. E. Evans, Commissioner
Industrial Commission of Virginia

You ask whether the Industrial Commission of Virginia should enter awards on new claims for compensation for victims of crime when the awards would exceed the funds available for disbursement.

The Criminal Injuries Compensation Fund was created under § 19.2-368.18 of the Code of Virginia (1950), as amended, as a special fund for compensating victims of crime. The fund was appropriated to the Industrial Commission, see
Item 651, Ch. 850 [1978] Acts of Assembly 1866, but is administered by the comptroller. See § 19.2-368.18. This section provides that payment of claims by the comptroller under the Act "shall be limited to the funds available in the Criminal Injuries Compensation Fund as collected during the preceding fiscal year and any funds remaining unawarded from any prior fiscal year." The comptroller may not pay claims when insufficient monies remain in the Fund.

Section 4-5.01 of the Appropriations Act, Ch. 850 [1978] Acts of Assembly 1866, provides that no State agency receiving appropriations in whole or in part from special revenues shall "obligate or expend funds in excess of, or at a rate which would result in expenditures in excess of, collections of such revenues combined with any general fund appropriations,..." except in an emergency with prior written approval from the Governor. (Emphasis added.)

When the Industrial Commission makes an award, it must promptly notify the comptroller and the claimant. See § 19.2-368.7. The claimant, in turn, can record the award in the circuit court, making it in effect a judgment against the Fund. See § 65.1-100.1. Thus, awards against the Criminal Injuries Compensation Fund where insufficient monies remain in it to satisfy them would constitute an obligation in excess of appropriations. Cf. Report of the Attorney General (1950-1951) at 313.

Accordingly, in my opinion, the Commission is not authorized to make awards in excess of the funds available for disbursement. This does not mean however that the Commission would be unable to receive and process claims to the point that an award could be made as soon as funds became available.

You further ask whether you may apportion the available funds among deserving claimants, or must make the full awards authorized by statute until the funds are depleted.

Section 19.2-368.11A provides that any award for loss of earnings shall be made in accordance with the schedule of benefits and degree of disability as specified in §§ 65.1-54 through 65.1-56. These sections set forth mathematical formulas by which the Commission must determine the amount to be awarded for a particular disability, and they make no provision for deviation from the schedule by the Commission. Awards may also be made under § 19.2-368.11B on claims, or portions of claims, for certain expenses incurred as a result of the victim's injury or death, which in the discretion of the Commission are appropriate. This section makes no provision for apportioning payments among deserving claimants once the Commission has determined the appropriateness of the expenses. It is a general principle of administrative law that administrative agencies, in the exercise of their powers, may validly act only within the authority conferred upon them by statutes vesting power in them. Sydnor Pump & Well Co. v. Tyler, 201 Va. 311, 110 S.E.2d 525 (1959).

It is therefore my opinion that the Commission may not apportion the available funds among deserving claimants, but must make awards as provided for by § 19.2-368.11 until there are no funds remaining for disbursement.

CONDEMNATION. EMINENT DOMAIN. LOSS OF RETAIL OUTLET THROUGH TAKING BY EMINENT DOMAIN PRECLUDES REPLACEMENT UNDER PROHIBITION OF "NEW" RETAIL OUTLETS. VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT.
October 27, 1978

The Honorable Stanley C. Walker
Member, Senate of Virginia

This is in response to your inquiry concerning the meaning of "new retail outlet," as used in the Virginia Petroleum Products Franchise Act, § 59.1-21.16:1 of the Code of Virginia (1950), as amended. Specifically, you pose the question whether following the taking of an existing outlet by eminent domain, the building of a replacement outlet at a different site would be violative of the statutory prohibition of new retail outlets. It is my opinion that it would.

Section 59.1-21.16:1 states:

"A. No distributor shall open a new retail outlet, or convert an existing retail outlet to a direct distributor operation. Any such retail outlet must be operated by a dealer. Provided however, that this section shall not be construed to prohibit: (1) the direct distributor operation of a new retail outlet where the distributor owns or has an option to buy a properly zoned parcel of property or a permit to build has been granted prior to May one, nineteen hundred seventy-eight; or (2) the direct distributor operation of any new or existing retail outlet for a period not to exceed one hundred twenty days pending the execution of a franchise agreement; or (3) the direct distributor operation of a retail outlet by an association as defined in § 15(a) of the Agriculture Marketing Act of 1929 (49 Stat. 317, 12 U.S.C.A. 1141).

B. The provisions of this section shall expire on March one, nineteen hundred seventy-nine."

In a question of statutory construction, the ascertainment of legislative intent is the primary objective. Vollin v. Arlington County Electoral Board, 216 Va. 674, 678, 222 S.E.2d 793, 797 (1976). The legislative history of the section in question is minimal. However, it does indicate that the original Bill was patterned closely after § 46.1-547.2, and would have, with minor exceptions, prohibited distributor ownership of retail outlets. Although the final version of the Bill is not nearly so stringent, it must be assumed that it remained the legislature's intent to limit strictly the role of distributors in the marketplace and to protect franchisees from increased competition from distributor-owned outlets.

If the statute were interpreted to permit distributors to replace outlets on a one-to-one basis, this protection of the franchisees could be seriously undermined. Outlets at undesirable locations could be replaced by outlets at more favorable sites. Old or small outlets could be replaced by modern and larger ones. Clearly, the franchisees would not have these options available to them and could be injured rather than protected by the provision.

An interpretation of the statute to include replacement outlets in the definition of "new" outlets is further supported by traditional rules of statutory interpretation. First, unless legislative history indicates a different or broader meaning, "statutory words must be given the meaning they have acquired from customary usage." Greer v. Dillard, 213 Va. 477, 479, 193 S.E.2d 668, 670 (1973). "New" is customarily used to indicate "having
originated or occurred lately; not early or long in being,...having been in
some relationship, position, or condition but a short time,..." or "different
or distinguished from a person, place, or thing of the same kind or name that
has longer or previously existed." Webster's New International Dictionary
of the English Language (2d ed. 1959). A different building at a different
site would clearly be a "new" outlet within the ordinary usage of the word,
even though it would not be an additional outlet.

Second, interpretation of the statute should consider the rule that the
expression of one thing is the exclusion of another. See Crawford, The
Construction of Statutes § 195 (1940). The Code section lists three exceptions
to the general prohibition. Obviously, had the legislature wished to permit
replacement outlets, it could have set forth an additional exception. That it
did not, implies that those stated exceptions are exclusive.

An analogy may be drawn between the instant situation and that of a
nonconforming use under a zoning statute. In the case of the latter:

"It is a general rule that the right to a nonconforming use continues
only so long as the use continues to exist in fact and until its legal
termination, which may be by nonuse or discontinuance for a prescribed
period, by voluntary destruction, or by involuntary destruction that is
total or nearly total." 8A McQuillin The Law of Municipal Corporations

Section 59.1-21.16:1 prohibits "new retail outlets" just as a zoning law
prohibits certain land uses. As long as the distributor's former outlet is
functioning, § 59.1-21.16:1 has no impact. But once the outlet is abandoned or
destroyed, even involuntarily, § 59.1-21.16:1 acts to prohibit a replacement
just as a zoning statute would prohibit the replacement of what had been a
nonconforming use.

Thus, it is my opinion that the statute precludes the replacement of the
former outlet by one that is directly operated by the distributor. It should
be noted, however, that the prohibition section expires on March 1, 1979,
pursuant to § 59.1-21.16:18.

CONSTITUTION. USE OF PUBLIC FUNDS FOR LOANS TO LOW AND MODERATE INCOME
HOMEOWNERS FOR HOUSING REPAIR DOES NOT VIOLATE "CREDIT CLAUSE" OF ART. X,
§ 10.

February 19, 1979

The Honorable Jerry K. Emrich
County Attorney for Arlington County

You ask three questions concerning the power of local governments to make
loans for housing.

Housing Repair

You first ask whether the lending of public funds to low and moderate
income persons to enable them to repair their homes and bring them up to
building code standards will violate Art. X, § 10, of the Constitution of
Virginia (1971), known as the "credit clause." The credit clause provides that public credit shall not be used for private purposes.

In order not to violate Art. X, § 10, the public credit must be used in a manner which serves a public purpose. The public purpose test will be satisfied if a governmental activity is carried out by the program. II A. Howard Commentaries on the Constitution of Virginia 1131 (1974). In an Opinion addressed to you and dated December 21, 1978, it was ruled that a locality may use public funds to make loans to low and moderate income homeowners for the purpose of preserving and renovating their homes assuming that appropriate enabling legislation exists. A program designed to assist low income people in making the repairs necessary to secure compliance with the building code standards to reduce the shortage of sanitary and safe housing which is "inimical to the health, welfare and prosperity of residents of the Commonwealth..." would be a public purpose. The General Assembly has expressly concluded in the Virginia Housing Development Authority Act that this is a public purpose. See § 36-55.25 of the Code. Furthermore, the Supreme Court of Virginia has ruled that it will not interfere with what the legislature has declared to be a public purpose. Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966).

I therefore conclude that Arlington County may lend public credit to low and moderate income persons to enable them to repair their homes and bring them up to building code standards without violating Art. X, § 10, of the Constitution because such a program serves a public purpose.

Purchase of Housing

You next ask whether Arlington County may lend public funds to low and moderate income persons to enable them to purchase housing.

It has been declared that a serious shortage of sanitary and safe housing exists at prices which persons of low and moderate income can afford. The General Assembly has enacted legislation stating that the elimination and eradication of this condition "are public purposes and uses for which public moneys may be borrowed, expended, advanced, loaned, or granted, and that such activities serve a public purpose in improving or otherwise benefiting the people of this Commonwealth;..." See § 36-55.25. I therefore conclude that no violation of the credit clause results from the use of public funds to make loans to low and moderate income persons to enable them to purchase housing.

Energy-Saving Devices

You ask whether public funds may be used to make loans to low and moderate income persons to assist them in installing energy saving devices.

There is a national and State interest in decreasing the use of energy in this country. The General Assembly has determined that a public purpose is served by a program which assists citizens of the Commonwealth in saving energy. See § 36-55.31:1. I am of the opinion that public credit may therefore be used to enable low and moderate income persons to install energy-saving devices without violating the provision of Art. X, § 10.

1In that Opinion, enabling legislation had been enacted in § 15.1-29.7 of the Code of Virginia (1950), as amended, which authorized participation of
localities in the federal Housing and Community Development Act, 42 U.S.C. § 5301. I concluded that loans for renovation of housing were a valid public purpose. It was noted that the General Assembly had made a specific finding to that effect in the Virginia Housing Development Authority Act, § 36-55.25.

CONSTITUTIONAL LAW. LENDING OF PUBLIC FUNDS TO LOW AND MODERATE INCOME HOMEOWNERS TO REHABILITATE THEIR PROPERTY DOES NOT VIOLATE "CREDIT CLAUSE" OF ART. X, § 10.

December 21, 1978

The Honorable Jerry K. Emrich
County Attorney for Arlington County

You ask whether Arlington County may participate in the Federal Community Development Program as authorized by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301. The program authorizes loans of federal and local funds to low and moderate income homeowners for preserving and renovating their homes. Localities are authorized to participate in programs under the Act as long as the activity is not in contravention of the Constitution of Virginia (1971). See § 15.1-29.7 of the Code of Virginia (1950), as amended. I am of the opinion that the county may take such action.

Historical Background

Article X, § 10, of the Constitution of Virginia provides in part that:

"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...."

This provision is known as the "credit clause" and has been the basis for much debate and litigation since similar language was first added to the Constitution of Virginia in 1870.

During the nineteenth century, states freely extended their credit and assistance to private corporations undertaking "internal improvement," typically, turnpikes and canals. As a result, many states experienced financial disaster. The provision thus seeks to avoid such a situation by preventing the use of public "credit" to aid such private ventures. A. Howard Commentaries on the Constitution of Virginia 1128 (1974).

While the language of the statute appears to preclude the use of funds to aid "persons," many credit programs which aid individuals, such as scholarship loans and the provision of welfare funds, have not been found unconstitutional under the credit clause. Cf. Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261 (1972). Internal improvement projects enjoining public support and which meet a "public purpose" test have been found not to violate the intent of Art. X, § 10. A. Howard, supra, at 1129.

In Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956), the Virginia Supreme Court held that Art. X, § 10, was not violated when retirement funds were invested in the obligations of private corporations, since by so doing the
Commonwealth was acting for its own benefit. The investment served a public purpose. The fact that an incidental benefit might be received by the private venture did not render the activity invalid. The court has held that the credit clause does not prohibit the lending of public funds to a produce market authority on grounds that an authority was not a private enterprise and served a public purpose. Harrison v. Day, 200 Va. 750, 107 S.E.2d 585 (1959).

A public purpose also has been found in the use of public assistance to industrial authorities (Fairfax County Industrial Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966)) and port facilities (Harrison v. Day, 200 Va. 764, 107 S.E.2d 594 (1959), Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1961), and Button v. Day, 205 Va. 629, 139 S.E.2d 91 (1964)).

Public Purpose

Thus, the lending of public credit to low and moderate homeowners will not violate the "credit clause" if the program can meet the "public purpose" test. The public purpose test is satisfied if a governmental activity is carried out. A. Howard, supra, at 1131.

The General Assembly has expressly determined that the use of public funds to remedy the "serious shortage of sanitary and safe residential housing at prices or rentals which persons and families of low and moderate income can afford" is a public purpose since the "shortage has contributed to and will contribute to the creation and persistence of substandard living conditions and is inimical to the health, welfare and prosperity of the residents of this Commonwealth." Section 36-55.25 of the Code. The court has stated that it "cannot interfere with what the General Assembly has declared to be a public purpose and thus a function of government unless the judicial mind conceives that the legislative determination is without reasonable relation to the public interest or welfare and is beyond the scope of legitimate government." Fairfax County Industrial Development Authority v. Coyner, supra.

Your inquiry states that the public funds will be made available on the basis of need to persons of low and moderate income. Such funds will be used to eradicate blight and unsanitary housing conditions in Arlington County. The eradication of blighted housing is recognized to be a governmental function. Whatever benefit will be received by private enterprise from the program will be incidental to its basic objective of improving housing conditions.

I therefore conclude that the fundamental and overriding objective of the lending of public credit to low and moderate income homeowners to rehabilitate their homes serves a public purpose. Accordingly, the program is not violative of the "credit clause" of Art. X, § 10, of the Constitution.

Prior Opinions

Your inquiry, provides sufficient information regarding the public purpose to be served by this program--namely eradication of blighted and unsanitary housing conditions--to enable me to reach the conclusion that no violation of the credit clause will result from the use of public funds.
See Opinion to the Honorable Clive L. DuVal, 2d, Member, Senate of Virginia, dated June 20, 1974, and found in Report of the Attorney General (1973-1974) at 93. Providing such funds may not always be unconstitutional, as in this case, and to the extent that the prior Opinion to Senator DuVal appears to conflict with this one, it is superseded.

CONSTITUTIONAL LAW. PARENTAL RESPONSIBILITY. LAWS IMPOSING FINANCIAL RESPONSIBILITY UPON PARENTS FOR DAMAGES INFLECTED ON PROPERTY BY THEIR MINOR CHILDREN ARE CONSTITUTIONAL.

January 26, 1979

The Honorable Kenneth R. Plum
Member, House of Delegates

You ask whether §§ 8.01-43 and 8.01-44 of the Code of Virginia (1950), as amended, are constitutional. These statutes allow the recovery of up to $200 in damages from the parents of a minor who willfully or maliciously destroys or damages public or private property. You further ask whether the $200 limitation can be raised to $2,000.

Constitutionality

Absent the relation of master and servant or principal and agent, a parent is not liable at common law for the tort of his child. See Nixon v. Rowland, 192 Va. 47, 63 S.E.2d 757 (1951). A number of states have enacted parental responsibility statutes like §§ 8.01-43 and 8.01-44 in order to encourage parental supervision of minors and to allow recovery of damages by victims from the parents of a minor who willfully damages their property. See Rudnay v. Corbett, 374 N.E.2d 171 (Ohio 1977); Kelly v. Williams, 346 S.W.2d 434 (Tex. Cir. app.); Mahaney v. Hunter Enterprises, Inc., 426 P.2d 442 (Wyo.). Such statutes have been upheld as valid exercises of state police power. See Rudnay, supra, 374 N.E.2d at 174; Annot. 8 ALR3d 612 (1966).1

In General Insurance Co. of America v. Faulkner, 139 S.E.2d 645, 650 (N.C. 1963), a case upholding a parental responsibility statute, the rationale for the statute was described as being:

"[t]hat parental indifference and failure to supervise the activities of children is one of the major causes of juvenile delinquency; that parental liability for harm done by children will stimulate attention and supervision; and that the total effect will be a reduction in the antisocial behavior of children."

Although the Virginia Supreme Court has not ruled on the constitutionality of these laws, since similar statutes in other states have consistently been held not to violate the guarantees of due process and equal protection of the law, it is my opinion that §§ 8.01-43 and 8.01-44 are constitutional.

Increased Recovery

You ask whether the maximum damages allowable under the statutes could be increased from $200 to $2,000 without affecting their constitutionality under the due process clauses of the federal and state constitutions.
It has been held that if laws passed have a reasonable relation to a proper purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. Board of Supervisors v. State Milk Commission, 191 Va. 1, 60 S.E.2d 35, appeal dismissed, 340 U.S. 881, 71 S.Ct. 198, 95 L.Ed. 640 (1950). The General Assembly might, consistent with the rationale in General Insurance Co., impose a maximum damage ceiling of $2,000 as a reasonable means of correcting the problem of antisocial behavior of children. In fact the Rudnay case involved a statute imposing a ceiling of $2,000 which was upheld as a reasonable exercise of the police power.

It is therefore my opinion that raising the maximum damages in §§ 8.01-43 and 8.01-44 to $2,000 would not affect the constitutionality of the statutes.

1Corley v. Lewis, 182 S.E.2d 766 (Ga. 1971), is the only case to hold such a statute unconstitutional. The statute is distinguishable from Virginia's in that it set no limit on the amount recoverable and allowed recovery for personal injury as well as property damages. In reaching a different result from the other courts to consider the issue, the Georgia court relied on a number of prior Georgia decisions which would be inapplicable in Virginia.

2This goal, would not in my opinion be contrary to the ruling in Corley, supra, n. 1, because a ceiling of that magnitude would be regarded as an appropriate means of increasing parental supervision.

CONSTITUTIONAL OFFICERS. NOT SUBJECT TO CONTROL AND JURISDICTION OF LOCAL GOVERNING BODY. BUDGET. BOARD OF SUPERVISORS CANNOT APPROPRIATE LESS THAN AMOUNT SET BY STATE COMPENSATION BOARD FOR COMPENSATION AND EXPENSES OF.

September 19, 1978

The Honorable Robert F. Ripley, Jr.
Commonwealth's Attorney for York County

You have informed me that the State Compensation Board has established the level of compensation, expenses and other allowances of York County's constitutional officers. That determination was made prior to the beginning of the 1978-1979 fiscal year and was not objected to or appealed by the York County Board of Supervisors. The Board of Supervisors has, however, recently approved a budget for the fiscal year which contains a level of appropriations for the operation of constitutional offices which is less than that established by the State Compensation Board. You ask three questions based on these facts.

The Budgetary Process

You first ask if, when the State Compensation Board has fixed the expenses for the operation of a constitutional office, a county may establish a budget for that office which contains a lower level of funding.

The positions of sheriff, treasurer, Commonwealth's attorney, commissioner of revenue and clerk of the circuit court are constitutional offices created by Art. VII, § 4, of the Constitution of Virginia (1971).
Constitutional officers are not subject to the control and jurisdiction of the local governing body. See Report of the Attorney General (1974-1975) at 558. In addition, this Office has ruled that the traditional view and practice in Virginia is 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." See Report of the Attorney General (1966-1967) at 65.

Title 14.1 of the Code of Virginia (1950), as amended, establishes the compensation of constitutional officers and provides the manner in which the expenses for the operation of their offices shall be set. It is the responsibility of the State Compensation Board to fix the salaries, expenses and other allowances of constitutional officers. See § 14.1-51. These sums constitute the budget for the operation of a constitutional office. A portion of the funds to make these payments come from State sources, and a portion comes from local sources. See generally §§ 14.1-64 and 14.1-79. A locality may object to these allowances or may appeal the Board's decision pursuant to §§ 14.1-51 and 14.1-52. However, that decision, unless overturned, is binding upon the locality and may not be altered during the local budgetary process. See Opinion to the Honorable J. Elwood Clements, Sheriff of Arlington County, dated December 9, 1974, and found in Report of the Attorney General (1974-1975) at 385. I therefore conclude that a local governing body may not approve a budget for the operation of a constitutional office which contains an appropriation for salaries, expenses and other allowances less than that approved by the State Compensation Board.

The Expenditure of Funds

You ask whether a governing body may require its approval of specific purchases before funds may be expended for the purchase of materials and the employment of individuals by a constitutional officer, which do not exceed the amounts appropriated for these purposes.

The authority of a constitutional officer to control the operation and administration of his office includes the authority to hire the personnel he chooses. See Opinion to the Honorable Ellis D. Meredith, Treasurer of Montgomery County, dated July 1, 1976, and found in Report of the Attorney General (1976-1977) at 304. The approval of the local governing body need not be obtained prior to any personnel decision, for it is not the prerogative of any local official to make personnel determinations for a constitutional office. See Opinion to the Honorable Charles A. Reid, Treasurer for Greensville County, dated July 6, 1977, a copy of which is enclosed.

In addition, while constitutional officers are required to purchase supplies and equipment through the local central purchasing agent, those officers alone are the judges of their needs and they alone can write the specifications for the materials they purchase. See Opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated December
18, 1975, and found in Report of the Attorney General (1975-1976) at 63. While a constitutional officer must not exceed the budget set by the State Compensation Board for the salaries, allowances and expenses of his office, he is not required to obtain the approval of the local governing body of the items he desires to purchase. I am of the opinion that a local governing body is without authority to require that a constitutional officer secure its approval of specific purchases prior to expending funds for personnel, materials and supplies needed for the operation of his or her office. 1

The Action of Mandamus

You further ask whether mandamus will lie to insure compliance by the local governing body with the requirements of law in these matters.

By appropriating funds for the operation of a constitutional office which are less than the sums fixed by the State Compensation Board and by requiring that it approve an officer's expenditures, a local governing body is exceeding its authority to control such officers. Mandamus will lie to compel a public board to perform its ministerial duties. 12B M.J.2d Mandamus § 14 (1978). The responsibility of establishing a budget for the operation of a constitutional office, commensurate with that set by the State Compensation Board, is a nondiscretionary, ministerial act which may be enforced by a proceeding in mandamus. Buck v. Radford, Circuit Court of the City of Radford (1977) (unreported).

In addition, should the county refuse to pay a claim properly placed before it, which is within the budgetary limits set for that item, mandamus will lie to compel payment of the claim.

1Note that a constitutional officer must comply with the procedural requirements imposed for the receipt, auditing, and approval of claims against the county. See §§ 15.1-117(11) and 15.1-547. If, however, the claim is within the appropriation limits approved by the county and in proper form the county must authorize payment of the claim.

CONTRACTS. FAILURE OF BIDDER TO PLACE CONTRACTOR REGISTRATION NUMBER BOTH ON BID AND ON ENVELOPE CONTAINING BID. INFORMALITY.

July 21, 1978

The Honorable J. Stuart Barret, Director
Division of Engineering and Buildings

You ask whether the failure of a bidder to place its contractor registration number both on the bid and on the envelope containing the bid, as required by paragraph 7(c) of the General Conditions of the Contract for Capital Outlay Projects, necessitates that the bid be rejected.

Section 54-139 of the Code of Virginia (1950), as amended, provides that a contractor must "show evidence of a certificate of registration before his bid is considered." Such a statutory requirement cannot be waived by a State
Paragraph 7(c) of the General Conditions provides a method by which a contractor can supply evidence of his certificate of registration as required by § 54-139. This particular method is not prescribed by statute. Thus, it is possible for a bidder to comply with the statutory requirement, yet fail to comply with the provision in the General Conditions by, for example, writing his registration number in only one of the two places described in paragraph 7(c).

In an Opinion to the Honorable Otis L. Brown, Director, Department of Welfare and Institutions, dated March 20, 1970, and found in Report of the Attorney General (1969-1970) at 66, the then Attorney General held that failure to show any evidence of registration voids the bid. Your inquiry presents a different question: whether a State agency may consider a bid which, while complying with the statutory requirement, fails to comply with a provision of the General Conditions applicable to the receipt of bids.

One purpose of competitive bidding is to ensure that the State has the work done at the lowest available cost by a responsible contractor. In order to make cost the primary determinant among competing responsible contractors, it is necessary that all bids be responsive to the same specifications. See Ragland v. Commonwealth, 172 Va. 186, 200 S.E. 601 (1939); Opinion to the Honorable Stanley C. Walker, Member, Senate of Virginia, dated September 8, 1977, a copy of which is enclosed. A deviation from any non-statutory requirement or specification which affects the amount of the bid destroys the competitive character of the bid. It gives one bidder an advantage over the others. See Taylor v. County Board, 189 Va. 472, 53 S.E.2d 34 (1949); 64 Am.Jur.2d Public Works and Contracts, §§ 58, 59, 62 (1972). Such a variation cannot be waived; the bid is void.

A second and complementary legislative purpose is to preclude favoritism or collusion by establishing an open procedure which places all qualified contractors on an equal footing in the competition to gain a public contract. Any deviation which compromises the integrity of this process cannot be waived.

However, if the deviation from a non-statutory requirement or specification does not affect the amount of the bid or impugn the integrity of the competitive process, it may be considered an informality. Taylor v. County Board, supra. A common provision in public contracts permits the public body to waive informalities in bids when waiver is in the interest of the public body. See para. 14(b) of the General Conditions. Cf. Grant Construction Company v. City of New Bedford, 301 N.E.2d 453 (Mass. Ap. 1973). Wide discretion is vested in public officials in determining whether or not to waive informalities. See Excavation Construction, Inc. v. Ritchie, 230 S.E.2d 822 (W.Va. 1976); 64 Am.Jur.2d Public Works and Contracts, § 58 (1972). In the absence of fraud, collusion or arbitrariness, courts will not interfere with the exercise of such discretion. Cf. Taylor v. County Board, supra.

In my opinion, failure to place the contractor registration number on both the envelope and the bid does not affect the amount of the bid nor the
integrity of the process. As long as the statutory requirement of furnishing evidence of registration is complied with in some manner, the failure to write the registration number in both places described in para. 7(c) of the General Conditions is an informality, and may be waived by the State.

CONTRACTS. SCHOOLS. LEASE BETWEEN SCHOOL BOARD AND OPPORTUNITIES INDUSTRIALIZATION CENTER. SCHOOL BOARD, AS PARTY TO CONTRACT, MAY ENFORCE RIGHTS TO BACK RENT.

April 9, 1979

The Honorable J. Harry Michael, Jr.
Member, Senate of Virginia

You ask two questions concerning the School Board of the City of Charlottesville.

You first state that the Opportunities Industrialization Center (hereafter referred to as "Center") owes approximately $3,000 to the school board for back rent of a facility owned by the board. You ask whether the school board may seek to collect the funds which it is owed.

The debt of the Center to the school board arises from a lease between the entities. A party to such a contractual agreement may seek to enforce its rights under a contract. 17 Am.Jur.2d Contracts § 8 (1964).

You also state that a member of the school board is Executive Director of the Center. You ask whether the member may continue to serve on the school board and participate in matters concerning the Center.

The Virginia Conflict of Interests Act contains no express prohibition on the holding of two public offices such as those in question. Section 2.1-349 of the Code of Virginia (1950), as amended, prohibits, however, an officer of a governmental agency from having a material financial interest in any contract with the agency of which he is an officer. See Opinion to the Honorable Roger W. Mullins, Commonwealth's Attorney for Tazewell County, dated June 16, 1978, and found in Report of the Attorney General (1977-1978) at 478. I am presented with no evidence which indicates that the officer possesses a personal interest in the contract between the school board and the Center which would constitute a material financial interest. I therefore conclude that, despite the existing contract between the School Board of the City of Charlottesville and the Opportunities Industrialization Center, the member may continue to hold these two positions.

Section 2.1-352 requires, however, that an officer or employee of a governmental agency who has a material financial interest in a transaction, not of general application, in which his agency is concerned, shall disclose his interest and abstain from participating in any consideration of the matter on behalf of the agency. See Opinion to the Honorable Benjamin J. Lambert, III, Member, House of Delegates, dated May 26, 1978, and found in Report of the Attorney General (1977-1978) at 480. The school board member does have a material financial interest in the Center by virtue of her employment with that entity. The contract between the school board and the Center is, of course, a matter of concern to the board. As a result, the member should
disclose his interest but would not be required to abstain from participating in any matter before the school board which concerns the Center unless it is one in which the member has a material financial interest. Not participating in any consideration requires that the member not vote, and abstain from participating in any formal or informal discussions concerning the Center as a member of the school board.

Section 2.1-349(a)(1) states:

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

Section 2.1-348(f)(1) states:

"Ownership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business shall be deemed to be a material financial interest in such firm, partnership or other business;"

Section 2.1-352 states, in 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."

CORRECTIONS. MAXIMUM CAPACITIES FOR JUVENILE DETENTION CENTERS. STATE BOARD OF CORRECTIONS HAS AUTHORITY TO SET.

October 31, 1978

The Honorable Terrell Don Hutto, Director
Department of Corrections

You have asked three questions about the operation of juvenile detention programs in the Commonwealth which I shall answer in order.

1. You first ask whether the State Board of Corrections may establish maximum detainee capacities for local juvenile detention facilities.

Statutory authority for the establishment and operation of juvenile detention facilities is found in §§ 16.1-310 to 16.1-314 of the Code of Virginia (1950), as amended. While § 16.1-310 requires the Department of Corrections "to devise, develop and promulgate a statewide plan for the establishment and maintenance of suitable local and regional detention homes...for children...." § 16.1-311 places the responsibility for prescribing minimum standards for these homes upon the Board of Corrections. This latter section authorizes and directs the Board to prescribe minimum standards for the construction and equipment of these homes and for the "feeding, clothing, medical attention, supervision and care of children detained therein."
This statutory provision gives the Board of Corrections broad regulatory authority in the operation of local detention facilities, and I believe that such authority would include the power to set maximum capacities for each juvenile detention home as a minimum standard for its operation. Such a standard would clearly have an effect upon the "supervision and care" of the children detained therein.

2. You next ask whether the State Board of Corrections, through the Department of Corrections and a local detention home superintendent, could refuse to accept a lawful court commitment owing to a detention's facility being completely filled according to the maximum capacity limit at the time of the commitment.

The only enforcement provision for assuring the compliance with the minimum standards promulgated by the Board of Corrections is also found in § 16.1-311. If a detention home does not comply with the minimum standards set by the Board, including a "maximum capacity" regulation, the Board may prohibit by its order the housing of children therein. If such an order is not complied with, the appropriate circuit court shall enforce the order under the same procedures as set forth in § 53-135. I am not aware, however, of any provision of the Code of Virginia which would allow the type of refusal contemplated by your question. The failure of any person to obey a lawful order of a court may be punished as a contempt under § 18.2-456(5).

3. You ask further whether the Board of Corrections, through the Department of Corrections and a local detention home superintendent, has the authority to designate alternative placement locations in situations wherein a detention facility's maximum capacity has been reached.

Section 16.1-311, in addition to authorizing the Board to prohibit the placement of children in a detention home failing to meet the Board's minimum standards, also provides that the Board may "designate some other place of detention or housing for children who would otherwise be held [in a facility in question]." However, as noted above, the Code only authorizes such a designated transfer by the Board and does not empower the Department of Corrections or a local detention home superintendent to make such a transfer. It is an accepted principle of statutory interpretation that the mention of one thing implies the exclusion of another and § 16.1-311, allowing a transfer to be done in a particular manner and by a prescribed authority, implies that it shall not be done otherwise, or by a different person or authority. The State Board of Corrections, therefore, is the only authority which may order such a transfer under § 16.1-311. I would note, however, that since § 16.1-311's use of the word "may" indicates a discretionary intent, the Board's use of its authority under this section is not mandatory.

Section 16.1-311 provides as follows:

"A. The State Board is authorized and directed to prescribe the necessary positions required in the operation of detention homes, group homes or other residential care facilities for children in need of services, delinquent or alleged delinquent youth, to fix minimum salaries and grade increment scales for such positions; provided, however, that nothing herein shall prevent the payment of salaries in excess of state-approved ranges when such excess is paid from local funds. The State Board is also authorized and directed to prescribe minimum standards for construction and equipment of detention homes..."
or other facilities and for feeding, clothing, medical attention, supervision and care of children detained therein. It may prohibit by its order the detention or housing of children in any place of residence which does not meet such minimum standards and designate some other place of detention or housing for children who would otherwise be held therein. Copies of each such order shall upon being issued be sent to the person in charge of the detention home or other facilities and to the judge of the circuit court of the county or of the city in which the facility is located.

B. Orders of the Board shall be enforced by circuit courts as is provided for orders issued under § 53-134 and procedure shall be, mutatis mutandis, as is provided for the enforcement of orders of the Board under § 53-135.

2Section 53-135 provides as follows:

"Any court of record having general chancery jurisdiction in any county or city which maintains and operates any such jail, jail farm or lockup, or in any county in which is situated any town which maintains and operates any such jail, jail farm or lockup, affected by any such order of the Board, shall have jurisdiction to enforce such order by an injunction or other appropriate remedy at the suit of the Board. In the City of Richmond such jurisdiction shall be vested in the Hustings Court of the city. Such proceeding shall be commenced by a petition of the Board at the relation of the Commonwealth and shall, insofar as possible, conform to rules of procedure applicable to chancery practice. The governing body of each county, city or town, which maintains and operates any jail, jail farm or lockup affected by the order of the Board, and the officer in charge of each such jail, jail farm or lockup affected, shall be made parties defendant. In every such proceeding the court shall hear all relevant evidence, including evidence with regard to the condition of the jail and any other evidence bearing upon the propriety of the Board's action, and may, in its sound discretion, refuse to grant the injunction if it appears that the action of the Board was not warranted."

3Section 18.2-476 makes it a crime for a jailer to willfully refuse to receive a person lawfully committed to his custody.

4Section 16.1-311, supra.


COSTS. CONVICTED DEFENDANT RESPONSIBLE FOR COSTS OF ALL PERSONS SUMMONED FOR JURY DUTY; WHETHER EXCLUDED FROM JURY OR JURY PANEL.

November 9, 1978

The Honorable Charles E. King, Clerk
Gloucester County Circuit Court

You have asked what number of jurors may be included as part of the costs chargeable against a defendant convicted in a criminal proceeding, who had requested a jury trial.

In the event that a defendant is found guilty in a criminal trial, he is liable for the payment of all costs "incident to the prosecution." It is
clear that the expenses incurred in compensating jurors for their services are such costs properly chargeable to a defendant who sought a trial by jury.2 The question arises, however, whether a defendant may be made to pay the costs of all the prospective jurors summoned to appear in court for a particular trial, or only those that comprise the jury panel, or those that actually serve on the jury.

Section 14.1-195.1 of the Code provides in part that "[e]very person summoned as a juror in a...criminal case" shall be entitled to compensation for each day he attends court, as well as his daily mileage and such other necessary and reasonable costs as the court may direct. (Emphasis added.)3 Pursuant to § 8.01-353, all prospective jurors are summoned to appear in court, including those who are discharged or excused from jury duty as a voir dire examination is conducted. Thus, § 14.1-195.1 would clearly seem to require that these individuals receive compensation for their services, even though they do not constitute part of the jury or jury panel.4

That being the case, I am of the view that the compensation for all such prospective jurors summoned to court must be included as costs "incident to the prosecution." This is in accord with the Supreme Court of Virginia's characterization of costs:

"[Costs] are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws...The right to enforce payment of them is...vested in the Commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it."5

Since all of the jurors summoned to appear in court must be compensated for their services, and since the Commonwealth otherwise would be obligated to make such reimbursements,6 it is apparent that a convicted defendant, having necessitated the calling of the jurors by his request for a jury trial, would be liable for such expenses.

I would note that this conclusion is consistent with previous Opinions from this Office dealing with similar questions. For example, it has been held that a defendant convicted in a second trial after the first proceeding resulted in a hung jury is responsible for the jury costs incurred in both trials.7 This Office has also concluded that if a defendant's trial is postponed due to the absence of the prosecuting witness, and, subsequently, the accused is convicted in a second trial, again he is liable for the jury costs for both proceedings.8 The rationale for these Opinions is that the wrongdoer should be compelled to make full reimbursement of the expense he has caused the Commonwealth to suffer.

It is my view that this rationale is fully applicable in the present instance. Accordingly, I conclude that upon his conviction, a defendant is liable for the compensation of all individuals summoned to appear in court for jury duty in his case, regardless of whether they ultimately are excluded from the jury or jury panel.

1Section 19.2-336 of the Code of Virginia (1950), as amended, states in part: "In every criminal case the clerk of the circuit court in which the
accused is found guilty, shall, as soon as may be, make up a statement of all the expenses incident to the prosecution, and execution for the amount of such expenses shall be issued and proceeded with."


3 Section 14.1-195.1 states in part: "Every person summoned as a juror in a civil or criminal case shall be entitled to twelve dollars for each day of attendance upon the court as well as daily mileage for travel to and from court by the most direct route, and other necessary and reasonable costs as the court may direct."


COSTS. DEPRECIATION ON MACHINERY AND EQUIPMENT USED IN LANDFILL OPERATIONS. COST THAT COUNTY CAN CHARGE TO TOWN FOR USE OF LANDFILL.

August 18, 1978

The Honorable William H. Logan, Jr.
Commonwealth's Attorney for Shenandoah County

You ask whether payments for depreciation on machinery and equipment used in landfill operations is a cost that the county can charge to a town for the use of the landfill.

An incorporated town may establish and operate its own solid waste disposal facility or use that established by an adjoining county. See § 32-9.1 of the Code of Virginia (1950), as amended. A county may charge the town for the disposal of its solid wastes if: (1) the county levies a consumer utility tax; (2) the county's ordinance provides that revenues derived therefrom may be used for solid waste disposal to the extent necessary; and (3) the town also levies a consumer utility tax. See Report of the Attorney General (1974-1975) at 383. The county may not charge the town, or its residents, establishments and institutions, an amount in excess of their pro rata cost based on population. See § 32-9.1.

Depreciation on equipment used in the undertaking is a capital fund to pay for new equipment when required. Charges for municipal services may include not only the costs of operation and maintenance, but also the costs of replacement and improvements. Bexar County v. City of San Antonio, 352 S.W.2d 905 (1961). A local government is not required to resort to deficit financing in order to raise capital for expansion of its utility, and it may legitimately consider raising capital for future outlays when it establishes its utility rates and charges. Contractors & Builders Ass'n v. The City of Dunedin, 329 S.2d 314 (1976).

Therefore, I am of the opinion that the county may include in its charge to the town, depreciation on equipment used at the landfill.
COUNTIES. BOUNDARY DISPUTES MAY BE RESOLVED ONLY BY COURT-APPOINTED COMMISSIONER METHOD.

July 12, 1978

The Honorable Marshall L. Haney
Commonwealth's Attorney for Essex County

You ask whether a dispute over a six mile length of the boundary between Essex County and Caroline County may be resolved only by court-appointed commissioners, as provided for by statute, or whether the counties can negotiate a settlement. I am of the opinion that boundary disputes may be resolved only by the court-appointed commissioner method.

Sections 15.1-1026 through 15.1-1031 of the Code of Virginia (1950), as amended, provide that, when a boundary dispute arises, the circuit courts of the counties involved may appoint commissioners to determine the true boundary. The use of the word "may" in a statute normally signifies that the provision is permissive, not mandatory. 17 M.J.2d Statutes § 75 (1951). However, no other method for the resolution of a boundary dispute is provided for by general statute.

It has been suggested that the political subdivisions involved could resolve their boundary dispute by negotiation, or by some other means which does not involve commissioners appointed by the circuit courts. Such a method is inconsistent with the Virginia Constitution and with the terms of § 15.1-1026, as construed by the Virginia Supreme Court.

Counties, cities and towns are creatures of the Commonwealth and all of their governmental characteristics, including organization, powers, and means for change of boundaries, consolidation, and dissolution, are provided for by legislative act. See Art. VII, § 2, of the Constitution of Virginia (1971).

Because the power to alter boundaries, and thus resolve boundary disputes, resides with the General Assembly, boundaries may be altered only by the legislature or in accordance with procedures expressly provided for by general statute. Id. The General Assembly has enacted general statutes which provide a procedure for resolution of boundary disputes. See Newport News v. Warwick County, 191 Va. 591, 61 S.E.2d 871 (1950). There is no implied authority for a county or municipal corporation to alter its boundaries by means other than those expressly provided for by general statute.

Moreover, the history and judicial construction of the boundary dispute statutes indicate that the court-appointed commissioner procedure is the exclusive means for resolution of boundary disputes.

Prior to the recodification effort of 1950, the predecessor statute to § 15.1-1026 provided in part:

"Whenever a doubt shall exist or dispute arise as to the true boundary line between any two counties in this state, it shall be lawful for the circuit courts of the respective counties, whose boundary is thus in doubt or dispute, each to appoint not less than three nor more than five commissioners, who shall be resident freeholders of their respective counties (a majority of those appointed for each county being necessary
to act), who shall meet and proceed to ascertain and establish the true line." (Section 2685, Code of Virginia (1942)) (Emphasis added.)

This statute was construed by the Virginia Supreme Court to establish "[t]he proceeding for ascertaining and establishing the true boundary line between any two counties." Newport News v. Warwick County, supra. (Emphasis added.) The court also stated "[t]he General Assembly has the power to increase or diminish the territorial limits of a county...and by section 2685 of the Code of 1942, has fully set forth the procedure for settling disputed boundary lines." Id. at 597. (Emphasis added.) The court thus interpreted the phrase "it shall be lawful" to signify that the statute authorized circuit courts to resolve boundary disputes by appointing commissioners and refused to permit any deviation from that procedure. 3

I therefore conclude that § 15.1-1026 fully sets forth the procedure to be employed by counties in resolving boundary disputes. No alternative is expressly provided, and none may be implied by the use of the term "may." The dispute must be resolved by the appointment of commissioners by the Circuit Courts of Caroline County and Essex County, who must meet to ascertain and establish the true boundary line.

1"Whenever a doubt shall exist or dispute arise as to the true boundary line between any two counties, any two cities or a county and a city in this State, the circuit courts or the corporation courts of the respective counties and cities whose boundary is thus in doubt or dispute may each appoint not less than three nor more than five commissioners, who shall be resident freeholders of their respective counties or cities, a majority of those appointed for each county or city being necessary to act, who shall meet and proceed to ascertain and establish the true line." See § 15-1026. (Emphasis added.)

2Article VII, § 2, provides:
"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.

Every law providing for the organization of a regional government shall, in addition to any other requirements imposed by the General Assembly, require the approval of the organization of the regional government by a majority vote of the qualified voters voting thereon in each county and city which is to participate in the regional government and of the voters voting thereon in a part of a county or city where only the part is to participate."

3When § 2685 was recodified after that decision in 1950, the words "shall be lawful" were changed to "may." The intent of the statute, however, was not altered. The Commission on Code Recodification stated that it had "avoided unnecessary changes in the language of the General Assembly and has made no changes whatsoever in the meaning of the statutes." Commission on Code Recodification, Preface xi (1948).
The Commission further indicated that "care has been exercised to make no changes in meaning or application, and these divisions, combinations and rearrangements should be apparent from the historical references and the table of comparative sections...The Commission has endeavored throughout to correct errors, to eliminate duplications and redundancies, to reconcile conflicts and inconsistencies where it has been possible to do so without departure from the legislative intent, and to remove ambiguities and clarify obscure passages where the intent of the General Assembly could be determined with sufficient certainty. Efforts have been made to improve the language of the statutes where it seemed sufficiently important and where it could be done without alteration of the meaning. Again, the Commission has been at great pains to avoid making any change in substance." Commission on Code Recodification, Report xxvi (1947).

As a result of this language, the change in phraseology in the statute as a result of recodification has not altered its interpretation.

COUNTIES, CITIES AND TOWNS. AUTHORITY. GOVERNING BODIES CAN IMPOSE CONDITIONS ON APPROVAL OF SUBDIVISION PLATS THAT RELATE TO PLANNED PUBLIC IMPROVEMENT OUTSIDE SUBDIVISION. ZONING DECISIONS.

October 30, 1978

The Honorable James T. Edmunds
Member, Senate of Virginia

You have asked whether the Board of Supervisors of Chesterfield County has a legal authority to prohibit or restrict construction or otherwise limit development, on sites which lie totally or partially within the proposed highway Route #288 right-of-way location that has been approved by the State Highway and Transportation Commission. Such prohibitions, restrictions or other limitations apparently would be implemented through zoning decisions or subdivision plat approval procedures granted the county by the General Assembly.

The police power of the State is inherent in the General Assembly and it may delegate that power or a part of that power to cities, towns and counties within the State. Kirkpatrick v. Board of Supervisors, 146 Va. 113, 136 S.E. 186 (1926). In Title 15.1 of the Code of Virginia (1950), as amended, the General Assembly has, in fact, conferred on Chesterfield County, along with other counties, cities and towns, various police powers relating to public health, safety, convenience and welfare, including the power to plan for future development. The powers to enact subdivision control and zoning ordinances are granted under Articles 8 and 9 of Title 15.1.

However, these police powers are subject to Art. I, § 11 of the Constitution of Virginia (1971) which provides:

"That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly;..."
Your question really asks where the line is to be drawn between the requirement for just compensation to property owners and the right of the Chesterfield County Board to employ proper land use planning.

Zoning

The Supreme Court has held that under Art. I, § 11, of the Constitution of Virginia, a zoning ordinance was unconstitutional that required "individual landowners, as a condition to the right to develop their parcels, to dedicate a portion of their fee for the purpose of providing a road, the need for which is substantially generated by public traffic demands rather than by the proposed development." Board of Supervisors of James City County v. Rowe, 216 Va. 128, 138, 216 S.E.2d 199, 208 (1975).

Subsequently, the General Assembly authorized local governments to adopt conditional zoning ordinances. However, the statutory provisions very carefully limited the nature of the conditions that could be imposed. For example, rezoning cannot be made conditional on an applicant's agreeing to a condition "that is not related to the physical development or physical operation of the property." See § 15.1-491.2(vi).

I am not aware of the reason or reasons why Chesterfield County has chosen to prohibit, restrict or limit the land use within the area in question. However, in light of the foregoing, I am of the opinion that, while there may be situations arising under conditional zoning which might support some prohibition, restriction or limitation on development due to the proposed Route 288, those restrictions would be subject to close scrutiny by the courts in light of Art. I, § 11, of the Virginia Constitution.

Subdivision Restrictions

Governmental actions to prohibit, restrict or otherwise limit land use under subdivision provisions fall under a different concept of approach. The Supreme Court in James City County, supra, specifically reserved the question whether, when land was subdivided, counties could withhold subdivision approval if dedications for access roads and other public facilities were not proffered by developers. The court also reserved their determination as to the constitutionality of requiring developers to construct and/or maintain such public facilities as a price for obtaining approval of the subdivision.

The General Assembly, in Ch. 8 of Title 15.1, established that such "exactions" are to be limited to facilities within the subdivision or which become necessary outside of the subdivision, at least in part, due to the developer's actions in utilizing his property.

Other courts have dealt with prohibition, restriction and other limitations in the subdivision context. Uniformly, the courts have upheld such conditions where the conditions imposed or "exactions" demanded have a reasonable relation to the public welfare. See Associated Home Builders of the Greater East Bay, Incorporated v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606 (1971), app. dismissed, 404 U.S. 878 (1971); Annot., 43 ALR3d 862 (1973), Rohan, Zoning and Land Use Controls, vol. 2, Ch. 9, § 902 p. 9-21.

Accordingly, I am of the opinion that the Supreme Court would hold prohibitions, restrictions or other limitations with respect to subdivision
approval constitutionally permissible if reasonably related to the subdivision or the impact of the subdivision on county facilities. Thus, the actions of the Chesterfield County Board of Supervisors might be permissible if some justifiable nexus could be drawn between the development of the subdivision and the proposed Route 288.


"It is the general policy of the Commonwealth in accordance with the provisions of § 15.1-489 to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and at the same time to recognize effects of change. It is the purpose of §§ 15.1-491.1 through 15.1-491.4 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. The provisions of this section and the following five sections shall not be used for the purpose of discrimination in housing."

COUNTIES, CITIES AND TOWNS. COUNTY AND ADJOINING TOWN MAY CONSOLIDATE.

January 22, 1979

The Honorable J. Paul Councill, Jr.
Member, House of Delegates

You ask whether § 15.1-1130 of the Code of Virginia (1950), as amended, authorizes the consolidation of a single town into an adjoining or adjacent county.


Section 15.1-1130 implements this constitutional provision and authorizes consolidation to occur between (1) adjoining or adjacent counties, (2) adjoining or adjacent cities, (3) adjoining or adjacent towns, (4) any combination of such counties, cities or towns, or (5) any county and all incorporated towns when the political subdivisions in question adjoin or are adjacent to each other. See Opinion to the Honorable Robert C. Fitzgerald, Commonwealth's Attorney for Fairfax County, dated December 2, 1960, and found in Report of the Attorney General (1960-1961) at 74.

In order for such consolidation to occur, the provisions of Title 15.1, Ch. 26, Art. 4, must be followed. Should these steps be adhered to, §§ 15.1-1130 and 15.1-1131 allow consolidation of the separate political

Because one of the consolidation alternatives authorized by § 15.1-1130 is any combination of adjoining counties, cities or towns, I am of the opinion that a county and a single town may consolidate pursuant to this statute.

1Section 15.1-1130 provides:
"By complying with the requirements and procedure hereinafter specified in this article, any one or more adjoining or adjacent counties or any one or more adjoining or adjacent cities or towns, or any of such counties, cities or towns where such counties, cities or towns, as the case may be, adjoin or are adjacent to each other or any county and all incorporated towns located entirely therein may consolidate into a single county or city, or into a single city and one or more counties, and the remaining portions of such counties not so consolidated with such city may be consolidated with each other or with adjoining or adjacent counties into one or more counties, or any such counties and cities may be consolidated into a single county or more than one county." (Emphasis added.)

COUNTIES, CITIES AND TOWNS. COUNTY HAS NO AUTHORITY TO ENACT ORDINANCE PROVIDING THAT DOG LICENSE MAY NOT BE ISSUED UNLESS DOG HAS BEEN VACCINATED IN SPECIFIC PRECEDING TIME PERIOD, IF VACCINATION CERTIFICATE REMAINS VALID.

February 15, 1979

The Honorable Ellis D. Meredith
Treasurer for Montgomery County

As Treasurer for Montgomery County you have, pursuant to § 29-213.10 of the Code of Virginia (1950), as amended, the responsibility of issuing dog licenses. You state that § 29-213.20 provides that no dog license tag may be issued unless evidence is presented showing that the dog has been "inoculated or vaccinated against rabies by a currently licensed veterinarian." You ask whether this statute authorizes a Treasurer to issue a license if the vaccination certificate remains valid at the time the request for the license is made. In the alternative, you ask whether Montgomery County may enact an ordinance prohibiting the Treasurer from issuing a license if a dog has not been inoculated within a specific preceding time period, although the certificate of vaccination remains valid.

Certificates of vaccination commonly indicate the length of time for which the inoculation is valid. The duration of immunity to rabies is dependent upon the type of vaccine used, and is subject to standards set by the United States Department of Health, Education and Welfare. At the time a dog is vaccinated, the veterinarian will indicate on the certificate the period for which it is valid. The effect of the county's ordinance would thus be to invalidate a certificate of vaccination before the inoculation expired.

As 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. A local governing body may enact an ordinance of the type
addressed 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 Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated February 1, 1978, and found in Report of the Attorney General (1977-1978) at 190.

The Virginia Dog Laws, §§ 29-213.5 through 29-213.34, establish procedures to be followed by counties and cities in licensing dogs and vaccinating them against rabies. The effect of §29-213.20 is that the licensing officer may issue a license if a vaccination certificate remains valid at the time the request for a license is made. The request must be refused if the certificate has expired.

The Code of Virginia contains no express or implied authority, however, which permits a locality to enact procedures for licensing dogs which are at variance with those established by general statute. In addition, a locality has no power to shorten the period of time within which a certificate of vaccination is valid. A local licensing official may not thus rule a vaccination certificate invalid if a period of time remains before it expires. A license may be issued during the entire period the certificate is valid. I therefore conclude that Montgomery County has no authority to enact an ordinance providing that, although the vaccination certificate remains valid, a dog license may not be issued unless the animal has been vaccinated in a specific preceding time period.

COUNTIES, CITIES AND TOWNS. FAILURE TO ENACT COMPREHENSIVE PLAN RENDERS LOCAL LAND USE DECISION VULNERABLE TO LEGAL CHALLENGE.

December 11, 1978

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

You ask several questions concerning a proposed comprehensive plan for the development of Washington County.

Result of Failure to Enact a Plan

You ask what detriment might be incurred by Washington County should it fail to adopt a comprehensive plan by July 1, 1980, as required by §15.1-446.1 of the Code of Virginia (1950), as amended. A comprehensive plan is a general plan showing the planning commission's long range recommendations for the growth and development of the county.

The Code of Virginia imposes no express penalties on localities which fail to enact a comprehensive plan. Comprehensive plans do, however provide guidelines upon which the land use decisions of a community should be based. Fairfax County v. Snell Corporation, 214 Va. 655, 202 S.E.2d 889 (1974). Among such decisions are zoning, subdivision regulations and capital improvements funding. Land use decisions will only be upheld if they can be determined to be reasonable and not arbitrary. Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959). A court would more readily conclude that land use
decisions based on a comprehensive plan met the standard of "reasonableness" than such decisions made in the absence of a plan. Depending on the facts of a particular case, a locality which fails to enact a comprehensive plan pursuant to § 15.1-446.1 could be more vulnerable to legal action seeking to overturn its decisions regarding the use of land.

Because the adoption of a comprehensive plan is a mandatory duty of the governing body, it may be enforced in an action in mandamus. Such an action may be brought by any citizen; it is not necessary that it be brought in the name of an officer authorized to represent the public. Richmond Railway & Electric Company v. Brown, 97 Va. 26, 32 S.E.775 (1899), 128 M.J.2d Mandamus § 25 (1978). Mere standing as a citizen is adequate to entitle a private individual to bring an action in mandamus to enforce a public duty; he need not show any special interest in the result; his interest as a citizen is sufficient. Clay v. Ballard, 87 Va. 787, 13 S.E.262 (1891); Harrison v. Barksdale, 127 Va. 180, 102 S.E.789 (1920).

Furthermore, I am of the opinion that a locality which fails to enact a comprehensive plan may not enact special land value assessments and taxation for agricultural, horticultural, forest and open space land. Section 58-769.6 authorizes only those localities which have enacted a "land use plan" to adopt such assessments. The term "land use plan" refers to the "comprehensive plan for the territory under its jurisdiction" required by § 15.1-446.1. If Washington County fails to enact such a plan, it thus may not adopt an ordinance to provide for use value assessment and taxation.

Referendum

You next ask whether Washington County may hold an advisory referendum on the question whether a comprehensive plan should be adopted. 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. Advisory referenda may only be held where there exists a specific legislative grant authorizing such referenda. There is no authority for an advisory referendum on the adoption of a comprehensive plan.

Comprehensive Plans and Land Use Ordinances

You also ask whether the county must enact a comprehensive plan since it presently has a zoning ordinance, subdivision ordinance and other ordinances regulating growth and development. The existence of ordinances regulating the use of land in a locality in no way affects the mandatory requirement of § 15.1-446.1 that a comprehensive plan be enacted by July 1, 1980.

Receipt of Financial Assistance

You finally ask whether the failure of Washington County to enact a comprehensive plan would preclude it from receiving federal and State funds.

Although no express penalties are imposed by the Code of Virginia on localities which do not adopt a comprehensive plan, failure to do so might make it more difficult for the locality to obtain federal and State funds. Some financial assistance programs require a showing that funds obtained will
be spent in a manner in conformance with the comprehensive plan. Failure to enact such a plan, when such action is mandated by State law, may disqualify a locality from participation in such programs.

COUNTIES, CITIES AND TOWNS. ORDINANCES. NO AUTHORITY TO REQUIRE DISCLOSURES TO PROSPECTIVE PURCHASERS OF NEW HOMES.

May 14, 1979

The Honorable Warren E. Barry
Member, House of Delegates

You have asked about the power of Fairfax County to enact a "Disclosure Bill for Home Buyers." You also inquire as to the county's authority to establish as a traffic offense that of failure to pay full attention to driving.

Real Estate Disclosures

The purpose of the disclosure ordinance is to provide prospective purchasers of single-family residences with information, directions and warnings in an effort to prevent fraud or deception. You advise that the ordinance now applies only to the sale of new homes by the builder or developer.

The ordinance raises several serious questions. Much of the information in the "Disclosure Bill" is furnished not by the seller, but by the governing body, and much relates not to the new home in question, but to advice on buying new homes generally. The advice may be good or bad, current or obsolete, complete or incomplete. In any event, the ordinance is so worded that it seems to place responsibility on the seller to give advice specified by the governing body. Compare Etheredge v. Norfolk, 148 Va. 795, 139 S.E. 795 (1927).

The ordinance is also in an area where the General Assembly has been active, but has not seen fit to authorize or require documents such as the "Disclosure Bill." First, localities have been given limited authority to deal with fraud and deceit under § 15.1-866 of the Code of Virginia (1950), as amended, but that authorization is limited to goods, wares, merchandise and other personal property. Second, the General Assembly has enacted the Virginia Residential Landlord and Tenant Act, § 55-248.2, et seq., but in that area it expressly reserved the legislative power to itself. See, e.g., Opinion to the Honorable Robert C. Scott, Member, House of Delegates, dated May 19, 1978, found in Report of the Attorney General (1977-1978) at 496.

Third, the General Assembly has authorized local governments to establish offices of consumer affairs, but those offices have no power to require sellers to provide information to prospective home buyers. See § 15.1-23.2. Fourth, perhaps the principal concern in new home purchases is quality and habitability. This, however, is the very area where in 1978 the Supreme Court deferred to the General Assembly, rather than find warranties implied in the law. Bruce Farms v. Coupe, 219 Va. 287, __ S.E.2d ___ (1978). In its last session, the General Assembly responded by enacting a new statute creating implied warranties of quality and habitability for new homes. See Ch. 282 [1979] Acts of Assembly.
Despite all this activity, there is no statute which expressly authorizes a local government to adopt an ordinance like the one you have described, nor may that power be implied necessarily from any other power granted by statute in Virginia. Accordingly, I am of the opinion that the county does not have the authority to adopt such an ordinance. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

Traffic Offense

You next inquire whether the county has authority to adopt an ordinance creating a motor vehicle violation for failure to pay full attention to driving.

Counties are permitted to enact motor vehicle ordinances as are authorized under § 46.1-180, and certain other statutes not relevant here, if such regulation is uniform with the general law of the State. Section 46.1-180 permits counties to regulate the operation of vehicles "not in conflict with" the provisions of Title 46.1. That title does not create an offense of failure to maintain full attention to driving. It does, however, create the offense of reckless driving (§ 46.1-189), and specify those instances in which a person shall be deemed guilty of reckless driving. See § 46.1-190. An examination of those instances reveals that they may all result from failure to pay full attention to driving.

Upon the trial of any person charged with reckless driving, where the court finds that the degree of culpability is slight, it may in its discretion find the accused not guilty of reckless driving, but guilty of improper driving. See § 46.1-192.2. The arresting officer may not charge the accused with improper driving; rather, whether the accused is guilty of that offense rests within the discretion of the court after trial of the accused on the charge of reckless driving. It follows, therefore, that a county ordinance authorizing an arresting officer to charge a person with the substantive equivalent of improper driving would intrude upon the discretion of the court and be inconsistent with State law. I conclude that the county has no authority to adopt the ordinance to which you refer.

COUNTIES, CITIES AND TOWNS. POLICE OFFICERS OF CITY MAY MAKE ARRESTS ON COUNTY PROPERTY, § 15.1-138.

April 6, 1979

The Honorable Lynn C. Armentrout
Sheriff of Warren County

You have asked whether the police of the Town of Front Royal have police power over property owned by Warren County which is located within the town limits.

The powers and duties of police officers of towns are set forth in § 15.1-138 of the Code of Virginia (1950), as amended. Part of the duties of such policemen is to use their best endeavor to prevent within the town the commission of offenses against the laws of the Commonwealth and against the ordinances and regulations of the town. Such officers are also required to preserve the good order of the town, to secure the inhabitants thereof from
violence and the property therein from injury. I find nothing within § 15.1-138 which would exempt county owned property from the protection afforded to other property located within the town. It is my opinion that the police of the Town of Front Royal are mandated to exercise police power over all property within the town, including property owned by Warren County.

COUNTIES, CITIES AND TOWNS. PROHIBITED POSTING OF POLITICAL POSTERS.

February 21, 1979

The Honorable Wiley F. Mitchell, Jr.
Member, Senate of Virginia

You ask whether a city may enact an ordinance banning all types and sizes of political signs from being displayed on any public right-of-way.

The power of a locality to regulate or prohibit the posting of political material is restricted by the First Amendment of the Constitution of the United States. It is established that a locality cannot adopt an ordinance which singles out political literature for regulation. Buckley v. Valeo, 424 U.S. 1, 18 (1976); Ross v. Goshi, 351 F.Supp. 949 (D. Idaho 1972). Even an ordinance neutral on its face may be invalid if it can be shown to discriminate invidiously against rights of political expression. James v. Valtierra, 402 U.S. 137 (1971). Any ordinance in this area would be subject to exacting scrutiny; Buckley v. Valeo, supra, 424 U.S. at 41, 64. The Constitution would prohibit banning political signs from all public property. See Report of the Attorney General (1971-1972) at 297.

However, statutes enacted under the police power which limit or ban the posting of all signs on public property have been upheld. It has been held that the Constitution does not prohibit a locality from enacting an ordinance prohibiting attachment of signs, including political posters, to public utility poles. Peltz v. City of Euclid, 11 Ohio St.2d 128, 228 N.E.2d 320, 324 (1967).

In Virginia, a city may exercise general regulatory power over signs under the police power. See § 15.1-839 of the Code of Virginia (1950), as amended. However, when signs of a political character, as opposed to a purely commercial character, are involved it would require satisfaction of a compelling governmental interest to justify singling out political signs for exclusion. Buckley v. Valeo, supra, 424 U.S. at 64.

A locality's authority to regulate the posting of signs on public highways is limited by the grant of authority to the Department of Highways and Transportation in Ch. 7 of Title 33.1 of the Code. Thus the city would have no authority to regulate the posting of signs on State right-of-ways.

Therefore, I am of the opinion that a city may enact an ordinance regulating the posting of signs on right-of-ways exclusively controlled by the city. So long as political signs are not singled out for regulation or treated differently from other kinds of signs, the test of validity is whether there is a compelling need.
The Honorable James D. Swinson
Sheriff of Fairfax County

August 28, 1978

You have asked whether a judge who sentences a defendant to jail for work release may authorize you, in your discretion, to award furloughs to such inmates and require them to attend community treatment programs.

I am unaware of any statutory authority whereby jail inmates may be released from custody on furlough. Furloughs sanctioned by § 53-37.1 of the Code of Virginia (1950), as amended, are available only to inmates assigned to correctional facilities under the authority of the Director of the Department of Corrections. Likewise, community release programs authorized under § 53-38 are limited to inmates under the Director's control.

There is specific statutory authority in § 53-166.1 for sentencing courts to assign inmates having jail sentences to work release programs, the terms and conditions of which are to be determined by the court. Furthermore, §§ 53-163 through 53-165 permit jail inmates to work on public projects under certain prescribed conditions. There is, however, no indication in these statutes nor any other operative statute that inmates confined to jail may be released from custody to the community for educational programs, furloughs or any other purpose other than employment as specified by statute.

While community based rehabilitative programs for jails are limited, there is evidence of legislative intent to establish community corrections facilities offering a wider variety of rehabilitative programs in the community. Sections 53-128.7 through 53-128.15 permit cities and counties to establish and operate community corrections facilities, subject to minimum standards prescribed by the Board of Corrections. I am advised that the Board has not promulgated such standards and that the General Assembly has not appropriated funds to implement these sections of the Code. Accordingly, I am of the opinion that the provisions are not operative. See Opinion of the Attorney General to the Honorable Jack F. Davis, Director of the Department of Corrections, dated July 16, 1975, a copy of which is attached.

Programs available through the Fairfax Jail Prerelease Center are therefore limited to those authorized for jails which, as discussed above, do not include furloughs or other programs beyond the employment opportunities specifically recognized by law. In view of this conclusion, I am of the opinion that a sentencing court does not have the authority to permit you to grant furloughs or to require inmates under your custody to attend community treatment programs.

CRIMES. BAD CHECK STATUTE. AMENDMENT DOES NOT COVER CHECKS FOR SERVICES RENDERED OR POST-DATED CHECKS FOR SERVICES, BUT DOES COVER CHECKS FOR SERVICES PARTLY RENDERED AT TIME OF TRANSACTION, TO BE COMPLETED LATER.
August 30, 1978

The Honorable Joseph H. Campbell
Commonwealth's Attorney for the City of Norfolk

You have asked for my interpretation of the amendment to § 18.2-181 of the Code of Virginia (1950), as amended, the bad check statute, by Ch. 791 [1978] Acts of Assembly 1359.

Chapter 791 amends § 18.2-181 to provide that anyone who gives a bad check in payment for services shall be guilty of larceny.

You ask whether the services must be rendered contemporaneously with the delivery of the bad check to violate the amendment. In other words, you question whether the amendment covers the situation where the services have already been rendered and the check is given in payment of an account for those services.

In an Opinion to the Honorable Mark D. Woodward, Commonwealth's Attorney for Page County, dated June 17, 1953, and found in Report of the Attorney General (1952-1953) at 32, it was concluded that the predecessor to § 18.2-181 did not apply where a bad check had been given in payment of an already existing account. Chapter 791 provides that a person who gives a bad check as a "present" consideration for services shall be deemed guilty of larceny. Accordingly, it is my opinion that § 18.2-181 does not apply to a bad check which is given as payment on an account for services.

You further ask whether the amendment covers a post-dated bad check which is given in exchange for services. The Supreme Court of Virginia has held that where at the time the check is drawn or delivered to him, the payee has knowledge, or an understanding, that it is not then good or collectible, the bad check statute has not been violated. Hubbard v. Commonwealth, 201 Va. 61, 109 S.E.2d 100 (1959). As a matter of fact, the court has also implicitly recognized that if a post-dated check is given in exchange for goods, that is a good defense to a prosecution under the bad check law. Cook v. Commonwealth, 178 Va. 251, 260, 16 S.E.2d 635 (1941). I am of the opinion, therefore, that Ch. 791 was not meant to cover a post-dated check which was given in exchange for services.

You finally ask whether the amendment was meant to cover bad checks which are given in exchange for services that will be rendered in part at the time the check was delivered, but which will not be concluded at the time of the transaction. For example, the services of an attorney or an accountant which will be partly rendered at the time of the transaction and partly rendered after the transaction.

As previously noted, Ch. 791 provides that a person shall be guilty of larceny if he gives a bad check "as a present consideration" for goods or services. Consideration has been defined as:

"Any act of the plaintiff (or the promisee) from which the defendant (the promisor) or a stranger derives a benefit or advantage, or any labor, detriment, or inconvenience sustained by the plaintiff, however small, if
such act is performed or inconvenience suffered by the plaintiff by the consent, express or implied, of the defendant." Black's Law Dictionary 379 (Rev. 4th ed. 1968).

Accordingly, it is my opinion that when the service is partly provided, the party providing the service is presently supplying the consideration necessary for Ch. 791 to apply. I am of the opinion, therefore, that the amendment to § 18.2-181 does cover the situation where a bad check is given in exchange for services which are partly rendered at the time the check is delivered and completed after the transaction.

1Chapter 791 added the following clause to § 18.2-181: "Any person making, drawing, uttering or delivering any such check, draft or order in payment as a present consideration for goods or services for the purposes set out in this section shall be guilty as provided herein."

CRIMINAL LAW. UNMARRIED COUPLE LIVING TOGETHER IS NOT GUILTY OF LEWD AND LASCIVIOUS COHABITATION UNDER § 18.2-345 IN ABSENCE OF FURTHER PROOF CONCERNING THEIR RELATIONSHIP.

May 24, 1979

The Honorable Harold B. Singleton, Judge
Juvenile and Domestic Relations District Court
Twenty-Fourth Judicial District

You have asked whether a couple violates § 18.2-345 of the Code of Virginia (1950), as amended, if they live together as man and wife without being married.

Section 18.2-345 establishes criminal penalties in the event "any persons, not married to each other, lewdly and lasciviously associate and cohabit together, or whether married or not, be guilty of open and gross lewdness and lasciviousness...." The Supreme Court of Virginia has construed this statute to penalize two distinct acts: (1) lewd and lascivious cohabitation by persons not married to each other, and (2) open and gross lewdness and lasciviousness by persons, married or unmarried.

It is my opinion that an unmarried couple living together would not violate the second proscription in § 18.2-345 since "[c]onduct not in a public place or a place open to public view and which can be seen only by looking past drawn curtains into a private residence is not 'open'...."2 At the very least, facts in addition to the simple act of living together would be required in order to characterize the conduct as "open."

I am of a similar opinion with respect to the first prohibition established under § 18.2-345. "Lewd and lascivious cohabitation" has been defined as "the living together of a man and woman not married to each other, in the same house or apartment, as husband and wife...Habitual acts of illicit intercourse are necessary elements."3 I believe that absent evidence
of such habitual acts, the mere fact that a non-marital living arrangement exists is not by itself proof of "lewd and lascivious cohabitation."

I also take note of the Supreme Court of Virginia's recent decision in Cord v. Gibb,4 where the court directed a trial court to issue a certificate of honest demeanor or good moral character to an individual, which was a prerequisite to her taking the Virginia bar examination. The trial court had refused to issue the certificate because of evidence that Cord had jointly purchased a home with a man, and that she and he jointly resided there. In reversing the lower court decision, the Supreme Court stated that while Cord's living arrangement might be "unorthodox" and "unacceptable to some segments of society," it bore no rational connection to her fitness to practice law.

It is my opinion that behavior which is only characterized as "unorthodox" and "unacceptable" to certain groups could hardly be simultaneously described as "lewd and lascivious." Therefore, for all of the above reasons, I conclude that more must be shown than the simple fact that two unmarried people are living together in order to establish a violation of § 18.2-345.

Any decision concerning the placing of a child in the custody of persons living under the circumstances you have described is one which the court must make.

2Id.

CRIMINAL PROCEDURE. ARSON INVESTIGATIONS ARE GENERALLY SUBJECT TO FOURTH AMENDMENT REQUIREMENT OF SEARCH WARRANT.

May 14, 1979

The Honorable D. M. Slane, Superintendent
Department of State Police

You have asked several questions concerning the effect of the recent United States Supreme Court decision in Michigan v. Tyler,1 dealing with searches and seizures of premises damaged by fires.

You first ask about the effect of the Tyler decision upon § 27-58 of the Code of Virginia (1950), as amended. This statute authorizes the Department of State Police "at all times of the day, in the performance of the duties imposed by the provisions of § 27-56, to enter upon and examine any building or premises where any fire has occurred..." and any immediately adjoining buildings or premises so long as they are not then occupied and used as a dwelling house. Section 27-56 in turn imposes upon the Department the duty to
"examine, or cause examination to be made, into the origin and circumstances of all fires occurring in this State, which may be brought to its attention by official report, or otherwise..."

In *Tyler*, the Supreme Court considered the constitutionality of a series of unconsented and warrantless searches and seizures conducted by police and fire officials at a furniture store damaged by a fire. The court stated that the Fourth Amendment, and its requirement of a valid search warrant, normally protect both residential and commercial premises, and apply to administrative searches as well as searches for evidence of crime. In the context of an investigatory fire search, the court held that an entry to fight a fire requires no warrant, and that once inside the premises, officials may remain there for a reasonable time to investigate the cause of a blaze after it has been extinguished. Once this initial exigency has passed, however, further entries to investigate the cause of the fire must be made in accordance with warrant procedures governing administrative searches. In addition, if during the course of investigation officials discover evidence of arson and require further access to gather evidence for a possible prosecution, a warrant may be obtained only upon "a traditional showing of probable cause applicable to searches for evidence of crime."

In view of the guidelines set forth in *Tyler*, it is my opinion that § 27-58 must be given a restrictive construction in order that it be constitutional under the Fourth Amendment. It is of course a fundamental rule of statutory construction that a statute is presumed to be constitutional and should not be construed as invalid unless its voidness is plain. When a statute is susceptible of two constructions, one of which is within the legislative power and the other without, the former construction should be adopted.

On its face, § 27-58 appears to permit warrantless searches of buildings where fires have occurred in many more instances than would seem proper under *Tyler*. The statute provides for the State Police's entry onto premises "at all times of the day, where any fire has occurred...." (Emphasis added.) While I am unaware of any decisions construing § 27-58 as requiring the use of a search warrant, it is my opinion that the statute can constitutionally authorize warrantless, non-consensual searches of fire-damaged premises only under the circumstances set forth in *Tyler* --namely during the officials' initial entry to fight a fire and for a reasonable time thereafter to investigate the cause of the blaze after it has been put out. Any other entry must be pursuant to a warrant.

You next ask what is a reasonable period of time, if any, after a fire has been extinguished during which police or arson investigators may come upon the premises without a warrant or the owner's consent to look for evidence of crime. In my opinion, once a fire has been put out, such an entry ordinarily would be improper. The Supreme Court in *Tyler* emphasized the general necessity to secure a search warrant, and that only an exigent circumstance, such as a burning structure or the need to make an immediate initial determination as to the cause of the fire, could justify a warrantless entry. The court also carefully distinguished between examinations of the premises conducted, on the one hand, to ascertain the cause of a fire, and, on the other hand, to seek evidence to be used in criminal prosecutions. In the latter instance, "the
usual standard [of probable cause] will apply." Accordingly, under the facts you pose, normally a search warrant would be required.

I would point out, however, one exception to this rule. In Tyler, fire officials, who had entered the premises to extinguish the fire and conduct a preliminary investigation as to the cause of the fire, left at 4 a.m. due to the darkness, steam and smoke present at the scene. They returned shortly after daylight to continue their investigation. The Supreme Court held that this latter entry was no more than an actual continuation of the initial one, and that the lack of a warrant therefore did not invalidate the resulting seizure of evidence.

I believe under this narrow set of circumstances—where an initial investigation is temporarily interrupted due to adverse conditions such as smoke, steam, or darkness—officials may legitimately reenter the premises without a warrant to continue their investigation of the cause of the fire. I would add that it would be incumbent upon officials to make such a reentry promptly upon the end of the obstructive conditions. Only in this event could their return be deemed a "continuation" of the first intrusion.

Finally, you inquire as to the reference in Tyler to administrative search warrants, and what provisions the Code of Virginia makes for the obtaining of such warrants. The basic difference between an administrative search and a "typical police search" is the purpose underlying the search. The former is normally conducted to enforce local building, health or fire codes, while the latter is undertaken to look for evidence of a crime. In the present context, an administrative search would be conducted to ascertain the cause of the undetermined fire and to prevent such fires from recurring.

In Tyler, the Supreme Court made clear that administrative searches as well as more traditional searches are encompassed within the Fourth Amendment. However, while the necessity for a warrant exists in each situation, the court recognized that "[t]he showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search . . . ." Specifically, the court stated that an investigatory fire search may be conducted "pursuant to a warrant issued in accordance with reasonable legislative or administrative standards, or, absent their promulgation, judicially prescribed standards. . . ." The court set forth a number of factors that a magistrate might use in considering whether to issue a warrant for an investigatory search: "The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might all be relevant factors." If a magistrate, after evaluating the question of probable cause, then were to issue a warrant for such a search, the warrant, rather than authorizing the search for certain property concealed at a stated place in connection with the commission of a specified offense, simply would permit an investigatory search of any part of the premises which would need to be examined in order to ascertain the reason for the fire.

My examination of the Code of Virginia discloses no statutory guidelines for the issuance of such a warrant. Sections 19.2-393 et seq. establish procedures for the issuance of an "inspection warrant" but limit their application to cases involving the manufacturing or emitting of toxic
substances. Sections 19.2-52 et seq. authorize "traditional" search warrants—that is, those aimed at detecting evidence for use in criminal prosecutions.

Under these circumstances, where the legislature has not yet enacted a general statutory scheme governing the issuance of a warrant for an investigatory search, the question arises as to how such a warrant may be obtained. I take note of the fact that the Supreme Court in the Tyler case stated that in the absence of reasonable legislative or administrative standards, investigatory fire searches may be conducted pursuant to warrants issued in accord with "judicially prescribed standards...." It is also noteworthy that the Supreme Court has recognized that certain procedures, such as an administrative agency seeking injunctive relief allowing a search in the event its requested inspection is refused, may be deemed the equivalent of a warrant and thus may uphold the constitutionality of an administrative search.13

Therefore, I conclude an administrative search warrant may properly be obtained to investigate the cause of a fire despite the fact that the Code does not appear to establish a procedure for obtaining such a warrant. While §§ 19.2-393 et seq. are not directly applicable, it is my view that these statutes at least to some degree reflect the legislature's general approach as to obtaining administrative search warrants, and that the procedure they set forth may legitimately be regarded as the functional equivalent of a warrant. Therefore, in my opinion, until such time as the legislature sees fit to enact legislation allowing administrative searches in situations other than that found in § 19.2-393, officials seeking to undertake investigatory fire searches should seek court-approved inspection warrants under the mechanism established by §§ 19.2-393 et seq.

1 See Adams Express Co. v. Charlottesville Woolen Mills, 109 Va. 1, 5, 63 S.E. 8 (1908).
3 The Supreme Court of Virginia previously rejected such a contention in Bennett v. Commonwealth, 212 Va. 863, 188 S.E.2d 215 (1972).
February 15, 1979

The Honorable Donald H. Sandie, Chief Judge
City of Portsmouth General District Court

You have asked whether a person found "not innocent" of possession of marijuana as a juvenile may be placed on probation pursuant to § 18.2-251 of the Code of Virginia (1950), as amended, for a similar offense committed after he becomes an adult. Section 18.2-251 provides that a person who has not previously been "convicted" of an offense relating to narcotic drugs, marijuana or depressant, hallucinogenic or stimulant drugs and who is found guilty under § 18.2-250 may be placed on probation.

The rule in Virginia is clear, and this Office has long held, that proceedings in a juvenile court are civil in nature. A juvenile is not charged with a criminal act and the finding of delinquency by a juvenile court is not a "conviction" of a crime.

I am of the opinion, therefore, that a person who was found "not innocent" of possession of marijuana as a juvenile would not be precluded from the probation alternative of § 18.2-251 if he is later convicted of a similar offense as an adult.

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2 See § 16.1-308.
3 Opinion to The Honorable John N. Lampros, Commonwealth's Attorney for Roanoke County, dated February 13, 1978, a copy of which is enclosed for your consideration.

CRIMINAL PROCEDURE. PERSON IS SUBJECT TO ENHANCED PENALTY PROVISIONS OF § 19.2-2971 IF HE IS CURRENTLY CHARGED WITH OFFENSE DEEMED TO BE PETIT LARCENY (OTHER THAN SHOPLIFTING UNDER § 18.2-103) AND HAS PRIOR FELONY AND/OR MISDEMEANOR LARCENY CONVICTIONS.

April 6, 1979

The Honorable James A. Cales, Jr.
Commonwealth's Attorney for the City of Portsmouth

You have asked whether in a prosecution under § 19.2-2971 of the Code of Virginia (1950), as amended, the offense charged must be petit larceny, or whether the statute encompasses other offenses deemed to be larceny.

In construing former § 19.1-293 (now § 19.2-297), this Office concluded that the reference to "petit larceny" was not intended to limit the offense charged to petit larceny under § 18.2-96, but included other offenses deemed to be larceny. In my opinion it would be proper to proceed under § 19.2-297 for any offense deemed to be larceny, except a charge of shoplifting under § 18.2-103. The legislature has evinced its intention to treat offenses under § 18.2-103 in a specific manner by providing graduated penalties for subsequent offenses. See § 18.2-104.
You have also asked whether in a prosecution under § 19.2-297, the prior convictions may be for larcenous acts other than petit larceny.

Section 19.2-297 provides for enhanced punishment in cases where a person has a history of prior convictions. In 1978 this section was amended by substituting the language "any larceny or any offense deemed to be larceny by the law of the sentencing jurisdiction" for "the like offense" in describing the prior convictions. This amendment makes clear that the legislature intends the statute to apply to larcenies generally. Nothing in the statute suggests that the prior convictions are meant to include only misdemeanor larceny convictions, and it is my opinion that the prior convictions may be either felonies or misdemeanors, or any combination of either.

1Section 19.2-297 states: "When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or found by the jury or judge before whom he is tried, that he has been before sentenced in the United States for any larceny or any offense deemed to be larceny by the law of the sentencing jurisdiction, he shall be confined in jail not less than thirty days nor more than twelve months; and for a third, or any subsequent offense, he shall be confined in the penitentiary not less than one nor more than two years."


DEEDS. MATTERS AFFECTING VALIDITY. DEEDS EXECUTED IN VIOLATION OF STATUTE VOID AND INEFFECTIVE TO PASS TITLE.

February 8, 1979

The Honorable Robert C. Fitzgerald, Chairman
Virginia Airports Authority

You have asked me about the validity of two deeds executed by the Town of Tangier. Your letter states that the property in question was part of a tract of land acquired by the town in 1968 by purchase and condemnation, pursuant to the authority granted by Ch. 3, Art. 1, of Title 5.1 of the Code of Virginia (1950), as amended, for the purpose of establishing and operating an airport on Tangier Island under the same article. After pledging the total airport property as a sponsor's share to acquire federal and State funds for airport development, the town purportedly conveyed two parcels of airport land to the Tangier Island Development Corporation for use in developing local industry. The entire airport property, including the two subject parcels, was thereafter conveyed with general warranty to the Virginia Airports Authority. The purpose of this conveyance was to permit the Authority to assume control of airport operations and development and to establish the State of Virginia as the sponsor for additional grants from the Federal Aviation Administration for the funding of airport improvements.

Your inquiry concerns the validity of the two deeds to the development corporation which purported to convey the fee simple interest in the two parcels. They are invalid because § 5.1-39 provides that:
"No easements, rights or privileges acquired under the terms of this article by any county, city or town shall be employed or disposed of except to accomplish the purposes for which they were originally acquired. Upon the abandonment of any airport or landing field acquired pursuant to this article all easements, rights and privileges which shall have been so acquired over or with respect to adjacent lands shall thereupon terminate and revert back to the person from whom the easement, right or privilege was obtained or his successor in interest."

The word "rights" as used in § 5.1-39 is an all-inclusive term referring to "an interest or title in an object of property; a just and legal claim to hold, use or enjoy it, or to convey or donate it, as he may please." Black's Law Dictionary 1487 (4th ed. 1968). There is nothing in this section or elsewhere to indicate that the word should be given some other or a more narrow meaning. Moreover, a well established rule of statutory construction requires the adoption of that sense of the word which promotes in the fullest manner the object of the statute and which does not cause the provision to conflict with the purpose which the act was intended to accomplish. Rountree Corp. v. City of Richmond, 188 Va. 701, 51 S.E.2d 256 (1949). The second sentence of § 5.1-39, supra, which applies to "easements, rights and privileges...over or with respect to adjacent lands..." cannot be read to modify the first sentence to make it apply only to adjacent lands because the first sentence of the statute, in this respect, is plainly written to apply to all easements, rights and privileges. Thus, it would be improper to rewrite the first sentence to limit its application. That is the job of the legislature. Porter v. Virginia Elec. & Power Co., 183 Va. 108, 31 S.E.2d 337 (1944). Therefore, in my opinion, the restriction imposed by this statute extends to the fee simple title purportedly conveyed to the corporation.

The purpose of § 5.1-39 is to restrict the power of the municipality to use or dispose of certain public property. Generally, a municipality can alienate its property just as any other corporation or individual might do, if its public use has ceased and it is no longer needed, but not where, as here, its power is restricted by law. City of Williamsburg v. Lyell, 132 Va. 455, 112 S.E. 666 (1922), established the principle in Virginia that the exercise of a municipality's general power to use or convey property may be limited or even prohibited by its charter or by statute. This doctrine applies with particular force where the property has been acquired for a special purpose or specifically dedicated to public use, which is the case here. Id. 132 Va. at 461, 112 S.E. at 668. The town acquired the property in question for a specific public purpose in accordance with the powers granted by statute; this property, being owned for a governmental purpose and appropriated for the public use, was impressed with a trust and could not be disposed of except by valid legislative authority. Id. 132 Va. at 460, 112 S.E. at 668. The conveyances to the Tangier Island Development Corporation were for use by private industry in building and operating a fish packing plant and a boat factory. Such private uses, unrelated to construction, maintenance or operation of the airport, are not such as would accomplish the purposes for which the land was originally acquired as specified by § 5.1-39. Therefore, the conveyances fall squarely within the concept of Williamsburg v. Lyell, in that they were made in violation of a statutory prohibition which barred their conveyance or use except for the purposes for which the land was originally acquired, i.e., airport purposes.

Since the two deeds to the corporation were executed in violation of statute, they were void and ineffective to pass title. Bowe v. City of
Implicit in your inquiry is the question of whether the Virginia Airports Authority is also restricted by § 5.1-39 in its use or disposal of these parcels, which were acquired by the Authority under power granted by Ch. 6 of Title 5.1. This chapter grants the Authority the power "[t]o acquire, by purchase, gift, devise, lease, existing airports and air navigation facilities." See § 5.1-58(d). It also grants the Authority general power to dispose of any airport or other property or portion thereof or interest therein "acquired pursuant to this chapter." (Emphasis added.) See § 5.1-60. The general grant of authority contained in § 5.1-60 is in conflict with § 5.1-39, which prohibits disposal of property acquired under Ch. 3, Art. 1, of Title 5.1 as explained, supra.

Where two statutes conflict, as in the present case, they should be so construed, if reasonably possible, as to allow both to stand and to give force and effect to each. Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935). This result is reached by recognizing that § 5.1-39 is applicable to the particular situation wherein property is acquired by a municipality under Ch. 3, Art. 1, of Title 5.1, while § 5.1-60 is so broad as to cover every instance in which the Virginia Airports Authority acquires property. It is an accepted rule of statutory construction that a statute applicable to a special or particular state of facts must be treated as an exception to a general statute so comprehensive in its language as to cover all cases within the purview of the language used. Southern Railway Co. v. Commonwealth, 124 Va. 36, 97 S.E. 343 (1918). Following this rule, § 5.1-39 operates as an exception to § 5.1-60, and effectively prevents the Authority from exercising the broad powers of use and disposal conferred by the latter statute whenever the situation involves property acquired by counties, cities or towns under Ch. 3, Art. 1. Such is the case under the facts you have presented.

Therefore, I am of the opinion that the Virginia Airports Authority is also prohibited by statute from employing or disposing of the subject parcels except for airport purposes.
set forth in your letter do not entitle the grantor to an exemption from the recordation tax imposed by § 58-54.1.

Section 58-54.1 requires that "[t]he tax imposed by this section shall be paid by the grantor." The section also grants an exemption from the tax for any deed which is a "conveyance of real property to the State or any county, city, town, district or other political subdivision thereof, if such political unit is required by law to reimburse the party or parties taxable pursuant to this section." (Emphasis added.)

The leading decision interpreting the phrase "required by law" is the case of Brinckerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 663 (1885), in which that court stated:

"Such expressions as 'required by law,' 'regulated by law,' 'allowed by law,' 'made by law,' 'limited by law,' 'as prescribed by law,' 'a law of the state,' are a frequent occurrence in the codes and other legislative enactments; and they are always used as referring to statutory provisions only." Id. at 190-191, 1 N.E. at 665.

Thus, the fact that the city may, as a matter of contractual obligation, be required to reimburse the grantor for the expense of the recordation tax imposed under § 58-54.1 does not fall within the exemption granted under circumstances where the city would be required to reimburse the grantor as a matter of statutory law.

DISTRICT COURTS. WHEN WARRANTS, BOTH FELONY AND MISDEMEANOR, AND SUMMONSES REMAIN UNADJUDICATED DUE TO FLIGHT OR ABSENCE OF ACCUSED, DISTRICT COURT SHOULD NOT FILE THEM WITH CIRCUIT COURT IF DISTRICT COURT DESIRES TO RETAIN JURISDICTION.

December 27, 1978

The Honorable J. R. Zepkin, Judge
General District Court
Ninth Judicial District

You have asked whether the district court can file warrants, both felony and misdemeanor, and summonses with the circuit court when the charges have not been finally disposed of in the district court because the defendant has fled and cannot be found. You further asked if the district court could retrieve the papers if the defendant is subsequently found and proceed to try him on those papers.

As your letter notes, § 19.2-345 of the Code of Virginia (1950), as amended, provides that "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.) A statute limiting a thing to be done in a particular manner implies that it shall not be done otherwise. Further, the word "shall," when employed in a constitutional or statutory setting, is to be given mandatory effect.

I find no provision allowing the retrieval of a warrant already filed with the circuit court.
In my opinion the district court should not forward these papers to the circuit court until the matters are finally adjudicated. Not only is there no statutory provision permitting such a procedure, but under §§ 19.2-76.1 and 19.2-346, the circuit court is ultimately responsible for the destruction of those papers after the appropriate time periods have run. Further, under § 19.2-76.1, the Commonwealth's Attorney must submit quarterly reports to the circuit court of misdemeanor warrants which have not been executed within five years from the date of issuance, with the warrants attached. If a district court filed unadjudicated warrants and summonses with the circuit court and attempted to retrieve them when the subject be brought to trial, unnecessary administrative and jurisdictional problems undoubtedly would be created.

Accordingly, it is my opinion that the district court should not file unadjudicated warrants or summonses with the circuit court.

2Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965).

DIVORCE: VALIDITY IN VIRGINIA OF DIVORCES OBTAINED IN COUNTRIES OTHER THAN UNITED STATES.

August 9, 1978

The Honorable Gary R. Myers
Member, House of Delegates

You ask whether the Commonwealth of Virginia recognizes the validity of divorces obtained in countries other than the United States when both spouses have submitted to the jurisdiction of the appropriate forum. In particular you ask whether divorce decrees from the Dominican Republic will be recognized as valid in this Commonwealth.

Such questions frequently arise but cannot be answered in the abstract. This Office addressed a similar question when it was asked to construe the validity of a Mexican divorce in Virginia. See Report of the Attorney General (1962-1963) at 65. That Opinion explains that "without a statement of all the facts and circumstances surrounding the divorce...it would be impossible to give a definitive answer to this question." In any event, "an expression of an opinion by this Office on such a question would not be binding on any of the parties." No actual case raising the issue has ever come before the Supreme Court of Virginia, but should it arise the court would most probably be guided by the general principles pertaining to the doctrine of comity and to the recognition of foreign divorces, considering, among other things, whether the parties were bona fide residents of the country and legally domiciled therein, whether the divorce was obtained by fraud, and whether the recognition of the foreign divorce decree would be in violation of a public policy of this State. See Hyde v. Hyde, Tenn. 1978, 4 F.L.R. 2237; Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709 (1965); Weber v. Weber, Neb. (1978), 4 F.L.R. 2407.

Therefore, the answers to each of your questions cannot be determined solely by reference to the country rendering a divorce decree, but require a
determination by a court in Virginia that the circumstances warrant recognition of that decree.

**DOG LAWS. DEFINITIONS.** "FAIR MARKET VALUE" MEANS PRICE PAID BY WILLING BUYER TO WILLING SELLER, NEITHER BEING UNDER COMPULSION TO TRANSACT.

April 9, 1979

The Honorable Ronald W. Williams
County Attorney for Pittsylvania County

You asked two questions concerning the Virginia Dog Laws.

First, you ask the meaning of the phrase "fair market value" in § 29-213.25 of the Code of Virginia (1950), as amended. That section entitles any person whose livestock or poultry has been killed or injured by any dog not his own to receive as compensation the "fair market value" of such livestock or poultry.

I am of the opinion that the phrase "fair market value" found in § 29-213.25 has the meaning commonly found at law in Virginia. It is the price paid by a willing buyer to a willing seller, neither being under compulsion to transact. Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 101 S.E.2d 571 (1958); American Viscose Corp. v. City of Roanoke, 205 Va. 192, 135 S.E.2d 795 (1964). It is the present actual value of an item. Fruit Growers Express Co. v. City of Alexandria, 216 Va. 602, 221 S.E.2d 157 (1976).

Before the enactment of § 29-213.25, a locality was authorized to compensate an owner for the "reasonable value" of his livestock or poultry. See § 29-202, now repealed. The enactment of the Virginia Dog Laws in 1977 provided that compensation must be at the "fair market value" and it is that value which must be provided to an owner whose livestock or poultry is killed or injured by any dog not his own.

Second, you ask whether compensation claims should be paid before other budgeted expenses. Section 29-213.25 also provides that claims for compensation are to be paid "in the order they are received when moneys become available" if the dog fund is not sufficient to pay all claims.

Moneys collected for dog license taxes are required to be kept in a separate dog fund. Section 29-213.31 provides that the dog fund shall be used for the following purposes:

A. The salary and expenses of the animal warden and necessary staff;

B. The care and maintenance of a dog pound;

C. Payments for the treatment of any person bitten by a rabid animal as provided in § 29-213.23;

D. The maintenance of a rabies control program;
E. Payments as a bounty to any person neutering or spaying a dog up to the amount of one year of license fee as provided by ordinance;

F. Payments for compensation as provided in § 29-213.25;

G. Any part or all of any surplus remaining in such account on December thirty-one of any year may be transferred by the governing body of such county or city into the general fund of such county or city."

This statute does not require that expenses in items A through F be paid in any particular order. Rather, the statute mandates that moneys in the dog fund shall be budgeted for each of the categories of expenses specified in § 29-213.31. The amounts budgeted for items A, B and C may be supplemented with other public funds. See § 29-213.32.

The amount of funds necessary to satisfy item F may vary depending upon the number, and value, of livestock or poultry killed or injured. The funds budgeted for compensation may thus be exhausted before all claims have been satisfied. It is for this reason that § 29-213.25 indicates that claims shall be paid in the order they are received "when moneys become available."

I therefore conclude that compensation claims need not be paid before other budgeted expenses. Compensation claims need only be paid when there is money available in the dog fund to do so. Claims filed when funds are not adequate should be held, in the order they are received, until sufficient dog license taxes are received to make compensation possible.

Section 29-213.25 provides:
"Any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation the fair market value of such livestock or poultry provided that: (i) the claimant has furnished evidence within sixty days of discovery of the quantity and value of the dead or injured livestock and the reasons the claimant believes that death or injury was caused by a dog; (ii) the animal warden or other officer shall have been notified of the incident within seventy-two hours of its discovery; and (iii) the claimant first has exhausted his legal remedies against the owner, if known, of the dog doing the damage for which compensation under this section is sought. Exhaustion shall mean a judgment against the owner of the dog upon which an execution has been returned unsatisfied.

Local jurisdictions may by ordinance waive the requirements of (ii) or (iii) or both provided that the ordinance adopted requires that the animal warden has conducted an investigation and that his investigation supports the claim. If there are not sufficient moneys in the dog fund to pay these claims, they shall be paid in the order they are received when moneys become available. Upon payment under this section the local governing body shall be subrogated to the extent of compensation paid to the right of action to the owner of the livestock or poultry against the owner of the dog and may enforce the same in an appropriate action at law." (Emphasis added.)

DOG LAWS. ORDINANCES. CERTIFICATE OF INOCULATION OR VACCINATION OTHERWISE VALID MAY NOT BE INVALIDATED BY ORDINANCE.
February 15, 1979

The Honorable Ellis D. Meredith  
Treasurer of Montgomery County

As Treasurer for Montgomery County you have, pursuant to § 29-213.10 of the Code of Virginia (1950), as amended, the responsibility of issuing dog licenses. You state that § 29-213.20 provides that no dog license tag may be issued unless evidence is presented showing that the dog has been "...inoculated or vaccinated against rabies by a currently licensed veterinarian." You ask whether this statute authorizes a Treasurer to issue a license if the vaccination certificate remains valid at the time the request for the license is made. In the alternative, you ask whether Montgomery County may enact an ordinance prohibiting the Treasurer from issuing a license if a dog has not been inoculated within a specific preceding time period, although the certificate of vaccination remains valid.

Certificates of vaccination commonly indicate the length of time for which the inoculation is valid. The duration of immunity to rabies is dependent upon the type of vaccine used, and is subject to standards set by the United States Department of Health, Education and Welfare. At the time a dog is vaccinated, the veterinarian will indicate on the certificate the period for which it is valid. The effect of the county's ordinance would thus be to invalidate a certificate of vaccination before the inoculation expired.

As creatures of the Commonwealth and thus subordinate, the powers of local government can be no greater than those the General Assembly has conferred upon them. A local governing body may enact an ordinance of the type addressed 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 Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated February 1, 1978, and found in Report of the Attorney General (1977-1978) at 190.

The Virginia Dog Laws, §§ 29-213.5 through 29-213.34, establish procedures to be followed by counties and cities in licensing dogs and vaccinating them against rabies. The effect of § 29-213.20 is that the licensing officer may issue a license if a vaccination certificate remains valid at the time the request for a license is made. The request must be refused if the certificate has expired.

The Code of Virginia contains no express or implied authority, however, which permits a locality to enact procedures for licensing dogs which are at variance with those established by general statute. In addition, a locality has no power to shorten the period of time within which a certificate of vaccination is valid. A local licensing official may not thus rule a vaccination certificate invalid if a period of time remains before it expires. A license may be issued during the entire period the certificate is valid. I therefore conclude that Montgomery County has no authority to enact an ordinance providing that, although the vaccination certificate remains valid, a dog license may not be issued unless the animal has been vaccinated in a specific preceding time period.
You ask who has the responsibility to insure that Carroll County complies with the laws of the Commonwealth of Virginia on building and maintaining a dog pound and its method and procedure of euthanasia.

Section 29-213.19 of the Code of Virginia (1950), as amended, provides that the governing body of a county "shall cause to be maintained" a dog pound of a type approved by the county health department in accord with guidelines issued by the State Health Department. The county governing body shall require that a dog confined within the pound must be kept alive for a period of not less than five days, and if the dog has not been claimed, it may be humanely destroyed or disposed of. Destruction of any animal must be by a method prescribed or approved by the State Veterinarian.¹

Maintenance of Pound

Because the establishment and maintenance of the pound is a mandatory duty of the governing body, it may be enforced in an action in mandamus. Such an action may be brought by any citizen; it is not necessary that it be brought in the name of an officer authorized to represent the public. Richmond Railway & Electric Company v. Brown, 97 Va. 26, 32 S.E. 775 (1899), 128 S.J. 2d Mandamus § 2 (1978). Mere standing as a citizen is adequate to entitle a private individual to bring an action in mandamus to enforce a public duty; he need not show any special interest in the result; his interest as a citizen is sufficient. Clay v. Ballard, 87 Va. 787, 13 S.E. 262 (1891); Harrison v. Barksdale, 127 Va. 10, 102 S.E. 789 (1920).

Euthanasia of Dogs

Since the manner of euthanasia to be used to destroy animals in the pound is also mandatory, I am of the opinion that an action in mandamus may be brought by any citizen to insure that the methods of euthanasia employed in the pound be those prescribed or approved by the State Veterinarian.

I am also of the opinion that the State Health Department may require that a county governing body comply with its guidelines for the maintenance of the pound, and that the Department of Agriculture and Commerce may insure that methods of euthanasia approved by the State Veterinarian are employed in the facility.

¹Section 29-213.19 provides:
"The governing body of each county or city shall cause to be maintained a pound or enclosure of a type to be approved by the county or city health department in accordance with guidelines issued by the State Health Department and to require dogs running at large without the tag required by § 29-213.10 or in violation of an ordinance passed pursuant to § 29-213.17 to be confined therein. The governing body of any county or city need not own the facility
required by this section but may contract for its establishment with a private
group or in conjunction with one or more other local governing bodies. Such
governing body shall require that any dog which has been so confined must be
kept for a period of not less than five days unless sooner claimed by the
owner thereof and if the dog has not been claimed, it may be humanely
destroyed or disposed of by sale or gift to a federal agency, or
state-supported institution, agency of the Commonwealth, agency of another
state, or a licensed federal dealer, or by delivery to any local humane
society, shelter, or to any person who is a resident of the county or city for
which the pound is operated and who will pay the required license fee, if any,
on such animal. Such animal may also be delivered to any person who proposes
to adopt such animal as a pet and who will pay the required license fee, if
any, on such animal; provided that no more than one animal shall be delivered
during any thirty-day period to any one such person. No provision herein shall
prohibit the destruction of a critically injured or critically ill dog for
humane purposes. Any animal destroyed pursuant to the provisions of this
chapter shall be euthanized by one of the methods prescribed or approved by the
State Veterinarian. Such governing body shall require that the pound be
accessible to the public at reasonable hours during the week.

ELECTIONS. ANNEXATION. TOWNS. SPECIAL ELECTION FOR CERTAIN UNEXPIRED TERMS ON
GOVERNING BODY. CANDIDATES MUST RUN FOR SPECIFIC UNEXPIRED TERM.

February 12, 1979

The Honorable J. Paul Councill, Jr.
Member, House of Delegates

You state that the Town of Smithfield has recently annexed a portion of
Isle of Wight County. Section 15.1-1054 of the Code of Virginia (1950), as
amended, requires that Smithfield hold a special election to fill the
unexpired term of those members of the town council whose term extends beyond
the July first immediately following the effective date of the annexation. The
terms of all seven of the town's council members extend beyond this date; the
terms of four members extend for three years; the terms of three members
extend for one year. Council members are elected on an at large basis.

You ask whether each candidate must run for a three-year or one-year term
or, in the alternative, whether the candidates may file for office without
regard to a specific term, with the four candidates receiving the highest
number of votes obtaining a three-year term and the three candidates receiving
the next highest number of votes obtaining a one-year term.

Section 15.1-1054 mandates the holding of the special election. It
provides in part that "[i]f council members are chosen on an at large basis
the election shall be held for the unexpired portion of the term of each
council member whose term extends beyond the July first...immediately
following the effective date of annexation." (Emphasis added.) This Office has
previously ruled that candidates must run for a specific unexpired term in
such an election. See Opinion to the Honorable J. Patrick Graybeal,
Commonwealth's Attorney for Montgomery County, dated February 10, 1975, a copy
of which is attached. The special election must make use of two separate
ballots, one for those candidates seeking a three-year term, and one for those
seeking a one-year term. Candidates must indicate, at the time they file a
notice of candidacy, which unexpired term of office they are seeking. In addition, while incumbents will be seeking the unexpired term of the present council members, they are not restricted to running for their own unexpired terms. See Opinion to the Honorable J. Patrick Graybeal. Id.

ELECTIONS. RESIDENCE FOR VOTING. REQUIRES BOTH DOMICILE AND PLACE OF ABODE. BUSINESS ADDRESS, WHEN INSUFFICIENT.

January 17, 1979

The Honorable T. A. Emerson
County Attorney for Prince William County

You ask whether a person's business address may be used as his place of domicile in order that he be qualified to vote in Virginia.

In order to vote in the Commonwealth, one must satisfy the residence requirements of the Constitution of Virginia (1971). Article II, § 1, of the Constitution indicates that residence, for voting purposes, requires both domicile and a place of abode. Domicile in Virginia requires the intent to make a home in the State for an indefinite time. An eligible voter must also have an abode, or a place where he presently dwells in the State. I. A. Howard, Commentaries on Constitution of Virginia 352 (1974). Domicile is, therefore, the place where one intends to establish a permanent residence. See Opinion to Mrs. Leonard Hotinger, Secretary, Rockbridge County Electoral Board, dated September 23, 1970, and found in Report of the Attorney General (1970-1971) at 167.

An analysis of whether individuals are qualified to vote must be made on a case-by-case basis. The prospective voter has the burden of satisfying the constitutional requirements of domicile. See Opinion to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated July 21, 1971, and found in Report of the Attorney General (1971-1972) at 199. Business pursuits are but one factor to be considered in determining domiciliary status. See § 24.1-1(11). A business address is not necessarily the place where one makes his home. The location at which one conducts business may not be the place where he dwells.

I therefore conclude that it is the place where one wishes to permanently make a home, that is, a permanent place of residence, which determines domicile. Unless a voter's business address is also the place he intends to permanently reside, it may not be used as the place of domicile in order to be qualified to vote.

ELECTIONS. STATE BOARD OF ELECTIONS MAY EXERCISE DISCRETION IN REQUESTING ASSISTANCE TO ENFORCE ELECTION LAWS PURSUANT TO § 24.1-21.

December 18, 1978

The Honorable Ray L. Garland
Member, House of Delegates

You ask several questions concerning § 24.1-21 of the Code of Virginia (1950), as amended. That section authorizes the State Board of Elections to
request the Attorney General, or other attorney designated by the Governor, to assist a Commonwealth's Attorney in the enforcement of the election laws or prosecution of violations thereof.

Duty of State Board of Elections

You ask if § 24.1-21 imposes any obligation or duty on the State Board of elections to act in the event that it knows, or has reason to believe, that a violation of the election laws has taken place.

Section 24.1-21 states that the State Board of Elections "may" request assistance for a Commonwealth's Attorney when "it is of the opinion that the public interest will be served thereby,..." The section thus permits, but does not mandate, such action. 17 M.J.2d Statutes §§ 75-76 (1951). The language of the statute clearly indicates that the decision to request assistance is based upon the exercise of discretion by the State Board of Elections. See Opinion to the Honorable Mills E. Godwin, Jr., Governor of Virginia, dated April 4, 1968, and found in Report of the Attorney General (1967-1968) at 106. The Board may determine whether a violation of the election laws may have occurred, whether the public interest would be served by requesting assistance for a Commonwealth's Attorney, and whether a request should be made for such assistance. As long as the State Board of Elections makes such decisions in good faith, it is in compliance with the duty imposed on it by § 24.1-21.

Duty of Board Members

You ask whether this obligation is held by the Board as a collective body, or by individual members of the Board. The provisions of § 24.1-21 indicate that the duty to act falls on the Board as a collective entity, and not on members of the Board as individuals. The decisions required pursuant to this statute must be made by the Board acting as a collegial body within its own rules of procedure.

Refusal to Act

You ask whether the State Board of Elections may refuse to act pursuant to § 24.1-21 if it has knowledge of actual or probable violations of the election laws. As noted above in response to your first question, as long as it is acting in good faith, the Board is free to employ its discretion to decide whether to implement the provisions of § 24.1-21. This section permits the request for assistance if "the public interest will be served thereby,..." The section does not make such request mandatory, and a refusal to request assistance may therefore be justified.

Responsibility of Other Officers

You ask whether the Attorney General, or other attorney designated by the Governor, may act on his own initiative to enforce the election laws of the Commonwealth.

Violation of Virginia's election laws is a criminal offense punishable, in most situations, by a misdemeanor. See §§ 24.1-262 and 24.1-264 to 24.1-281. The Attorney General may only institute or conduct criminal prosecutions for violations of laws relating to elections if requested to do so by the Governor or State Board of Elections. See § 2.1-124. If so
requested, it is within the discretion of the Attorney General to institute
the proceedings himself, or leave the prosecution to the Commonwealth's
Attorney.

It is the responsibility of the Commonwealth's Attorney to prosecute
violations of the Commonwealth's criminal laws. See § 15.1-8.1. Since
violation of election laws is a criminal offense, the Commonwealth's Attorney
has authority to prosecute such an offense. See Opinion to the Honorable C.
Alton Lindsay, Sr., Secretary, City of Hampton Electoral Board, dated April
12, 1971, and found in Report of the Attorney General (1970-1971) at 146. This
authority is not dependent on a request by the State Board of Elections or a
local electoral board that the Commonwealth's Attorney so act.

The only means by which another attorney designated by the Governor may
assist the Commonwealth's Attorney in investigating violations of the election
laws is if the State Board of Elections has requested, pursuant to § 24.1-21,
that the Governor designate such an attorney.

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1Section 24.1-21 provides:
"The Board, in any instance in which it is of the opinion that the public
interest will be served thereby, may request the Attorney General, or other
attorney designated by the Governor for the purpose, to assist the attorney
for the Commonwealth of any jurisdiction in which election laws have been
violated, and the Attorney General, or the other attorney designated by the
Governor, shall have full authority to do all things necessary or appropriate
to enforce the election laws or prosecute violations thereof.

The Commonwealth's attorney or a member of the electoral board of such
county or city may make a request, in writing, that the Attorney General
appoint a committee to make an immediate investigation of the election
practices in that city or county, accompanied by a statement under oath that
substantial violations of this title have occurred which may alter or have
altered the outcome of an election. Upon receipt of such request and
statement, the Attorney General shall forthwith appoint a committee of two or
more persons qualified to make such investigation.

The Attorney General shall direct such committee to observe, investigate
or supervise such election if supervision appears necessary. Such committee
shall make a preliminary report to the Attorney General within five days of
its appointment. If such report shows that violations of this title have
occurred, the Attorney General may, notwithstanding any other provision of
law, authorize prosecution of those responsible for such violations."

ELECTIONS. SUBSTITUTE TEACHER. EMPLOYEE OF COUNTY PROHIBITED FROM SERVING ON ELECTORAL BOARD.

November 3, 1978

The Honorable Barbara F. Hall, Secretary
Stafford County Electoral Board

You ask whether a substitute teacher in the public schools may serve as a
member of the Stafford County Electoral Board, and whether a member of the
Board may serve as campaign manager for one of the candidates.
Substitute Teacher

Article II, § 8, of the Constitution of Virginia (1971) provides that no person who is employed by the government of a county shall be appointed a member of an electoral board. Section 24.1-33 of the Code of Virginia (1950), as amended, contains language similar to this constitutional provision.

In my opinion, a substitute teacher in the public schools is an employee of the government of the county and is barred from being appointed as a member of an electoral board. This interpretation is consistent with previous Opinions of this Office which construe the government of the county to include employees of the school board and constitutional officers. See Report of the Attorney General (1970-1971) at 154, holding a school cafeteria employee ineligible; Report of the Attorney General (1971-1972) at 171, holding a sheriff's radio dispatcher ineligible; and Report of the Attorney General (1975-1976) at 118, holding a part-time noncontract county employee, who is a kindergarten aide, ineligible.

Campaign Manager

Article II, § 8, of the Constitution requires that representation on a local electoral board shall be shared, as far as practicable, by the two political parties which, at the general election preceding their appointment, cast the highest and next highest number of votes. Since members of the electoral board represent the political parties, the appointments are political in nature. There is no requirement that members of local electoral boards abstain from participation in partisan politics during their appointment. Therefore, I conclude that there is no prohibition on partisan political activity by members of local electoral boards, including serving as campaign chairman for a candidate.

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1Article II, § 8, of the Constitution (1971) provides in part:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."

EVIDENCE. CRIMINAL LAW. CHARACTER WITNESSES. IMPROPER TO ALLOW CHARACTER WITNESS TO STATE WHETHER HE WOULD BELIEVE DEFENDANTS'S SWORN TESTIMONY.

April 18, 1979

The Honorable John C. Singleton
Commonwealth's Attorney for Bath County

You have asked whether it is proper for a defense attorney to inquire of a character witness whether he would believe the defendant's sworn testimony.

Although there are no Virginia cases that directly address this issue, it does appear from construing other Virginia decisions that such a question would be improper. Clearly, by allowing the character witness to state whether he would believe the defendant under oath, the court is allowing the witness
to state his conclusion or opinion as to the credibility of the defendant. The courts have long held that "no principle of the law is better settled than that the opinions of witnesses are in general inadmissible, that witnesses can testify to facts only, and not to opinions or conclusions based on the facts." Southern Railway Co. v. Mauzy, 98 Va. 692, 37 S.E. 285 (1900); Ramsey v. Commonwealth, 200 Va. 245, 105 S.E.2d 155 (1958). In Jordan v. Taylor, 209 Va. 43, 161 S.E.2d 790 (1968), the court held that a question is improper if it called for an answer that tended to bolster the credibility of a witness.

Such a question would also be improper for the reason that it allows the character witness to infringe upon the province of the jury (or the judge in a non-jury trial). It is a well established tenet of the law that the credibility of witnesses and the weight to be given their testimony is the province of the jury alone. See e.g., Gottlieb v. Commonwealth, 126 Va. 807, 101 S.E. 872 (1920), and Updike v. Texas Co., 147 Va. 208, 136 S.E. 591 (1927).

Finally, it should be noted that when it is proper for character witnesses to give supportive testimony concerning the defendant's credibility, it can be done only in a limited manner. Generally, the character witness is limited to testifying about evidence of defendant's general reputation for veracity. Redd v. Ingram, 207 Va. 939, 154 S.E.2d 149 (1967). The type of question which you have written about goes beyond testimony of the defendants' general reputation for veracity, and would be improper.

EVIDENCE. HEARSAY RULE. § 8.01-390 CONSTITUTES EXCEPTION TO RULE WITH RESPECT TO FACTS CONTAINED IN OFFICIAL RECORDS.

September 13, 1978

The Honorable C. Phillips Ferguson
Commonwealth's Attorney for the City of Suffolk

You have asked whether § 8.01-390 of the Code of Virginia (1950), as amended, constitutes an exception to the hearsay rule with respect to duly authenticated copies of the records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court. You are concerned with whether duly authenticated copies of those official records are admissible in evidence in substitution for the personal testimony of the party making such records and of the custodian of such records.

It is a generally recognized rule that records and reports prepared by public officials pursuant to a duty imposed by statute, or required by the nature of their offices, are admissible as proof of the facts stated therein. However, simply because a record or report qualifies as a public document does not automatically overcome the hearsay objection unless the document relates facts or events within the personal knowledge and observation of the recording official to which he could testify should he be called as a witness.

Accordingly, the Supreme Court of Virginia has held, under an analogous statute, that only facts contained in a death certificate, and not expressions of opinion, should be accorded the dignity of prima facie evidence. Further, the court has also ruled that the admission into evidence of official records violates no constitutional right of a defendant.
I am of the opinion, therefore, that § 8.01-390 creates an exception to the hearsay rule by making admissible into evidence, without the testimony of the recording official or custodian, facts and events within the personal knowledge and observation of the recording official which are contained in those official records.

2Id. at 46.

FEES. COMMONWEALTH EXEMPTED FROM BY § 14.1-87 UNLESS STATUTE TO THE CONTRARY.
April 10, 1979

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You ask whether State agencies are liable for the payment of fees for serving process on nonresident defendants.

Section 14.1-87 of the Code of Virginia (1950), as amended, states that "no clerk, sheriff or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by statute." Section 14.1-103 states that a fee shall be paid to your office for serving process on nonresident defendants. Since this statute does not specifically allow for the payment by the Commonwealth of the fees listed therein, it is my opinion that there is no obligation to pay them. It has been consistently held by this Office that the Commonwealth is not subject to the payment of fees provided in Title 14.1, unless the statute providing for a given fee specifically states that the Commonwealth must pay it. See Opinion to the Honorable Keary R. Williams, Commonwealth's Attorney for Buchanan County, found in Report of the Attorney General (1974-1975) at 72.

FEES. REFUNDS OF FEES AUTHORIZED FOR SERVICES PERFORMED BY JUDGES OR CLERKS OF DISTRICT COURTS IN CIVIL CASES.
July 28, 1978

The Honorable Brian J. Donato, Judge
General District Court of Albemarle County
Sixteenth Judicial Circuit

You have asked under what circumstances the fee authorized by § 14.1-125 of the Code of Virginia (1950), as amended, for services performed by the judges or clerks of district courts in civil cases may be refunded. In amplification of your request you have enclosed correspondence from a private attorney and from the office of the clerk of your court expressing conflicting views concerning whether such a refund may be made. It is my opinion that a refund of such fee may only be made when the civil action is brought by a motion for judgment, which is returned by the sheriff (or other officer serving process) due to nonservice on the defendant.
Civil actions brought in the general district court may be initiated either by an action on a warrant or by an action on a motion for judgment. Section 14.1-125 provides in part that the fee "shall not be refundable, except in case of error or as herein provided." (Emphasis added.) The determination of whether the fee in civil cases is refundable is dependent upon which of the two procedural remedies is elected by the plaintiff.

Actions Brought on a Warrant

In an action brought on a warrant, "[t]he judge or clerk shall collect the...fee at the time of issuing process,..." according to § 14.1-125. "The officer issuing a warrant shall deliver [it] to the officer to whom it is directed...." See § 16.1-80. There is no provision in § 14.1-125 to allow for a refund of this fee when the action has been brought in this manner even if the sheriff or other officer serving process is unable to effect service of process on the defendant.2

Actions Brought by Motion for Judgment

If the plaintiff elects this procedural remedy, the motion for judgment is prepared and delivered directly "to the officer or other person serving the motion" who attempts to effect service of process upon defendant. See § 16.1-82. "When no service of process is had as to any defendant served by notice of motion for judgment, the officer serving process shall return such notice of motion and the court fee collected by him to the plaintiff or his counsel." Section 14.1-125. (Emphasis added.) Therefore, when a proceeding in a civil action is initiated by a motion for judgment and service of process is not had on the defendant, the fee must be refunded by the officer serving process.3

There are two additional situations which may cause some confusion as to whether the fee should be refunded. One of these appears to be described in the letter which you enclosed from the office of the clerk of your court. According to that correspondence, when the sheriff was unable to effect service of process, instead of returning the notice of motion for judgment and the court fee collected by him to the plaintiff or his counsel, the sheriff returned such papers and fee directly to the clerk of the court. In this instance, the sheriff was in error and the fee must be refunded as provided for in § 14.1-125. The second situation is where the plaintiff or his counsel erroneously files the notice of motion for judgment with the clerk of the court instead of with the sheriff or other officer serving process. In this case as well, the fee must be refunded if the sheriff is unable to effect service of process since an error has been committed.4

There remain two questions raised by implication in the letters which you enclosed. The attorney has expressed some concern that a sheriff, who is unable to effect service of process, would not be compensated for his services. Section 14.1-125 provides that "[t]he foregoing court fee shall not include the service fee of any sheriff, or other officer serving process...." However, this Office has previously ruled that sheriffs are not entitled to a fee for service of process in district court proceedings by virtue of the more recent controlling language found in the last sentence of § 14.1-105.5

The second question raised by implication is in the letter from the office of the clerk of your court. The letter states, "I will be glad to send
this warrant out for you at a new address if you have one available." (Emphasis added.) The deputy clerk refers to the process as a "warrant" whereas the private attorney identifies the process as a "notice of motion for judgment." Assuming the action in question was brought by a motion for judgment and assuming that the sheriff erroneously delivered the unserved notice of motion for judgment unto the clerk's office, neither the court nor the clerk has the authority to reissue such notice of motion for judgment to the sheriff or other officer serving process. Section 14.1-125 provides in part that "[w]hen no service of process is had on a defendant named in any civil process other than a notice of motion for judgment, such process may be reissued once by the court or clerk at the court's direction ...." (Emphasis added.)

1See §§ 16.1-79 to 16.1-82.

FIREMEN - COUNTIES. NO AUTHORITY TO GUARANTEE REPAYMENT OF LOAN FOR VOLUNTEER COMPANY.

June 25, 1979

The Honorable George R. St. John
County Attorney for Albemarle County

You ask three questions about how a county might help finance $250,000 for construction of a fire house for a volunteer fire company organized under § 27-8 of the Code of Virginia (1950), as amended.

Guarantee of Loan

Your first question is whether the county can guarantee repayment of a $250,000 loan to the fire company from the Farmers Home Administration ("FMHA") for construction of a fire house.


A county may act only to the extent it has been expressly granted the power to do so, or the power can be implied necessarily from other powers expressly granted. Any doubt as to the existence of a power must be resolved against the county. See for example, Commonwealth v. Arlington County Board,

Service Agreement

Your second question is whether the county may enter into a service agreement with the fire company, with the amounts payable being used by the fire company to repay the FMHA loan.

Section 27-23.1 authorizes counties to enter into such service agreements, but only in the event of the creation of a fire zone or district. I am advised, however, that no fire zone or district is involved in the present financing. Section 27-23.6 authorizes certain named counties to enter into service agreements with fire companies without a requirement for fire zones or districts, but yours is not one of the named counties. See also § 27-3 (authority for counties to contract with certain cities and other counties).

Despite all this legislative activity, there is no statute authorizing the type of service agreement your describe. Accordingly, I do not find that your county is authorized to enter into a service agreement with the fire company unless the county creates a fire zone or district. See, for example, Commonwealth v. Arlington County Board, supra.

County Loan to Fire Company

Your third question is whether the county may itself lend the money to the fire company.

The county may lend money to any authority created by the governing body of the county. See § 15.1-511.1 and Opinion to the Honorable George W. Titus, Treasurer of Loudoun County, dated March 28, 1972, found in Report of the Attorney General (1971-1972) at 27. A fire company organized under § 27-3 is not an authority, however, for purposes of § 15.1-511.1.

The county may also make a loan to a fire district pursuant to § 27-23.2, but again I am advised that no fire district is involved in the present financing.

A county may also appropriate moneys to a fire company pursuant to § 15.1-25, but the authority to appropriate moneys does not include the authority to loan moneys. Compare Opinion to the Honorable Ross G. Horton, Acting County Attorney for Prince William County, dated July 16, 1976, found in Report of the Attorney General (1976-1977) at 85. A loan indicates the county may have retained a financial asset. An outright appropriation makes it clear the county has not retained a financial asset.

Once again, despite all this legislative activity, there is no statute authorizing the financing you describe. Accordingly, I do not find the county has authority to make a loan to the fire company.

FIREMEN. VOLUNTEER FIREMEN. NOT COUNTY EMPLOYEES UNDER GRIEVANCE PROCEDURE.
March 28, 1979

The Honorable George W. Grayson
Member, House of Delegates

You indicate that several volunteer members of the York County Department of Fire and Rescue were disciplined and terminated by the fire marshal in October 1978. You ask three questions concerning these volunteer firemen.

Status of Members

You first ask whether the volunteer firemen were employees of York County and therefore entitled to avail themselves of the grievance procedure.

You advise that the firemen are not full-time employees but are paid $2.00 by the county for each fire attended. The county board of supervisors has appointed a fire marshal who serves as chief administrator of the entire county fire department, a company of which consists of volunteer firemen. See § 27-13 of the Code of Virginia (1950), as amended. See also Art. I, § 3, and Art. II, § 1, of the bylaws of the York County Fire Department. As part of his duties, the fire marshal establishes rules and regulations governing conduct in and around the county's engine houses and directs and controls all firemen in the conduct of their duties.

The ability to control and supervise the performance of another is the conclusive test of an employer-employee relationship. 12B M.J. Master and Servant § 2 (1978). Whether the firemen may be considered employees of York County for at least some purposes does not grant them access to the county's grievance procedure. Volunteer firemen are at best part-time employees who serve during duty periods and when called to fight fires. The approved grievance procedure in effect in York County at the time the firemen were disciplined was not available to part-time employees.

Power of Dismissal

You next ask whether the fire marshal has authority to dismiss a volunteer fireman from membership in the volunteer organization or prevent him from entering the county's engine houses.

This Office has previously ruled that a local government may designate a volunteer fire company as the community's fire department. Such a quasi-contractual relationship is evidenced and bound by agreement of the locality and the volunteer organization. See Opinion to the Honorable Bonnie L. Paul, Member, House of Delegates, dated October 31, 1977, a copy of which is enclosed. The bylaws of the fire department embody this agreement and the power of the fire marshal is limited by that document. Article IV, § 2, of the bylaws provides that dismissal from membership in the volunteer fire company may occur during the first twelve months of membership if a volunteer fails to attend seventy-five percent of all fire department activities. Dismissal under this provision is made by the executive committee, of which the fire marshal is a member. In addition, Art. IV, § 12, provides that upon a majority vote of the membership, a fireman may be dismissed for violation of the bylaws for conduct "which reflects discredit upon the Fire Department." I am advised of no provision which authorizes the fire marshal to dismiss a fireman from membership in the volunteer company.
The fire marshal has no authority to dismiss a volunteer fireman without complying with procedures evidenced in the bylaws. In addition, he may not discipline a volunteer fireman in a manner indistinguishable from dismissal without complying with those procedures. See N.L.R.B. v. Cement Mason Local No. 555, 225 F.2d 168 (Ninth Cir. 1955). The fire marshal may not, therefore, prevent volunteers from entering the county fire station. Such an order effectively dismisses a fireman from membership in the volunteer organization.

Disposition of Assets

You ask how the volunteer company, which you indicate is an incorporated organization, may dispose of its equipment should it elect to disband.

Under § 58-12.2 of the Code certain volunteer fire departments are designated charitable entities and are entitled to property tax exemptions for property "used...exclusively for the benefit of the general public without charge." Such organizations also can receive tax exempt status from the federal government under § 501, et seq. of the Internal Revenue Code of 1954. Therefore, dissolution of "charitable" organizations generally entails fulfilling certain reporting requirements at both the federal and local level.

Incorporated charities in Virginia are organized under the Virginia Nonstock Corporation Act. See § 13.1-201, et seq. Article 6 of the Act provides dissolution procedures, and § 13.1-249(c) controls how the charitable organization may distribute its assets. Those "organizations engaged in activities substantially similar to those of the dissolving corporation" should be the ones to benefit from the volunteer fire department's disbanding and this may somewhat limit the department's ability to liquidate its assets and donate the proceeds to another worthwhile charity. See Hanshaw v. Day, 202 Va. 818, 120 S.E.2d 460 (1961). If the department encounters difficulties in formulating an appropriate plan of dissolution, then a bill of complaint in chancery seeking the court's advice and guidance may be appropriate.

Pursuant to § 6043(b) of the Internal Revenue Code of 1954, tax exempt organizations planning to disband must file information returns with the Internal Revenue Service. The filing requirement is subject to certain exceptions, and the volunteer fire department should contact the local IRS office to ascertain whether it falls within the exception language and, if necessary, to obtain the appropriate return forms. Following these procedures should enable the organization to comply with all applicable laws.

FISH, OYSTERS AND SHELLFISH. FISHING TOURNAMENTS. COMMERCIAL FISHING LAWS DO NOT APPLY TO PRIZE MONEY FISHING TOURNAMENTS ON NON-TIDAL WATERS EXCEPT FOR § 28.1-50 WHICH APPLIES ON ALL WATERS.

October 6, 1978

The Honorable A. Victor Thomas
Member, House of Delegates

You ask whether there is any statute which would prohibit or restrict giving prize money in fishing tournaments for striped bass.
There is no statute of the Commonwealth which prohibits or restricts the awarding of prizes in fishing tournaments. The commercial fishing laws of the Commonwealth, which are found at Title 28.1, Ch. 4, of the Code of Virginia (1950), as amended, regulate the taking of fish with any device other than hand lines, in the tidal waters of, or within the jurisdiction of, the Commonwealth and consequently do not apply to sport fishing tournaments in non-tidal waters, where the participants use rod and reel.

There are, however, statutory and regulatory provisions which place indirect limitations on the conduct of such tournaments. Section 28.1-50 prohibits the taking, catching, possession or transport, during any one day, of more than two rockfish (striped bass), over forty inches in length, measured from the tip of the nose to the tip of the tail. Any person taking more than two such rockfish shall immediately release and return such fish to the water of the place where the fish were taken or caught. In addition, § R23-4 of the Regulations of the Commission of Game and Inland Fisheries prohibits the selling, offering for sale or the buying of any species of freshwater game fish, which, under § R1-4, includes striped bass. Tournament participants are prohibited from transferring the ownership of their catch to the tournament sponsor, in order to be eligible to win prizes. See § R23-4.

You have also asked whether the Commission has the statutory authority to adopt regulations which directly prohibit or control fishing tournaments. The source of the Commission's regulatory power is § 29-125, which authorizes the Commission to prohibit some activity permitted by statute when it finds it necessary to do so. I have found no provision of law which pertains to fishing tournaments, however, and accordingly, it is my opinion that § 29-125 does not authorize the Commission to prohibit or control fishing tournaments by regulation. The Commission has the power, however, to prescribe bag limits for fish. See § 29-129.1. Therefore, if the Commission should determine that game fish populations in certain lakes are threatened with serious depletion because of fishing tournaments or other unusual circumstances, the Commission could promulgate a regulation prescribing substantially reduced limits for such lakes. Such limits must be applied equally to all fishermen on the lake, however, and thus, while this regulatory approach might discourage fishing tournaments, it would also have the consequence of limiting the catch of the non-tournament fisherman.

1Section 29-125. "Having a due regard for the distribution, abundance, economic value and breeding habits of wild birds, wild animals, and fish in inland waters, the Commission is hereby vested with the necessary power to determine when, to what extent, if at all, and by what means it is desirable to restrict, extend or prohibit in any degree the provisions of law obtaining in this State or any part thereof for the hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage or export of any wild bird, wild animal, or fish from inland waters and may upon its own motion or upon written petition of one hundred licensed resident landowners of any county propose regulations for such purpose."

FORFEITURES. LAWS OF COSTS APPLY TO FORFEITURE PROCEEDING TO SAME EXTENT THEY APPLY TO ANY OTHER CIVIL PROCEEDING.
The Honorable Michael M. Foreman, Clerk
Circuit Court of the City of Winchester

You have asked several questions with regard to the procedures, fees, and costs applicable to a proceeding under § 46.1-351.2 of the Code of Virginia (1950), as amended, which provides for the forfeiture of vehicles seized for certain violations of the Virginia Operators' and Chauffeurs' License Act (§§ 46.1-348 to 46.1-387.12).

Subsection (b) of § 46.1-351.2 permits the owner of a seized vehicle to obtain possession of the vehicle prior to the hearing by posting a bond in an amount equal to the appraised value of the vehicle "plus the court costs which may accrue." (Emphasis added.)

1) You first ask what court costs may accrue in such a proceeding.

The laws of costs are to apply to a forfeiture proceeding to the same extent that they apply to any other civil proceeding. Such costs are considered generally in §§ 14.1-177 to 14.1-201. See Report of the Attorney General (1964-1965) at 234. However, § 46.1-351.2(h) specifically augments the laws of costs by providing for two additional expenses which are to be taxed as costs should the proceeding conclude in a forfeiture sale. First, the actual expense of custody or storage of the seized vehicle will accrue to some extent with all seizures. Secondly, the expenses incident to the forfeiture sale, including any commissions, are also taxed as costs. The expenses attributable to storage and sale will vary by locality, depending upon the facilities available for use and the local practices employed in such sales.

2) You next ask if the clerk is entitled to fees under §§ 14.1-112(15), 14.1-112(16) and 14.1-112(17).

The proceeding to forfeit vehicles is not a criminal proceeding; it is a civil case and is not part of the owner's punishment for violation of the Virginia Operators' License Act. Commonwealth v. One 1970 Lincoln Automobile, 212 Va. 597, 186 S.E.2d 279 (1972). As §§ 14.1-112(15) and 14.1-112(16) are concerned with criminal proceedings, they do not apply to a civil proceeding under § 46.1-351.2.

Section 14.1-87 specifically states that no clerk shall be paid out of the State treasury for services rendered "in cases of the Commonwealth, except when it is allowed by statute." (Emphasis added.) The underscored language means those cases in which the Commonwealth is a party, whether as plaintiff or defendant. Section 14.1-112(17) does not provide that the Commonwealth shall compensate the clerk in vehicle forfeiture proceedings and, therefore, is not applicable in the situation you have presented. Moreover, § 14.1-112(17) is applicable to actions where the plaintiff is seeking a monetary award. A forfeiture proceeding is not such an action. Accordingly, the clerk is not entitled to a fee under any of the aforementioned statutes.

3) You finally ask whether the writ tax provided for by § 58-71 is applicable to vehicle forfeiture proceedings.

Section 58-71 imposes a tax upon the filing of actions or suits in courts of record of the Commonwealth. However, the general rule is that no tax is to
be imposed upon the State unless such taxation is expressly authorized. See Report of the Attorney General (1951-1952) at 163. In Pelouze v. City of Richmond, 183 Va. 805, 33 S.E.2d 767 (1945), the Supreme Court of Virginia announced the principle that the State and its municipalities are presumptively exempted from the operation of the general tax laws. The court then decided that the City of Richmond was not liable for the writ tax under the statutory predecessor to § 58-71, since the statute contained no express requirement that municipal corporations pay such taxes on their initiation of legal actions.

The same principle applies here. Since the General Assembly made no provision for the payment of the writ tax by the State, it is presumed that the General Assembly did not intend that the State pay such tax.

GENERAL ASSEMBLY. LOBBYST WHO FORGETS TO FILE DISCLOSURE STATEMENT IN VIOLATION OF FILING REQUIREMENT NOT EXEMPT.

June 25, 1979

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

This is in reply to your letter of June 8, 1979, in which you inquire whether you have the authority to waive fines imposed by you upon lobbyists who filed their "Statement of Lobbying Expenses, Retainers and Salaries" after the statutory deadlines. In certain cases, the statute, § 30-28.5:1 of the Code of Virginia (1950), as amended, provides for a fine of $50 per day for late filing; it is silent as to acts which excuse late filing.

When the Lobbyist Forgot to File

You state that a lobbyist delivered the report to his secretary for timely mailing and she forgot to mail it. Although it is unquestioned that the omission was the result of an honest error, the statute is directed specifically to the failure to file and does not distinguish between persons who choose not to file and those who forgot to file. The duty to file the statement is not satisfied by delivery to a secretary for mailing.

When the Registered Lobbyists Did Not Lobby

A corporation and its lobbyist and the lobbyist for another organization registered but state that they subsequently performed no lobbying activity. The statute requires those who register to file the statement. The fact that the registered lobbyist subsequently does no lobbying does not relieve him of the duty to file the statement. The purpose of the statement is to disclose the extent of lobbying activity, if any.

When the Lobbyist Was Transferred to Another City

The lobbyist was transferred by his employer to another city and neglected to file. This means he forgot to file. As noted above, forgetting to file the report does not excuse the failure.
REPORT OF THE ATTORNEY GENERAL

1Section 30-28.5:1 provides in pertinent part:
"Within sixty days after the adjournment sine die of a session of the General Assembly each individual required to register as a lobbyist under § 30-28.2 shall file with the Secretary of the Commonwealth, on a separate form for each person for whom, or on whose behalf, he lobbys, a complete and detailed statement...

***

The Secretary of the Commonwealth shall assess and collect a civil penalty of fifty dollars per day from each lobbyist who fails to file, within the time prescribed in this section, the statement required by this section, and from each person for whom he lobbied. For so long as the report remains unfilled or the assessed penalty uncollected, such individual shall not be permitted to register as a lobbyist."

2The argument is made that the lobbyists were unaware of the date of adjournment, from which the 60 day period for filing begins to run. Adjournment is a public action and the lobbyist is charged by statute with the duty of timely filing. There is no requirement that notice of the date of adjournment be provided specifically to the lobbyist.

GENERAL ASSEMBLY. RENT CONTROL. MAY ENACT SUCH LEGISLATION OF TEMPORARY DURATION IN EMERGENCY.

October 18, 1978

The Honorable Peter K. Babalas
Member, Senate of Virginia

You ask whether the General Assembly is empowered under the Constitution to enact legislation to freeze rents on commercial and residential property and whether localities may do so.

Unless forbidden by some provision of the Virginia Constitution or the United States Constitution, the powers of the General Assembly are plenary. Harrison v. Day, 200 Va. 764, 107 S.E.2d 594 (1959). Rent control laws enacted in response to a housing emergency have been subjected to a variety of attacks on constitutional grounds and have survived practically all of them. In 1922 the United States Supreme Court held that a housing emergency justified regulation of rents and evictions under the police power. Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 42 Sup.Ct. 289, 66 L.Ed. 595 (1922). It has also been held that the constitutional prohibition against laws impairing the obligation of contracts is no objection to rent control laws, even though they change the rights of parties to leases already in effect and impair the obligation of the tenant to surrender possession at the end of the term, since private contracts cannot prevent the State from exercising its sovereign power to protect the safety, health and welfare of its people. Ibid. Landlords are not denied equal protection of the law by emergency rent control legislation. Twentieth Century Associates, Inc. v. Waldman, 294 N.Y. 571, 63 N.E.2d 177 (1945).

The constitutionality of federal control of rents was upheld on the basis of the war powers of Congress, but there is sufficient basis for temporary state control of rents in time of emergency. Block v. Hirsh, 256 U.S. 135, 41
Sup.Ct. 458, 65 L.Ed. 865 (1921). It is therefore my opinion that the General Assembly may enact rent control legislation if it finds that an emergency exists that justifies such action and the legislation is only of temporary duration. Limitations on the exercise of this power were spelled out by the Supreme Court of New Jersey in the case of Helmsley v. Borough of Fort Lee, No. A-163-77, decided on October 17, 1978.

You ask whether a city or county may enact an ordinance to freeze rents on commercial and residential property. Article VII, § 3, of the Constitution of Virginia (1971) states that the General Assembly may provide by general law or special act that any unit of government, including any county, city, or town, may exercise any of its powers or perform any of its functions. In Virginia the powers of a county or municipal corporation are fixed by statute, and it has no other powers than those conferred, necessarily implied, or essential and indispensable. See Board of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975). The General Assembly has not enacted legislation that empowers counties or cities to enact rent control ordinances. It is therefore my opinion that counties or cities cannot enact ordinances freezing rents on residential and commercial properties.

GENERAL ASSEMBLY. REORGANIZATION PLAN. POWERS OF GENERAL ASSEMBLY AND GOVERNOR TO ORGANIZE AND REORGANIZE EXECUTIVE BRANCH AGENCIES.

August 8, 1978

The Honorable Adelard L. Brault
Member, Senate of Virginia

You have asked whether the General Assembly may authorize the Governor to prepare a reorganization plan, which becomes effective after the General Assembly has adopted a joint resolution approving it, and if so, what effect that plan would have upon statutes in conflict with it.

The Executive Reorganization Act

The General Assembly enacted the Executive Reorganization Act, which is codified as Ch. 1.1 of Title 2.1 of the Code of Virginia (1950), as amended, at its 1977 session. Section 2.1-8.1 directs the Governor to examine the organization of executive branch agencies periodically, and determine what changes would reduce expenditures, increase the efficiency of operation of State government, reduce the number of agencies through consolidation, and accomplish other similar purposes. When the Governor prepares a reorganization plan, he must submit it to each house of the General Assembly at least forty-five days prior to the commencement of a regular or special session of that body. See § 2.1-8.3. The Act is expressly clear that the plan cannot authorize an agency to exercise a function not authorized by law. See § 2.1-8.5. A reorganization plan shall become effective only if both the Senate and House of Delegates approve it by a resolution of a majority of the members present and voting in each house. See § 2.1-8.6.

Authority to Organize and Reorganize the Executive Branch

The first part of your question involves the respective powers of the General Assembly and the Governor to organize and reorganize executive branch
agencies. Under the Virginia Constitution, the legislative and executive branches are required to be separate and distinct so that neither exercises the powers properly belonging to the other. See Art. III, § 1, of the Constitution of Virginia (1971).

The legislative power of the Commonwealth is vested in the General Assembly, which has authority to create executive agencies with such authority and duties as it may prescribe by law. See Art. IV, § 1; Art. III, § 1; and Art. V, § 9 of the Constitution. The executive power of the Commonwealth is vested in the Governor, who shall take care that the laws are faithfully executed. See Art. V, §§ 1 and 7 of the Constitution.

These constitutional provisions do not deal expressly, however, with the organization and reorganization of the executive agencies. Article V, § 9, of the Constitution provides:

"The functions, powers, and duties of the administrative departments and divisions and of the agencies of the Commonwealth within the legislative and executive branches may be prescribed by law."

This constitutional provision is a truncated version of the proposal made in 1969 by the Commission on Constitutional Revision. The Commission recommended that the new Constitution expressly empower the Governor to initiate reorganization proposals and submit them for review to the General Assembly. Under that proposal, the Governor's reorganization plan would become effective unless it was disapproved by a majority of either house during the legislative session to which it was submitted. Commission on Constitutional Revision, The Constitution of Virginia 170 (1969). This proposal was rejected by the General Assembly, however, whose members evidenced the belief that it would increase the power of the executive branch at the expense of that of the legislative branch. Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution 29, 35-36, 1969 Ex. Sess., 1970 Reg. Sess. (1971); Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 132-133, 134, 1969 Ex. Sess., 1970 Reg. Sess. (1971).

In place of the Commission's proposal, the General Assembly approved the language of Art. V, § 9, quoted above. That language, though it is new, adds little to the legislature's inherent powers; it does, however, make express the power of the General Assembly to specify the functions, powers and duties of the executive branch agencies.

There is nothing in Art. V, § 9, however, which prevents the General Assembly from providing by statute for executive-initiated reorganization plans. II A. Howard Commentaries on the Constitution of Virginia 632 (1974). Indeed, during the debates on that constitutional provision, a member stated that "the General Assembly can grant reorganization authority to the Governor without it being in the Constitution." Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution, supra at 29. It was also reasoned that executive reorganization could "be effected through the normal legislative action of this General Assembly, without the provision being tied into the Constitution, hence difficult to change if we found it was not working." Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, supra at 133.

By enacting the Executive Reorganization Act, the General Assembly has empowered the Governor to initiate reorganization efforts. No violation of the
principle of separation of powers, and no improper delegation of legislative authority to the executive results, because the authority to reorganize executive agencies is not necessarily legislative; that reorganization may be accomplished not only by the legislature, but by any means provided for by law.

Effect of Reorganization Plan on Conflicting Statutes

The Executive Reorganization Act provides that the Governor's reorganization plan shall become effective if approved by resolution of each house of the General Assembly. Your question is whether that resolution could be construed to amend, repeal or suspend statutes in conflict with the reorganization plan.

Article IV, § 11, provides that "no law shall be enacted except by bill." The Constitution does not specify how statutes may be amended or repealed. It is well settled, however, that the power to amend and repeal statutes is vested exclusively in the legislature. 1 A. Sands Sutherland Statutory Construction §§ 22.02 and 29.07, pp. 107 and 340.

"To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. A concurrent resolution of the two Houses is not a statute. (Citations omitted.) A concurrent resolution, unlike a statute, is binding only on the members and officers of the legislative body. It resembles a statute neither in its mode of passage nor in its consequences." Moran v. LaGuardia, 270 N.Y. 450, 1 N.E.2d 961 (1936); Newport News Fire Fighters Ass'n v. City of Newport News, 307 F.Supp. 1113 (E.D. Va. 1969).

No legislative resolution, by which a reorganization plan is approved, can therefore amend or repeal any statute.

We must next examine whether the joint legislative resolution could operate to suspend laws in conflict with the approved reorganization plan. Because there are no Virginia authorities on this point, the constitutions and executive reorganization acts of a number of other states were examined. Pennsylvania and California, whose relevant provisions are essentially identical to Virginia's, have provided expressly for suspension of those statutes which are inconsistent with approved reorganization plans. See 71 Pa. Stat. Ann. Title 71, § 750-11 (Purdon); Cal. [Gov.] Code § 12080.8 (West, 1978 Cum. Supp.). The California Act goes further to require that a bill be introduced to conform the statutory law to the approved plan, thereby removing suspended statutes from the books. See Cal. [Gov.] Code § 12081 (West, 1978 Cum. Supp.). Whether this bill is enacted, however, does not affect the plan.

Virginia's Reorganization Act does not expressly authorize suspension of statutes in conflict with an approved plan. The Commonwealth is unique, however, in requiring an affirmative action of both houses of the General Assembly to approve the plan; the other states have provided a passive role for the legislature, either a two-house or one-house veto of a governor's plan. Because it has reserved this active role, the Virginia General Assembly may avail itself constitutionally of the opportunity to suspend statutes in conflict with the plan. This power is vested exclusively in the General Assembly, and can be exercised constitutionally by resolution. See Art. 1, § 7 and I A. Howard, supra at 90. I have examined English Parliamentary precedents.
and cases, as well as those of Virginia, and have found no authority which
would restrict the exercise of the power to suspend laws in emergency
situations.

Although I can find no authority on this point, I am of the opinion that
no statute would be deemed suspended unless it was referenced expressly in the
Governor's plan or the legislative resolution approving it. Further, it would
be prudent to annotate the Virginia Code, as has been done in other states,
with an italicized statement that a statute has been suspended.

Conclusion

The General Assembly has authorized the Governor to prepare and submit,
from time to time, a reorganization plan, which becomes effective upon
adoption by the General Assembly of a joint resolution approving it. The plan
cannot authorize an agency to exercise a function not authorized by law.
Statutes in conflict with an approved plan are neither amended or repealed by
it, because the law may be amended or repealed only by bill. The General
Assembly may suspend inconsistent statutes, however, during the effective term
of the reorganization plan.

GOVERNOR. COMPUTATION OF TIME FOR VETO.

February 22, 1979

The Honorable John N. Dalton
Governor of Virginia

You ask several questions regarding computation of the seven day period
within which you are required by Art. V, § 61 of the Constitution to return
bills while the General Assembly is in session.

Computation of Time

You first ask when the seven day period begins to run.

In computing the time within which an action is to be done, the general
rule is to exclude the first day and to include the last. 18 M.J. Time § 5
(1974). In Virginia, it is provided by statute that this rule is applicable on
the case of actions required to be taken by statute. The case law has applied
the rule in construction of contracts. Homestead Insurance Co. v. Ison, 110
Va. 18, 65 S.E. 463 (1909); Bowles v. Brauer, 89 Va. 466, 16 S.E. 356 (1892).
These decisions discuss the rule as one of general applicability and do not
indicate that it is limited to construction of contracts.

There is a line of cases which held that in matters relating to service
of process the first day was counted but not the last. Anderson v. Union Bank,
117 Va. 1, 3, 83 S.E. 1080 (1915); Kelly v. Trehy, 133 Va. 160, 112 S.E. 757
(1922); Swift & Co. v. Wood, 103 Va. 494, 49 S.E. 643 (1905); Turnbull v.
Thompson, 68 Va. (27 Gratt.) 306 (1872). These decisions, however, turned upon
statutory interpretation rather than on any common law rule and therefore do
not contribute an exception to the general rule. Today § 1-13.3 specifically
includes these cases.
Although there is no Virginia case construing the applicability of the general rule to gubernatorial vetoes, opinions from other states hold that the day of presentation is excluded. In Re Advisory Opinion to the Governor, 131 So.2d 196 (Fla. 1961); Hebert v. Hall, 308 S.W.2d 828 (Ark. 1958); Lewis v. Cozine, 234 Ky. 781, 29 S.W.2d 34 (1930).

I am therefore of the opinion that in computing when the seven-day period for returning bills runs, the day the bill is received would not count and the period would begin on the next day and end on the seventh thereafter.

Time of Day

You next ask whether the time of day when the bill is received is relevant in determining when the period ends.

The law does not recognize fractions of a day.3 3 Sutherland Statutory Construction § 33.10 (4th ed. 1972). Accordingly, the seven-day period would end on midnight of the seventh day regardless of the time of day the bill was received by the Governor.

Sundays and Holidays

You ask whether the seventh day is counted in the event it falls on a Sunday or holiday. The Virginia rule is that Sundays are included in the computation as long as the act can lawfully be done on Sunday. Bowles v. Brauer, supra, 89 Va. at 467, Report of the Attorney General (1969-1970) at 66.

Accordingly I am of the opinion that in computing the seven-day period within which you may exercise a veto no extension of time is permitted when the last day falls on a Sunday or holiday.4

1Article V, § 6, of the Constitution provides in part: "If any bill shall not be returned by the Governor within seven days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it...."

2Section 1-13.3 of the Code of Virginia (1950), as amended, provides:
"When a statute requires a notice to be given, or any other act to be done, a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding, but the day on which such notice is given, or such act is done, may be counted as part of the time; but when a statute requires a notice to be given or any other act to be done within a certain time after any event or judgment, that time shall be allowed in addition to the day on which the event or judgment occurred."

3Courts have recognized exceptions to the rule, none of which are applicable here. See 18 M.J. Time § 4 (1974).

4Section 76 of the Constitution of Virginia (1902) gave the Governor five days, "Sunday excepted," to act on a bill. The present Constitution, Art. V, § 6, provides for seven days without mention of Sunday.

GRIEVANCE PROCEDURE. DEPUTIES OF CONSTITUTIONAL OFFICERS ARE PUBLIC OFFICERS AND ARE NOT COVERED BY STATE GRIEVANCE PROCEDURE.
December 28, 1978

The Honorable S. J. Smith
Sheriff for the City of Virginia Beach

You have asked several questions concerning application of the State grievance procedure to the employees and appointees of constitutional officers. Specifically, you question application of the State grievance procedure to sworn deputies within your office.

Coverage of State Grievance Procedure

Section 2.1-114.5:1(C) of the Code of Virginia (1950), as amended, provides in part that:

"All permanent State government personnel, excluding probationary employees, are eligible to file grievances except for: (i) those appointees of elected groups or individuals;..."

This section further provides that "constitutional officers' employees shall have access to the State grievance procedure if such officer employs fifteen or more persons;..." unless these employees are accepted in a local governing body's grievance procedure at the discretion of the governing body.

While constitutional officers such as sheriffs are elected individuals, the above exception for appointees of elected individuals only applies to permanent State government personnel. Thus, the appointees of constitutional officers would not be exempted from coverage under the State grievance procedure solely by operation of that exception. Regarding constitutional officers, however, § 2.1-114.5:1(C) refers only to their "employees" as being persons given access to the State grievance procedure.

Employees of Constitutional Officers

In order to determine which persons in the office of a constitutional officer come within the coverage of the State grievance procedure, it is necessary to examine which persons can properly be considered employees of such an officer within the meaning of § 2.1-114.5:1(C). Specifically, you have asked about deputies in your office, appointed pursuant to § 15.1-48.

Section 15.1-48 is the general section authorizing the appointment of deputies of various constitutional officers and specifies their powers and how they may be removed. Such deputies are considered to be public officers and, as to such persons, former opinions of this Office have held that they are distinguishable from mere employees. See Opinion to the Honorable Ora A. Maupin, dated January 15, 1976, and found in Report of the Attorney General (1975-1976) at 50, 51; Opinion to the Honorable Paul H. Miller, III, dated November 20, 1974, and found in Report of the Attorney General (1974-1975) at 373, 374; Opinion to the Honorable Catesby Graham Jones, Jr., dated October 28, 1974, and found in Report of the Attorney General (1974-1975) at 374, 375; Opinion to the Honorable William Ferguson Reid, dated January 11, 1974, and found in Report of the Attorney General (1973-1974) at 310, 311.

Accordingly, I am of the opinion that deputies of constitutional officers, appointed pursuant to § 15.1-48, are not employees within the
meaning of § 2.1-114.5:1(C). Such deputies of constitutional officers, therefore, are not within the coverage of the State grievance procedure. As to all other personnel in the offices of constitutional officers who are not public officers but who aid or help in the carrying out of ministerial, administrative or clerical duties, they would appear to be properly within the term "constitutional officers employees" and would, therefore, come within the coverage of the State grievance procedure.

1Section 15.1-48 provides, in pertinent part, as follows:

"The treasurer of any county or city, the sheriff of any county or city, any commissioner of the revenue, any county clerk and the clerk of any circuit or city court may at the time he qualifies as provided in § 15.1-38 or thereafter appoint one or more deputies, who may discharge any of the official duties of their principal during his continuance in office, unless it be some duty the performance of which by a deputy is expressly forbidden by law."

This conclusion is bolstered by the fact that previously in § 15.1-7.1, dealing with establishment of grievance procedures for local government employees, the General Assembly recognized a distinction between deputies and employees of constitutional officers, excluding both groups from local grievance procedures.

1I am aware of the decisions in Elrod v. Burns, 427 U.S. 347 (1976), and Rainey v. Harber, slip op. 77-1928, December 15, 1978, which limits the discretion of the sheriff to terminate the employment of deputies. These decisions are not helpful in determining the applicability of the State grievance procedure to deputy sheriffs.

GRIEVANCE PROCEDURE. EMPLOYEES OF COUNTY'S LIBRARY BOARD OR AIRPORT AUTHORITY NOT EMPLOYEES OF BOARD OF SUPERVISORS. NOT SUBJECT TO COUNTY'S OR STATE'S GRIEVANCE PROCEDURE.

November 3, 1978

The Honorable Robert M. Galumbeck
County Attorney for Tazewell County

You have asked whether the governing body of a county is mandated by § 15.1-7.1 of the Code of Virginia (1950), as amended, to adopt a grievance procedure concerning:

(1) employees of constitutional officers who employ less than 15 employees; and

(2) employees of local agencies, departments and authorities which are not separate corporate bodies, created by statutes of the Commonwealth, but which are under the guidance of boards whose members are citizens appointed by the Board of Supervisors of the County (for example: The Library Board and the Airport Authority); and

(3) employees of agencies, departments and authorities of the county which are separate corporate bodies, created under authority of statutes of the Commonwealth, and which are under the guidance of
citizen boards appointed by the Board of Supervisors of Tazewell County (for example: The Water and Sewer Authority and The Industrial Development Authority); and

(4) employees of nonprofit corporations to whom the Board of Supervisors makes contributions for the specific purpose of paying those employees' salaries.

You have also asked whether the local governing body of the county may elect to include the above-mentioned employees in a local grievance procedure, in the event that § 15.1-7.1 is found not to require such inclusion.

Employees of Constitutional Officers

Section 15.1-7.1 requires that "the governing body of every county, city and town which has more than fifteen employees shall establish ... a grievance procedure for its employees...". The phrase "its employees" has been interpreted to refer only to employees of the governing body of the county, city or town and has specifically been found not to include employees of constitutional officers. See Opinion to the Honorable Morris E. Mason, dated March 31, 1976, and found in Report of the Attorney General (1975-1976) at 150, 151; Opinion to the Honorable Joseph M. Whitehead, dated January 30, 1974, and found in Report of the Attorney General (1973-1974) at 165, 166. Tazewell County does not have specific authorization, therefore, to adopt a procedure concerning employees of constitutional officers. This conclusion is consistent with previous rulings of this Office which have held that, absent contrary statutory authority, elected constitutional officers are not subject to the control and jurisdiction of a local governing body. See Opinion to the Honorable Charles A. Reid, dated July 6, 1977, a copy of which is enclosed; Opinion to the Honorable James E. Durant, dated January 10, 1975, and found in Report of the Attorney General (1974-1975) at 559.

Employees of Noncorporate Entities

As to the employees of the various kinds of agencies, departments, authorities and corporations which you have also referenced, their inclusion in the county's grievance procedure would depend upon whether they could properly be considered employees of the governing body of the county. Generally, only where the governing body can be said to have management and control of the personnel function over these employees would they properly be considered county employees. See Opinion to the Honorable Edward A. Natt, dated November 20, 1975, and found in Report of the Attorney General (1975-1976) at 80 through 84. Of the specific examples you have provided, none appear to meet this test.

Employees of the county's library board, for example, are not employees of the Board of Supervisors. Rather, pursuant to § 42.1-35, "[t]he management and control of a free public library system shall be vested in..." a library board. This grant of management and control powers to the library board has been found to include personnel control. See Opinion to the Honorable William G. Broadus, dated September 21, 1977, a copy of which is attached. Library board employees, therefore, are not subject to the county's grievance procedure.
Employees of Authorities

The other examples which you have listed involve independent "authorities." These authorities generally are considered separate and distinct legal entities established to perform the public purpose designated by the legislature. They are normally independent of a locality in their operations, incurring of debt, and ownership of property. See Chesapeake Devel. Authority v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967). Moreover, such authorities either expressly or impliedly have the power to employ such persons as they may require and determine their qualifications, duties and compensation. A county would not possess any management and control power over the personnel function of such authorities, absent express statutory power or power necessarily implied from powers expressly granted. See Opinion to the Honorable A. L. Philpott, dated August 25, 1977, a copy of which is attached. Accordingly, I am of the opinion that employees of the authorities which you have specifically listed are not employees of the county and are, therefore, not covered by the county's grievance procedure.

Power to Mandate Inclusion

Since these persons are not employees of the county and since there is no specific or implied statutory authorization for the county to extend its grievance procedure to these employees, I am of the opinion that the county would not have authority to bring such persons within its procedure. To do so would be to infringe upon powers vested in others.

1Section 15.1-7.1 provides in relevant part:
"Notwithstanding any other provision of law to the contrary, the governing body of every county, city and town which has more than fifteen employees shall establish by June thirty, nineteen hundred seventy-four, a grievance procedure for its employees to afford an immediate and fair method for the resolution of disputes which may arise between such public employer and its employees and a personnel system including a classification plan for service and uniform pay plan for all employees excluding division superintendents of schools; provided, however, employees of local welfare departments and local welfare boards may be included in such a grievance procedure at the discretion of the governing body of the county, city or town but shall be excluded from such a personnel system."
2Nevertheless, certain constitutional officers' employees have access to the State grievance procedure, where such officer employs fifteen or more persons. See § 2.1-114.5:1(C). Admittedly, employees of constitutional officers who employ less than fifteen employees are left without a grievance procedure. Such a situation is not violative of equal protection standards, however, since a rational basis for such a distinction can be found in an interest in allowing small employers to directly address employee problems informally. Employees of a county, city or town with fifteen or fewer employees are also left without any formal procedure. § 15.1-7.1.
3See e.g., § 15.1-1378(i) dealing with Industrial Development Authorities; § 5.1-57 dealing with the Airport Authority; and §§ 15.1-1250 and 15.1-1270 dealing with Water and Sewer Authorities.

GRIEVANCE PROCEDURE. PARHAM DECISION PREVENTS STATE BOARD OF EDUCATION AND GENERAL ASSEMBLY FROM REQUIRING BINDING GRIEVANCE ARBITRATION OF LOCAL SCHOOL BOARDS.
July 28, 1978

The Honorable W. L. Lemmon
Member, House of Delegates

You ask what effect the recent Virginia Supreme Court decision, which held that the State Board of Education and the General Assembly may not require binding grievance arbitration of local school boards, has on the constitutionality of House Bill 750, which was passed by the 1978 General Assembly and vetoed by the Governor.

House Bill 750 provided that a teacher recommended for dismissal or probation would have the option of requesting a hearing before the school board or before a fact finding panel. If the latter were chosen, a hearing would be held with the panel thereafter presenting its recommendations and findings of fact to the school board. The school board, if not satisfied with the panel's findings, could hold a further hearing, after which it would make a decision based on the transcript, the findings of fact and recommendations of the panel, and such further evidence as was received at the second hearing.

In Parham the court held that the General Assembly and State Board of Education could not require that a school board delegate to a third party the authority to adjudicate grievances of school employees. This would also, in my opinion, apply to State mandated delegation of decisions to dismiss or place on probation.

However, House Bill 750 does not delegate the final authority of the school board to the fact finding panel, since the school board specifically retains the final authority over the decision to dismiss or place on probation, and the fact finding panel is limited to making a recommendation to the board. Consequently, in my opinion, the Parham decision does not affect the constitutionality of House Bill 750.

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1Parham v. School Board of the City of Richmond, April 21, 1978.
2I am enclosing a copy of an Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated May 11, 1978, to the effect that following Parham, a local school board may, with State Board of Education approval, voluntarily adopt a grievance procedure with a binding arbitration component, and a copy of an Opinion to the Honorable Mary A. Marshall, Member, House of Delegates, dated July 28, 1978, to the effect that a school board may voluntarily allow an arbitrator to hold a hearing and make a recommendation to the school board on a proposed dismissal, suspension, or probation.

GRIEVANCE PROCEDURE. SANITARY DISTRICT EMPLOYEES MAY BE CONSIDERED EMPLOYEES OF COUNTY AND SHOULD BE INCLUDED WITHIN COUNTY'S GRIEVANCE PROCEDURE.

April 24, 1979

The Honorable Floyd C. Bagley
Member, House of Delegates
You have asked whether Prince William County is mandated by § 15.1-7.1 of the Code of Virginia (1950), as amended, to include the employees of its sanitary districts within its grievance procedure.

Coverage of Local Grievance Procedures

Section 15.1-7.1 requires that "the governing body of every county, city and town which has more than fifteen employees shall establish... a grievance procedure for its employees...." Failure to do so brings the employees under the procedure adopted by the Commonwealth. The phrase "its employees" has been interpreted to refer only to employees of the governing body of the county, city or town. See Opinion to the Honorable Morris E. Mason, dated March 31, 1976, and found in Report of the Attorney General (1975-1976) at 150, 151. Thus, required inclusion of employees of Prince William County sanitary districts within the county's grievance procedure would depend upon whether such employees can properly be considered county employees.

Employees of Sanitary Districts

Section 21-118 provides in part that upon creation of a sanitary district in a county, the governing body of the county shall have the power and duty, among other things, to "employ and fix the compensation of any technical, clerical or other force and help..." deemed necessary to operate and maintain various sanitary district systems. Thus, the governing body of the county would appear to have control of the personnel function for sanitary district employees. Generally, where a governing body can be said to have such management and control of the personnel function for certain employees, they may properly be considered employees of the county. See Opinion to the Honorable Edward A. Natt, dated November 20, 1975, and found in Report of the Attorney General (1975-1976) at 80 through 84. Accordingly, I am of the opinion that sanitary district employees should be included within the coverage of the county's grievance procedure.

Coverage of State Grievance Procedure

Even though it would appear that sanitary district employees should be included within the coverage of Prince William County's grievance procedure, you have stated that the governing body of the county has exempted such employees from its procedure. Under these circumstances, the grievance procedures adopted by the Commonwealth should be applicable to such employees. See § 15.1-7.1.

1Section 15.1-7.1 provides:
"Notwithstanding any other provision of law to the contrary, the governing body of every county, city and town which has more than fifteen employees shall establish by June thirty, nineteen hundred seventy-four, a grievance procedure for its employees to afford an immediate and fair method for the resolution of disputes which may arise between such public employer and its employees and a personnel system including a classification plan for service and uniform pay plan for all employees excluding division superintendents of schools; provided, however, employees of local welfare departments and local welfare boards may be included in such a grievance procedure at the discretion of the governing body of the county, city or town but shall be excluded from such a personnel system."
Every such grievance procedure shall conform to like procedures established pursuant to § 2.1-114.5:1 and shall be submitted to the Director of Personnel appointed pursuant to § 2.1-113 for approval; provided that any local government's panel composition method approved by the Director of Personnel prior to the enactment of § 2.1-114.5:1(D) shall be considered in substantial compliance with such subsection. Failure to comply with any provision of this section shall cause the grievance procedures adopted by the Commonwealth to be applicable in accordance with such rules as the Director of Personnel may prescribe and shall cause the noncomplying locality to promptly apprise its employees of the applicability of the grievance procedure adopted by the Commonwealth and shall cause such locality to disseminate copies of such grievance procedure to those employees covered by the procedure. The term 'grievance' as used herein shall not be interpreted to mean negotiations of wages, salaries or fringe benefits.

GRIEVANCE PROCEDURE. STATE GRIEVANCE PROCEDURE PANELS HAVE NO AUTHORITY TO AWARD EMPLOYEE DAMAGES OR ATTORNEYS' FEES.

June 20, 1979

The Honorable Leo E. Kirven, Jr., M.D., Commissioner
Department of Mental Health and Mental Retardation

You have asked whether a State grievance procedure panel has authority to award damages or attorneys' fees to an employee pursuant to § 2.1-114.5:1 of the Code of Virginia (1950), as amended. That section provides for the development by the State Department of Personnel and Training of a grievance procedure which shall afford a means for the resolution of disputes which may arise between an agency of the State and its employees. Section 2.1-114.5:1(D) requires a panel hearing as the last step in the procedure with the decision of a panel to be final and binding. Nowhere in § 2.1-114.5:1 or in the State grievance procedure is there any specific authority for a panel to award either damages or attorneys' fees.

Damages

The range of matters which may properly be considered by a grievance panel is limited and is set forth in § 2.1-114.5:1(A). That section and the State grievance procedure make clear, for example, that while a panel has authority to review the application of appropriate personnel policies and procedures it has no authority to formulate or establish policy. Generally, an administrative tribunal, like a grievance panel, will be limited in authority to those powers specifically granted. See Zamantakis v. Commonwealth, Human Rel. Comm'n., 10 Pa. Cmwlth. 107, 308 A.2d 612 (Commw. Ct. 1973).

If the General Assembly had intended to authorize grievance panels to award damages, it would have been a simple matter to provide explicitly for such a power. Absent such a provision, it cannot be concluded that the General Assembly intended to vest panels with such authority. See Ohio Civil Rights Commission v. Lysyj, 38 Ohio St.2d 217, 313 N.E.2d 3 (1974). Traditionally, the power to award damages to a person suffering loss has been limited to judicial proceedings and courts have generally been unwilling to imply a grant of such power to an administrative body. Id.
Finally, it is the long settled law in Virginia that a claim against the Commonwealth for money damages can be brought only in the manner specifically prescribed by the Commonwealth. Tunnel District v. Beecher, 202 Va. 452, 117 S.E.2d 685 (1961). Section 8.01-192 and the statutes mentioned therein provide the only procedures for bringing such claims. There is no indication that in passing § 2.1-114.5:1 the General Assembly intended to create another avenue for such relief.

In view of the foregoing, I am of the opinion that panels have no authority to award damages.¹

Attorneys' Fees

The grievance procedure as prepared by the Department of Personnel and Training pursuant to the statute provides that the "grievant must bear any cost involved in employing representation or in preparing or presenting his case." This administrative construction of the statute by the Department is entitled to great weight. See Opinion to the Honorable George A. Jones, Jr., Commonwealth's Attorney for Pittsylvania County, dated March 1, 1977, and found in Report of the Attorney General (1976-1977) at 295, 296. Furthermore, this construction is consistent with the general rule that even in actual court proceedings, absent statutory authorization, litigants must pay their own attorneys' fees. See Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Sperry Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir. 1971).

Accordingly, I am of the opinion that grievance panels have no authority to award either damages or attorneys' fees to successful grievants.

¹This conclusion, however, should not be taken to preclude the payment of back pay which would necessarily and naturally flow from a panel decision properly ordering that a termination be reversed and that the employee be reinstated.

HEALTH. COUNTIES, CITIES AND TOWNS. LOCAL HEALTH DEPARTMENTS MUST PROVIDE CERTAIN MINIMUM SERVICES AS SPECIFIED IN HEALTH CODE.

September 21, 1978

The Honorable J. Samuel Glasscock
Member, House of Delegates

You have asked three questions regarding the fiscal relationship between the Commonwealth and a locality in the operation of a local health department.

Local Health Department Budget

You first asked what control a locality has in deciding the amount of funds to be appropriated annually for the operating budget of its local health department.
A locality may either establish its own local board of health or contract with the Commonwealth to have the Department of Health operate the local department. If the locality establishes its own health department using only local funds, it has the power to determine the operating budget of the local department. However, the local health department must still provide certain minimum services, as specified in the Health Code, and the locality must appropriate sufficient sums to pay for these minimum requirements.

If the locality contracts with the Commonwealth for the Department of Health to operate the local department, the budget of the local department is shared between the Commonwealth and the locality under an established formula. The locality may appropriate more money than is necessary to pay its share of the minimum services and receive additional State funds to pay for "optional" programs and services. What optional services shall be provided is a matter of negotiation and mutual agreement.

If a locality selects neither option, the State Board of Health may establish a local health department and charge the total expense of operation to the locality. In such an event, the locality could not refuse to appropriate the monies deemed necessary by the Board for providing certain minimum services by the local health department.

Changes in the Budget

You next asked whether the Commonwealth can unilaterally change the budget for a particular year after agreement has been reached between the Commonwealth and the locality on its terms. Clearly, the amount of the budget for any year is a joint decision, based upon the kind and amount of services to be provided. It is not an absolute ceiling upon the cost of providing the minimum services, and others desired, because in certain instances a need for additional funds may arise.

For example, if the General Assembly directs that additional services shall be provided, the Department of Health and the locality will have to contribute additional funds. Changes in the budget could also be engendered as a result of the acts of others who are not parties to the budget agreement. An example of this possibility is the Commonwealth's participation in certain federal programs, implementation of which may depend upon, on occasion, the manpower or other resources of the local departments, and if the program is altered in some way which affects the operating budget of the local department, both the Commonwealth and the locality must contribute the necessary, additional funds.

A third example could be a statewide increase in the salaries of State personnel. With few exceptions, the personnel of local health departments are State employees and members of the State Merit System. Whenever either a legislative or executive order, as opposed to a State Health Department order, mandates an increase in the salaries of State employees, the result will be an increase in the local health department's budget.

Thus, where the budget estimate for a year is insufficient to pay for the agreed-upon services, each party must bear its share of the additional costs, in accordance with the formula. The parties may, however, agree to reduce or
eliminate certain optional services to contain the unanticipated additional costs. Further, because the agreement is negotiated annually, the locality may reduce or eliminate the scope of optional services in subsequent years to help contain costs.

As a general rule, once agreement upon the budget has been reached, the Department of Health may not unilaterally change the services to be provided, thereby affecting the budget. Only in certain limited instances, such as action by the General Assembly, or changes in federally funded programs, or a statewide increase in the salaries of State employees, can the budget be increased without prior agreement between the Department of Health and the locality.

Disposition of Surplus Revenues

You finally ask who controls disposition of surplus revenues generated by the local health department in excess of the amount anticipated in the original budget agreement.

It is my understanding that any revenues generated by local departments are deposited with the State Treasury in an account for the locality. Any surplus left, after all losses are paid, should be distributed between the Commonwealth and the locality in accordance with the cost-sharing formula. Thus, the Commonwealth, as custodian of these funds, would be responsible for making the distribution.

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2See e.g., § 32-93.
3See § 32-40.
5Id.

HEALTH DEPARTMENT. MEDICAL EXAMINER. RELEASE OF INFORMATION TO NEWS MEDIA.

October 2, 1978

The Honorable James A. Cales, Jr.
Commonwealth's Attorney for the City of Portsmouth

You have asked whether a medical examiner has the right or duty to release information to the news media concerning a death he may be currently examining.

Section 32-31.18 of the Code of Virginia (1950), as amended, requires the medical examiner to report his findings to both the Chief Medical Examiner and the attorney for the Commonwealth. No additional duty to report is required by law. Whether the medical examiner should release any information concerning a death to the news media depends on drawing a balance between the public interest in knowing and the possible prejudicial effect on a pending criminal trial. Such a decision must be governed by sound professional ethics and the inherent duty to protect the right of a fair trial; and must be made on a case by case basis.
You also inquired whether the Attorney General has the responsibility of representing the medical examiner when he is made a defendant in a civil action arising out of the performance of his official duties.

Section 2.1-121 provides that the Attorney General render legal services in civil matters to the State Department of Health, which comprehends the office of the Medical Examiner. This section further provides that the Attorney General, in his discretion, may represent any member, agent or employee of the State Department of Health. Therefore, individual representation by the Attorney General's Office is determined on a case by case basis. It is my opinion that the facts and circumstances would dictate whether this Office would represent the Medical Examiner.

HIGHWAYS. ACCEPTANCE OF ROADS INTO STATE SECONDARY SYSTEM.

July 21, 1978

The Honorable Lewis P. Fickett, Jr.
Member, House of Delegates

You have asked what the requirements are for acceptance of a short length of road into the State secondary system, and for the expenditure of State moneys on it. One of your constituents' homes is located on a private roadway some 87 yards beyond the existing terminus of State Route 699, which also marks the end of State maintenance on that route. You have enclosed a letter from John E. Harwood, Commissioner, Virginia Department of Highways and Transportation, dated April 14, 1978, in which he denied the request for acceptance by restating portions of the Department's policy which establishes the criteria for additions to the secondary system.

You have also asked whether federal or State funds are used for secondary road construction "and, of so, if Caroline County has the right to make arbitrary decisions...which deny certain people access to services provided by those funds."

Establishment as a Secondary Road

Article 2, Ch. 2, of Title 33.1 of the Code of Virginia (1950), as amended (§§ 33.1-229 through 33.1-246), governs the establishment of secondary roads; § 33.1-229 provides that:

"The local road authorities shall continue to have the powers...for the establishment of new roads in their respective counties, which shall, upon such establishment, become parts of the secondary system of State highways within such counties...provided, however, that the State Highway Commissioner shall be made a party to any proceeding before the local road authorities for the establishment of any such road...and, provided further, that no expenditure by the State shall be required upon any new road so established...except as may be approved by the Commissioner."

As I understand it, the portion of the road about which you inquire is not now, nor has it ever been, a part of the State secondary system; further, from what you say, I infer that the general public has no rights, prescriptive or otherwise, in the 87 yards about which you inquire.
On these facts I am of the opinion that, if the road is to be established as a public road, the county must take appropriate action under § 33.1-229. Furthermore, this action must be accomplished in accordance with other parts of the article and section which require, among other things, that viewers be appointed to determine the necessity for the road and that no State funds be spent upon newly established secondary roads without the consent of the Highway and Transportation Commissioner.

Availability of State Funds: Rural Additions or Subdivision Streets

The Commission draws a distinction between "rural additions" and subdivision streets. Streets and roads categorized by the Commissioner as "rural additions," with certain mileage and physical limitations, are eligible for State funding for the entire cost of improvement to minimum State standards. A Secondary System Manual, p. 5, effective July 1, 1949.

Roads categorized as subdivision streets are entitled to State expenditure for improvement to meet the standard according to the age of the subdivision. The Commissioner's policy promulgated on July 1, 1949, first made the distinction between "rural additions" and subdivision streets. That distinction assumed most of its present significance with the enactment of § 33.1-72 (formerly § 33-47.2) which authorized the acceptance of certain substandard subdivision streets created prior to July 1, 1958, provided that the county expend fifty percent of the funds necessary to improve the street to the system standard.

Thus, if the 87 yards of road is categorized as a "rural addition," it may be eligible for 100 percent State expenditure to be improved to minimum State secondary standards for inclusion in the State secondary system for maintenance. If the road is determined to be a subdivision street, created prior to July 1, 1958 and subsequent to July 1, 1949, it may be eligible for 50 percent State funding and 50 percent county funding in order to attain minimum State standards.

Service to a Requisite Number of the Public

The only case in which a road must serve at least three families per mile is found in § 33.1-72 with respect to subdivision streets. Although the Commissioner may consider, and, in the past, has considered, this fact in determining public necessity where "rural additions" are concerned, he is not bound to refuse improvement of a road designated a "rural addition" merely because three houses are not served. A Secondary System Manual, p. 6. Apparently, there is a disagreement as to the number of houses which would be served by the proposed addition; I do not have sufficient information, nor am I empowered, to resolve such questions of fact.

Inclusion After Use for a Certain Period of Time

You have referred to a suggestion by a member of the local Board of Supervisors that a road may be eligible for inclusion in the "County system" after six years of use. After an extensive review of both the Commissioner's policy and State law, I can find no reference to any such requirement, nor can I determine what may have been meant by reference to the "County system."
Extraneous Considerations

Further, you have cited a number of considerations which might argue in favor of extension of Route 699. Some of these may have a bearing upon the public necessity for the addition but they involve primarily questions of personal convenience which must be evaluated by the appropriate officials only as they affect the public at large.

Summary

In summary, I am of the opinion that two official actions must be taken in order for your constituent's wishes to be realized. First, the road must be accepted into the State secondary system by the county. Second, if State funds are to be expended thereon for maintenance, the road must be improved to the Department's minimum standards; whether State funds may defray all or part of the cost of such improvement must be decided by the Commissioner based upon a determination of the public purpose to be served by such expenditure, and, if so whether the land would be a subdivision street or a "rural addition." I do not find that the fact that the road may have been created subsequent to 1949 to be an absolute bar to such an expenditure of State funds although it may certainly bear upon the proportion of the cost the State may incur, depending upon whether the road is part of a subdivision as defined by the Commissioner. Likewise, I do not find that the fact that the road may not serve three families to be an absolute bar unless the road falls within the categories of subdivision referred to in § 33.1-72. It would seem, however, that this factor is certainly relevant toward a determination of a public necessity for State participation.

Determination of both of these questions are ultimately within the sound discretion of, respectively, the County Board of Supervisors and the Highway and Transportation Commissioner and must be based primarily on their judgments as to public necessity. I am providing the Commissioner with a copy of this opinion in order that he may act accordingly should your constituent wish to pursue this matter further.

1This entails the appointment of viewers of a county road engineer or manager to determine issues related to public need for the road. For a complete analysis of this procedure see an Opinion to the Honorable Edward P. Simpkins, Commonwealth's Attorney for Hanover County, dated May 13, 1946, and found in Report of the Attorney General (1945-1946) at 137.

2In this regard see an Opinion to the Honorable A. W. Garnett, County Attorney for Spotsylvania County, dated July 22, 1975, and found in Report of the Attorney General (1975-1976) at 163.

3Subsequently there have been major additions to § 33.1-72 which do not bear on the narrow issues raised by your inquiry but it should be noted that on subdivisions platted between July 1, 1958, and July 1, 1975, cost of improvement of substandard streets must be borne completely by the county.
August 25, 1978

The Honorable Wiley F. Mitchell, Jr.
Member, Senate of Virginia

You have asked about the possible impact on street maintenance payments made by authority of § 33.1-43 of the Code of Virginia (1950), as amended, because the City of Alexandria barricaded certain streets which would otherwise connect with portions of the State system of secondary highways in Fairfax County. You have stated that all of the streets involved are regular city streets, not a part of or an extension of the State primary system, and that the city council took the action to close the streets because of "determined to be an unacceptable burden of commuter traffic...." You have not inquired as to the legal propriety of closing the streets, and, since that question is currently in litigation, this opinion will not address it.

As you know, § 33.1-43 authorizes the State Highway and Transportation Commission to make maintenance payments for a city street, not a part of or an extension of the State Highway primary system in the event it meets the following conditions:

1. the city or town in which it lies has a population of 3500 or more;
2. the lanes for which payment is made are available to peak hour traffic;
3. if the street was constructed before 1950, it has a minimum unrestricted right-of-way width of thirty feet and a minimum pavement width of sixteen feet;
4. if the street was constructed subsequent to 1950, it has a minimum unrestricted right-of-way width of fifty feet and a minimum pavement width of thirty feet; and
5. the street under consideration is maintained "up to a standard satisfactory to the Commission."

Depending on the construction and design of the affected streets it is possible that the action taken by the city council does not affect any of these criteria except those concerning availability of the street to peak hour traffic and the necessity to satisfy the standards of the Commission.

Initially, it would appear that the barricading would make the affected streets unavailable to peak hour traffic. However, the barricading may have transformed those streets into the category of cul-de-sacs which are, under the Commission's current standards, eligible for maintenance payments on the same basis as are all other city streets. This policy of allowing payments for cul-de-sacs is implicitly ratified by the provisions of § 33.1-43 which requires that cul-de-sacs have minimum right-of-way width of forty feet and acceptable "turnarounds" in order to be eligible for payments.

After a review of the applicable standards, I am of the opinion that the city's action does not directly violate any express standard of the Commission; however, it must be recognized that the question of whether the street meets the maintenance standards of the Commission is a matter of
discretion granted to the Commission by the General Assembly. Consequently, I believe that the Commission must investigate this situation and reevaluate the eligibility of each street in light of the city's action. In this evaluation, the Commission should consider whether each street has an adequate "turnaround;" it would also seem germane that all of the subject streets were originally designed as "through" streets rather than cul-de-sacs. Given this state of facts, it would not be inconceivable that the Commission could find that the streets were not built or maintained to its standards, based upon the purposes for which they were originally intended.

In conclusion, it is my opinion that the city's action in closing the subject streets does not automatically remove those streets from eligibility for street maintenance payments under § 33.1-43. The State Highway and Transportation Commission, based on the facts of each individual case, must make a decision whether the streets are maintained up to acceptable standards. If it determines a street is substandard, it may deny payments for that portion determined not to meet the standard.

HIGHWAYS. CONSTRUCTION MUST MEET CERTAIN STATE ENVIRONMENTAL PROTECTION STANDARDS.

April 6, 1979

The Honorable Mary A. Marshall
Member, House of Delegates

This is in reply to your recent request for an opinion concerning the Virginia environmental standards which must be met by the proposed Dulles Toll Road. Specifically, you have inquired:

"1. What environmental protection standards will the proposed Dulles Toll Road have to meet in the Wolf Trap Park area under Virginia law? Are these environmental standards set by state law or local ordinances which apply to the Dulles Toll Road?

2. Does an environmental assessment such as is proposed by the Virginia Department of Highways and Transportation place any legal obligation on the Department to meet any environmental protection standards in constructing the road?"

Assuming that the Dulles Toll Road will be financed entirely by State bond revenues, as authorized by Ch. 221 [1979] Acts of Assembly without federal participation in the form of grants of money, permits or land, the applicable environmental standards for the entire road, including the vicinity of Wolf Trap Farm Park, will be governed by State law. Therefore, no environmental impact statement would be required for this project since § 10-17.107 of the Code of Virginia (1950), as amended, exempts highway or road construction or any part thereof from the reporting and approval requirements of Title 10, Ch. 1.8. Other statutes, however, do impose environmental requirements on road construction which would be applicable to the toll road. These requirements are discussed below.
The State Air Pollution Control Board has promulgated regulations, pursuant to § 10-17.18, which would require the Department of Highways and Transportation to secure an indirect source permit for highway construction. Issuance of such a permit would require an evaluation of the effects of anticipated vehicle emissions on the Ambient Air Quality Standards established by the Federal Environmental Protection Agency. Furthermore, in the event construction of the road would encroach upon the bed of any river, stream or creek which is the property of the Commonwealth, a permit would first have to be secured from the Virginia Marine Resources Commission in accordance with § 62.1-3. Any such alteration of a body of water would also require a permit from the State Water Control Board, pursuant to § 62.1-44.15. Finally, the Virginia Antiquities Act, Title 10, Ch. 12.1, would require the issuance of a permit for the project, through the Virginia Historic Landmarks Commission, before any objects of antiquity which might lie within the construction area could be disturbed. None of these statutes exempt highway or road construction from their requirements; therefore, they impose legal obligations on the Department of Highways and Transportation to meet the environmental protection standards set out therein or established by valid regulation of the appropriate agencies, even though no State environmental impact report is required.

My conclusion would, of course, be somewhat different in the event the federal government became involved in the project. In that case, the nature and extent of federal participation would have to be evaluated according to the standards established by the National Environmental Policy Act, 42 U.S.C. § 4321, et seq., and related federal regulations. An environmental impact statement would be required if the involvement constituted a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332.

The Federal Highway Administration has issued regulations defining "major federal actions" as

"those of superior, large and considerable importance involving substantial planning, time, resources or expenditures. Any action that is likely to precipitate significant foreseeable alterations in land use; planned growth; development patterns; traffic volumes; travel patterns; transportation services, including public transportation; and natural and man-made resources...." 23 C.F.R. § 771.9(d).

Examples of actions ordinarily deemed major include new freeways or expressways, or new or expanded highways providing new or improved access to areas, which are likely to precipitate significant changes in land use or development patterns. Id.

Guidelines for the "significant effect" determination are set out in 23 C.F.R. § 771.10. Actions generally considered to have a significant effect include, inter alia:

"(1) [a]n action that has more than minimal effect on properties protected under Section 4(f) of the DOT Act or Section 106 of the Historic Preservation Act.

(2) [a]n action that is likely to be highly controversial on environmental grounds...."
(3) [a]n action that is likely to have a significant adverse impact on natural, ecological, cultural or scenic resources of natural, State or local significance." 23 C.F.R. § 771.10(e).

If federal involvement falls within the above criteria, an environmental impact statement would be required for the toll road the same as for any other federal-aid highway, under 42 U.S.C. § 4332. Therefore, federal environmental protection standards would apply in addition to the State standards initially discussed herein.

HIGHWAYS: DISCONTINUED SECTION OF SECONDARY SYSTEM OF STATE HIGHWAYS REMAINS PUBLIC RIGHT-OF-WAY.

May 30, 1979

The Honorable F. Paul Blanock
Commonwealth's Attorney for Mathews County

This is in response to your request for an opinion concerning the power of a county Board of Supervisors to barricade a public highway. Specifically, you inquire "whether or not a public road, which has been taken out of the Secondary Highway System in order that the Highway Department would not have to maintain same, could be barricaded in order to restrict the public from traveling over the discontinued road." For the reasons stated below, I must answer in the negative.

Section 33.1-150 of the Code of Virginia (1950), as amended, provides that only the State Highway and Transportation Commission may discontinue any road in the secondary system of State highways, either on its own motion or on petition of the governing body of the county in which it lies. The effect of such discontinuance is merely to remove the road from the secondary system. "Discontinuance of a road is a determination only that it no longer serves the public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use." Ord v. Fugate, State Highway Commissioner, 207 Va. 752, 758, 152 S.E.2d 54, 59 (1967). Thus, a road discontinued for maintenance purposes remains a public roadway until abandoned pursuant to § 33.1-151 and "[t]he public is entitled to the full and free use of all the territory embraced within a highway in its full length and breadth...." Wray v. Norfolk & Western Railway Co., 191 Va. 212, 221-222, 61 S.E.2d 65, 70 (1950), quoting City of Richmond v. Smith, 101 Va. 161, 167, 43 S.E. 345, 346 (1903). Since discontinuance does not render a road unavailable for public use (Ord v. Fugate, supra) a county would be without authority to prohibit public use of such a road by the erection of a barricade, except in the case of temporary necessity in the exercise of its police power. Wray v. Norfolk & Western Railway Co., supra, 191 Va. at 222, 61 S.E.2d at 70. See also Opinion to the Honorable George R. St. John, County Attorney for Albemarle County, dated July 17, 1975, found in Report of the Attorney General (1975-1976) at 153.

I recognize that a prior Opinion of the Attorney General to the Honorable Ford C. Quillen, Member, House of Delegates, dated April 1, 1975, interpreted these same statutes and decisions so as to permit Wise County to barricade a public road, not in the secondary system, but for the purpose of controlling
vandalism at the county landfill at the end of the road. See Report of the Attorney General (1974-1975) at 205. In that situation, the only other abutting landowner agreed to the closure, the road remained open from 8:00 a.m. to 4:30 p.m. weekdays and until noon on Saturdays, and the landfill caretaker was available on weekends and holidays to admit people wanting to visit cemeteries served by the road. The facts on which you based your inquiry are substantially different. In your case, Mathews County proposes a complete bar to public access. Thus, the analysis on which the prior Opinion was based is neither controlling nor persuasive in this instance.

HIGHWAYS. MAXIMUM WEIGHT LIMIT. TOLERANCE OVER LIMIT.

July 17, 1978

The Honorable Edward M. Holland
Member, Senate of Virginia

This is in response to your recent letter requesting my opinion on the legality of allowing a 5 percent tolerance over the 76,000 pound maximum weight limit authorized by the General Assembly for Virginia Highways.

There is nothing in the statutory law of Virginia to allow such a tolerance to be granted. See Report of the Attorney General (1969-1970) at 202. Although I am advised that a tolerance has been used administratively for some time, it is my opinion that it does not have the effect of law.

Under § 46.1-341 of the Code of Virginia (1950), as amended, a violation of § 46.1-339, which establishes the maximum weights on Virginia highways, is a misdemeanor. The police may exercise discretion in enforcement of this law by taking into consideration the facts of each particular case. For example, they could consider such factors as inaccuracy of a scale or circumstances beyond the control of the driver which add to the weight of the vehicle, for example, accumulation of ice or snow. If the facts merit its use, they could employ a reasonable guideline, such as a tolerance in determining whether a charge should be made. But it is not required for conviction that the Commonwealth prove that the violation exceeded the weight limit plus a "tolerance." It need prove only a violation of the statutory limit.

HIGHWAYS. SECONDARY HIGHWAYS. SIX-YEAR PLAN AND ANNUAL CONSTRUCTION PRIORITY LIST BINDING ON BOTH PARTIES WHEN ADOPTED BY COUNTY AND DEPARTMENT. ADOPTION NOT MANDATORY.

October 10, 1978

The Honorable Clive L. DuVal, 2d
Member, Senate of Virginia

You have asked about the role of the Fairfax County Board in decisions made by the Virginia Highway and Transportation Commission concerning the State secondary system of highways within that county. You tell me that the Department of Highways and Transportation (the Department) and the Board jointly adopted a six-year plan, and subsequently adopted a list of construction priorities for the present fiscal year, drawn from projects
listed in the six-year plan. However, now the Board has unofficially expressed opposition to one project included in both documents, the "four-laning" of Great Falls Road. You have also made reference to opposition by area residents to the proposed project. In light of this and other correspondence concerning this project which has come to my attention, I gather that the opposition has been directed against the particular design plan for this particular road, rather than against any or all other alternatives which might have been adopted.

Your inquiry requires analysis of four questions.

(1) What is the legal effect of a disagreement between the Board and the Department during the process of the adoption of a six-year plan or an annual construction priority list?

Section 33.1-70.01 of the Code of Virginia (1950), as amended, permits a Board to formulate, in cooperation with the Department's representative, a six-year plan for improvements to the State secondary system of highways in that county. The plan must be based upon the best estimates of funds to be available to the county within the six-year period encompassed by the plan; it must list each proposed improvement and its estimated cost. There are other provisions relating to the formulation of this plan which are not related to your inquiry and need not be discussed here.

After official adoption of the plan, the Department's representative and the Board of Supervisors are required to meet annually in order to prepare a budget for the expenditure of improvement funds in each fiscal year. They are required, among other things, to agree on a list of projects to be carried out in the upcoming year based upon a current estimate of funds available.

I am of the opinion that implementation of any of the section's provisions is mandatory on neither the county nor the Department. Either the county or the Department may thwart the adoption of either or both the six-year plan and the annual construction priority list by simply refusing to concur in them. The section clearly states that the Board "may, jointly with the resident engineer...prepare a six-year plan...." (Emphasis added.) All other steps in the adoption process are referred to by use of the prepotent term, "shall," but qualified by stipulating that both parties must concur at each step. It is clear that the concurrence requirement carries with it the right not to concur.

(2) To what extent is the adoption of a six-year plan and construction of a priority list binding upon the county or Department?

Once agreement is reached on both the plan and the list, it is my opinion that they are binding on both parties. Neither party can unilaterally withdraw its support; the change of the adopted plan or list can only be accomplished by mutual agreement. I base this conclusion on the following passages:

[with respect to the six-year plan the Board and the Department representative] "shall finalize and officially adopt the six-year plan which shall then by considered the official plan of the county. ***

[with respect to the priority list the Board with concurrence of the Department representative] shall adopt, as official, a priority program...
Both documents are given official status after adoption, but, more importantly, the Department is required to include the projects listed on the annual priority list in its budget for the ensuing year. I am of the opinion that this clearly mandates proceeding with listed projects once agreed upon.

(3) Is § 33.1-70.1 in conflict with § 33.1-69?1

It is my opinion that the two statutes in question are not in direct conflict. Since the concurrence of the Department is necessary for adoption, should the Department not concur at any stage prior to adoption, it is my opinion that no official document, within the meaning of the statute, would exist. Accordingly, under § 33.1-69, the Department would be free legally to carry forward its own plans for the secondary system within that county without regard to the policy direction of the Board. Likewise, to the extent that an officially adopted annual priority list does not require use of all available funds, either because of the parties' intent or because of underestimation of available funds or project costs, the Department is free to use those funds in its own unfettered discretion.

(4) What degree of location and design specificity is necessary or desirable in such plans?

It is contemplated that the two documents in question will be general in nature as to the location and design of projects, although certainly they may be made as specific as the parties desire. The statute does require that the estimated cost of each project be included in the priority list, but it would be impractical to construe this as being more than a general limitation on the discretion of the Department for several reasons. First, if federal funds are involved, location and design may not be determined until proper federal deliberative procedures are invoked, including, among other things, location and design public hearings held pursuant to 23 U.S.C. § 128. Second, the Highway and Transportation Commission continues to have the power to let all contracts for the construction of State highways pursuant to § 33.1-12(2) and must comply with the advertising and bidding procedures set out in §§ 33.1-185 et seq. Third, the Commission, alone, has the power to locate routes under § 33.1-12(1); the resident engineer cannot be construed to have the ability to impair this deliberative power under § 33.1-70.01. Davis v. Marr, 200 Va. 479, 106 S.E.2d 722 (1959). Finally, § 33.1-70.01 specifically provides that the annual priority list must follow "generally the policies of the...Commission in regard to the statewide secondary system improvements." To the extent that location or design may be inferred from Commission policy or to the extent that the Commission subsequently interjects itself into those aspects of a particular project, the annual construction priority list must coincide with the Commission's decisions.

Thus, I am of the opinion that, since the Fairfax County Board has agreed to a six-year plan and an annual priority list including the subject project, the Department has full authority to proceed with its construction despite the current opposition expressed unofficially. Had the Board not agreed and had the Department refused to concur with county's policy direction, there would have been no officially adopted plan or list and the Department could have proceeded with plans under § 33.1-69. In any event, the plan and list are not
required to be specific with regard to location or design, and if the subject street needed improvement and was included on the plan and list without specific location or design criteria, such criteria should be provided by the Department.

1"The control, supervision, management and jurisdiction over the secondary system of State highways shall be vested in the Department of Highways and the maintenance and improvement, including construction and reconstruction, of such secondary system of State highways shall be by the State under the supervision of the State Highway Commissioner. The boards of supervisors or other governing bodies of the several counties...shall have no control, supervision, management and jurisdiction over such public roads, causeways, bridges, landings and wharves, constituting the secondary system of State highways." Section 33.1-69.

HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF. AUTHORITY TO REMOVE AN OBSTRUCTION OF NATURAL WATERCOURSE ON LANDS OF ANOTHER.

May 30, 1979

The Honorable Douglas H. Napier
County Attorney for Warren County

This is in answer to your recent inquiry concerning the propriety of the Commonwealth of Virginia going upon the property of a landowner whose land adjoins and is contiguous to a State secondary highway right-of-way for the purpose of removing an obstruction erected by the landowner across a culvert or drain upon his land. As a result of the obstruction, drainage waters discharged under the highway and onto the adjoining landowner along a natural channel cause the drainage waters to back up and flood the land of the person on the upper side of the road.

You further advise that "[i]n 1959, the Commonwealth of Virginia was granted by deed, in fee simple, a strip of land for the construction and improvement of State Route 649 in Warren County. The deed provided: 'The said grantor...agrees for himself, his heirs, successors and assigns, that the consideration hereinabove...paid to him shall be in lieu of any and all claims to compensation for land, and for damages, if any, to the remaining lands of the grantors which may result by reason of the use to which the grantee will put the land to be conveyed, including such drainage facilities as may be necessary.'"

In answering your questions, it is necessary to determine whether the Commonwealth can proceed for the removal of the obstruction under either (1) the provisions contained in the deed or (2) the surface water law of Virginia.

As you recognize in your letter, the deed lacks certain specificity inasmuch as it fails to definitively locate the drainage facilities. The question is therefore presented whether the easement is sufficiently descriptive to support enforcement. If the grant of easement does not definitively locate the drainage easement, but a natural way of drainage already exists, then the already existent way of drainage will be treated as the one contemplated by the parties. Eureka Land Co. v. Watts, 119 Va. 506,
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509, 89 S.E. 968 (1916); Gish v. Roanoke, 119 Va. 519, 89 S.E. 970 (1916). Moreover, if an ambiguity exists in a deed, the ambiguity will be construed most favorably to the grantee. Hamlin, et al. v. Pandapas, et al., 197 Va. 659, 663-664, 90 S.E.2d 829 (1956). Accordingly, I am of the opinion that the deed is sufficiently specific to be enforced. I reach the opinion because the facts as you note them illustrate that the drainage facility is located along the natural drainage course on the land of the obstructing landowner.

As to the rights enjoyed by the Commonwealth under common law, the Supreme Court of Virginia has adopted a modified common law rule as to surface water. As the court stated in Seventeen, Inc. v. Pilot Life, 215 Va. 74, 77, 205 S.E.2d 648 (1974), "[u]nder the common law rule surface water is considered a common enemy that may be fended off by each landowner. But the rule is subject to modification in Virginia that one must so use his property as not to injure unnecessarily the property of another. The privilege to protect one's property against surface water must be exercised reasonably and in good faith and not wantonly, unnecessarily, or carelessly." It should be noted that there are two exceptions to the general rule one of which states that "the owner of land cannot interfere with surface water in a natural channel or watercourse. Where the water has been accustomed to gather and flow along a well defined channel, which by frequent running it has worn a cut into the soil, he may not obstruct or divert it to the injury of another." Norfolk and Western Railway Co. v. Carter, 91 Va. 587, 593-594, 22 S.E. 517 (1895). See also Surface Water Law in Virginia, 44 Va. L. Rev. 135, 141-147 (1958). Accordingly, I am of the opinion that the obstruction of a natural watercourse, which is well defined and cut from frequent running of surface water, cannot be obstructed to the detriment of other landowners.

Given the fact that the obstruction of the channel in question is improper, the question is posited whether the Commonwealth can use self help to remedy the matter. It is my opinion that causing drainage waters to back up and flood an adjoining landowner constitutes a private nuisance. The Supreme Court of Virginia in Amick v. Tharp, (13 Gratt.) 54 Va. 564 (1856) at 566-567, has held that an aggrieved party may remove a private nuisance if it can be peaceably accomplished. Further, the owner of the land may enter upon the property of the other party who is causing the injury, and remove the obstruction which occasions the injury. Consequently, the landowner whose lands are directly inundated by the acts of his neighbor can initiate self help to defend his land against the improper obstruction of waters. In the case at hand, however, the Department of Highways and Transportation is not the aggrieved party, but the landowner above the road is the party suffering the injury. Under such circumstances, I would question the propriety of the Department of Highways taking steps, through self help, to remove an obstruction which does not directly interfere with the property of the Commonwealth. If the water did inundate the highway, it is my opinion that the Commonwealth could go upon the land in a peaceable manner and remove the obstruction. However, as to the upper landowner, who is not contiguous to the land upon which the obstruction rests, although there is a strong argument that this landowner would enjoy the same common law rights as the Commonwealth, since it is a case of first impression I would counsel the upper landowner against self help and suggest that he proceed to obtain an injunction through the proper court.
HUMAN RIGHTS COMMISSION. FAIRFAX COUNTY AND CITY OF ALEXANDRIA HUMAN RIGHTS COMMISSIONS HAVE NO AUTHORITY TO INVESTIGATE EMPLOYMENT DISCRIMINATION COMPLAINTS AGAINST OR TO ENFORCE DECISIONS ADVERSE TO STATE AGENCIES.

May 24, 1979

The Honorable Kenneth B. Yancey, Director
Department of Personnel and Training

You have asked whether the Fairfax County and the City of Alexandria Human Rights Commissions have any jurisdiction to investigate employment discrimination complaints and enforce remedies against a State agency.

Authority of Localities

It is a well established rule of common law that the sovereign is not bound by any statute unless it is in express terms made to extend to the sovereign. This common law rule is applicable to the Commonwealth. See Opinion to the Honorable William F. Parkerson, Jr., dated August 10, 1971, and found in Report of the Attorney General (1971-1972) at 103, 104. Thus, an agency of the State government is not subject to the requirements of a local ordinance which is not by its terms made applicable to the State. See Opinion to the Honorable Edgar F. Shannon, Jr., dated March 29, 1972, and found in Report of the Attorney General (1971-1972) at 106, 107.

Fairfax and Alexandria Human Rights Commissions

The Fairfax Human Rights Commission is established and empowered by Ch. 11 of the Fairfax County Code. The Commission has jurisdiction to investigate and attempt to resolve complaints of unlawful employment discrimination against various employers. In defining employers, however, the State is not specifically mentioned.1

Similarly, the City of Alexandria Human Rights Commission is established and empowered by Ch. 18A of the Code of the City of Alexandria. This Commission also has general jurisdiction with respect to complaints of unlawful employment discrimination. As with the Fairfax County Code, however, the State is not specifically mentioned in the definition of an employer.2

Accordingly, I am of the opinion that the Fairfax County and the City of Alexandria Human Rights Commissions have no authority or jurisdiction to investigate employment discrimination complaints against State agencies or to enforce decisions adverse to State agencies.

1See definition of "employer" and "person" in §§ 11-1-2(a)(5) and (10) of the Code of the County of Fairfax, Virginia (1976).

2See definition of "employer" and "person" in §§ 18A-3 of the Code of the City of Alexandria, Virginia, as revised.

INDUSTRIAL DEVELOPMENT. AUDIT. INDUSTRIAL DEVELOPMENT AUTHORITIES MUST ARRANGE FOR INDEPENDENT ANNUAL AUDITS.
March 28, 1979

The Honorable William J. McGhee
County Attorney for Montgomery County

You ask whether § 15.1-1377 of the Code of Virginia (1950), as amended, requires the Montgomery County Industrial Development Authority to have an independent audit, or whether the authority may rely upon the annual audit of the bank acting as trustee for the authority's projects. Section 15.1-1377 states that the board of directors of an industrial development authority "shall keep suitable records of all its financial transactions and shall arrange to have the same audited annually."

For the reasons discussed below, I am of the opinion that the authority must arrange for an independent audit rather than rely on the bank's audit. The public accountant who examines the bank's account may not be held liable to the authority, with whom he has no contractual relation, for ordinary negligence in conducting the audit and issuing his report, whereas he would be liable if the authority had hired him. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

In addition, § 15.1-1377 does not require that the annual audit be conducted at any particular time of the year, but § 2.1-164 requires an authority to file a copy of a report of audit covering its financial transactions for the past fiscal year with the Auditor of Public Accounts. The report of audit must be filed within three months after the end of an authority's fiscal year, and the auditor has no discretion to vary the filing date. See Report of the Attorney General (1968-1969) at 15. Since the authority cannot require the bank to arrange for the production of an audit report to coincide with the end of the authority's fiscal year, a considerable period of time may pass between production of the bank audit report and the date the authority must report to the auditor, by which time the bank audit could be obsolete, and thus not indicative of the correct condition of the audited account. In order to avoid this difficulty, the authority must be able to assure the production of an audit report at the appropriate time, and in order to do so it must have control over the auditor.

Moreover, an audit of the authority's financial transactions is not limited to an examination of account books, but necessarily extends to such items as verification of the existence of ownership of assets and liens against them and verification that the transactions have been properly approved and ratified. An audit of a bank would scrutinize both the operations and books of account of the bank, but not those of the authority, and since it must be assumed that the purposes of the audit under § 15.1-1377 include that of demonstrating the procedural regularity and fiscal integrity of the authority to potential investors in bonds issued under § 15.1-1378, it is important that the operations of the authority be examined. This can be accomplished only by the authority's procuring its own audit.
You ask whether under § 15.1-1377 of the Code of Virginia (1950), as amended, the directors of industrial development authorities may be compensated for their services in addition to being reimbursed for necessary expenses incurred in the performance of their duties. You ask whether per diem constitutes salary.

Section 15.1-1377 provides that "[t]he directors shall receive no salary but shall be reimbursed for necessary traveling and other expenses incurred in the performance of their duties." The word "salary" is generally defined as "a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered." See Home Beneficial Insurance Company v. Unemployment Compensation Commission of Virginia and John W. Prins, 181 Va. 811, 27 S.E.2d 159 (1943). The term "per diem" is defined in Webster's New Collegiate Dictionary (1974) as "a daily fee" or "based on use or service by the day." Thus, per diem falls within the definition of salary. Accordingly, it is my opinion that the directors of industrial development authorities may not be compensated for their services, whether that compensation is per diem or any other payment based on time spent conducting authority business.

It should be noted that § 15.1-1377 was amended by Ch. 35 [1979] Acts of Assembly to provide that, effective July 1, 1979, directors may be compensated an amount up to fifty dollars per meeting.

INDUSTRIAL DEVELOPMENT. DECISION THAT ACTIVITY IS COMMERCIAL ENTERPRISE RESTS WITH LOCAL INDUSTRIAL DEVELOPMENT AUTHORITY.

You ask whether a four-story building, the first floor of which is rented to small shop owners, the second and third floors of which are office rental space and the fourth floor of which is leased to a law firm, partners in which are developers of the project, would be encompassed under the term "commercial enterprise" as set out in § 15.1-1375 of the Code of Virginia (1950), as amended. This section is a part of the "Industrial Development and Revenue Bond Act," which allows industrial development authorities to engage in projects designed to encourage "commercial enterprises" to locate or remain in Virginia.

Section 15.1-1374(j) includes within the definition of "enterprise" certain named activities and "such other businesses as will be in the furtherance of the public purposes of this chapter."

The test of whether the building is a commercial enterprise is whether the activities to be housed in it fall within the named categories of "enterprise" in § 15.1-1374(j) or the category of "such other businesses as
will be in the furtherance of the purposes of this chapter." The indicia of the "public purposes" of the chapter are the elements listed in § 15.1-1375. See Industrial Development Authority of the City of Richmond, Virginia v. LaFrance Cleaners and Laundry Corporation, 216 Va. 277, 217 S.E.2d 879 (1975). Those purposes are defined in § 15.1-1375 as being the "increase of the commerce of the people of the Commonwealth,..." or "the promotion of their safety, health, welfare, convenience or prosperity." The ultimate decision as to whether the named activities in your letter of September 1, 1978, constitute "commercial enterprises" thus rests with the authority, and depends upon whether the facts and circumstances which the authority finds to exist at the time of the decision support a finding that those activities will further the purposes of the Act.

INDUSTRIAL DEVELOPMENT. ELIGIBILITY FOR ASSISTANCE. INDUSTRIAL DEVELOPMENT AUTHORITY MAY ASSIST IN BUILDING FACILITIES FOR STATE-OPERATED MENTAL HEALTH CLINIC.

December 14, 1978

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

You ask whether the Rockbridge Industrial Development Authority may grant a loan to the Rockbridge Mental Health Advisory Board, Inc. for the purpose of building facilities for the Rockbridge-Buena Vista Mental Health Clinic, a State clinic operated by the Department of Mental Health and Mental Retardation. You state that the clinic provides out-patient services for the Rockbridge County area in the field of mental health, provides special services and programs for the elderly, and employs psychiatrists, psychologists and social workers for this purpose. You state that the clinic has a certificate of need as a "medical care facility" under § 32-211.5(6) of the Code of Virginia (1950), as amended.

The Rockbridge Industrial Development Authority was created pursuant to the provisions of the Industrial Development and Revenue Bond Act, §§ 15.1-1373 through 15.1-1399. Section 15.1-1375 states that it is the intent of the legislature and the policy of the Commonwealth:

"It shall be the intent of this chapter...
facilities for the residence or care of the aged in order to provide modern and efficient medical services to the inhabitants of the Commonwealth and care of the aged of the Commonwealth...."

Section 15.1-1374(d) defines the "facilities" which may be financed by industrial development authorities, to include any and all medical facilities and facilities for the residence or care of the aged, and states that any facility may consist of or include any or all buildings, improvements, additions, extensions, replacements, machinery or equipment, and may be constructed or installed on lands owned by the industrial development authority or others.

A clinic such as the one that you describe is included within the definition of "facilities" in § 15.1-1374(d) and would provide the services and care referred to by § 15.1-1375. It is therefore my opinion that the authority may grant a loan to the board for the purpose of building clinic facilities.

INSURANCE. LOCALITIES MAY NOT INSURE EMPLOYEES OF PLANNING DISTRICT COMMISSIONS UNDER § 15.1-506.1.

January 23, 1979

The Honorable O. Gene Dishner, Director
Department of Housing and Community Development

You have asked whether a participating local government may provide liability coverage for officers and employees of a planning district commission, and whether local governments may assume liability for acts of planning district commission employees.

Coverage Under Policy of Member Locality

Section 15.1-506.1 of the Code of Virginia (1950), as amended, provides that the board of supervisors of any county and the governing body of any political or governmental subdivision may provide liability insurance, or provide self-insurance, "for certain or all of its officers and employees to cover the costs and expenses incident to liability...arising from the conduct of its officials and employees in the discharge of their duties."

The commission, under § 15.1-1404, is "a public body corporate and politic." Accordingly, employees of a regional planning commission are not employees of the governing bodies of the member localities (with the exception of commission members who are full-time salaried employees of the localities). Thus, employees of a commission may not be insured as employees of the local governing bodies under § 15.1-506.1. See Report of the Attorney General (1975-1976) at 303.

Assumption of Liability By Localities

Under the doctrine of sovereign immunity, counties are political subdivisions of the State, created by the sovereign power for the exercise of the functions of local government, and like the State, cannot be sued except in cases where such suits are allowed by statute. Mann v. County Board, 199
Va. 169, 98 S.E.2d 515 (1957). No statute allows such suits against counties. Thus, a county is without authority to enter into a contract which purports to accept liability for tort claims and authorize such suits. Cf. Report of the Attorney General (1976-1977) at 51.

In Virginia, a municipality such as the City of Winchester, which is part of your planning district, is not immune from suit in actions arising out of the performance of its proprietary functions. Taylor v. Newport News, 214 Va. 9, 197 S.E.2d 209 (1973). Thus a municipality's authority to enter into a contract which purports to accept liability for tort claims depends upon whether the functions to be carried out under the terms of the contract are governmental or proprietary. Planning of the development of the physical, social and economic elements of the planning district is a governmental function. Cf. Howlett v. South Norfolk, 193 Va. 564, 69 S.E.2d 346 (1952).

It is therefore my opinion that neither the counties nor the municipalities within a district may enter into a contract which purports to accept liability for tort claims, and that such a contract would therefore not relieve the commission's employees and officers of liability.

INTEREST, FINES AND COSTS IN CRIMINAL PROSECUTION. TREATED LIKE ANY OTHER MONEY JUDGMENT IN FAVOR OF COMMONWEALTH. PROPER TO CHARGE INTEREST.

August 4, 1978

The Honorable Charles E. King, Jr., Clerk
Circuit Court of Gloucester County

You have asked whether a prior Opinion of this Office to the Honorable Horace Adams, Clerk, Circuit Court of Prince Edward County, dated April 26, 1951, and found in Report of the Attorney General (1950-1951) at 82, holding that clerks are without statutory authority to charge interest on fines imposed and costs taxed in a criminal prosecution, has been superseded by the enactment of §§ 6.1-330.10 and 19.2-340 of the Code of Virginia (1950), as amended. It is my opinion that a judgment in a criminal prosecution imposing a fine and taxing costs against a convicted defendant is treated like any other money judgment in favor of the Commonwealth and it is proper to charge interest on such amounts from the date of entry of the judgment.

In 1951, when the Opinion to Mr. Adams was issued, § 8-223 of the Code provided that the imposition of interest on civil judgments rested within the discretion of the court or the jury but the application of that statute was limited to actions in tort or contract and suits in equity. At the same time, § 19-299 contained no express authority for interest to be imposed on fines or costs taxed in criminal judgments. It is on this basis that the Opinion was rendered.

In 1960, Title 19 was recodified and, § 19-299 became § 19.1-324; however, the recodification made no substantive change relevant to your question. In 1974, § 8-223 was amended to set the rate of interest applicable to civil judgments at eight per centum per annum, but the scope of that section continued to be limited to proceedings in tort, contract, and equity.

The 1975 General Assembly enacted § 6.1-330.10 and amended § 8-223 to set out the judgment rate of interest as a separate statutory provision. Removal
of this provision from Title 8, which applies only to civil remedies, to Title 6.1 cannot, by itself, be construed as requiring the application of the judgment rate of interest to criminal judgments. That same year the General Assembly recodified Title 19.1. Section 19.1-324 was modified substantially by its successor statute, present § 19.2-340. Under § 19.2-340, the fine imposed and costs are taxed as "a judgment in favor of the Commonwealth..." in the nature of "any other monetary judgment." Nevertheless, § 8-223 remained unchanged as to the limitation of its applicability to proceedings in tort, contract and equity. Therefore, the recodification in Title 19.2 merely clarified the status of criminal judgments for fines or costs for purposes of determining which collection remedies may be appropriate.

The recodification of Title 8 by the 1977 General Assembly repealed § 8-223 and enacted its successor provisions in § 8.01-382, effective October 1, 1977. A significant change accomplished in the recodification was the removal of the limitation relating to tort, contract and equity proceedings such that interest is now applicable to all civil judgments and decrees. Although Title 8.01 is limited to civil remedies and procedure, it is my opinion that the 1975 recodification in § 19.2-340 assigns to criminal judgments for fines imposed or costs taxed the character of a civil judgment in sufficient measure to make the provisions of § 8.01-382 applicable to such criminal judgments. This position is reinforced by the fact that at the same time the General Assembly introduced the language "any other monetary judgment..." it deleted the language of the antecedent § 19.1-324 imposing a twenty-year statute of limitations upon the collection of fines imposed or costs taxed. The clear implication of this deletion is that the money judgment in favor of the Commonwealth for fines or costs is subject to the same statutory limitations on civil judgments provided by § 8.01-251A, that is, twenty years.

Section 8.01-1 makes the recodification applicable to causes of action which arose prior to the effective date, October 1, 1977, except as to statutes of limitations then in effect. A further proviso of that section gives discretion to the court to apply the law of Title 8, where, in its opinion, the provisions of the recodification "(i) may materially change the substantive rights of a party (as distinguished from the procedural aspects of the remedy) or (ii) may cause the miscarriage of justice." Thus, absent any of these considerations, it is my opinion that, as to any outstanding criminal judgment for fines imposed or costs taxed entered on or after October 1, 1975, interest shall accrue at the rate of eight per centum per annum authorized by § 6.1-330.10 from October 1, 1977, or the date of entry of the judgment, whichever is later.

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1 Section 6.1-330.10. "The judgment rate of interest shall be eight per centum per annum."
Section 19.2-340. "When any statute prescribes a fine, unless it be otherwise expressly provided or would be inconsistent with the manifest intention of the General Assembly, it shall be to the Commonwealth and recoverable by presentment, indictment, information or warrant. 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."
INVESTMENTS. REAL ESTATE INVESTMENT TRUST FORMED UNDER FEDERAL LAW NOT EXEMPT FROM CODE PROVISIONS GOVERNING LICENSURE.

May 9, 1979

The Honorable Dudley J. Emick, Jr.
Member, Senate of Virginia

You have asked whether a real estate management company is exempt from licensing required of real estate salesmen.¹

Section 54-734 of the Code of Virginia (1950), as amended, provides for the exemption from licensing of:

"[A]ny corporation managing rental housing when the officers, directors, and members in the ownership corporation and the management corporation are the same and the management corporation manages no other property for other persons, partnerships, associations, or corporations."

You state in your letter that the management company in question does not manage any property other than Cinnamon Ridge Apartments in Roanoke, but that the officers, directors and members in the management company are not the same as those of the ownership company because the apartments are owned by a Real Estate Investment Trust (R.E.I.T.) and federal law prohibits the officers of these two entities from being the same.


³Section 8-223. "In any action whether on contract or for tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the interest shall commence. If a verdict be rendered which does not allow interest, the sum thereby found shall bear interest from its date, and judgment shall be entered accordingly. In any suit in equity, or in an action or motion founded on contract, when no jury is impaneled, decree or judgment may be rendered for interest on the principal sum recovered, until such decree or judgment be paid; and when there is a jury, which allows interest, the judgment shall, in like manner, be for such interest until payment."

⁴Section 19-299. "When any statute imposes a fine, unless it be otherwise expressly provided or would be inconsistent with the manifest intention of the General Assembly, it shall be to the Commonwealth and recoverable by presentment, indictment, or information. When a fine without corporal punishment is prescribed, the same may be recovered, if limited to an amount not exceeding twenty dollars, by warrant, and if not so limited, by action of debt or action on the case, or by motion. The proceedings shall be in the name of the Commonwealth. No action, suit, or proceeding of any nature, however, shall be brought or had for the recovery of a fine or costs due the Commonwealth or any political subdivision thereof, unless within twenty years from the date of the judgment imposing the fine."

⁵See Reviser's note to § 8.01-382.

⁶Effective date of § 8.01-382.

⁷Effective date of § 8.01-382.
This being the case, it is clear that § 54-734 does not exempt the company in question from the licensing requirements imposed upon salesmen.

You also have asked whether § 54-1.3 constitutes a basis for the exemption. The statute is of general language saying that regulation of professions is in the public interest. A general provision dealing with the regulation of professions and occupations must give way to a special statute governing the specific subject matter you are concerned with, here the management of rental properties. Lucerne Cream & Butter Co. v. Milk Commission, 182 Va. 490, 496, 29 S.E.2d 397, 399 (1944); Powers v. County School Board, 148 Va. 661, 667, 139 S.E. 262, 263 (1927). The General Assembly has determined that regulation of the management of rental properties is appropriate. Section 54-749 requires a license for rental management. Section 54-734 does not exclude the management company you describe from the requirements of § 54-749. The general language of § 54-1.3(a) cannot be seen as a limitation on the specific provisions of §§ 54-749 and 54-734.

Section 54-731 requires a license of anyone offering to rent real estate or negotiate leases.

JUDGES. RETIREMENT SYSTEM. DISTRICT COURT JUDGE SUBJECT TO MANDATORY RETIREMENT PROVISIONS OF § 51-167(A). NOT LIMITATION OR REDUCTION IN BENEFITS PRECLUDED BY § 16.1-69.13.

July 24, 1978

The Honorable Robert N. Baldwin
Executive Secretary
Supreme Court of Virginia

You ask whether a district court judge, who elected to become a member of the Judicial Retirement System after the reorganization of the Virginia court system in 1973, is subject to the mandatory retirement provisions of § 51-167(a) of the Code of Virginia (1950), as amended, or whether the imposition of a mandatory retirement age would result in a limitation or reduction in benefits precluded by § 16.1-69.13.

You state the facts as follows: A municipal court judge took office prior to the creation of the present district court system, although the city participated in the Virginia Supplemental Retirement System. The judge was over sixty years of age upon appointment and was thus not entitled to membership in the retirement system. In 1973 the present district court system was created, and all municipal court judges became district court judges. As a district court judge, the judge became eligible to participate in the Judicial Retirement System, which he joined on July 1, 1973.

Section 51-167(a) requires members of the Judicial Retirement System who attain the age of seventy to retire twenty days after the convening of the next regular session of the General Assembly. There is an exception for members who were judges prior to July 1, 1970, who may serve as long as they would have been permitted to under the law in effect immediately prior to July 1, 1970. A previous opinion held that there was no State law applicable to the retirement of municipal court judges prior to July 1, 1970, and thus
judges who were municipal court judges prior to that date do not fall within the exception to the mandatory retirement age of seventy in § 51-167(a). See Opinion to the Honorable James G. Martin, IV, Judge, Norfolk Juvenile and Domestic Relations District Court, dated February 7, 1978, a copy of which is attached.

In my opinion, § 16.1-69.13 does not require the modification of this conclusion. That section provides that:

"Nothing in this chapter [Ch. 4.1 of Title 16.1, which established the present district court system] shall be construed to impose any new limitation on or reduction in the compensation or benefits of any judge in office on July one, nineteen hundred seventy-three, for the duration of his term of office, and for each additional consecutive term thereafter, but not longer than July one, nineteen hundred eighty."

Even if the establishment of a mandatory retirement age of seventy is a limitation on or reduction in the compensation or benefits for purposes of § 16.1-69.13, there was no mandatory retirement age imposed for judges in office prior to July 1, 1973, incident to the reorganization of the court system under Ch. 4.1 of Title 16.1. Rather, judges in office prior to July 1, 1973, who were not members of the State Judicial Retirement System, were given the opportunity to join the system by filing a written notice of such election with the board of trustees. See § 51-176.1. By becoming members of the Judicial Retirement System, those judges consented to be bound by the laws governing the system, including the imposition of a mandatory retirement age of seventy in accordance with § 51-167(a). See §§ 51-111.13 and 51-160.

In my opinion, although the organization of the present district court system under Ch. 4.1 of Title 16.1 enabled the former municipal court judge to participate in the Judicial Retirement System as of July 1, 1973, the imposition of a mandatory retirement age resulted from the judge's election to participate in the retirement system under § 51-176.1, rather than from the organization of the district court system itself. Accordingly, § 16.1-69.13 does not affect my conclusion that the judge is required to retire twenty days after the convening of the next regular session of the General Assembly after he attains the age of seventy under § 51-167(a).
Section 51-179 prohibits any person "who has served more than a single term as a full-time judge of a court not of record of the Commonwealth..." and who is retired and receiving retirement benefits under the Judiciary Retirement System from appearing as counsel in any court of the Commonwealth.\(^1\) Full-time general district court judges are elected or appointed for a term of six years.\(^2\)

In my opinion, if a judge serves less than six years as a full-time general district court judge, he will not have served more than a single term within the meaning of § 51-179. However, if a judge serves full-time for six years plus one day into a new term, he has served more than a single term and comes within the scope of § 51-179. Part-time service does not count in my opinion. Thus the date of designation as a full-time judge occurs when the counting of a term begins.

2. You next ask whether an appointment of a district court judge made by the circuit court judges during the recess of the General Assembly pursuant to § 16.1-69.9:2 is a single term within the meaning of § 51-179.

I do not believe that the period served by a pro tempore appointee constitutes a full single term within the meaning of § 51-179. Therefore, a pro tempore judge who has not served a full six years is not prohibited from making court appearances as proscribed by § 51-179.

3. You last ask whether a retired judge's right to receive retirement benefits would be affected if members of his firm make court appearances in the Commonwealth.

Inasmuch as § 51-179 only proscribes such court appearances for retired judges who are receiving retirement benefits and says nothing about members of their firm, it is my opinion that court appearances of the retired judge's partners or associates are permissible.

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\(^1\)Section 51-179 provides in part:

"No former justice or judge of a court of record of the Commonwealth and no person who has served more than a single term as a full-time judge of a court not of record of the Commonwealth, who is retired and receiving retirement benefits under the provisions of chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia, shall appear as counsel in any case in any court of the Commonwealth."


The Honorable Harold H. Purcell, Judge
Sixteenth Judicial Circuit

You ask several questions regarding the permissible scope of professional activities of a retired judge. I shall answer your questions in order.
1. You first ask what constitutes a court appearance in view of the prohibition against court appearances by a retired judge.

Section 51-179 of the Code of Virginia (1950), as amended, provides:

"No former justice or judge of a court of record of the Commonwealth and no person who has served more than a single term as a full-time judge of a court not of record of the Commonwealth, who is retired and receiving retirement benefits under the provisions of chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia, shall appear as counsel in any case in any court of the Commonwealth..."

This statute must be read in conjunction with § 51-178(a),\(^1\) which provides that retired judges of courts of record may be recalled to judicial service by the Chief Justice of the Supreme Court. See also Canon 8C, Canons of Judicial Conduct for the State of Virginia. Service upon recall is mandatory for retired judges who have not attained the age of 70 and discretionary thereafter. Section 51-178(d).\(^2\) Retired judges of courts not of record may also be recalled. Section 51-178(b).\(^3\) The purpose of § 51-179, then, is that:

"Judges who receive retirement benefits under the new System and are, therefore, former full-time judges should be proscribed from practicing law which requires appearances in the courts of the Commonwealth. So long as a substantial and fair retirement benefit is provided for the judiciary, a condition of the retirement should be an agreement not to practice law before any court of the Commonwealth while beneficiary of the retirement System. The prestige of judicial office remains with a retired judge who may be still acting as a judge under the proposed obligatory recall provision. Appearances in court should therefore be prohibited. This recommendation does not proscribe such appearances by former part-time judges nor does it proscribe other types of law practice, law teaching and activities...." Report of the Virginia Advisory Legislative Council on the Judicial Retirement System (1970) at 910.

All judges of courts of record and all judges of courts not of record, who have served more than one term, and who retire as members of the Judicial Retirement System and receive retirement benefits pursuant to the provisions of Title 51, Ch. 7, are prohibited from appearing as counsel in any Virginia courts.

The statute means that a judge cannot undertake to represent the interest of another in court with or without compensation.\(^4\) Hence a judge may not sign a pleading on behalf of another. It is my opinion, therefore, that the statute prohibits a judge from appearing personally or in the form of signed pleadings.

2. Is a retired judge who is practicing law prohibited from acting as a master commissioner in a chancery case?

This Office has ruled that a retired judge of a court not of record may be appointed as a commissioner in chancery. See Report of the Attorney General (1974-1975) at 219. Likewise, the same ruling holds for a retired judge of a court of record.
A commissioner in chancery is a quasi-judicial officer who is appointed by the court for the convenient dispatch of the court's business. Thus, a retired judge who has been appointed a commissioner in chancery is not one appearing as counsel in a court of the Commonwealth, and would not be in violation of § 51-179.

3. Is a retired judge prohibited from managing a political campaign, or running for public office, or from appearing before the General Assembly as a lobbyist?

Article VI, § 11, of the Constitution of Virginia (1971), codified in § 17-3.1 provides:

"No justice or judge of a court of record shall, during his continuance in office, engage in the practice of law within or without the Commonwealth, or seek or accept any nonjudicial elective office, or hold any other office of public trust, or engage in any other incompatible activity."

This Office held in 1972 that prohibitions contained in the Constitution and Code are applicable only during continuance in office. See Report of the Attorney General (1971-1972) at 225. However, on July 1, 1973, the Canons of Judicial Conduct became effective. With regard to the application of the canons to retired judges, Canon 8C states:

"The provisions of § 51-179 of the Code of Virginia and of those portions of this Code applicable to part-time judges shall apply to all retired judges eligible for recall to judicial service."

Canon 8A explicitly sets forth canons with which a part-time judge need not comply. Neither Canon 7 nor Canon 4 is listed as an exemption from compliance, as are Canons 5C(2), D, E, F, G and Canon 6C. Canon 78 governs political conduct and prohibits a judge from holding office or accepting leadership in a political organization. Furthermore, Canon 7 states that a judge must resign his office when he becomes a candidate in a general election for a public office. In your case, you could not resign from your present status as a retired judge. Therefore, you would not be eligible to run for a public office as long as you are eligible to be recalled. The position of a retired judge is a public office. A judge who engages in misconduct may be removed from that office, and his retirement benefits may be denied pursuant to Art. VI, § 10, of the Constitution of Virginia and § 2.1-37.2.10

Canon 4B11 gives us the activities in which a judge may engage. According to this canon, a judge may appear at a public hearing on matters concerning the administration of justice or proposed legislation. He may lobby on matters seeking to improve the law or the legal system. Furthermore, Canon 4 must be read together with Canon 7A(3) which prohibits a judge from engaging in political activity except in behalf of measures to improve the law, the legal system or the administration of justice. Since Canons 4 and 7 are applicable to part-time judges they also apply to retired judges in accordance with Canon 8C.

Therefore, it is my opinion that a retired judge who runs for public office, manages a political campaign, or lobbies for activities other than as permitted in Canons 4 and 7, is acting improperly.
4. Is a retired judge prohibited from having his name printed on legal stationery as a partner in a law firm?

Disciplinary Rules 2-102(B) and (C) do not prohibit a retired judge from entering into a partnership as long as he is actively and regularly practicing law as a member of the firm. The letterhead of a lawyer, partnership or law firm may include a retired judge. However, the letterhead must conform with DR 2-102A4. None of the above rules prohibits a retired judge from entering a partnership or including his name on the stationery as long as the other stipulations of the disciplinary rules are met.

5. Is a retired judge prohibited from examining titles and giving legal opinions as to those titles and can he appear before the ABC Board or other boards?

A judge is not prohibited from practicing law once he is retired. He merely may not represent a client in a case which warrants a State court appearance. In my opinion, therefore, a retired judge may examine titles, certify them, and also may represent clients in administrative hearings.

6. What can a retired judge who is practicing law do in the practice of law?

A retired judge may perform the services as defined in the Rules of Court. However, he cannot make a court appearance as proscribed by § 51-179.

7. Can a judge resign, practice law for a few years, and retire at a later date?

A judge who resigns from office or fails to be reappointed may withdraw from membership in the Judicial Retirement System pursuant to § 51-172. However, § 51-167(d) affords a method whereby he may resign or retire and elect not to draw his retirement benefit for some period of time. In order for retirement benefits to vest, a judge must have at least five years of service before he retires.

Since the prohibition on making court appearances is applicable to judges who are receiving retirement benefits, a judge who deferred his retirement benefits would be able to make court appearances during the period of deferral. Since the obligation to serve if recalled is conditioned upon receiving retirement benefits a judge who deferred retirement benefits would be freed of this obligation. Salary and length of service are frozen at the time he resigns. Therefore, a resigning judge should be mindful of the reduction factor in computing the early retirement salary.

In my opinion, since express statutory authority is given for a deferred retirement, a judge may resign, practice law and retire at a later date.

1Section 51-178(a) provides:
"The Chief Justice of the Supreme Court may call upon and authorize any justice or judge of a court of record who is retired under the provisions of chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia either to hear a specific case or cases pursuant to the provisions of § 17-7, such designation to continue in full force and effect for the duration of the case"
or cases, or to perform for a period not to exceed ninety days at any one time, such judicial duties in any court of record as the Chief Justice shall deem in the public interest for the expeditious disposition of the business of the courts of record."

2Section 51-178(d) provides:

"It shall be the obligation of any retired justice, judge or commissioner who is recalled to temporary service under subsections (a), (b) or (c) hereof and who has not attained age seventy to accept such recall and perform the duties assigned, and it shall be within the discretion of any such justice, judge or commissioner who has attained age seventy to accept such recall."

3Section 51-178(b) provides:

"The Chief Justice of the Supreme Court may call upon and authorize any judge of a district court who is retired under the provisions of chapter 7 (§51-160 et seq.) of Title 51 of the Code of Virginia to perform, for a period not to exceed ninety days at any one time, such judicial duties in any district court as the Chief Justice of the Supreme Court shall deem in the public interest for the expeditious disposition of the business of such courts."

4See Rules of Court, 215 Va. 859, 861 for the definition of practicing law.

5Section 8.01-607; Mountain Lake Land Co. v. Blair, 109 Va. 147, 63 S.E. 751 (1909).


7Canon 8A provides:

"A part-time judge of a court not of record is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to the practice of law or some other profession or occupation and whose compensation for that reason is less than that of a full-time judge.

A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C:

(2) shall not practice law in the court on which he serves;

(3) shall not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto."

8Canon 7 provides:

"(1) A judge shall not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office; or

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.

(2) A judge shall resign his office when he becomes a candidate either in a party primary or in a general election for a public office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(3) A judge shall not engage in any other political activity except in behalf of measures to improve the law, the legal system, or the administration of justice."


10Ibid.
Canon 4B provides:
"He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice, or proposed legislation."

DR 2-102 of the Rules of Court provide:
"(A) 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 of 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.

(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 or 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 sued 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, or 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."

Section 51-172 provides:
(a) If a member has ceased to be a judge otherwise than by death or by retirement under the provisions of this chapter, he shall be paid, on demand or as soon thereafter as practicable, the amount of his accumulated contributions reduced by the amount of any retirement allowances previously received by him under any of the provisions of this chapter.

(b) Notwithstanding any provision in subsection (a) above to the contrary, a member who retires under the provisions of subsection (b) of § 51-169 shall be refunded the amount of his accumulated contributions."

Section 51-167(d) provides:
"Any member terminating service on or after July one, nineteen hundred seventy, after five or more years of creditable service, may retire under the provisions of subsection (b) or (c) above, provided that he shall not have withdrawn his accumulated contributions prior to the effective date of his retirement, and except that any requirements as to the member being in service shall not apply; provided further, however, that no 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; such certification may be appealed to the Board, and its decision shall be final."

JUDGES. RETIREMENT SYSTEM. RETIREMENT PRIOR TO THE EXPIRATION OF PRESENT FULL SIX-YEAR TERM DOES NOT CONSTITUTE SINGLE TERM.

May 29, 1979

The Honorable Harold B. Singleton, Judge
Juvenile and Domestic Relations District Court
Twenty-Fourth Judicial District

You ask whether § 51-179 of the Code of Virginia (1950), as amended, would prohibit you from appearing as counsel in courts in the Commonwealth, should you decide to retire in 1980.

You have stated that from August 1964 until September 1967 you served as a county judge. Then you served as a judge for the Fifth Regional Juvenile and Domestic Relations Court until 1973. From July 1, 1973, until January 31, 1974, you served a transition period as a full-time judge for the Juvenile and Domestic Relations District Court. Subsequently, you were elected by the General Assembly and your present term began February 1, 1974.

On July 1, 1973, a new statute became effective which established a uniform system of district courts.1 Regional Juvenile and Domestic Relations Courts became Juvenile and Domestic Relations District Courts.2 As of that date, you were serving as a full-time judge of this newly established court system.

Should you decide to retire on January 31, 1980, you will have served at least a single term as a full-time judge.

This time computed with your service on and after July 1, 1973, up to the effective date of your 1974 appointment constitutes more than a single term. Should you retire before the expiration of your present term, you will not have served a single term. In that instance, you would be eligible for retirement benefits with the reduction for length of service and would not be prohibited from court appearances.

You may elect to defer your retirement benefit. Section 51-167(d) affords a method for deferring retirement benefits thereby allowing court appearances during the period of deferral.3

Therefore in my opinion your length of service from July 1, 1973, until January 31, 1974, added to your length of service as of January 31, 1980, place you within the scope of § 51-179 and would prohibit you from appearing as counsel in courts of the Commonwealth.

1Chapter 780 [1972] Acts of Assembly provides in part:
"An Act to amend the Code of Virginia by adding in Title 16.1 a new Chapter 1.1 consisting of §§ 16.1-1.1 through 16.1-1.52 to provide for the
establishment of a system of district courts at the court not of record level and for the judiciary, administration and supervision, personnel and financing thereof."

2Section 16.1-69.5(f) provides: "'Juvenile and domestic relations courts' and 'regional juvenile and domestic relations courts' shall be deemed to refer to juvenile and domestic relations district courts; and...."

3See Opinion to the Honorable Harold H. Purcell, Judge, Sixteenth Judicial Circuit, dated December 27, 1978, a copy of which is enclosed.

JUDGES. RETIREMENT SYSTEM. SERVICE FROM JULY 1, 1973, UNTIL JULY 31, 1974, IS CONSIDERED FOR COMPUTING JUDICIAL RETIREMENT. TIME SERVED AS COUNTY JUDGE PRIOR TO JULY 1, 1973, IS NOT CONSIDERED IN COMPUTING SINGLE TERM.

May 24, 1979

The Honorable Thomas A. Williams, Jr., Judge
Richmond General District Court
Thirteenth Judicial District

You ask two questions regarding the effect of § 51-179 upon your retirement.

You have stated that prior to July 1, 1973, you were a full-time judge of the Traffic Court for the City of Richmond. Then you were designated a full-time General District Court Judge for the period July 1, 1973, to February 1, 1974. On January 31, 1974, you were commissioned to a term of six years commencing on February 1, 1974.

You first ask whether you could be prohibited from making court appearances if you serve out your full-term and retire when that term expires.

Should you decide to serve out your present six-year term, you will have served six years plus one day (counting your other full-time service beginning as of July 1, 1973) as a full-time judge and you would come within the scope of § 51-179 since you would have served more than a single term. Therefore if you retire upon the expiration of your six-year term and receive retirement benefits, you are prohibited from making appearances in the courts of the Commonwealth. However, § 51-167(d) affords a method whereby you may retire and elect not to immediately withdraw your retirement benefit. In that instance you would not be prohibited from making such appearances.

You next ask whether court appearances would be prohibited if you retired prior to July 1, 1979, thereby abbreviating your present single term of six years.

If you retire prior to the expiration of your present full six-year term, you will not have served a single term as a full-time judge for this term.

In my opinion you may retire, receive retirement benefits and make court appearances providing you retire before your present term runs its full course.
1See Opinion to the Honorable Harold H. Purcell, Judge, Sixteenth Judicial Circuit, dated December 27, 1978, a copy is herein enclosed.

JUDGES. SPECIAL JUSTICES APPOINTED UNDER § 37.1-88 POSSESS ONLY THOSE POWERS CONFERRED BY TITLE 37.1.

July 5, 1978

The Honorable Joseph R. Zepkin, Judge
Williamsburg General District Court

You have asked whether special justices, appointed under § 37.1-88 of the Code of Virginia (1950), as amended, have jurisdiction to commit mentally ill minors to mental health facilities.

The answer to your inquiry turns on whether the minor in question is within the purview of the Juvenile and Domestic Relations District Court Law. Judges of the juvenile and domestic relations district courts have exclusive original jurisdiction over the commitment of minors, if those minors are otherwise within the purview of that Law. See § 16.1-241B. This class of minors includes those children before the court on petition in accordance with § 16.1-241 and those children under dispositional orders entered by the court. Where such a child is also found to be mentally ill, that court has exclusive original jurisdiction to commit him to a mental health facility. The procedures to be followed in such commitments are those established in Title 37.1. See Report of the Attorney General (1976-1977) at 127. Title 37.1 does not empower any juvenile and domestic relations district court judge to commit any minor not within the purview of the above-referenced Law. See Report of the Attorney General (1973-1974) at 214.

The special justices to which you refer are creatures of Title 37.1, and they possess only those powers conferred upon a judge by that title. Those powers include the power to commit any person, including a minor, to a mental hospital for treatment, except those minors who are within the exclusive original jurisdiction of the juvenile and domestic relations district court because they are within the purview of that Law.

JUDGMENTS. AFTER TWO YEARS CLERK OF CIRCUIT COURT HAS MANDATORY DUTY UNDER § 16.1-116 TO ISSUE ABSTRACT OF JUDGMENT.

July 31, 1978

The Honorable J. R. Zepkin, Judge
Ninth Judicial District

You have asked a question dealing with the issuance of abstracts of judgments. You noted that in an Opinion to you, dated February 14, 1978, I concluded that it is mandatory in some instances for the clerk of a circuit court to issue a writ of fieri facias on a judgment rendered by a district court. You ask whether it is also mandatory for the clerk of the circuit court to issue an abstract of judgment under the same circumstances.
Section 16.1-115 of the Code of Virginia (1950), as amended, provides, with certain specific exceptions, that all papers connected with any civil action in the 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.)

In my Opinion to you dated February 14, 1978, I construed the word "may" in § 16.1-116 as requiring that circuit court clerks issue writs of fieri facias upon request when more than two years have passed since the judgment was rendered by the district court, because to construe the clerk's duty as other than mandatory would defeat the manifest purpose of the legislature in enacting § 16.1-116: to enable judgment creditors to obtain executions upon and abstracts of judgments. Because the manifest purpose of the legislature in enacting § 16.1-116 was to enable judgment creditors to obtain abstracts of judgments, as well as executions, it is my opinion that to construe "may" with regard to abstracts of judgments as other than mandatory would defeat the purpose of the legislature. I am of the opinion, therefore, that the clerk of the circuit court has a mandatory duty to issue an abstract of judgment more than two years after the judgment has been rendered by a district court, if the papers have been filed with the circuit court for preservation and the abstract has been requested.

In addition, your request letter pointed out that the Clerk of the Circuit Court of Williamsburg-James City County has questioned how she can issue an abstract of a judgment which was not rendered in her court. In an Opinion to the Honorable Carey C. Hall, Clerk of the Circuit Court of King and Queen County, dated March 12, 1964, and found in Report of the Attorney General (1963-1964) at 35, it was concluded that § 16.1-116 authorizes the clerk of a court of record to issue an abstract upon a judgment of a court not of record.

Accordingly, I am of the opinion that § 16.1-116 authorizes the clerk of a circuit court to issue an abstract of a judgment rendered by a district court of the papers have been filed with the circuit court for preservation and the judgment has been entered in the judgment lien docket book of such court.
You have asked whether the court, in a suit on an open account, may enter judgment for the plaintiff without taking evidence as to the nature or validity of the plaintiff's claim where the defendant has failed to appear or file any pleadings in response to the plaintiff's civil warrant or motion for judgment.

Section 8.01-281 of the Code of Virginia (1950), as amended, provides that a plaintiff is entitled to judgment even if the defendant makes an appearance in response to the warrant or notice of motion for judgment, unless the defendant in addition to appearing, pleads in defense under oath. The court, in L. E. Mumford Banking Company v. Farmers and Merchants Bank of Kilmarnock, 116 Va. 449, 82 S.E. 112 (1914), stated that "[t]he purpose of the statute, as this court has repeatedly said, is to prevent delay to the plaintiff caused by continuance upon dilatory pleas when no real defense exists, and to require the defendant to make oath to his defense before his plea will be received."

It is my opinion that the filing of an affidavit for an attached account as is provided by § 8.01-28 is not required in those situations where the defendant has failed to appear in any manner. Of course, the plaintiff must comply with the notice provisions to § 8.01-296(2)(b), where service of process has been posted.

Section 8.01-28 provides that: "In any action at law on a contract, express or implied, for the payment of money, if the plaintiff file with his motion for judgment or civil warrant an affidavit made by himself or his agent, stating therein to the best of the affiant's belief the amount of the plaintiffs' claim, that such amount is justly due, and the time from which plaintiff claims interest, and if a copy of such affidavit together with a copy of any account filed with the motion for judgment or warrant shall have been served on the defendant at the time a copy of the motion for judgment or warrant is so served, he shall be entitled to a judgment on such affidavit and statement of account without further evidence unless the defendant appears and pleads under oath denying that the plaintiff is entitled to recover from the defendant on such claim, in which event plaintiff shall, on motion, be granted a continuance...."

JURISDICTION. DISTRICT COURTS. HAVE JURISDICTION OVER § 37.1-110 PETITION EVEN WHEN THERE IS NO WRITTEN AGREEMENT TO PAY.

December 8, 1978

The Honorable Francis M. Hoge, Chief Judge
Smyth County General District Court
Twenty-Eighth Judicial District
You have asked a number of questions concerning petitions by the Department of Mental Health and Mental Retardation to compel payment of patient expenses which I shall answer in order.

General Jurisdictional Questions

1. You have asked whether a general district court has jurisdiction by reason of § 37.1-110 to render judgment in favor of the Commonwealth when there has been no agreement executed by anyone to pay the expenses of the patient.

Section 37.1-110 was amended in the 1978 Session of the General Assembly by substituting the phrase "the appropriate court" for "courts of record" and "circuit courts." Because the venue provisions of § 37.1-110 were adopted prior to the 1978 amendment, it is my opinion that the change to "the appropriate court" was intended by the legislature to allow the Department to petition general district courts in appropriate cases.

Section 37.1-105 creates an unequivocal, statutory obligation to pay the expenses of the patient's care, treatment and maintenance in a State hospital. Section 37.1-110 places this statutory obligation first upon the patient or his guardian, committee, or trustee and secondarily upon the person or persons legally liable for the support of such patient. Furthermore, § 37.1-109 recognizes the statutory nature of the liability by authorizing the Department of Mental Health and Mental Retardation not only to contract with such persons, but also to assess such persons for the expenses incurred.

Since the jurisdiction of a general district court is not otherwise limited to executed agreements and none is required by these sections, a general district court does have jurisdiction over § 37.1-110 petitions, even when no one has executed an agreement to pay the expenses of the patient.

2. You have asked whether a general district court has jurisdiction to grant relief on a debt warrant or motion for judgment.

Section 37.1-110 states simply that "[T]he Department shall petition the appropriate court...for an order to compel payment of such expenses by persons liable therefor ...." (Emphasis added.) This statute does not set forth the nature of the petition nor its form. I have not found any case decided by the Virginia Supreme Court which defines the term "petition." From other statutory uses of the term "petition," it appears that this term connotes a written application to a court or judge requesting judicial action and stating the factual basis which justifies the action requested. As a review of the other statutory uses of the term "petition" will show, the relief requested is generally equitable or quasi-equitable in nature.

Though § 37.1-105 creates an unequivocal, statutory liability, § 37.1-112 authorizes the court to balance this obligation against the present and future needs of the persons liable, and their dependents, so as not to create, by its order, a financial hardship for them. Section 37.1-113 authorizes the court to modify its order upon application at any time. In Commonwealth v. Sharrett, 218 Va. 684 (1978), it was held that modification of the court's order was authorized not only prospectively but also retrospectively. Such judicial authority is equitable in nature and is foreign to a case brought on by a debt warrant or motion for judgment.
It is, therefore, my opinion that the jurisdiction of a general district court is not properly invoked under § 37.1-110 by a debt warrant or motion for judgment. However, if the body of such pleadings is otherwise sufficient under § 37.1-110, the form of the pleading may be corrected without dismissal. See § 16.1-93.

3. You have asked, if the Department proceeds by petition in the general district court under § 37.1-110, whether there are any limitations on this jurisdiction.

A general district court has "[e]xclusive original jurisdiction of any claim to...any debt...recoverable by...suit in equity, when the amount of such claim does not exceed one thousand dollars...and concurrent jurisdiction..." with the circuit courts on amount from one thousand dollars to five thousand dollars. See § 16.1-77. As long as a petition by the Department under § 37.1-110 neither exceeds the jurisdictional limit of a general district court nor is otherwise inappropriate, it has jurisdiction because the petition is "a claim to a debt" within the jurisdiction of a general district court and "recoverable by a suit in equity."

Other than the $5,000 jurisdictional limitation, my research has disclosed only one other limitation on a general district court's jurisdiction to consider a petition under § 37.1-110. Section 37.1-109 requires that all contracts with fiduciaries of patients adjudged legally incompetent and all assessments made upon such patients or their fiduciaries shall be subject to the approval of any court of record having jurisdiction over the patient's estate. Although § 37.1-110 permits suit to be brought in the appropriate court having jurisdiction over the estate of the incompetent, or for the county or city of which he is a legal resident, or from which he was admitted to a State hospital, it is my opinion that only the court of record having jurisdiction over the incompetent's estate is the appropriate court to compel payment based upon an assessment or contract approved pursuant to § 37.1-109.

Jurisdictional Objections

In addition to the above questions, you have made three statements regarding the general district court's jurisdiction over petitions under § 37.1-110.

1. You have stated that the general district court has no jurisdiction over the estate of a patient which is primarily liable. This statement is accurate insofar as it applies to patients who have died (see §§ 64.1-75 and 64.1-118) or have been adjudicated incompetent (see § 37.1-109). In any such case, the circuit court has exclusive jurisdiction over the patient's estates. If a present or former patient is alive and has not been adjudged incompetent, however, he is presumed competent and may sue or be sued like any other person (see § 71.1-87) except that the court may wish to appoint a guardian ad litem (see § 8.01-9). In such a case, the general district court has jurisdiction over the patient's assets, subject only to the limitations discussed above.

2. You have also stated that entry of an order to compel payment under § 37.1-110 could involve the forced sale of real estate by a fiduciary or other persons made liable and the general district court has no such power of which you are aware.
The general district courts do not have the power to force a fiduciary to sell real estate for the reasons stated in response to your third question and first objection. However, this reasoning does not apply to other legally liable persons. Section 37.1-115 provides that "[a]ny order or judgment rendered by the court hereunder shall have the same force and effect and shall be enforceable in the same manner and form as any judgment recovered in favor of the Commonwealth." Reading §§ 37.1-110 and 37.1-115 together, it is my opinion that the order to compel payment may be docketed as a judgment of a general district court. As such, it is enforceable like any other judgment in favor of the Commonwealth granted by a general district court. Pursuant to § 8.01-201, a writ of fieri facias upon a judgment against any person indebted or liable to the Commonwealth is sufficient to take and sell real estate. Thus, general district courts may force the sale of real estate owned by legally liable persons who are not fiduciaries.

3. You have finally stated that the application of § 37.1-110 requires evidence of ability to pay; determination of the order in which the patient, his estate and others are liable; institution of proceedings upon petition; and entry of an order or orders to compel the patient, a fiduciary, or others to pay such expenses; all of which lie within the exclusive jurisdiction of the appropriate circuit court.

The actions of the court outlined in this statement generally involve equitable determinations. However, as I stated in response to your third question, general district courts do have limited equity jurisdiction. Additionally, § 16.1-93 requires that every action or other proceeding in a court not of record be tried according to the principles of law and equity and, when the same conflict, that the principles of equity shall prevail. Thus, it is my opinion that the general district court has jurisdiction to hear and decide § 37.1-110 petitions.

Conclusion

General district courts have jurisdiction over § 37.1-110 petitions. This jurisdiction is limited only by the $5,000 jurisdictional maximum and the exclusive jurisdiction of circuit courts over the estates of incompetent and deceased patients.

1Section 37.1-110 of the Code of Virginia (1950), as amended by the 1978 General Assembly states:

"Upon the failure of any patient or of his guardian, committee, trustee or of the person or persons legally liable for his expenses, to make payment of the same, and whenever it appears from investigation that such patient, his guardian, committee, trustee, or the person or persons legally liable for the support of such patient, has sufficient estate, or there is evidence of ability to pay such expenses, the Department shall petition the appropriate court having jurisdiction over the estate of the patient, or for the county or city of which he is a legal resident, or from which he was admitted to a State hospital; provided, however, in any case in which a person or persons legally liable for the support of the patient is being proceeded against, the petition shall be directed to the appropriate court of the county or city in which such person or persons legally liable for the support of such patient reside,
for an order to compel payment of such expenses by persons liable therefore and in the following order:

First, by the patient or his estate; and second, by the person or persons legally liable for the support of such patient. Such person or persons shall be the father, mother, husband, wife, child or children of the patient, provided the child or children have attained the age of majority. Such persons shall be jointly and severally liable. The Department shall collect such part or all of such expenses from the several sources as appears proper under the circumstances and may proceed against all of such sources. The proceedings for the collection of such expenses shall conform to the procedure for collection of debts due the Commonwealth."

2See §§ 8.01-674 and 8.01-675, appeals; § 15.1-786, annexations by political subdivisions; § 16.1-260, petitions in juvenile proceedings; § 20-109, support and maintenance in divorce proceedings; §§ 34-11 and 34-16, homestead exemptions; § 36-94.1, fair housing law; § 63.1-221, adoptions; etc.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. CONFIDENTIALITY OF RECORDS. JUVENILE COURT RECORDS SEALED UNDER § 16.1-306B MAY BE MADE AVAILABLE TO SENTENCING COURTS IN OTHER STATES.

June 28, 1979

The Honorable A. L. Larkum, Judge
Juvenile and Domestic Relations District Court

You have asked two questions pertaining to the disclosure of juvenile records under § 16.1-306B of the Code of Virginia (1950), as amended. Both questions stem from the restriction contained in that section that the sealed records discussed therein "shall be available for inspection only by a juvenile court, general district court or circuit court sentencing a person for conviction of any criminal offense...."

Initially, you question whether this restriction allows the courts of other states to have access to these files. Secondly, you inquire as to whether the phrase "for inspection only" is meant to limit the inspection to a physical examination of the records only, thus precluding reproduction of such documents.

Since this statute has yet to be construed by our State courts, general rules of statutory construction must be used to determine the legislative intent behind it. A basic tenet of statutory construction is that the Code of Virginia is one act that should be construed as a whole. Indeed, in Shepherd v. F. J. Kress Box Co., 154 Va. 421, 153 S.E. 649 (1930), it was held that all provisions of the Code dealing with the same subject should be construed together and reconciled whenever possible. It is necessary, therefore, to interpret § 16.1-306B in light of the other provisions of Ch. 11 of Title 16.1.

Section 16.1-227 outlines the general purpose and intent of the statutes dealing with the powers and functions of the juvenile court system. It provides that the laws concerning juvenile and domestic relations district courts "shall be construed liberally" in order to effectuate certain purposes of the law. Subsection 4 of § 16.1-227 states that one of the purposes of
these laws is "[t]o protect the community against those acts of its citizens which are harmful to others and to reduce the incidence of delinquent behavior."

The obvious intent of § 16.1-306B is to inform those courts sentencing a convicted criminal of facts in his juvenile record in order that the sentence imposed will be appropriate. Enabling a sentencing court to act with fuller knowledge of a defendant's record comports with the enumerated purpose of protecting the community against harmful acts. To interpret § 16.1-306B as precluding the courts in other states from being able to obtain the pertinent juvenile records would be inconsistent with the purposes of the juvenile laws. It would restrict the intended effect of the statutory scheme where no intent to restrict it was exhibited by the legislature. In addition, such information might well benefit the person involved since a sentencing court in another state would have a greater understanding of the person's background and be better able to make a more informed decision.

The same reasoning applies to your question about the examination of these records. To restrict § 16.1-306B to physical inspection only would greatly inhibit the free flow of information between the courts concerned. That would be contrary to the obvious statutory intent—to facilitate the transmission of such information to the sentencing court in order to have an informed sentencing process. Since there is an absence of explicit language prohibiting the reproduction of the juvenile records for transmission to sentencing courts, it is my opinion that the legislature did not intend to preclude their reproduction for such a limited purpose.

2Chapter 11 of Title 16.1 deals generally with juvenile and domestic relations district courts.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. COSTS OF COURT. APPOINTED ATTORNEY. JUVENILE FOUND GUILTY OF COMMITTING DELINQUENT ACT. COSTS ASSESSED AGAINST HIM, WHEN PARENTS ARE INDIGENT. COSTS DOCKETED IN SEPARATE FILES AND RECORDS KEPT BY COURTS IN CASES INVOLVING JUVENILES.

September 20, 1978

The Honorable G. Garland Wilson, Judge
Juvenile and Domestic Relations District Court
Twenty-Seventh Judicial District

You have asked whether a juvenile, who has been found guilty of committing a delinquent act, may be assessed the costs for an attorney appointed to represent him by authority of § 16.1-266B of the Code of Virginia (1950), as amended. You hypothesize that the juvenile's parents are indigent within the contemplation of the law, but that the juvenile himself is employed and self-supporting.

Section 16.1-267A provides that when the court has appointed counsel to represent a juvenile under § 16.1-266 and finds that the juvenile's parents while financially able to pay the attorney refuse to do so, the court may assess costs against the parents for such representation. It further
provides, however, that "[i]n all other cases, counsel appointed to represent a child shall be compensated for his services pursuant to § 19.2-163 of the Code." (Emphasis added.)

Since your question assumes that the juvenile's parents are not financially able to pay the attorney appointed under § 16.1-266, the situation you set forth would be one of the "other cases" referred to in § 16.1-267A and the juvenile's attorney would thus be compensated under § 19.2-163.

Section 19.2-163(2) provides in part that, if a defendant is "convicted," the amount authorized by the court to his attorney shall be taxed against the defendant as a part of the costs of the prosecution.1 While this section refers to a "convicted" defendant and it is clear that juveniles are not charged with crimes or convicted of criminal offenses,2 the General Assembly specifically refers to the procedures of § 19.2-163 as those that should be used in situations such as you pose. Section 16.1-267A's referral to § 19.2-163 clearly indicates that the legislature intended the substantive procedures of that section to apply, the conflicting language notwithstanding, and it is a basic rule of statutory construction that the intention of the legislature is to be followed whenever possible and it is always to be given major weight. 17 M.J. Statutes § 35 (1951).

I am of the opinion, therefore, that a juvenile who has been found guilty of a delinquent act and whose parents are indigent may be assessed the costs required to compensate an attorney appointed under § 16.1-266. Such compensation in a court not of record may not, however, exceed the seventy-five dollar limit of § 19.2-163. In addition, such costs assessed against a juvenile should be docketed in the separate juvenile files and records kept by juvenile and circuit courts in accordance with § 16.1-301.

1"If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or the county, city or town, as the case may be. An abstract of such costs shall be docketed in the judgment docket and execution lien book maintained by such court." Section 19.2-163(2).
2Section 16.1-308 provides as follows: "A finding of guilty on a petition charging delinquency under the provisions of this law shall not operate to impose any of the disabilities ordinarily imposed by conviction for a crime, nor shall any such finding operate to disqualify the child for employment by any State or local governmental agency." See also Opinion to the Honorable John N. Lampros, Commonwealth's Attorney for Roanoke County, dated February 13, 1978, and enclosed for your consideration.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. DESTRUCTION OF RECORDS OF JUVENILES PURSUANT TO § 16.1-306.

November 2, 1978

The Honorable A. L. Larkum, Judge
Juvenile and Domestic Relations District Court for Augusta County
You have asked about the effective date of § 16.1-306 of the Code of Virginia (1950), as amended, regarding records of juvenile proceedings commenced prior to July 1, 1977. Subsection A of § 16.1-306 provides that the juvenile and domestic relations district court clerk shall "destroy its files, papers and records connected with any proceeding in such court..." when such proceeding concerned a juvenile who has attained the age of nineteen years, and when five years have elapsed since the last proceeding was disposed of by the courts. Section 16.1-306A specifically provides that the records of juvenile proceedings commenced prior to July 1, 1977, "shall be subject to the provisions of this section and after July one, nineteen hundred seventy-eight." (Emphasis added.) Although § 16.1-306 further states that the destruction of such records is to take place each year on January second, it also provides that such destruction may take place on another date "designated by the court."

It is my opinion, therefore, that the records of juvenile proceedings which fall within the contemplation of this section, and which were commenced before July 1, 1977, are now subject to the provisions of § 16.1-306A and have been since July 1, 1978. The actual destruction of these records may take place on a date designated by the court, or on January 2, 1979.

You have also asked whether the juvenile court's financial records are included within the meaning of "files, papers and records" in § 16.1-306A. This Office has previously concluded that court financial records such as cash receipts, register sheets, cash disbursements and general ledger sheets 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 as contemplated by § 16.1-306. Opinion to the Honorable James W. Flippen, Judge of the Roanoke County Juvenile and Domestic Relations District Court, dated August 17, 1977. Since such financial records are not part of a specific case file, they would not fall within the types of "files, papers and records" to be destroyed under subsection A of § 16.1-306.

Finally, you request my interpretation of the phrase "pertinent agencies" as used in subsection G of § 16.1-306. This section states that the juvenile court shall "notify all pertinent agencies and the circuit court of the destruction of records provided for in subsections A and C." This subsection also requires that such agencies and circuit courts shall "destroy any records they have in connection with the same proceeding."

The word "pertinent" means "applicable" or "relevant," Black's Law Dictionary 1302 [4th ed. (1968)], and, viewing the purpose of § 16.1-306, it is my opinion that subsection G was intended by the legislature to ensure that all references to the juvenile case in question be deleted from public records. To do this effectively, all circuit courts and all agencies which have records pertaining to the case are to be notified. This will allow the juvenile court, and any pertinent agency or circuit court involved, to treat the offense "as if it never occurred" as called for in § 16.1-306F.

The word "pertinent" means "applicable" or "relevant," Black's Law Dictionary 1302 [4th ed. (1968)], and, viewing the purpose of § 16.1-306, it is my opinion that subsection G was intended by the legislature to ensure that all references to the juvenile case in question be deleted from public records. To do this effectively, all circuit courts and all agencies which have records pertaining to the case are to be notified. This will allow the juvenile court, and any pertinent agency or circuit court involved, to treat the offense "as if it never occurred" as called for in § 16.1-306F.

1F. 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. All index references shall be deleted and the court and law enforcement officers and agencies shall reply and the person may reply to any inquiry that no record exists with respect to such person."
October 24, 1978

The Honorable Kenneth N. Whitehurst, Jr., Judge
Juvenile and Domestic Relations District Court
for the City of Virginia Beach

You have asked whether a provision of The Interstate Compact Relating to Juveniles1 prevails over a conflicting general provision of the Code of Virginia.

By entering into an agreement with other states, a state effectively surrenders a portion of its sovereignty dealing with the relevant subject matter.2 Moreover, such compacts govern the topic of the agreement and are superior to both prior and subsequent laws passed by the signatory states in conflict therewith.3

I am of the opinion, therefore, that the provisions of The Interstate Compact relating to juveniles take precedence over any conflicting state statutes and should be given full force and effect.

2Delaware River and Bay Authority v. Cavello, 222 A.2d 794 (Del. 1966).

February 13, 1979

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

You have asked whether § 16.1-241(A)(3) of the Code of Virginia (1950), as amended, permits grandparents to file a petition for visitation rights with a grandchild. I am of the opinion that it does.

Former § 16.1-158.1 gave jurisdiction to a juvenile and domestic relations district court to hear and determine a petition requesting visitation privileges for grandparents of certain minor children. Section 16.1-158.1 was among those sections repealed by the 1977 Session of the General Assembly and was not specifically reenacted as a new section in the New Ch. 11 of Title 16.1. See Ch. 559 [1977] Acts of Assembly 839-886.

The jurisdiction of a juvenile and domestic relations district court concerning situations where visitation of a child is in controversy is now included in § 16.1-241(A)(3).1 The general language found in that section grants jurisdiction over all cases, matters and proceedings where visitation
is a subject of controversy. I therefore conclude that this jurisdiction would cover not only those situations where visitation by natural parents was at issue, but extends also to petitions filed by grandparents, other relatives or any other properly interested party.

Section 16.1-241 states in part as follows:
"...each juvenile and domestic relations district court shall have...jurisdiction...over all cases, matters and proceedings involving:
A. The custody, visitation, support, control or disposition of a child:

3. Whose custody, visitation or support is a subject of controversy or requires determination;..."

Juvenile and Domestic Relations District Courts. Sentence Recommendation in Social History. Recommendation by Probation Officer as to Specific Disposition of Case is not Properly Includable in Social History Prepared Under § 16.1-273.

April 19, 1979

The Honorable Robert F. Ward, Judge
Pittsylvania Juvenile and Domestic Relations District Court

You have asked whether it is improper for a juvenile probation officer to include a sentence recommendation in a social study made pursuant to § 16.1-273 of the Code of Virginia (1950), as amended, and whether it would be improper for the trial judge to receive such a recommendation.

Section 16.1-279 empowers the juvenile court or the circuit court, as the case may be, to make the final dispositional orders with respect to children found to be abused or neglected, in need of services or delinquent. After adjudication, but before entering such a dispositional order, the court may require an investigation pursuant to § 16.1-273 into the child's personality, physical, mental or social condition and the facts and circumstances surrounding the violation of law involved. As you note in your letter, however, § 16.1-273 is silent as to recommendations regarding what the final disposition should be.1

It is clear that the final disposition in cases arising under the jurisdiction of the juvenile court is to be made by the court. See § 16.1-279. Indeed, it appears that the social history contemplated by the legislature in its passage of § 16.1-273 is to be but a review of the involved child's background and not a vehicle for advocating final dispositions. Although it seems that the Supreme Court of Virginia has never definitively decided this question, the court has noted, in regards to a sentence recommendation in an adult pre-sentence report, that "[i]t may not be amiss to say that the statute does not contemplate that the probation officer recommend what sentence should be imposed."2 More recently, the court, while again refusing to legitimize such recommendations, concluded that if such a recommendation were error, it was harmless.3
It is my opinion, therefore, that a recommendation by a probation officer as to the specific disposition of a case is not properly includable in a social history prepared under § 16.1-273. A probation officer, however, may legitimately discuss prior treatment afforded the juvenile and, based on this, give his assessment of the child's amenability to treatment in the future. I would note, furthermore, that if the court allows such recommendations in a social history with the understanding that they are not binding on the court and are not the basis for the court's final dispositional decision, then such recommendations, if error, would be harmless.

Section 16.1-273 reads as follows:
"When the juvenile court or the circuit court as the case may be has adjudicated any case involving a child subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law or a violation of the ordinance of any city regulating surfing, or the violation of any ordinance establishing curfew violations, the court may before final disposition thereof require an investigation, which may include the physical, mental and social conditions and personality of the child and the facts and circumstances surrounding the violation of law."

Waye v. Commonwealth, 219 Va. , 251 S.E.2d 202 (January 12, 1979). In this case the trial judge held that such recommendations were irrelevant.

See Waye v. Commonwealth, id.

The Honorable W. Alvin Hudson
Sheriff of the City of Roanoke

May 3, 1979

You have asked for clarification of your responsibilities with respect to the transportation of juveniles who come within the jurisdiction of the juvenile and domestic relations district court.

Senate Bill 875 was signed into law by the Governor on March 9, 1979, and will take effect on July 1, 1979. This Bill amends and reenacts § 16.1-254 of the Code of Virginia (1950), as amended, and mandates that the chief judge of each juvenile and domestic relations district court shall designate the appropriate law enforcement agency in each county, city and town which shall be responsible for the transportation of juveniles under §§ 16.1-246 through 16.1-250, and allows the chief judge to order such transportation in other situations he deems appropriate.

Because of this amendment to § 16.1-254, it is my opinion that the chief judge of the juvenile and domestic relations district court may designate your office as the law enforcement agency responsible for escorting children held in detention to doctors, dentists, counseling services, etc. Moreover, I also believe that such judge may order you to transport juveniles from other
jurisdictions. I should note that the amendment to § 16.1-254 codifies a previous opinion of this Office which concluded that juvenile judges "have the power to direct agencies and officials to provide transportation for juveniles within the jurisdiction of [their] court appropriate to the welfare of the child and the security of society." 2

You have also asked me to define your department's responsibilities in regard to juveniles as it applies to pre-trial and post-trial conditions. Because of the lack of specificity in this request and in light of the broad discretionary powers given to juvenile judges under the newly amended § 16.1-254, I am unable to give you my definitive opinion regarding such matters. If you would specify the exact conditions to which you refer, I will be most happy to respond at a future date.

1Section 16.1-254 has been amended to read as follows:
"A. The chief judge of the juvenile and domestic relations district court shall designate the appropriate agencies in each county, city and town, other than the Department of State Police, to be responsible for the transportation of children pursuant to §§ 16.1-246, 16.1-247, 16.1-248, 16.1-249 and 16.1-250, and as otherwise ordered by the judge. In no case shall a child known or believed to be under the age of fifteen years be transported or conveyed in a police patrol wagon.

No child shall be transported with adults suspected of or charged with criminal acts."

2Opinion to The Honorable Frederick P. Aucamp and Kenneth N. Whitehurst, Jr., Judges for the Juvenile and Domestic Relations District Court of Virginia Beach, dated May 7, 1974, and found in Report of the Attorney General (1973-1974) at 204. A copy of this Opinion is enclosed for your consideration.

**JUVENILES. § 16.1-249B(1) DOES NOT PERMIT JUVENILE TO BE REMOVED FROM DETENTION HOME TO JAIL TO MAKE ROOM FOR JUVENILE WHO CANNOT BE PLACED IN JAIL.**

July 3, 1978

The Honorable Von L. Piersall, Jr., Judge
Portsmouth Juvenile and Domestic Relations District Court

I am responding to three questions you have asked.

**Removing Juvenile From Detention Home**

1. You have asked whether § 16.1-249B(1) of the Code of Virginia (1950), as amended, permits a juvenile to be removed from a detention home to jail in order to make room for a juvenile who cannot be placed in jail.

Section 16.1-249(A) provides that a child may be detained, pending a court hearing, in either (1) an approved foster home or a home otherwise authorized by law to provide such care, (2) a facility operated by a licensed child welfare agency, (3) a detention home or group home approved by the Department of Corrections, or (4) some other suitable place designated by the court and approved by the Department.
Paragraph B of § 16.1-249 provides that:

"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;..." (Emphasis added.)

The very fact that the child you wish to transfer to a jail is housed in a detention home which has been approved by the Department makes it impossible to satisfy the provisions of § 16.1-249(B)(1), emphasized above, which requires that space in such a facility be unavailable. Accordingly, the transfer described above would not be permitted under § 16.1-249.

I will point out, however, that there are less secure detention facilities, detention outreach programs, and other secure detention homes in your area that could be used to house a child when space in the detention home is unavailable.

Portsmouth City Jail

2. You also ask whether your court is restricted from using the Portsmouth City Jail until it is approved by the Department of Corrections, under § 16.1-249(B), for the detention of children.

The authority of the Department of Corrections to approve jails for the housing of prisoners, whether they be adult or juvenile, did not come with the passing of the new juvenile code in 1977. Some 36 years ago, the General Assembly authorized the State Board of Corrections to prescribe minimum standards for the construction and equipment of local jails and minimum requirements for the feeding, clothing, medical attention, attendance, care, segregation and treatment of all prisoners confined in such jails. Ch. 217 [1942] Acts of Assembly 300. This authority has remained substantively unchanged to the present day. See § 53-133.

The latest of the general rules and regulations adopted by the State Board of Corrections was in February 1975. A copy of these Rules and Regulations for the Administration of Local Jails and Lockups is enclosed. These rules and regulations apply with equal force to juvenile and adult prisoners. The Department of Corrections regularly inspects local jails to determine whether they conform with the laws of the Commonwealth, in addition to any rules and regulations adopted by the Board. The Portsmouth City Jail was most recently inspected on June 21, 1977. A copy of the inspection report is enclosed.

Since the Portsmouth City Jail has been inspected and has passed the inspection of the Department of Corrections, it is my opinion that the Portsmouth City Jail has been approved for the detention of children.

Harboring A Runaway

3. You have further asked whether an adult can be charged under either § 16.1-257 or § 18.2-371, when the adult harbors a child who has run away from home.
Section 16.1-246 outlines those circumstances under which a child may be taken into immediate custody. This section has been amended by Ch. 643 [1978] Acts of Assembly 1040, effective July 1, 1978, to provide that when a law-enforcement officer has probable cause to believe that a child has run away from home, the child may be taken into immediate custody.

Section 16.1-257 provides that:

"No person shall interfere with or obstruct any officer, juvenile probation officer or other officer or employee of the court in the discharge of his duties under this law...."

In my opinion, an adult who interferes with or obstructs a law-enforcement officer from taking a child into custody who has run away from home would be in violation of § 16.1-257.

LABOR. BUILDING INSPECTORS MAY NOT ISSUE STOP-WORK ORDERS FOR VIOLATION OF OSHA.

May 24, 1979

The Honorable Frederic Lee Ruck
County Attorney for the County of Fairfax

You ask whether local building officials may issue stop-work orders pursuant to § 122.1 of the Uniform Statewide Building Code for violations of occupational safety standards promulgated as regulations by the Safety and Health Codes Commission.

The federal Occupational Safety and Health Act (29 U.S.C. §§ 651 et seq.) was passed by Congress in 1970. It preempts any State law or regulation on any occupational safety or health issue with respect to which a federal standard has been promulgated. See 29 U.S.C. § 667(a); Columbus Coated Fabrics v. Industrial Commission of Ohio, 1973-1974 OSHD ¶ 16,829 (S.D. Ohio 1973). Any state may enforce occupational safety and health laws and regulations, however, if it has authority under State law to do so, and its State Plan is approved by the U.S. Secretary of Labor. See 29 U.S.C. § 667(b). The approved State Plan is deemed to be the substantive equivalent of the federal program, and is enforceable in accordance with the terms of the approval.

Virginia's State Plan was approved effective October 1, 1976, with State enforcement beginning January 1, 1977. Section I, Item 14 of the State Plan provides that "no political subdivision will be involved in the inspection and enforcement activities as stated in this Plan." The federal Construction Industry Standards were adopted without change by the Safety and Health Codes Commission, effective April 15, 1977.

In my opinion, issuing a stop-work order upon the basis of a violation of an occupational safety standard would constitute enforcement of the standard. That stop-work orders may be addressed to the owner rather than an employer, does not alter the fact that it is an occupational safety standard which is being enforced. In fact, it would be summary enforcement compared with the requirement that the Commissioner of Labor and Industry or his representative must petition a court for an order to compel an employer to cease operations.
See § 40.1-49.2E. of the Code of Virginia (1950), as amended. Accordingly, local building officials are precluded from issuing stop-work orders for violations of occupational safety standards. Building officials may still issue stop-work orders pursuant to § 122.1 of the Uniform Statewide Building Code where "work on any building or structure is being prosecuted contrary to the provisions of this code or in an unsafe or dangerous manner..." so long as a promulgated occupational safety or health standard is not applicable to the particular issue.

Your suggestion that local building officials assume a role in the enforcement of occupational safety standards does have merit. One approach would be to have the building inspectors report hazardous conditions which they observe to the Department of Labor and Industry Inspectors, who could then visit the work site and issue a citation, if necessary. Another approach would be to seek amendment of the State Plan to authorize enforcement activities by building inspectors.

LAW ENFORCEMENT OFFICER. DEFINITION. CONTAINED IN § 9-108.1H IS TO BE FOLLOWED WHENEVER TERM "LAW-ENFORCEMENT OFFICER" IS USED IN STATUTES DEALING WITH CRIMINAL JUSTICE SERVICES COMMISSION UNLESS CONTEXT WOULD OTHERWISE REQUIRE.

December 15, 1978

The Honorable R. H. Geisen, Executive Director
Criminal Justice Services Commission

You have asked for an interpretation of § 9-111.2 of the Code of Virginia (1950), as amended by the General Assembly in 1976. That amendment authorizes the Criminal Justice Services Commission to exempt persons having previous employment as law-enforcement officers for a state or the federal government from the minimum training standards requirements for private security services business personnel. Specifically, you have asked whether this provision includes individuals who have prior experience with local enforcement agencies within Virginia and other states. You have also asked for an interpretation of the phrase "law-enforcement officer for...the federal government."

Section 9-108.1H defines "law-enforcement officer" 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 highway laws of this State,..." Section 9-108.1 mandates that this definition be followed whenever the term "law-enforcement officer" is used in the Chapter dealing with the Criminal Justice Services Commission unless the context would otherwise require. I find nothing in the context of § 9-111.2 which would require the Commission to deviate from the basic definition contained in § 9-108.1H.

Section 9-111.2 speaks of persons having previous employment as law enforcement officers for a state or the federal government, whereas the definition in § 9-108.1H speaks of employment in Virginia and the enforcement of Virginia's penal, traffic or highway laws. It is my opinion that the General Assembly intended the Commission to use the basic definition of "law-enforcement officer" set forth in § 9-108.1H, and that it be applicable to persons having previous employment in any state or the federal government as well as those previously employed in Virginia.
REPORT OF THE ATTORNEY GENERAL

LOBBYISTS. PENALTIES FOR FAILURE TO TIMELY FILE LOBBYING REPORTS. WHEN MAY BE REFUNDED.

August 7, 1978

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You ask whether you may remit several penalties collected and paid into the State Treasury based on your interpretation of the deadline for filing lobbying reports required by § 30-28.5:1 of the Code of Virginia (1950), as amended. You also ask whether checks for penalties delivered to your office, but not yet transferred to the Treasurer, may be returned to the senders.

In a previous Opinion this Office held that you must assess and collect a civil penalty of $50 per day from each person who fails to file a lobbyist's report, within sixty days from the adjournment of the General Assembly as provided by statute. See Report of the Attorney General (1976-1977) at 149.

The previous administrative practice by the Secretary of the Commonwealth's office was to require that lobbyists' reports be filed physically in your office by the sixtieth day from adjournment of the General Assembly. For the 1978 Session this date was May 10, 1978. Several reports postmarked before May 10, 1978, were received by your office, however, after that date, and you determined that your office would accept reports postmarked by May 10, 1978. Since the statute, § 30-28.5:1, is not specific as to when reports must be physically in your office, your interpretation is permissible.

The procedure for disbursing money from the State Treasury is controlled by Art. X, § 7, of the Constitution of Virginia and § 2.1-224 of the Code. In a recent Opinion considering Art. X and § 2.1-224, I held 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. See Opinion to the Honorable John R. McCutcheon, Director, Department of Planning and Budget, dated January 27, 1978, a copy which is attached. I further held that the General Assembly may, by general appropriation, provide for the refunding of money deposited in the State Treasury to which the Commonwealth is not entitled. It is my opinion that § 2.2(a) of Ch. 850 [1978] Acts of Assembly 1796, is a general appropriation, permitting the refund of the monies collected by your office.

Thus, I am of the opinion that the Treasurer may remit penalties collected for reports postmarked by May 10, 1978. I am further of the opinion that penalties collected by your office, but not yet transferred to the Treasurer, may be returned if the lobbyist's report was postmarked by May 10, 1978.

1Section 30-28.5:1 provides in part:
"Within sixty days after the adjournment sine die of a session of the General Assembly each individual required to register as a lobbyist under § 30-28.2 shall file with the Secretary of the Commonwealth, on a separate form for each person for whom, or on whose behalf, he lobbys, a complete and detailed statement...."
REPORT OF THE ATTORNEY GENERAL

LOTTERIES. BINGO. ELECTRONIC/MECHANICAL DEVICES NOT AUTHORIZED.

May 10, 1979

The Honorable Joseph T. Fitzpatrick
Member, Senate of Virginia

You have asked whether bingo may be played by the operation of a mechanical/electronic device. You ask whether the device would be authorized if no other prize is awarded for a successful operation other than additional games. The machine is described as follows:

"It is an electronic device using a video screen display of a Bingo board as normally set up. The machine is activated upon the insertion of one or more quarters. Upon activation, if the player does not like the card displayed, he can depress a reset button which displays a Bingo card with different numbers. When the player has displayed the desired card, he depresses a button which causes eight to twelve numbers to be blocked out in the identical manner that normal Bingo is played manually. A block out horizontally or diagonally, in typical Bingo mode, creates a winner which registers on the video screen as replays."

Section 18.2-325 of the Code of Virginia (1950), as amended, defines gambling devices. The device about which you inquire meets all of the requirements of an illegal gambling device except the element of prize. It is my opinion that a gaming device which awards only additional game credits upon successful operation of the device and that these credits are used for no other purpose than for replaying the machine would not violate the statute. See Report of the Attorney General (1977-1978) at 238.

You also ask whether an organization authorized to conduct bingo games and raffles would be in violation of the gambling statutes if the above-described machine were employed at a bingo game and cash were awarded for the successful operation of the machine. Now the element of prize has been added and, therefore, the machine meets all the criteria of a gambling device as defined in § 18.2-325.

Although the machine which you describe has a similarity to instant bingo, the playing of the machine is not instant bingo. Although § 18.2-335 authorizes "instant bingo," it does not authorize the playing of instant bingo by coin-operated devices. See Opinion to The Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated July 24, 1978, a copy of which is attached. I am of the opinion that the device about which you inquire would not be authorized at bingo games sponsored by an organization authorized to play bingo because it does not fall within the definition of "instant bingo."

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1 Section 18.2-325(b) reads, in part, as follows:
"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...."

Section 18.2-340.1, to be effective July 1, 1979, defines instant bingo as:

"Instant bingo' means a specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the pre-printed appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of such card."

MAGISTRATES. IMMUNITY. MAGISTRATES ARE IMMUNE FROM LIABILITY FOR MONEY DAMAGES IN CIVIL ACTION WHEN ACTING WITHIN THEIR JUDICIAL CAPACITY.

March 16, 1979

The Honorable Charles L. McCormick, III, Judge
Juvenile and Domestic Relations District Court
Halifax County and the City of South Boston
Tenth Judicial District

You ask whether a magistrate who issues a criminal warrant charging an offense thereafter determined in a court not to be a criminal offense under Virginia law is civilly liable for false arrest to the person arrested on the warrant.

It is a well established principle of law that judicial officers, acting within their jurisdiction, are exempt from liability in civil actions for their official acts, although such acts are alleged to have been done maliciously or corruptly. Bellamy v. Gates and Gill, 214 Va. 314, 200 S.E.2d 533 (1973); see also, Berry v. Smith, 148 Va. 424, 139 S.E. 252 (1927).

Magistrates have been held to be immune from liability in suits for money damages filed pursuant to 42 U.S.C. § 1983, commonly referred to as civil rights actions. Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975). In Timmerman, the court recognized magistrates as judicial officers and as such held them to be immune from money damages when acting within their judicial capacity. See also, § 19.2-119, Code of Virginia (1950), as amended.

Therefore, in my opinion, a magistrate who issues a warrant for an offense subsequently determined not to be an offense is immune from liability for money damages in any civil action.

MARINE RESOURCES COMMISSION. ENCROACHMENTS IN STATE'S TIDAL WATERS. WHEN NAVY DEPARTMENT NEEDS PERMIT FROM COMMISSION. DISCHARGE OF DREDGED OR FILL MATERIAL INTO NAVIGABLE WATERS.

August 21, 1978

The Honorable James E. Douglas, Jr.
Commissioner, Marine Resources Commission
You have asked whether certain Navy Department construction projects, which involve bottom encroachments in the State's tidal waters, require permits from the Virginia Marine Resources Commission. The projects involve dredging, the construction of a boat ramp and repair of a bulkhead adjacent to Willoughby Bay, Norfolk, and the construction of a boathouse in the York River at Yorktown.

State Law

All ungranted subaqueous bottoms of navigable waterways in Virginia are the public property of the Commonwealth. See § 62.1-1 of the Code of Virginia (1950), as amended. No one may encroach upon these publicly owned subaqueous beds without a permit from the Marine Resources Commission. See § 62.1-3. That statute defines encroachment to include dumping material onto the bottom. Among those activities which are exempted from this requirement are:

"[T]he construction and maintenance of congressionally approved navigation and flood-control projects undertaken by the United States Army Corps of Engineers, United States Coast Guard, or other federal agency authorized by Congress to regulate navigation, navigable waters, or flood control." Section 62.1-3(3).

The Navy projects in question are authorized by the Military Construction Authorization Act, 1978, P.L. 95-82, and funds were appropriated for their construction by the Military Construction Appropriations Act, 1978, P.L. 95-101. These Acts authorize the expenditure of public funds for construction activities at various military installations. The individual projects for which the funds may be spent, however, are neither identified nor described, and it is not possible to determine that Congress authorized construction of these specific Navy projects. Therefore, these projects do not fall within the exception to the permit requirement.

Having so held, it must next be determined whether federal law permits State regulation of such federal projects.

Constitutional Law

Federal law is the supreme law of the land. The states cannot regulate or control the functioning of the federal government within their boundaries in any manner to impede the execution of constitutionally enumerated federal authority. Antieau, Modern Constitutional Law § 10:66 (1969); McCulloch v. Maryland, 4 Wheat (17 U.S.) 316 (1819). It is the essence of supremacy to remove all obstacles to the federal government's actions within its own sphere, and to modify all powers of subordinate governments and thus exempt its operations from their influence. Hancock v. Train, 426 U.S. 167 (1976). The United States may therefore perform its functions without conformity to the police regulations of a state. Arizona v. California, 283 U.S. 423 (1931). Furthermore, a state is without power to provide the conditions on which the federal government may effectuate its policies. United States v. Georgia Public Service Comm., 371 U.S. 285 (1963).

A corollary of the Supremacy Clause holds that federal activities, which involve the accomplishment of directives extraneous to the enumerated federal powers, are also immune from the State regulatory process. Mayo v. United States, 319 U.S. 441 (1943). The immunity extends, for example, to a state...
requirement that the federal government desist from a performance of its duties until it satisfies a state that it is competent, within state law, to perform them. Johnson v. Maryland, 254 U.S. 126 (1920).

The Supremacy Clause does not, however, bar all state regulation of federal activities. The federal government may voluntarily subject itself to state regulatory processes. In legislation authorizing federal activities, Congress may express its intent that federal agencies comply with state requirements. The intent to be bound must be clear in an express Congressional mandate. Where Congress does not affirmatively declare that its instruments are subject to state regulation, the federal functions remain free of state intervention. Hancock v. Train, supra.; United States v. United Mine Workers of America, 330 U.S. 258 (1947); United States v. Wittick, 337 U.S. 346 (1949).

It is therefore necessary to examine the provisions of federal law applicable to these projects to determine if Congress has clearly and unambiguously subjected them to the jurisdiction of the Marine Resources Commission. Neither the Military Construction Authorization Act, nor the Military Construction Appropriation Act contain such provisions. The Federal Water Pollution Control Act, 33 U.S.C. § 1251, et seq., does, however, contain provisions which are pertinent to this inquiry.

Federal Water Pollution Control Act

The Federal Water Pollution Control Act was amended and reenacted in 1972 to "restore the chemical, physical, and biological integrity of the Nation's waters." Id. Upon federal approval of its water pollution control program, a state may issue permits for discharges of pollutants into its waters. To insure that the federal agencies would also comply with state water pollution control requirements, the Congress enacted § 313 of the Act. See 33 U.S.C. § 1323(a). That statute directed each federal installation to "comply with all Federal, State, interstate, and local requirements...respecting the control and abatement of water pollution to the same extent that any person is subject to such requirements." The United States Supreme Court, in EPA v. State Water Resources Control Board, 426 U.S. 200 (1976), held that the Act did not make it clear that the Congress had intended to subject federal facilities to state permit requirements. Accordingly, while federal installations were required to meet state substantive requirements regarding water pollution, the court held they were not required to get state permits.

After this decision, Congress enacted the Clean Water Act of 1977, P.L. 95-217, which, among other changes, amended § 313 to require expressly that federal pollutant dischargers must get state permits.2 However, § 313 is not directly applicable. By its terms, § 313 mandates compliance by federal agencies with state requirements for the "control and abatement of water pollution." It is intended to insure that all federal facilities will meet substantive and procedural requirements of State water pollution control laws. Senate Report #95-370 67, found in U.S. Congressional and Administrative News 4392 (1977). Though the projects in question may also be subject to state regulation for control of water pollution, the issue is whether the Navy must get a permit from the Commission before it encroaches upon State-owned bottom. Section 313 does not "clearly and unambiguously" relate to such encroachments. That subject is dealt with in § 404(t) of the 1977 Act.
Section 404(t)

The 1977 Clean Water Act also amended § 404 of the Federal Water Pollution Control Act. See 33 U.S.C. § 1344(t). This amendment was prompted by a federal court decision in Minnesota v. Hoffman, 543 F.2d 1198 (1976). In that case it was held that the United States Army Corps of Engineers was not required to comply with state water quality standards in its navigational dredging operations. The amendment expressly requires any federal agency to comply with all substantive and procedural state requirements concerning the discharge of dredged or fill material.3

The legislative history of the amendment indicates that the Corps and "other Federal agencies" are "bound by the same requirements as any other discharger into public waters." Senate Report # 95-370 at 4393. Furthermore, § 404(t) is not limited to requirements of "the State water pollution control agency;" rather, it speaks of all state requirements concerning the discharge of dredged and fill materials into navigable waters. Therefore, any state agency which, as a part of its regulatory authority may control such a discharge, may require "any federal agency," including the Navy, to satisfy substantive and procedural requirements of State law.

As a part of its jurisdiction over State bottoms, the Marine Resources Commission regulates those encroachments which result from dumping material into State waters. Because a discharge is equivalent to the "dumping of material" on the bottom, it is an "encroachment" within the Commission's jurisdiction. I am therefore of the opinion that the Department of the Navy, like any other federal agency, is required by federal law to comply with Virginia's substantive and procedural requirements regarding the discharge of dredged or fill material into navigable waters.

Compliance with § 404(t) will not interfere with federal control over navigation. Essentially all federal navigation maintenance is conducted by the Secretary of the Army, acting through the Chief of Engineers. The statute expressly requires each federal agency, including the Corps of Engineers, to comply with every State requirement respecting the discharge of dredged or fill materials. The statute further provides that it shall not be construed to affect or impair the authority of the Secretary to maintain navigation. I construe this provision to require the Corps of Engineers to obtain State approval to conduct any such discharge, but to relieve the Corps from compliance with any provision where the State has unreasonably withheld its approval. This escape clause applies only to navigation maintenance projects conducted by the Corps of Engineers.

Observe also that § 404(t) does not authorize a state to control federal dredging activity itself; the state may regulate only that portion of a federal project which involves the discharge of dredged or fill material into waters subject to state regulation. Thus, the Marine Resources Commission has no authority to require the Navy to obtain a permit for encroachment on state bottoms if the project does not involve the discharge of dredged or fill materials into navigable waters. Conversely, if such a discharge will occur, § 404(t) requires the Navy to obtain a permit.

Fees and Royalties

The permit for such a discharge must be accompanied by a fee for its issuance, as authorized by § 62.1-3. If the federal project involves dredging,
no royalty may be charged for the removal of bottom material, since the Marine Resources Commission has no authority over the dredging process itself. Because § 404(t) requires only that federal agencies comply with state requirements "to the same extent that any person is subject to such requirements," no special fees may be assessed for these federal projects that would not be required from another applicant.

Conclusion

The Navy must obtain a permit from the Marine Resources Commission if the construction of any project will involve the discharge of dredged or fill materials into navigable waters under the Commission's jurisdiction. No permit is required, however, for any project which does not result in such a discharge.

1Article VI of the Constitution of the United States provides in part:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding."

2"... and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." (Emphasis added.)

3"Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting or impairing the authority of the Secretary to maintain navigation." (Emphasis added.)

MENTAL HEALTH AND MENTAL RETARDATION. JUDGE OR SPECIAL JUSTICE MAY ORDER TEMPORARY DETENTION OF INDIVIDUAL PENDING FINAL COMMITMENT HEARING.

June 15, 1979

The Honorable William W. Carson, Jr., Judge
General District Court of Fauquier County
You have asked several questions concerning the temporary detention and commitment of allegedly mentally ill persons. I will respond to your questions in the order you have raised them.

Temporary Detention Pending Final Hearing

You first ask whether a judge or special justice has authority under § 37.1-67.3 to order the temporary detention of an individual who is the subject of a commitment petition under § 37.1-67.1, but who has refused to accept voluntary admission and treatment under § 37.1-67.2.

Section 37.1-67.3 provides that if a person refuses to accept such voluntary admission and treatment, a commitment hearing is to be held "within forty-eight hours of the execution of the detention order as provided for in § 37.1-67.1." Section 37.1-67.1, in turn, provides that the subject of a petition under that statute must be brought before the judge or special justice issuing the petition, but that "if such person cannot be conveniently brought before him, [the judge] may issue an order of temporary detention." You inquire what authority a judge or special justice may have to issue a temporary detention order under § 37.1-67.3, pending the final commitment hearing, when the person has refused voluntary admission and treatment under § 37.1-67.2.

Prior to 1976, the procedures for involuntary detention, preliminary hearings, and commitment hearings were all contained in one statute, then codified as § 37.1-67.1. See Ch. 671 [1976] Acts of Assembly 978-982. Under that scheme, temporary detention pursuant to an order authorized by that section was clearly authorized subsequent to a refusal of voluntary admission and treatment.

In amending the commitment procedure, the legislature set forth two new sections: one dealing with preliminary hearings, and one with the final commitment hearing itself. These new sections became §§ 37.1-67.2 and 37.1-67.3, respectively. Id. at 981-982. The authority to issue temporary detention orders, however, was retained in § 37.1-67.1, as amended. Id. at 978-979. It is my opinion that in thus amending the commitment statutes, the General Assembly did not intend to affect the authority to detain an individual pending a final commitment hearing, such authority having existed without question prior to 1976.

This interpretation is further strengthened by the new language in § 37.1-67.1 which provides that "prior to a hearing as authorized in § 37.1-67.2 or 37.1-67.3, the judge may release such person on his personal recognizance or bond set by the judge if it appears from all evidence readily available that such release will not pose an imminent danger to himself or others." Id. at 979. (Emphasis added.) I interpret this language as an indication of the legislative intent that authority be present for the detention of an individual pending the final commitment hearing provided by § 37.1-67.3. If such authority did not exist in the first instance, then the discretionary authority to release the person on recognizance or bond would be of no effect. A basic 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). Therefore, I conclude that an individual may be detained under § 37.1-67.1 pending a full hearing.
It should be added that while such temporary detention may be continued after a refusal of voluntary admission and treatment and pending a hearing, that detention may last for only the forty-eight or seventy-two hour period provided in § 37.1-67.1. That period runs from the time the temporary detention order is issued, and thus the final commitment hearing must itself be held within forty-eight or seventy-two hours from the time of issuance.

Hospitalization Pending Appeal of Order of Commitment

You next ask whether an individual may be hospitalized pending his appeal of the order of involuntary commitment if his release would pose a danger to others. You further ask whether the individual may be hospitalized for examination by the mental health hospital director before being released pending appeal.

An order of involuntary commitment must require that the subject of that order be delivered to a hospital for hospitalization and treatment whether or not an appeal is taken from that order. The district court may in its discretion exercise its inherent authority to stay the order of commitment and/or release the subject on bond or personal recognizance pending appeal. Likewise, the circuit court to which the appeal is taken may grant a stay of the order and/or release the subject on bond or personal recognizance. The mere fact that an appeal has been taken, however, does not affect the commitment order's authorization of involuntary hospitalization whether the subject is dangerous to others or only to himself.

If the subject of the order is delivered to the hospital for commitment, whether or not an appeal is pending, the hospital director must examine the order of commitment to determine whether it is in substantial conformity with the law before he admits the person into the hospital. See § 37.1-68. Similarly, the director shall cause the subject of the order to be examined by one or more physicians within twenty-four hours after his arrival. If such examination reveals insufficient cause to believe that such person is mentally ill, he shall be returned to the locality in which the involuntary commitment petition was initiated. See § 37.1-70. If such examination reveals sufficient cause, he shall be admitted. In deciding whether to grant a stay, there is nothing that would prohibit the court from considering the results of such an examination if properly admitted into evidence.

When an appeal is filed, the involuntary treatment of a patient would be limited to that treatment the director of the hospital reasonably believes to be necessary to protect his life, health, or safety, unless treatment is prohibited by order of the circuit court to which the appeal is taken. See § 37.1-85. Thus, though involuntary hospitalization continues the patient may not be treated during the period permitted for appeal, where the patient poses a danger only to others.

In summary, the individual must be involuntarily hospitalized upon commitment even if he appeals, unless (1) the district court or circuit court stays the order and/or releases him on bond or personal recognizance; or (2) the order is deemed defective by the hospital director, whereupon the person must be delivered back to the court; or (3) upon examination at the hospital, the person is determined not to be mentally ill, whereupon he shall be returned to the locality where the petition was initiated. In granting a stay of a commitment order, the court may consider the results of an admission
examination. Finally, if an individual appeals his commitment, he may only be treated involuntarily to protect his life, health, or safety. That treatment may be prohibited by the court in which the appeal is pending.

Examination by Physician or Psychiatrist

Your last question asks whether the language in § 37.1-67.3 which requires the court to summons a physician "skilled in the diagnosis of mental illness" limits the selection of a physician to a psychiatrist. I am of the opinion that this section does not limit the selection of a physician to a psychiatrist.

I must presume the legislature recognized the distinction between a "physician" and "psychiatrist." This presumption is strengthened by the language of § 37.1-67.1 prior to its amendment in 1976, which required the judge to summons "one physician or one physician and one clinical psychologist." See Ch. 671 [1976] Acts of Assembly 980. Because the legislature is presumed to act with full knowledge of the law in effect when it enacts statutory amendments, I must presume it was aware of the varying distinctions in the field of medicine. See School Board of Stonewall District v. Patterson and Miller, 111 Va. 482, 487-488, 69 S.E. 337, 339 (1910). It is my opinion, therefore, that any "physician skilled in the diagnosis of mental illness" may be summoned.

MILK COMMISSION. MILK IS MERCHANDISE AS DEFINED BY § 59.1-11(1). MILK COMMISSION MAY NOT ESTABLISH POLICIES WHICH CONFLICT WITH UNFAIR SALES ACT.

September 29, 1978

The Honorable C. H. Coleman, Administrator
State Milk Commission

You have asked whether fluid milk products regulated by the Milk Commission¹ would be subject to the Unfair Sales Act. §§ 59.1-10 through 59.1-20.

The Milk Commission has the power to establish prices for milk under certain circumstances, see §§ 3.1-437 and 3.1-437.1, and to supervise and control the milk industry, see § 3.1-430(c). These powers are limited, however, by specific legislative policies established by the General Assembly. In Richmond Food Stores, Inc. v. State Milk Commission of Virginia, 204 Va. 46, 55 (1963), the Supreme Court of Virginia held that the Commission could not void by regulation the right of a cooperative acting pursuant to § 13.1-301 to give rebates or dividends to its members. Likewise, the Commission may not establish policies which would contravene the Unfair Sales Act.

Generally, the Unfair Sales Act prohibits the sale or offering for sale of merchandise at below cost. See § 59.1-14. Merchandise is defined in § 59.1-11(1) as "any tangible personal property the subject of commerce."

Obviously milk is tangible personal property and is the subject of commerce. Therefore, milk is covered by the Unfair Sales Act.
REPORT OF THE ATTORNEY GENERAL

1Regulated under the authority granted by Ch. 21, Art. 2 of Title 3.1 of the Code of Virginia (1950), as amended.

MOTOR VEHICLES. HABITUAL OFFENDERS. TIME FOR RESTORATION OF LICENSE PURSUANT TO § 46.1-387.9:2 RUNS FROM DATE ADJUDICATED HABITUAL OFFENDER.

August 11, 1978

The Honorable A. R. Giesen, Jr.
Member, House of Delegates

You asked when the earliest time is that a person declared an habitual offender under the Virginia Habitual Offender Act can petition for restoration of his license.

Section 46.1-387.9:2 of the Code of Virginia (1950), as amended, provides that such a person can apply for restoration after five years from the date he was adjudicated an habitual offender. In view of the unambiguous language in this section, it is my opinion that the earliest time a person may petition for restoration of his privilege to operate a motor vehicle in this State is five years from the date he was adjudicated an habitual offender.

The 1978 General Assembly considered but failed to pass a proposed amendment (House Bill 171) to start the five-year period from the date of "the most recent conviction used in finding such person to be an habitual offender."

1"Any person who has been found to be an habitual offender where such adjudication was based in part and dependent on a conviction as set out in § 46.1-387.2(a)(2) and (3) [driving under the influence and impaired driving], the latter subsection now repealed, may, after the expiration of five years from the date of such adjudication, petition the court...for restoration of his privilege to operate a motor vehicle in this State...."

MOTOR VEHICLES. LICENSE FEES ASSESSED BY TOWN OF LEESBURG PURSUANT TO § 46.1-65. VEHICLES OWNED BY CHURCHES OR RELIGIOUS GROUPS NOT EXEMPT. TOWN COUNCIL HAS NO AUTHORITY TO EXEMPT.

May 2, 1979

The Honorable Earl E. Bell
Member, House of Delegates

You ask my opinion (1) whether vehicles owned and used by churches or religious groups and normally housed, garaged or parked in Leesburg are exempt from the requirements of § 46.1-65 of the Code of Virginia (1950), as amended, and (2) whether the Leesburg Town Council has legislative authority to exempt such vehicles from the requirements of § 46.1-65.
Section 46.1-65 authorizes counties, cities and towns to charge license fees upon motor vehicles, trailers and semitrailers, except as provided in § 46.1-66. There are no exceptions in either of these statutes that would exclude vehicles owned and used by churches or religious groups from such fees.

There is a correlation between the general registration and licensing laws, § 46.1-41, et seq., and the authority of a county, city or town to enact an ordinance assessing local license fees pursuant to § 46.1-65, in that the latter provides that such local assessment may not be greater than the license tax imposed by the State on vehicles of like class. Such general registration and licensing laws contain no exemptions for vehicles owned and used by churches or religious groups. Article X, § 6, of the Constitution of Virginia (1971), authorizes the General Assembly to classify certain property and no other as tax exempt. In Chap. 1, Art. 3, of Title 58, § 58-12.86, classified vehicles designed for carrying more than ten passengers, owned by churches and used for church purposes, are exempt from local personal property taxation. I find no such exemptions, however, for the license fees authorized under § 46.1-65. See Report of the Attorney General (1977-1978) at 445. Section 46.1-65 provides that the situs for the imposition of licensing fees under this section shall be the county, city or town in which the motor vehicle "is normally garaged, stored or parked." In conclusion, it is my opinion that vehicles owned and used by churches or religious groups and normally garaged, stored or parked within Leesburg's limits would not be exempt from an ordinance of the Town of Leesburg adopted in accordance with § 46.1-65.

Section 1-13.17 provides that when the council or authorities of any city or town are authorized to make ordinances, the same must not be inconsistent with the Constitution and the laws of the United States or of this State. Section 46.1-65, in authorizing counties, cities and towns to enact ordinances assessing license fees upon motor vehicles, trailers and semitrailers, provides for the exceptions in §§ 46.1-65 and 46.1-66, and no other. No exceptions are included in these statutes for vehicles owned and used by churches or other religious groups. Neither do the general registration and licensing statutes make any provisions for exempting vehicles owned and used by churches or other religious groups from licensing requirements. As previously indicated, there are no exemptions relating to such assessments among the general or specific exemptions from taxation found in Ch. 1, Art. 3, of Title 58. Accordingly, I find no authority for the Town Council of Leesburg to exempt such vehicles from the requirements of an ordinance enacted pursuant to § 46.1-65.

You ask whether a nonresident who is not a resident of and does not hold a license issued by a "reciprocating state" is entitled to a summons under § 46.1-178.

November 8, 1978

Colonel D. M. Slane, Superintendent
Department of State Police

You ask whether a nonresident who is not a resident of and does not hold a license issued by a "reciprocating state" is entitled to a summons for a violation of Title 46.1 of the Code of Virginia (1950), as amended, under the provisions of § 46.1-178.
Section 46.1-178 mandates the issuance of a summons for a violation of Title 46.1 punishable as a misdemeanor, except as otherwise provided in § 46.1-179. One of the exceptions found in the provisions of § 46.1-179 is that a person "believed by the arresting officer to be likely to disregard a summons issued under § 46.1-178" shall be taken forthwith before the nearest or most accessible judicial officer or other person qualified to admit to bail in lieu of issuing the summons required by § 46.1-178. This exception has been applied by police officers generally to any nonresident arrested for a traffic violation because of the lack of sanctions to compel a non-resident to honor his personal recognizance given under § 46.1-178.

Section 46.1-178.1 provides for the service of warrant and the suspension of the operator's license of a person who fails to comply with such summons. This would have little or no effect upon a nonresident since there is no practical means of serving the warrant or requiring compliance with the warrant, and there is no authority for this State to suspend a nonresident's operator's license issued in another state. His privilege to drive in this State could be suspended, but this would be of little or no effect in most cases.

Article 1.1, Ch. 4, Title 46.1, §§ 46.1-179.1, 46.1-179.2 and 46.1-179.3, establishes reciprocal provisions for the arrest of nonresidents for violation of traffic laws. Under this article a nonresident from a "reciprocating state" who is thus arrested, with exceptions not here applicable, will be issued a traffic summons. If he fails to comply with his personal recognizance given in such summons, the licensing agency in his home state must be notified and will thereupon suspend his license to drive until he complies with the summons issued in this State.

For a number of years only the State of Maryland and the District of Columbia were parties to such an agreement with this State. Section 46.1-179.1 was amended by Ch. 205 [1975] Acts of Assembly 380, to make it easier for other states to comply simply by signing a written agreement with this State. Currently the States of Virginia, Maryland, Minnesota, North Carolina, Delaware, New Jersey, New York, Pennsylvania, Louisiana, Florida, West Virginia and the District of Columbia are all parties to such an agreement, sometimes referred to as a "nonresident violator compact."

From the history of the provisions of §§ 46.1-178 and 46.1-178.1 as applied to residents and the reciprocal provisions of §§ 46.1-179.1, 46.1-179.2 and 46.1-179.3 providing for issuing summonses to nonresidents of a reciprocating state it is obvious that the General Assembly has deemed the latter statutes necessary for specific application to such nonresidents. Where two or more statutes are in apparent conflict, they should be construed, if reasonably possible, so as 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 (1936). If a nonresident from a state other than a reciprocating state who is arrested for a traffic violation in this State were entitled to a summons under § 46.1-178, there would have been no need for the later enacted §§ 46.1-179.1, 46.1-179.2 and 46.1-179.3 relating specifically to nonresidents.

When the legislature passes a new law, it is presumed to act with full knowledge of the law as it stands bearing upon the subject with which it proposes to deal. Powers v. County School Board, 148 Va. 661, 139 S.E. 262
Further, as previously stated, § 46.1-179 gives the arresting officer the discretion to decide whether an arrestee would be likely to disregard a summons issued under § 46.1-178. The law does not give the arrestee the right to make this decision. If the arresting officer believes the person arrested likely to disregard a summons, such officer must take the arrestee before a magistrate or other judicial officer qualified to admit to bail in lieu of issuing a summons.

Accordingly, it is my opinion that a nonresident who is not a resident of and does not hold a license issued by a "reciprocating state" is not entitled to a summons for a violation of Title 46.1 under the provisions of § 46.1-178, nor under the named reciprocal statutes.

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- **Description of the content**: The document is a report from the Attorney General, discussing legal implications of traffic violations related to whether a summons can be issued to nonresidents who are not residents of a state that has reciprocal agreements with Virginia. It references sections of the Virginia Code and discusses the powers of local governing bodies under Dillon's Rule. The report also includes a state ordinance about opening vehicle doors in the path of approaching vehicles.

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**MOTOR VEHICLES. ORDINANCES. CITY MAY ADOPT ORDINANCE RELATIVE TO OPENING CAR DOOR IN PATH OF APPROACHING VEHICLE.**

October 4, 1978

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

This is in response to your recent inquiry whether § 46.1-1801 of the Code of Virginia (1950), as amended, authorizes the City of Salem to adopt an ordinance which states that "no person shall open the door of, or enter or emerge from any vehicle in the path of an approaching vehicle without due regard for safety of persons and property."

Under Dillon's Rule the powers of local governing bodies in Virginia are limited to those conferred expressly 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). Furthermore, when the council of any city is authorized to make ordinances, the same must not be inconsistent with the Constitution and laws of this State. § 1-13.17. A municipal corporation, in the exercise of its police powers, may however "forbid the doing of an act where State legislation is silent on the subject, and there can be no conflict between a statute and an ordinance where there is no statute dealing with the same subject matter." Kisley v. City of Falls Church, 212 Va. 693, 695, 187 S.E.2d 168, 170 (1972). Accordingly, when adequate enabling legislation exists and there is no conflict with general law, the enactment of a valid city ordinance is not precluded by the absence of comparable provisions in the State Code.
While I can find no statute expressly authorizing the specific ordinance in question, I do note that § 15.1-891 provides in part that a municipal corporation may regulate and control the operation of motor and other vehicles and the movement of vehicular and pedestrian travel and traffic on streets, highways and roads provided such regulations are not inconsistent with the provisions of Art. 2 of Ch. 4 of Title 46.1, § 46.1-180, et seq.\(^2\) The pertinent limitation contained in this Article and stated in § 46.1-180 is that ordinances regulating the operation of vehicles on the highways of counties, cities and towns not be in conflict with the provisions of Title 46.1. As I find §§ 46.1-180 and 15.1-891 adequate enabling legislation for the ordinance in question, and as I can find no provision in Title 46.1 which conflicts with said ordinance, I am of the opinion such ordinance is authorized by §§ 46.1-180 and 15.1-891.

\(^1\)Section 46.1-180(a) provides in pertinent part that "[i]n counties, cities and towns the governing body may adopt ordinances to regulate the operation of vehicles on the highways of such counties, cities and towns not in conflict with the provisions of this title...."

\(^2\)I also note that § 15.1-522 provides in part that with the exception of such ordinances as are expressly authorized under §§ 46.1-180 to 46.1-185 and 46.1-193, county ordinances regulating the equipment, operation, lighting or speed of motor-propelled vehicles operated on the public highways of a county must be uniform with the general laws of this State regulating such equipment, operation, lighting or speed.

MOTOR VEHICLES. SCHOOL BUSES. VANS USED TO TRANSPORT CHILDREN TO PRIVATE SCHOOL.

May 7, 1979

The Honorable Floyd C. Bagley
Member, House of Delegates

This is in response to your recent inquiry concerning the applicability of §§ 46.1-286.\(^1\) and 46.1-287\(^2\) of the Code of Virginia (1950), as amended, to a van engaged in transporting children to a private school but which makes intermediate stops along the way.

The primary object in the interpretation of statutes is to ascertain and give effect to the intention of the legislature. Vollin v. Arlington County Electoral Board, 216 Va. 674, 222 S.E.2d 793 (1976). Unless a literal interpretation would lead to a manifest absurdity, legislative intent is to be gathered from the words used in the statute itself. Id. A statute which is plain upon its face should be taken at its face value. Franklin and Pittsylvania Railway Company v. Shoemaker, 156 Va. 619, 159 S.E. 100 (1931). In the interpretation of statutes the whole body of a legislative enactment is to be examined with a view to arrive at the true intention of each part. National Maritime Union of America, AFL-CIO v. City of Norfolk, 202 Va. 672, 119 S.E.2d 307 (1961). Full force and effect must be given to every provision of statutory law. County of Fairfax v. City of Alexandria, 193 Va. 82, 68 S.E.2d 101 (1951).
Section 46.1-286.1 provides that school buses as defined in § 46.1-1(37) which transport pupils to and from public, private or parochial schools shall meet certain criteria: they shall (1) be painted yellow, (2) be marked with the required distinctive lettering, and (3) be equipped with warning devices prescribed in § 46.1-287. Use of the word "shall" indicates a mandatory intent. Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965). By express terms, however, § 46.1-286.1 exempts commercial buses, station wagons, automobiles, trucks, and vehicles which transport pupils, residents at a school, from one point to another without intermittent stops for the purpose of picking up or discharging pupils.

You state in your correspondence that the van in question is not a "'commercial' bus, station wagon, automobile or truck." Your conclusion accords with the Opinion of the Attorney General found in Report of the Attorney General (1974-1975) at 297, a copy of which is enclosed, wherein these terms as used in §§ 46.1-286.1 and 46.1-1(37) were defined.4

You further state that the van makes intermediate stops, presumably to pick up and discharge pupils. While you do not advise whether the pupils are residents of the school, such a fact is of no moment to the case at hand: the fact that the van makes intermediate stops disqualifies it for the exception set forth in the last sentence of § 46.1-286.1. Thus, it becomes necessary to determine whether the van is a school bus as defined in § 46.1-1(37).

In view of the requirements of § 46.1-286.1, and the definition of a school bus in § 46.1-1(37), whether the van in question qualifies as a school bus depends on whether it is designed and used primarily for the transportation of pupils to and from public, private or parochial schools. "'Designed' means 'appropriate, fit prepared, or suitable; also adapted, designated, or intended.'" Smith v. Commonwealth, 190 Va. 10, 55 S.E.2d 427 (1949). Clearly, a van may be an "appropriate" vehicle for the transportation of pupils. See Report of the Attorney General (1972-1973) at 289. Whether the particular van in question is used primarily for the transportation of pupils is a question of fact. Assuming it is so used, I am of the opinion that §§ 46.1-286.1 and 46.1-287 are applicable.

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1Section 46.1-286.1 reads as follows:
"All motor vehicles, except commercial buses, station wagons, automobiles or trucks, transporting pupils to and from public, private or parochial schools shall be painted yellow with the words 'School Bus, Stop, State Law' on the front and rear in letters at least six inches high, except that the words 'School Bus' on the front may be in letters at least four inches high if space is limited, or with only the words 'School Bus' on front and rear in letters at least eight inches high, and shall be equipped with warning devices prescribed in § 46.1-287. Only school buses, as defined in § 46.1-1(37), may be painted yellow, identified by words above and equipped with the specified warning devices. A vehicle which merely transports pupils, residents at a school, from one point to another without intermittent stops for the purpose of picking up or discharging pupils, need not comply with the requirements of this section."

2Section 46.1-287 provides for warning devices on buses used for the principal purpose of transporting school children.
The term "School bus" is defined in § 46.1-1(37), as follows:

"Any motor vehicle, except commercial bus, station wagon, automobile or truck, which is designed and used primarily for the transportation of pupils to and from public, private or parochial schools, which is painted yellow with the words 'School Bus' in black letters of specified size on front and rear, and which is equipped with warning devices prescribed in § 46.1-287. School buses, manufactured prior to July one, nineteen hundred seventy-four, may continue to have the words 'Stop, State Law' in black letters of specified size on front and rear."

"Truck" has since been defined in § 46.1-1(39).

MOTOR VEHICLES. SCHOOL CROSSING GUARDS. AUTHORITY AND LIABILITY OF COUNTY.

April 9, 1979

The Honorable William J. McGhee
County Attorney for Montgomery County

This is in response to your recent correspondence wherein you stated a representative of a private nonprofit sectarian school has requested that Montgomery County, pursuant to § 46.1-183.11 of the Code of Virginia (1950), as amended, deputize several individuals to direct traffic at said school. I understand from your letter and related correspondence that the individuals in question would serve as school crossing guards on the public highway near said school. Your questions are answered as follows:

"1) Is there a mandatory duty upon the County to comply with this request?"

Section 46.1-183.1(a) provides that a chief of police or sheriff, as the case may be, may deputize persons for the limited purpose of directing traffic during periods of heavy traffic or congestion.2 The word "may" should be given its ordinary meaning, i.e., permission, importing discretion, unless it is manifest that the purpose of the legislature was to use it in the sense of "shall" or "must." Masters v. Hart, 189 Va. 969, 55 S.E.2d 205 (1949). As I can find nothing in § 46.1-183.1 which suggests that the word "may" was intended to convey other than its ordinary meaning, the answer to your first question is no.

In your letter, you suggest Art. IV, § 16, and Art. VIII, § 10, of the Constitution of Virginia (1971), "would prohibit the County from providing this service to a sectarian school." The first of these constitutional provisions prohibits appropriations of public funds to religious bodies. The second limits appropriations to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof. In deputizing individuals to direct traffic on public highways pursuant to § 46.1-183.1, however, the County would not be appropriating any funds to a religious body or sectarian institution of learning. The purpose of § 46.1-183.1 is a purely secular one; namely, the orderly control of traffic on public highways, and its primary effect necessarily neither advances nor inhibits religion. In addition, as responsibility for the appointment and control of crossing guards under § 46.1-183.1 lies exclusively with the appropriate local governmental official, the statute does not foster any excessive governmental entanglement with religion. See Miller v. Ayres, 214 Va. 171, 198 S.E.2d 634 (1973).
"2) If the County must comply with said request, or if it exercises its discretion and deputizes such crossing guards, would these individuals then, in fact, be agents of the County and as such would the County be liable for their actions?"

In law, the word "depute" is usually restricted to the definition--substitution of a person appointed to act for an officer of the law. Black’s Law Dictionary 529 (Rev. 4th ed. 1968). An agent is one who represents another in dealings with third persons. Johnston v. Kincheloe, 164 Va. 370, 180 S.E. 540 (1935). The term has a wide variety of applications and includes a great many classes of persons. Norfolk & Western R. R. Co. v. Cottrell, 83 Va. 512, 3 S.E. 123 (1887). The distinguishing features of an agent are his representative character and his derivative authority. Taylor v. Sutherlin-Meade Tobacco Co., 107 Va. 787, 60 S.E. 132 (1908). Persons deputized pursuant to § 46.1-183.1(a) possess both of the distinguishing features of an agent and thus may be said to be the agents of their appointing authorities.

School crossing guards appointed pursuant to § 46.1-183.1 are distinguishable from the police officer discussed in Clinchfield Coal Corp. v. Redd, 123 Va. 420, 96 S.E. 836 (1918), who acted both for the company and, ostensibly, as an officer of the law. That case concerned the employment by a private corporation of a special agent clothed with police powers and whose duty it was to keep order at the company's camp. School crossing guards, however, perform a governmental function--traffic control, on public highways. Consequently, their primary purpose is not the furtherance of a private interest but the protection of the public, generally at a particularly congested point on the public highways.

The second part of question 2) concerns the potential liability of the county. Counties are not liable for the 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). Furthermore, the doctrine of respondeat superior is not applicable to public officers. Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973). Consequently, a sheriff or chief of police who deputizes a school crossing guard is not liable for injury resulting from the negligence of such individual in the absence of proof that the sheriff's or police chief's own personal negligence was a contributory factor.

"3) What authority does the County have to demand that this organization reimburse it for its out-of-pocket expenses, i.e., liability insurance, bonding, workmen's compensation premiums?"

I can find no authority for the county to demand reimbursement. Section 46.1-183.1 is silent on the subject. Furthermore, the appointments under § 46.1-183.1 are unlike those of special policemen under Art. 3, Ch. 1 of Title 15.1, where express provision is made in § 15.1-146 for private employment.

"4) Assuming that these crossing guards are 'employees' within the meaning of the workmen's compensation statutes, does the presumption of on-the-job disability for certain heart ailments apply to these individuals as it would to Sheriff's deputies or police officers?"
Section 65.1-47.1 provides in part that "[t]he death of, or any condition or impairment of health...of any member of a county...police department, or of a sheriff, or of a deputy sheriff...Caused by hypertension or heart disease, resulting in total or partial disability shall be presumed to be an occupational disease suffered in the line of duty that is covered by this act unless the contrary be shown by a preponderance of competent evidence...."

Section 46.1-183.1 expressly provides that persons deputized to direct traffic lack the power of arrest and serve for the limited purpose of directing traffic in accordance with § 46.1-183 during periods of heavy traffic or congestion. Lacking a power of arrest and having duties restricted to traffic control, such individuals are not law-enforcement officers as that term is defined in § 9-108.1H. Furthermore, the language of § 46.1-183, which authorizes uniformed school crossing guards to direct traffic by signals, distinguishes between such guards and peace or police officers. A similar distinction is found in § 46.1-250.1, relating to the stopping of a vehicle of another for the sole purpose of impeding its progress on the highways. In view of these limitations and distinctions, I am of the opinion that such guards do not qualify as deputies sheriffs or members of a county police department within the meaning of § 65.1-47.1.

"5) Assuming that the County denies this request and assuming that this organization proceeds to attempt to direct traffic at the location in question, in the absence of deputization, what result would obtain?"

Pursuant to § 46.1-183, only uniformed school crossing guards and peace or police officers are authorized to direct traffic by signals. Accordingly, I am of the opinion that if an individual has not been deputized pursuant to § 46.1-183.1 and has not duly qualified as a peace or police officer, such individual is without authority to direct traffic pursuant to § 46.1-183. Any such individual who undertook to direct traffic on a public highway would, in my view, do so at his own risk. Furthermore, pursuant to § 46.1-250.1, in the absence of an emergency or mechanical breakdown, any person who willfully stops the vehicle of another for the sole purpose of impeding its progress on the highways is guilty of a misdemeanor, unless such person falls within the exception of paragraph (c) of the statute. In addition, any person who shall falsely assume or exercise the powers and duties of a peace officer, or who shall falsely pretend to be a peace officer, is guilty of a misdemeanor pursuant to § 18.2-174.

In the event the county declines to deputize individuals pursuant to § 46.1-183.1, however, the Circuit Court of Montgomery County could appoint special policemen pursuant to §§ 15.1-144, et seq., who could perform traffic control duties near the school in question.

1Section 46.1-183.1 states as follows: "(a) The chief of police of any county, city or town, or the sheriff of any county which does not have a chief of police, may deputize persons over the age of eighteen years without the power of arrest for the limited purpose of directing traffic in accordance with § 46.1-183 during periods of heavy traffic or congestion, provided, that such persons first receive training as the chief of police or sheriff determines necessary to fully acquaint such persons with the techniques of traffic control."
(b) Any person who is deputized as provided in subsection (a) above, shall at all times while engaged in traffic control wear a distinctive police uniform, safety vest or a white reflectorized belt which crosses both the chest and back above the waist."

Montgomery County is authorized to have a police department by § 15.1-158.1.

"The provisions of this section shall not apply to any law-enforcement officer, school guard, fire fighter or member of a rescue squad, when they are engaged in the performance of their duties or to any vehicle owned or controlled by the Virginia Department of Highways and Transportation while engaged in the construction, reconstruction or maintenance of highways." § 46.1-250.1(c).

MOTOR VEHICLES. USE OF FOREIGN DEALER'S LICENSE PLATES. LIMITED TO AUTHORIZATION BY COMMISSIONER UNDER § 46.1-138. COMMISSIONER'S AUTHORIZATION BY MULTISTATE RECIPROCAL AGREEMENT.

March 27, 1979

The Honorable Richard W. Davis, Judge
Radford General District Court

You ask me to interpret § 46.1-138 of the Code of Virginia (1950), as amended, in respect to the legality of a North Carolina motor vehicle dealer who purchases a used automobile in Virginia and uses his North Carolina dealer's license plates to return the vehicle to North Carolina without the specific consent of the Commissioner.

Section 46.1-138 makes it unlawful for any person to operate or for the owner to permit the operation of a motor vehicle, trailer or semitrailer in this State on a foreign dealer's license, unless such operation is specifically authorized by the Commissioner of the Division of Motor Vehicles. This statute must be considered in conjunction with the Multistate Reciprocal Agreement Governing the Operation of Interstate Vehicles, which provides in Part VI B thereof that dealer license plates issued by one of the reciprocating jurisdictions "shall be mutually recognized in accordance with the legal purpose of such plates in the jurisdiction of issuance."

This State and North Carolina are both parties to the Multistate Reciprocal Agreement, which was signed by the Governor of Virginia on the twenty-first of March, 1963. North Carolina General Statute § 20-79 provides that motor vehicle dealers shall be issued dealers' license plates for use in transacting the business of buying, selling, distributing or exchanging motor vehicles, trailers or semitrailers. Since the transaction in question involves an interstate operation and complies with the provisions of Part IV B of the Agreement by which the Commissioner has specifically authorized such operation, it would be lawful for the North Carolina dealer to use his dealer's plates to operate the motor vehicle purchased in Virginia to North Carolina. In light of the Commissioner's having authorized the operation by the Agreement, additional consent of the Commissioner would be superfluous in this case.
MOTOR VEHICLES. VEHICLES APPROACHING "T" INTERSECTION AT APPROXIMATELY SAME TIME. DETERMINING WHO HAS RIGHT-OF-WAY.

March 14, 1979

The Honorable D. M. Byrd, Jr.
Chief Judge of the General District Courts
Twenty-Fifth Judicial District

You ask whether § 46.1-221 or § 46.1-190(j) of the Code of Virginia (1950), as amended, constitutes the applicable statutory law governing the right-of-way at a "T" intersection of two improved secondary roads where there is no traffic control.

The question raised stems from § 46.1-221 which provides that, except where traffic controls are present, when two vehicles enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right. Section 46.1-190(j) makes it reckless driving to enter a highway from a side road when traffic is approaching upon the highway entered within five hundred feet or, if a yield sign is posted, to fail to yield the right-of-way to traffic approaching such highway from either direction.

At a "T" type intersection where one of the highways, i.e., the leg of the "T," ends as it enters the other highway at approximately a right angle, a driver entering the other highway from the leg of the "T" must either turn right or left onto the highway entered. Such turn is subject to the requirement in § 46.1-216 which provides that a driver making a turn must "first see that such movement can be made in safety." A person who intends to make a turn has the duty to keep a reasonable lookout for oncoming vehicles and to see such vehicles approaching in plain view. Von Roy v. Whitescarver, 197 Va. 384, 89 S.E.2d 346 (1955). Further, such move, in my opinion, would constitute entering a highway from a side road and failure of a driver to bring his vehicle to a stop before entering such highway when traffic is approaching would constitute reckless driving under § 46.1-190(j).

NATIONAL GUARD. CITY ORDINANCE MAY NOT FORBID FIREMEN AND POLICEMEN FROM ENLISTING IN NATIONAL GUARD BY THREAT OR INJURY IN EMPLOYMENT.

November 3, 1978

The Honorable J. Samuel Glasscock
Member, House of Delegates

You ask whether the City of Suffolk is exempt from the application of § 44-98 of the Code of Virginia (1950), as amended. Section 44-98 forbids a "person" from dissuading any individual from enlisting in the national guard or naval militia by threat or injury to him in his employment.

You state that the City of Suffolk has enacted an ordinance forbidding its firemen and policemen from affiliating with reserve components which might call them to service in times of local emergency. The reserve components of the armed forces include the national guard. See 10 U.S.C.A. § 261.
Section 1-13.19 states that the word "person" may extend and be applied to bodies politic and corporate as well as individuals. Thus, the City of Suffolk, a municipal corporation, may be considered a person in this instance. See Hanbury v. Commonwealth, 203 Va. 182, 122 S.E.2d 911 (1961). Accordingly, the ordinance is unenforceable and the city may not prohibit or dissuade individuals from service.

You cited §§ 10.01, 10.02 and 11.01 of the Charter of the City of Suffolk as providing general authority to the City Council to enact the ordinance in question. I do not believe that the language of the cited sections provides sufficient authority for the City to enact an ordinance inconsistent with § 44-98, a specific statute.

NOTARIES PUBLIC. COMMISSION NOT AUTOMATICALLY RENDERED INVALID BY DEATH OF SURETY.

January 16, 1979

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You have asked whether a commission of a notary public remains valid after the death of a surety who has posted a faithful performance bond under § 47-1 of the Code of Virginia (1950), as amended.

I assume the bond is silent as to its effect on the surety's distributees or personal representatives in the event of his death. In that situation, it is my opinion that death of a surety does not automatically invalidate his obligations under his bond.

Under the statute, all bonds are penal in nature and must be in a sum certain, not less than five hundred dollars, effective for the term of the notary--four years. If under seal or supported by consideration, such a bond is a binding contract, no different from any other contractual obligation to which a decedent might be a party.1 Such obligations must be accounted for by the decedent's personal representative prior to concluding the decedent's estate under the provisions of Title 64.1 of the Code.2 Thus, the death of the surety would not automatically place a notary out of compliance with the statutory requirements of a bond.

I would suggest that, in order to properly subject the decedent's estate to any claims which might arise as a result of this bond, notification of the outstanding obligation should be given to the personal representative.

A surety or his personal representative can petition the circuit court for relief from obligations under official bonds.3 If the notary then failed to obtain a new surety he could be removed from office as provided in § 47-1(1).

1United States, ex rel., Wilhelm v. Chain, 300 U.S. 31, 81 L.Ed. 487, 57 S.Ct. 394. If there is no legal consideration, the surety agreement is no more than an offer to pay which is revocable at will and is revoked upon notice of the surety's death to the obligee. See also A. Stearns, Law of

Section 64.1-144 provides that, "A personal representative may sue or be sued upon any judgment for or against or any contract of or with his decedent." Also, § 8.01-11 provides that a bond is not released upon the death of the surety.

Section 49-22 provides the procedure for release of the surety. Germane to the same point is § 64.1-143 which permits limited renewal of a deceased surety's obligation.

OPTICIAN. CONTACT LENSE FITTING BY PRESCRIPTION FOR SPECTACLES ONLY. REFUSAL BY OPHTHALMOLOGIST OR OPTOMETRIST TO WRITE CONTACT LENSE PRESCRIPTION. EFFECT OF FTC RULES.

May 2, 1979

The Honorable Ruth J. Herrink, Director
Department of Commerce

You request my opinion on a number of questions regarding the impact of the recently promulgated Federal Trade Commission (hereinafter FTC) Trade Regulation Rule concerning the advertising of prescription eyewear and eye examinations and the release of prescriptions to consumers on a previous Opinion to Dr. James R. Prince, President, Virginia State Board of Examiners in Optometry, dated March 17, 1977, and found in Report of the Attorney General (1976-1977) at 191-192 interpreting § 54-398.271 of the Code of Virginia (1950), as amended.

Prescription for Spectacles Only

Your first inquiry is whether a refractionist may limit his prescriptions "for spectacles only" under the new FTC rules. A refractionist, a term defined in 16 C.F.R. § 456.1(h) to be "any Doctor of Medicine" (ophthalmologist), "Osteopathy or Optometry ... authorized by state law to perform eye examinations,..." must give to his patient a copy of that patient's prescription immediately after the eye examination is completed. See 16 C.F.R. § 456.7(a). The information required to be set forth on the prescription is "all of the information necessary to permit the buyer to obtain the necessary ophthalmic goods,..." including contact lenses, "from the seller of his choice." See 16 C.F.R. § 456.1(g). Section 456.1(g) goes on to state that:

"In the case of a prescription for contact lenses, the refractionist must include in the prescription only those measurements and directions which would be included in a prescription for spectacle lenses." (Emphasis added.)

Thus the refractionist is only required to provide spectacle lense information on the prescription, and may write "for spectacles only" on the prescription, there being no express prohibition against such an act either in 16 C.F.R. § 456.1-.9 or in State law.
Prescription Restricted to Spectacles for Non-Medical Reasons

Your next inquiry deals with whether a refractionist may write "for spectacles only" on a prescription in order to prevent an optician from fitting that patient with contact lenses, unless there is a valid medical reason for so restricting the use of that prescription. While the FTC rules require that a refractionist give his patient a copy of his prescription, that prescription need only contain spectacle lens information. For an optician to fit the contact lenses on the basis of a prescription for spectacles would be a violation of § 54-398.27, unless the prescribing refractionist gave permission to do the fitting. See Report of the Attorney General (1976-1977) at 192. The medically sensitive nature of fitting contact lenses, which forms the basis for the statutory requirement that an optician must work under the supervision of a refractionist in fitting contact lenses, was noted in the previously mentioned Opinion to Dr. Prince, found in Report of the Attorney General (1976-1977) at 191-192, a copy of which is attached.

Section 456.7 of the FTC rules allows consumers the opportunity to comparison shop for ophthalmic goods, which includes contact lenses. Therefore, while there is no express obligation on a refractionist to reveal his reason for withholding contact lens information, it is my opinion that the effect of the refractionist's refusal is to limit the patient's choice of a seller of ophthalmic goods and could well violate the FTC rule.

Obligation to Explain

The answer to your inquiry whether the refractionist must explain to the patient why the patient is not able to be fitted for contact lenses, if the words "for spectacles only" appear on the prescription, must be in the positive. If the patient asks specifically for a prescription which contains contact lens information and the refractionist refuses to honor the request, he would have an obligation to fully disclose to the patient the reason for the refusal.

Possible Antitrust Problems

Your next inquiry concerns whether there are possible antitrust problems if a number of refractionists are writing "for spectacles only" on prescriptions in order to prohibit opticians from filling such prescriptions. Section 59.1-9.5 makes illegal "[e]very contract, combination or conspiracy in restraint of trade or commerce of this State." If a group of refractionists had combined to prevent opticians, in general, from competing in the business of fitting contact lenses, then I believe § 59.1-9.5 would apply. Additionally, Section 1 of the Sherman Act, 15 U.S.C. § 1 may also apply if interstate commerce was affected in any way.

You have also asked whether a refractionist can refuse to allow his patient the opportunity to have the optician of his choice fill a prescription for contact lenses. If the refractionist has written a prescription which contains contact lens information, the patient may take that prescription to the seller of ophthalmic goods of his choice to be fitted for contact lenses. As noted in the Opinion to Dr. Prince, the seller, if such person is an optician, must, however, fit the lenses under the direction of an optometrist or ophthalmologist. The optician must direct the patient to return to the refractionist who wrote the prescription "for a review examination and any needed adjustments in the prescription." See Report of the Attorney General (1976-1977) at 191, 192.
Possible Liability

Your last inquiry regards the liability of the refractionist for the product produced by the optician as a result of the refractionist's prescription. The FTC rules prohibit a written waiver of liability or responsibility of the refractionist for the accuracy of the eye examination or the accuracy of the ophthalmic goods and services dispensed by another seller but not an oral waiver. (Emphasis added.) See 16 C.F.R. § 456.7(d). The FTC rules in § 456.9(e), however, express the intent that the prohibition on written waivers of liability does not impose liability on a refractionist for the ophthalmic goods and services dispensed by another seller pursuant to the refractionist's prescription. Considering the state of flux in the area of products liability law, and the lack of case law on point, however, it would be imprudent of me to state with certainty that the refractionist could or could not escape all liability for a defective lense which was produced from a prescription written entirely by that refractionist. It should be noted, however, that § 54-398.27 requires that an optician must work under the direction of a refractionist in fitting contact lenses. This statutory mandate would figure significantly in a court's decision on liability for defective contact lenses.

Section 54-398.27 provides:

"Nothing in this chapter shall be construed in any way to authorize an optician, or anyone else not otherwise authorized by law, to make, issue, or alter optical prescriptions, or to practice ocular refraction, orthoptics, or visual training, or to fit contact lenses except on the prescription of an ophthalmologist or optometrist and under his direction, or to advertise or offer to do so in any manner."

Since the information in the prescription contains only information necessary for spectacles writing the words "for spectacles only" is redundant. To prohibit filling the prescription with contact lenses the note should state that the prescription is not to be used to make contact lenses.

ORDINANCES. MORATORIUM ON ZONING CHANGES. LOCAL GOVERNING BODY DOES NOT HAVE AUTHORITY TO ENACT.

October 18, 1978

The Honorable C. Richard Cranwell
Member, House of Delegates

You ask whether a local governing body has authority to enact an ordinance establishing a moratorium on all zoning changes in a portion of the locality until such time as highway improvements in that area can be made. I am of the opinion that a governing body does not have authority to enact such a provision.

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. See 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 expressly 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).

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, 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, Ch. 11, Art. 8, 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. There is, however, no express grant of authority which would empower a local government to enact an ordinance establishing a moratorium on the rezoning of land.

The general principles applicable to judicial review of the validity of a zoning ordinance are well settled. The legislative branch of a local government, in the exercise of its police power, has wide discretion in the enactment and amendment of zoning regulations. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959), 21A M.J.2d Zoning and Planning § 5 (1964).

The refusal of a local governing body to rezone property will not be overturned if the decision is not unreasonable. Local governing bodies are allowed wide discretion in the enactment or amendment of zoning ordinances. A court should not substitute its judgment for that of the local governing body unless there has been a clear abuse of power. Byrum v. Orange County, 217 Va. 37, 225 S.E.2d 369 (1976). A governing body may not, however, impose arbitrary or unreasonable restrictions upon the use of land through the exercise of its police power.

The reasonableness of a refusal to rezone property based on a rezoning moratorium can best be analyzed in light of the effect of such a provision on the rezoning process. In exercising its legislative judgment in regard to zoning, § 15.1-490 requires a locality to consider the general guidelines of its comprehensive plan, property lines, physical characteristics of the land, and other factors. Fairfax County v. Snell Corp., 214 Va. 655, 202 S.E.2d 889 (1974). A refusal to rezone property will be upheld where no compelling need for the rezoning is shown and it is not clearly demonstrated that the existing zoning classification is no longer reasonable or appropriate. A denial of a rezoning request will not, however, be sustained if, under all the facts of the particular case, the denial is unreasonable and has no substantial relationship to the public health, safety, morals or general welfare. 82 Am.Jur.2d Zoning and Planning § 24 (1976). The refusal to rezone cannot therefore be made without consideration of the actual merits of the individual rezoning application in light of the factors outlined in § 15.1-490.

A rezoning moratorium has the effect of establishing a blanket prohibition on the consideration of applications for rezoning. It would eliminate the governing body's authority to consider, much less grant, an application for rezoning within the area affected by the ordinance. It would therefore render meaningless the mandatory provisions of § 15.1-490 and the
ability of the governing body to scrutinize the merits of an application for rezoning in light of the provisions of § 15.1-490 and its relationship to a comprehensive plan.

I am of the opinion that a refusal to rezone property because of a moratorium would be, on its face, an arbitrary and capricious exercise of the police power. A decision based on such an ordinance would be unreasonable. The authority to enact a zoning regulation which would result in an unreasonable exercise of the police power may not be implied from the express authority granted to the localities to enact zoning provisions. I am therefore of the opinion that a local governing body has no authority to enact a regulation imposing a moratorium on zoning changes.

Section 15.1-486 provides:
"The governing body of any county or municipality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:
(a) The use of land, buildings, structures and other premises for agricultural, 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.
(e) [Repealed.]

For the purpose of zoning, the governing body of a county shall have jurisdiction over all the unincorporated territory in the county, and the governing body of a municipality shall have jurisdiction over the incorporated area of the municipality."

In Board of Supervisors v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975), the Virginia Supreme Court ruled that absent express authority, a locality may not enact a moratorium on the filing of subdivision plats and site plans since the approval of a site plan and the issuance of a building permit are ministerial acts. The enactment of a zoning regulation and the approval of rezoning applications is, however, a legislative function of the governing body to be exercised within its discretion.

PARDOI\N, PROBATION AND PAROLE. PROBATIONER PREVENTED SERVICE OF CAPIAS BY ABSCONDIING. PROBATION REVOCATION PROCEEDINGS, WHEN NOT WITHIN ONE YEAR AFTER EXPIRATION OF PROBATIONARY PERIOD.

September 26, 1978

The Honorable Richard H. Barrick
Commonwealth's Attorney for the
City of Charlottesville
You have asked whether a suspended sentence and probation may be revoked in a certain case. You have said that a defendant was convicted in the Circuit Court of the City of Charlottesville, and on March 4, 1975, he was sentenced to two years in the penitentiary, suspended on condition of supervised probation for two years from that date. On June 5, 1975, his probation officer reported to the court that the probationer had absconded from supervision, and a capias was issued on June 10, 1975, for his arrest. The capias was not executed, however, until mid-August 1978, when the probationer was discovered in the custody of Albemarle County authorities for another offense.

Section 19.2-306 of the Code of Virginia (1950), as amended, provides that a court may, for any sufficient reason which occurs during a probation period, revoke the probation and cause the probationer to be arrested and brought before the court at any time within one year after the probation period.¹

When a court in its order prescribes a period of suspension and supervised probation it may normally, under § 19.2-306, revoke the suspension and probation only within the time period specified in that statute.² The Supreme Court of Virginia has held, however, that where probation revocation proceedings have been commenced within the statutory time period, but have not been concluded within that period because of the actions of the probationer, such as in gaining a continuance, the probationer will not be heard to argue that the revocation was not timely made.³ Moreover, courts from other jurisdictions have held that a probationer will not be allowed to contend that a court no longer has jurisdiction to revoke his probation where a capias was issued during the statutorily mandated period, but the capias was not executed until the period expired because the probationer had absconded.⁴

Accordingly, it is my opinion that if a capias is issued within one year after a probationer's probationary period expires, and the capias cannot be served because the probationer has absconded, the Commonwealth should not be prevented from going forward with probation revocation proceedings when the probationer is finally located more than one year after his probationary period expires.

¹Section 19.2-306 provides, in part: "The court may, for any cause deemed by it sufficient which occurred at any time within the probation period, or if none, within the period of suspension fixed by the court, or if neither, within the maximum period for which the defendant might originally have been sentenced to be imprisoned, revoke the suspension of sentence and any probation, if the defendant be on probation, and cause the defendant to be arrested and brought before the court at any time within one year after the probation period, or if no probation period has been prescribed then within one year after the period of suspension fixed by the court, or if neither a probation period nor a period of suspension has been prescribed then within one year after the maximum period for which the defendant might originally have been sentenced to be imprisoned, whereupon, in case the imposition of sentence has been suspended, the court may pronounce whatever sentence might have been originally imposed." ²See Vick v. Commonwealth, 201 Va. 474, 111 S.E.2d 824 (1960); Dyke v. Commonwealth, 193 Va. 478, 69 S.E.2d 483 (1952). ³Berry v. Commonwealth, 200 Va. 495, 106 S.E.2d 590 (1959). ⁴Brandt v. Percich, 507 S.W.2d 951 (Mo.App. 1974); see also State v. Taylor, 306 A.2d 173, 111 R.I. 653 (1973).
PARKS. EXCHANGE OF LAND IN SHENANDOAH NATIONAL PARK BY UNITED STATES FOR PRIVATELY OWNED LAND.

August 14, 1978

The Honorable George P. Beard, Jr.
Member, House of Delegates

You ask whether the United States may exchange land in Shenandoah National Park for privately owned land. Your inquiry turns on whether the land in question was granted or conveyed to the United States by the Commonwealth after June 26, 1936. If title were obtained from another entity than the Commonwealth, I am aware of no legal restriction on its exchange for privately owned land. Further, there is no restriction concerning land obtained from the Commonwealth before June 26, 1936. If, on the other hand, the land was granted or conveyed by the Commonwealth after June 26, 1936, right and title to such land immediately reverts to the Commonwealth, when the United States ceases to own it, or use it in accordance with the grant. See § 7.1-22A of the Code of Virginia (1950), as amended.1

The General Assembly amended this statute at its 1975 Session to permit exchange of such lands without reversion to the Commonwealth under certain conditions. See Ch. 449 [1975] Acts of Assembly.2 This proviso was repealed in its entirety, however, in 1976. See also Ch. 211 [1976] Acts of Assembly.

Therefore, if the United States acquired the lands in question from the Commonwealth after June 26, 1936, right and title to such lands shall immediately revert to the Commonwealth when the United States ceases to be the owner thereof.

1Section 7.1-22A, which became effective on June 26, 1936, provides:
"If the United States shall cease to be the owner of any lands, or any part thereof, granted or conveyed to it by the Commonwealth, or if the purposes of any such grant or conveyance to the United States shall cease, or if the United States shall for five consecutive years fail to use any such land for the purposes of the grant or conveyance, then, and in that event, the right and title to such land, or such part thereof, shall immediately revert to the Commonwealth."

2Chapter 449 [1975] Acts of Assembly, provides:
"Provided, however, that in the event the United States shall acquire other lands adjacent to the Shenandoah National Park in exchange for lands granted to it by the Commonwealth which are at present a part of the Shenandoah National Park, and that such exchange be of nearly equivalent value, then the lands in such manner ceasing to be owned by the United States shall not revert to the Commonwealth, but such limitation shall attach to the lands acquired by the United States by exchange as provided herein."

PHYSICIANS. PATIENT INFORMATION DISCLOSURE ACT. PROCEDURE FOR DISCLOSURE OF PATIENT INFORMATION TO THIRD PARTY PAYORS BY MENTAL HEALTH PROFESSIONALS. CONFIDENTIALITY.

August 17, 1978

The Honorable George H. Heilig, Jr.
Member, House of Delegates
You have asked whether a physician employed by a medical insurer is prohibited from disclosing to non-physician medical review personnel, also employed by that insurer, the information received by him in connection with a mental health insurance claim.

The Patient Information Disclosure Act

At its 1978 Session, the General Assembly enacted several statutes which prescribe detailed procedures for disclosure of patient information to third party payors by mental health professionals. See Ch. 632 [1978] Acts of Assembly, codified as §§ 37.1-225 through 37.1-233 of the Code of Virginia (1950), as amended. These statutes divide all patient information into two categories for purposes of disclosure. First, if the patient requests a mental health professional to submit a bill to a third party payor for payment under a contract or policy of insurance that covers that patient, the patient is deemed to have consented to the disclosure of certain information specified in that statute. This information includes his name, contract or policy number, when his illness began, the date his treatment began, when the services terminated, a diagnosis and brief supporting statement, and a brief description of the services provided to the patient. See § 37.1-226.

Second, if the third party payor is unable to settle the claim on the basis of that information, a physician employed by the third party payor may request additional information if he states his reasons for needing it. The mental health professional is then authorized, without further consent of the patient, to submit "to the physician" the requested additional information, "which shall be confidential." See § 37.1-227.

The remaining statutes in this procedure specify what information the third party payor may disclose without the patient's consent, how such consent may be obtained, and remedies and penalties for violations of these non-disclosure provisions. Except in the context of an audit or regulatory rate review, or where the third party payor is engaged in a benefit program with other third party payors, no patient information shall be disclosed without the patient's consent, and the disclosures permitted under the exceptions to this rule are strictly limited. See § 37.1-228.

Confidentiality of Detailed Information

Under previous practice in the medical insurance industry, the patient's request that the mental health professional submit a bill to the third party payor was deemed to be the patient's authorization to release all information that the third party payor required to settle the claim. It is my opinion that the new statutory procedure described above no longer permits this practice. Only that information specified in § 37.1-226 may be disclosed generally to the third party payor by the mental health professional when he submits his bill. If further information is required, the mental health professional may only submit that information upon request to the third party payor's physician and, by the express terms of the statute, that physician must keep it confidential. Therefore, it is my opinion that the third party payor's physician may not disclose that additional information to non-physician medical review personnel also employed by the third party payor. Such information may only be disclosed pursuant to specific written consent of the patient.
You have asked me who owns medical records which are sent, upon the request of the patient involved, from one physician to a second physician who works for a clinic established with the help of the Public Health Service. You ask specifically whether those records belong to the clinic or to the physician when the physician leaves the clinic to begin a private practice.

Medical records, as a general principle, do not belong to a patient but rather to the physician or medical care facility treating the patient. See Report of the Attorney General (1939-1940) at 220. Thus, in the situation you have described, the medical records belong either to the second physician or to the clinic at which he was working when the records were received. The fact that it was the patient who had the first physician transmit the records is not legally significant. Nevertheless, while the patient may not own these records, he may request, pursuant to § 8.01-4138 of the Code of Virginia (1950), as amended, that the owner of the records, whether it be the physician or the clinic, supply him with copies of those records. See Opinion to the Honorable Ralph L. Axselle, Jr., dated July 27, 1977 (copy attached). The physician or clinic, however, may retain the original records.

As between the clinic and the physician, the ownership of the records depends upon certain additional facts, which may vary from one situation to another. For example, if the physician stored the records at the clinic and treated the patient at the clinic as a part of his normal work routine, I would be of the opinion that the records belonged to the clinic. If, however, the physician kept the records among his personal possessions at the clinic and he treated the patient outside of the clinic, I would conclude that the records belonged to the physician, particularly if the patient paid the physician compensation over and above any salary which the clinic regularly paid him. Consequently, the determination of ownership will depend upon facts which would indicate the nature and the extent of the clinic's and the physician's respective rights to possess, use, and otherwise control those records.

Section 8.01-4138 provides: "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. A reasonable charge may be made for such copies."

In my judgment, the word "hospital" in § 8.01-4138 is to be construed in its large generic sense, not in the more limited sense of a general acute care hospital. Therefore, the clinic is a "hospital." See also § 32-298(2).

This Opinion refers to § 8-277.1B. After Title 8 was recodified as Title 8.01, this provision became the current § 8.01-4138.
You have asked whether § 15.1-440 of the Code of Virginia (1950), as amended, which states that "no action of the local commission shall be valid unless authorized by a majority vote of those present and voting..." requires that every affirmative action be supported by a majority of the members present.

In the fact situation you have described, a proposed rezoning was presented to the local planning commission, with all members present, and the vote was four (4) in favor of rezoning, none against, and four (4) abstaining. Under the literal language of § 15.1-440, the motion would pass because it received the votes of all "those present and voting." One must, therefore, determine whether there is some authority which dictates that the statute be construed otherwise.

There are no Virginia cases or Opinions of this Office concerning § 15.1-440. There are, however, several Opinions which construe a similar provision, § 15.1-5401 and its predecessor statutes. Prior to 1946, that statute2 provided that all questions submitted to the board of supervisors for decision shall be determined by vote of a majority of the supervisors present. In an Opinion of this Office, it was held that a motion receiving a majority of votes of those actually voting was passed lawfully, even though it was not supported by a majority of those actually present. This conclusion was based upon the view that the members who were present, but refrained from voting, acquiesced in the action of the majority of those actually voting. See Report of the Attorney General (1938-1939) at 23. Subsequently, this statute was amended, changing the requirement from a majority required for passage of the motion. See Report of the Attorney General (1950-1951) at 29.

Section 15.1-440 was amended in 1974 to add the words "and voting" after the words "a majority of those present." Under a literal reading of the statute, a motion requires only a majority vote of those who are present and who vote for or against the motion. This literal interpretation is completely consistent with the logic expressed in the prior opinions discussed herein. Therefore, it is my opinion that the motion for rezoning passed.

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1Section 15.1-540 provides, in relevant part, as follows: "All questions submitted to the board for decision shall be determined by viva voce vote of a majority of the supervisors voting on any such question...."

2Section 2717 of the Code of Virginia (1942), as amended [1946 Cumm. Supp.].
The Honorable George P. Beard, Jr.
Member, House of Delegates

You state that the Rappahannock County Board of Supervisors referred to the planning commission for its recommendation a proposed amendment to the county's zoning ordinance. After approximately one month, the planning commission had failed to make a recommendation on the proposed amendment. The Board then proceeded to adopt the amendment to the zoning ordinance. You ask whether the Board's action was in compliance with the provisions of § 15.1-493 of the Code of Virginia (1950), as amended, which establishes procedures to be followed in amending a zoning ordinance. ¹

Section 15.1-493 provides that no zoning ordinance shall be amended or reenacted unless the governing body has referred it to the local commission for its recommendations. See Opinion to the Honorable Thomas R. Nelson, County Attorney for Augusta County, dated December 29, 1971, and found in Report of the Attorney General (1971-1972) at 89. The statutory procedure required by § 15.1-493 is mandatory. See Opinion to the Honorable A. Plunket Beirne, Commonwealth's Attorney for Orange County, dated August 21, 1973, and found in Report of the Attorney General (1973-1974) at 479.

Section 15.1-493 requires a planning commission to report its recommendation to the governing body within ninety days "or such shorter period as may be prescribed by the governing body..." after the amendment has been referred to the commission. If the commission fails to make a recommendation within this time period, inaction is deemed to be approval. The statute grants a commission up to ninety days to make a recommendation; however, the language of § 15.1-493 and the advisory nature of the commission's role authorize the governing body to stipulate a shorter time limit on the deliberations of the planning commission. See Opinion to the Honorable David R. Thompson, Commonwealth's Attorney for King George County, dated December 14, 1976, and found in Report of the Attorney General (1976-1977) at 334. If no time limit is stipulated by the governing body at the time the amendment is referred to the planning commission to report its recommendations, it was authorized to act on the amendment when the commission failed to take a position within that period of time. If no stipulation was made, however, the governing body was required to wait until ninety days had passed before it enacted the amendment.

¹Section 15.1-493 provides in part:
"No zoning ordinance shall be amended or reenacted unless the governing body has referred the proposed amendment or reenactment to the local commission for its recommendations. Failure of the commission to report ninety days after the first meeting of the commission after the proposed amendment or reenactment has been referred to the commission, or such shorter period as may be prescribed by the governing body, shall be deemed approval."
September 1, 1978

The Honorable Charles H. Leavitt
Sheriff of the City of Norfolk

You have asked what disposition may be made of funds left by inmates no longer in your custody.

Section 53-312.1 of the Code of Virginia (1950), as amended, provides that if any inmate of a penal institution leaves any article of personal property, including money, in the custody of such penal institution upon release or escape, the director may, in his discretion, sell it after the lapse of three years, if no claim has been made by the owner. The proceeds of the sale shall become the property of the Commonwealth and shall be paid into the State Treasury, and credited to the Literary Fund.

Thus, I am of the opinion that you should, from time to time, report all inmate funds held by you for a period exceeding three years to the Director of the Department of Corrections. That report should include the name of each inmate for whom funds are held, the amount held for each, the date of release or escape, and finally a statement whether any claim has been made against the funds credited to the inmate. You should request that the director direct the payment of those funds to the State Treasury for credit to the Literary Fund.

PRISONERS: WORK RELEASE: AVAILABLE TO ALL DESERVING INMATES, WHETHER IN LOCAL JAILS OR STATE PRISONS.

July 10, 1978

The Honorable John A. Dezio
Commonwealth's Attorney for the City of Charlottesville

You have asked for an opinion addressing the authority of a sentencing court to assign a prisoner to work release pursuant to § 53-166.1 of the Code of Virginia (1950), as amended, after that court has reduced the prisoner's original penitentiary sentence to a jail sentence. Specifically, you state that each of two prisoners was originally sentenced to serve three years of a fifteen year sentence by the Circuit Court of Nelson County, but, due to an intervening federal sentence, the prisoners were never committed to the State correctional system. On January 23, 1978, prior to their release from federal custody, the prisoners were awarded a sentence reduction by the Circuit Court of Nelson County, the effect of which was to sentence the prisoners to jail time in the Albemarle-Charlottesville Joint Security Complex. The prisoners now seek work release assignment under § 53-166.1.

Section 53-272 vests the sentencing court with authority to suspend or modify any felony sentence in a case of a prisoner who has been convicted to a felony but not "actually committed and delivered" to the penitentiary. Because the prisoners had not been committed and delivered to the penitentiary as of January 23, the order of that date was an appropriate exercise of the court's discretion under § 53-272.

Section 53-166.1, governing work release assignments for jail inmates, has a counterpart in § 53-38 governing work release assignments for prisoners.
in State correctional facilities. The existence of these complementary statutes evidences a legislative intent to make work release available to all deserving inmates, regardless of whether they are held in local jails or in State prisons. To condition eligibility for work release consideration upon the manner of sentencing would be to frustrate that intent. Accordingly, I am of the opinion that the reduction of the original sentence from a penitentiary to a jail sentence under the facts of your request constitutes a "jail sentence" for purposes of determining eligibility for work release under § 53-166.1.

PRIVACY ACT. DISSEMINATION OF ADDRESSES BY GOVERNMENTAL AGENCIES.

March 21, 1979

The Honorable Richard H. Barrick
Commonwealth's Attorney for the City of Charlottesville

You have asked whether the Charlottesville Police Department may obtain from the City Gas and Water Department (Department) the current address of persons whom they seek to arrest or serve with legal process. Specifically, you ask whether the Department's release of such addresses would violate the Virginia Privacy Protection Act (Act).

Section 2.1-384(2) of the Code of Virginia (1950), as amended, provides that any restrictions imposed by the Act shall not apply to personal information systems which may exist in publications of general circulation. Since the correct address of an individual is information which may exist in publications of general circulation, such as city directories and telephone directories, Department records containing current addresses of customers would not be subject to the provisions of the Act. Accordingly, I am of the opinion that the Department's release of such records to local police authorities would not violate the Act.

PROCESS. WHO MAY SERVE PROCESS OTHER THAN SHERIFF. ELIGIBILITY UNDER § 8.01-293.

July 10, 1978

The Honorable Robert M. Hurst, Chief Judge
Nineteenth Judicial District of Virginia

You ask whether § 8.01-293 of the Code of Virginia (1950), as amended, "requires" that the General District Court allow a person other than the sheriff to serve process.

That section reads as follows:

"The following persons shall be eligible to serve process:

1. The sheriff within such territorial bounds as described in § 8.01-295; or"
2. Any person of age eighteen years or older and who is not a party or otherwise interested in the subject matter in controversy, provided that such person shall not be eligible to serve process which commences divorce or annulment actions." (Emphasis supplied.)

A person who meets the qualifications as set forth in the statute is thereby made eligible to serve process. Since the statute speaks in terms of eligibility, even though the requirements of the statute may be met, it is not then mandatory that the court allow such a person to serve the process. The selection of a responsible person to serve the process is still subject to the sound discretion of the court. In practice, the federal courts exercise such discretion,\(^1\) and although no explicit authority has been found, such would appear to be the rule in Virginia. The allowance for discretion of the court serves to provide the flexibility necessary to insure the proper administration of justice, and the protection of the interests of parties before the court.

I am, therefore, of the opinion that § 8.01-293 does not require that the General District Court allow a person other than the sheriff to serve process.


PROFESSIONAL AND OCCUPATIONAL REGULATION. HAIRDRESSER. PERSON PERFORMING SKIN CARE TREATMENTS DOES NOT HAVE TO OBTAIN LICENSE.

December 27, 1978

The Honorable Ruth J. Herrink, Director
Department of Commerce

You ask whether certain skin care constitutes the administration of cosmetic treatments as defined in § 54-112.2 of the Code of Virginia (1950), as amended, thus requiring persons who deal solely with skin care to be licensed professional hairdressers. You further inquire whether a person who deals in skin care must have a beauty shop permit to operate a skin care salon.

You state that new treatments for the skin are becoming popular and include the use of machines which involve application of electric currents. These treatments include removal of hair, removal of a layer of skin; treatment for acne, broken capillaries, brownish marks or freckles and solar marks.

It is my opinion that treatments involving the use of electrical instruments are not included in the definition of "cosmetic" in § 54-112.2(1). Treatments which involve the use of creams, lotions and other like substances are "cosmetic" as that word is statutorily defined. It is my opinion persons who deal with skin care alone are not required to be licensed as professional hairdressers, nor are skin care salons required to obtain beauty shop permits.
Cosmetic Treatments

Section 54-112.2(1) defines "cosmetic" as "any external application or substance intended to beautify and improve the complexion, skin or hair." The board's current regulations provide no assistance in further defining "cosmetic." Webster's Third New International Dictionary of the English Language, G. & C. Merriam Co., 1961, page 105, however, has defined "application" to be "something applied or used in applying, as something applied to the body locally as a remedial device, e.g., a poultice." The other key word "substance" has been defined in Webster's, at page 2279, to be "material from which it owes its characteristic qualities." Applying the preceding definitions to your inquiry leads to the conclusion that a "cosmetic" must be a tangible material which can be put on the skin or hair, such as a cream or lotion. By definition, an application or substance cannot be an intangible thing, such as an electric current. Therefore, cosmetic treatment methods using electric currents alone are not covered by § 54-112.2(1).

Licensure of Individuals

Section 54-112.2(3) defines "professional hairdresser" as "any person...who uses cosmetics, administers cosmetic treatments, or cuts, curls or dresses human hair for compensation." The use of the disjunctive "or" in this definition seems to indicate that a person is within the statutory definition if that person uses cosmetics or administers cosmetic treatments to the skin for compensation without ever cutting, curling or dressing human hair. It has been held, however, by the Supreme Court of Appeals of Virginia in O'Connor v. Smith, 188 Va. 214, 49 S.E.2d 310 (1948), that statutes which impose restrictions on trade or common occupations must be strictly construed. To reach the opposite conclusion would require a liberal construction to be placed on the definition of "professional hairdresser" and would bring a new trade or occupation within the State licensing domain.

The terms "beautician" and "cosmetologist" are used interchangeably with the term "hairdresser" in common parlance when speaking about a person who "cuts, curls or dresses human hair for compensation" and who occasionally gives a facial cosmetic treatment in his shop or salon. To expand the definition of "professional hairdresser" to include persons who provide only skin care treatments but never cut, curl or dress human hair would be to violate the principle of strict construction in O'Connor v. Smith, supra.

Under the applicable board regulation, POR 13-27, skin care and makeup are only one small segment of a two thousand hour course in hairdressing. It would be unreasonable to require a person who has no desire to cut, curl or dress human hair to complete such training in hairdressing and to obtain a license as a professional hairdresser when that person desires to engage solely in the skin care field.

For the preceding reasons a skin care specialist who uses cosmetic substances and persons merely selling cosmetics are not required to obtain a professional hairdresser's license.

Licensure of Salons

Your last inquiry regarding skin care salons must be answered in the negative also. Section 54-112.2(4) defines "beauty parlor or salon" as "any place or establishment which renders as a part of its service to the general
public, cosmetic treatments of any kind or nature, cutting, curling, treating or dressing human hair for compensation." Section 54-112.26 requires each beauty salon to obtain a license from the board to operate. Strictly construing the definition in § 54-112.2(4) in line with O'Connor v. Smith, supra, and considering the unreasonableness of placing skin care salons under statutory requirements and regulations which are oriented toward hairdressing, leads me to conclude that skin care salons do not have to obtain beauty salon permits to operate in Virginia.

PUBLIC OFFICERS. MEMBER OF BOARD OF COMMISSIONERS OF VIRGINIA PORT AUTHORITY MAY SERVE ON BOARD OF DIRECTORS OF NON-PROFIT CORPORATION LEASING PORT FACILITY.

June 6, 1979

The Honorable Herbert H. Bateman
Member, Senate of Virginia

This is in reply to your letter of April 20, 1979, in which you request my opinion as to the following: "Does membership of the Board of Directors of Maritime Terminals, Inc., while also serving as a member of the Board of Commissioners of the Virginia Port Authority, present or involve a conflict of interest or improper dual office-holding?" Maritime Terminals, Inc. is a private corporation which operates, as lessee, the Norfolk International Terminals, a port facility owned by the Virginia Port Authority (VPA).

It is apparent from an agreement dated March 30, 1972, between VPA, the City of Norfolk, and the Norfolk Port and Industrial Authority by which VPA acquired Norfolk International Terminals and an agreement of lease dated July 1, 1972, between VPA and Maritime Terminals, Inc. (MTI) that MTI was created by VPA and the city to operate the port facility as a private, nonstock corporation. MTI is governed by a seven member board of directors, four of whom are appointed by the Board of Commissioners of VPA, and three of whom are appointed by the City Council of the City of Norfolk. Its members are not salaried employees of the corporation, but are entitled to per diem compensation for service on the board. Pursuant to its charter and bylaws, MTI does not operate the port for the purpose of earning profits, and under its lease with VPA, MTI is entitled to only that portion of its revenues necessary to defray the corporation's operating expenses. Funds earned in addition thereto are payable to VPA.

Notwithstanding its corporate identity, MTI has been held by this Office to be a governmental agency within the meaning of the Virginia Conflict of Interests Act (the "Act"), §§ 2.1-347 through 2.1-358 of the Code of Virginia (1950), as amended. See Opinion to the Honorable E. P. Holmes, Executive Director of VPA, Report of the Attorney General (1971-1972) at 463. In that Opinion, it was also held that members of the board of directors of the corporation are subject to the provisions of the Act.

In view of the foregoing, I do not consider concurrent service on the Boards of VPA and MTI a conflict within the meaning of the Act. Pertinent to this conclusion is § 2.1-349, which prohibits an officer of a governmental agency from being a contractor or subcontractor with the agency of which he is
an officer, or from having a material financial interest in any such contract or subcontract. Section 2.1-348 defines a contract to include "[a]ny agreement to which a government agency is a party..." and "[a]ny agreement on behalf of a governmental agency, which involves the payment of moneys appropriated to such governmental agency." A material financial interest is defined in § 2.1-348 to include a "personal and pecuniary interest accruing to an officer..." which must equal or exceed ownership of a five percent interest in a firm or an aggregate annual income from the firm of at least $5,000.

In the context of the relationship between VPA and MTI, a member of the Board of Directors of MTI is not a party to a contract with VPA which would be forbidden by the Act. Because MTI was created by VPA to perform a governmental function on behalf of that State agency, its contract of lease with VPA does not constitute an agreement between parties having divergent interests. To the contrary, the agreement is designed to achieve a mutual public purpose. Further, neither MTI nor its directors earn profits, other than per diem compensation, from operation of the port, which negates the existence of a personal pecuniary interest therein on behalf of any director. Accordingly, the members of both boards are engaged in the performance of public duties which are parallel in interest. Such an arrangement is not suggestive of the potential conflict of interests which the Act is intended to proscribe.

You also inquire whether service on both boards constitutes an improper dual officeholding. Article II, § 5, of the Constitution of Virginia (1971), relating to qualifications to hold elective office, provides inter alia, that "nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision." Article VII, § 6, of the Constitution prohibits dual officeholding by certain elective officials of counties, cities and towns. Also, the General Assembly has, by statute, further proscribed dual officeholding by officials of State and local governments; for example, see §§ 2.1-30 through 2.1-37 concerning federal-State officeholding and §§ 15.1-50 and 15.1-800 relating to officials of local governments. The constitutional and statutory restrictions on dual officeholding do not, however, address the compatibility of the public offices which are the subject of your inquiry. Accordingly, it is necessary to resolve that issue in the context of the common law doctrine of incompatibility of public offices.


"The doctrine of incompatibility of public offices is a part of the common law and of great antiquity. Its correctness and propriety are so well established as to be assumed without discussion in practically every case which has arisen upon the subject. The question, however, is what constitutes incompatibility. Without citing and discussing the many cases upon the subject, we think they are practically unanimous in basing the doctrine on public policy. But the full scope of what public policy requires and the content of a general rule which will in all cases determine whether any two particular offices are compatible, has rarely, if ever, been determined by any court. The great majority of the
reported cases take a somewhat narrow view of the question and determine the incompatibility by the duties of the respective offices rather than by the power of the incumbent to perform such duties."

It is, then, in the context of public policy that the compatibility of membership on the governing boards of VPA and MTI must be considered. VPA is charged with the responsibility of promoting and stimulating the shipment of cargoes and commerce through the several ports which it owns, including ports in the Hampton Roads area in addition to its terminal at Norfolk. See Title 62.1, Ch. 10. It is, therefore, the implied duty of the Board of Commissioners to encourage and assist in the development of each port on an equal basis. The fact that one member of the board also serves in a position which might cause him to favor one port in particular, does, I believe create a potential imbalance in his consideration of overall port activities. Nevertheless, the Board of VPA must have taken this into consideration when it established MTI and elected to appoint a member of its board to the governing authority of the corporation. That decision represents an expression of VPA's policy that MTI, while serving the interests of a particular port, should nevertheless be under the close supervision of VPA. This is clearly the case where the dual directorship is occupied by an appointee of the State, rather than the City of Norfolk. The policy established by VPA for managing the Norfolk port is, therefore, a valid exercise of the discretion committed to VPA by the legislature. Such a public policy should not be disturbed unless plainly illegal, and I do not find from it any significant incompatibility of offices.

Consequently, I am of the opinion that the Board of Commissioners of VPA may appoint one of its members to the Board of Directors of MTI without creating a conflict of interests of improper dual officeholding.

RETIREMENT SYSTEM. MEMBERS OF INVESTMENT ADVISORY COMMITTEE NOT LIABLE FOR FINANCIAL ADVICE RENDERED IN GOOD FAITH TO VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM’S BOARD OF TRUSTEES.

June 13, 1979

The Honorable Glen D. Pond, Director
Virginia Supplemental Retirement System

You have asked whether members of an investment advisory committee are subject to liability for the financial advice rendered in good faith to the Board of Trustees.

You have stated that the Board of Trustees desires to establish an investment committee composed of three investment experts and the State Treasurer. The committee's responsibility would be to advise the board in the following matters:

the establishment of investment policy;
the selection of investment managers;
the monitoring of results;
the formulation of long range investment planning goals;
the formulation, review and updating of investment guidelines;
the establishment of realistic investment objectives related to actuarial assumptions;
the determination of asset mix;
the consideration of alternate investment media, such as real estate, private placements, foreign investments, etc.;
the employment of a Chief Investment Officer;
the review of competence of staff, both in-house and out-side managers;
the preparation of suitable reports on all phases of the investment operation; and
the continued effort to improve investment results.

The State Treasurer has been designated by statute as the custodian of the assets of the retirement system. See § 51-111.51 of the Code of Virginia (1950), as amended. Therefore he is deemed to be an insurer of such funds. The other members of the advisory committee have no statutory obligation to the members of the retirement system, and are not subject to the rule of strict liability as are public officers. See Opinion to the Honorable David B. Ayres, Jr., Comptroller of Virginia, dated February 6, 1974, and found in Report of the Attorney General (1973-1974) at 8. The advisory committee members are neither administrative nor public officers.

Accordingly, I am of the opinion that the committee would incur no liability for advice given in good faith on the described matters.\footnote{Such persons would be subject to the Virginia Conflict of Interests Act and, depending on the facts, could be prohibited from having a material financial interest in actions recommended to the board.}

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RETIREMENT SYSTEM: STATE AND POLITICAL SUBDIVISIONS HAVE AUTHORITY TO MAKE PAYMENTS ON ACCOUNT OF SICKNESS FOR EXEMPTION FROM FICA TAXES.

April 24, 1979

The Honorable Glen D. Pond, Director
Virginia Supplemental Retirement System

You have asked whether or not the State and political subdivisions have the authority to make payments "on account of sickness," in order that sick leave payments could be excluded from the Federal Insurance Contributions Act (FICA). The effect would be to save both the employer and the employee the amounts now collected for this purpose from the salary received when sick leave is taken.
State's Authority

The current Appropriations Act specifically authorizes the Governor to establish a plan to achieve this purpose. See Ch. 850 [1978] Acts of Assembly 1879.2

Accordingly, there is specific authority for the State to adopt a plan for payments on account of sickness.

Authority of Political Subdivision

Localities operate under a different mandate. According to § 15.1-7.1 of the Code of Virginia (1950), as amended, the governing body of a locality must establish a uniform pay plan for all employees. This constitutes authorization to establish compensation and benefits. Localities then, by virtue of this statute, have the discretion to establish a sick pay plan or a plan for payments in lieu of sickness.

In my opinion then both the State and localities are authorized to institute sick leave plans which qualify as payments on account of sickness exempt from payment of FICA taxes.

126 U.S.C. § 3121, excludes from wages for FICA purposes payments made to an employee under a plan or system to reimburse employees on account of sickness.

2Chapter 850 [1978] Acts of Assembly provides:

"g. Subject to approval by the Governor of a plan for nonsalary payments to State employees who are absent from work on account of sickness or accident disability: (1) there is hereby appropriated from the respective appropriations to State agencies in the current biennium a sum sufficient to provide for such payments; (2) no State employee included within the plan shall continue to be paid a salary by the employing State agency during absences from work on account of sickness or accident disability. The provisions of this paragraph shall not be applicable to employees after an absence on account of sickness or accident disability in excess of six calendar months following the last calendar month in which the employee worked for the State."

SALARIES. MILITARY LEAVE. EMPLOYEES COMING WITHIN § 44-93 ENTITLED TO LEAVE WITH PAY FOR UP TO FIFTEEN WORK DAYS MISSED.

June 20, 1979

The Honorable George W. Jones
Member, House of Delegates

You have inquired about the meaning of § 44-93 of the Code of Virginia (1950), as amended, which concerns military leave without loss of pay for various public employees.1 Section 44-93 relates to leaves of absence for all days which an employee is engaged in annual active duty for training, or when called forth by the Governor when execution of the law is obstructed or in the event of disaster. The section further provides that "there shall be no loss of pay during such leaves of absence, not to exceed fifteen days per calendar
Specifically, you have asked whether these fifteen days are to be consecutive calendar days or normal working days. You have also questioned whether Rule 10.9 of the Rules for the Administration of the Virginia Personnel Act, which deals with military leave, is in conflict with § 44-93.²

It is a fundamental rule of construction that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. See Gates & Son Co. v. City of Richmond, 103 Va. 702, 49 S.E. 965 (1905). Often a word or phrase takes color or expression from the meaning of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole. See Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 183 S.E.2d 170 (1971).

In § 44-93, the phrase "not to exceed fifteen days per calendar year" refers to and modifies the phrase "such leaves of absence," which is synonymous with actual work days missed on account of military duty. Accordingly, I am of the opinion that the most reasonable interpretation of the words "fifteen days" would be that they were intended to refer to work days and to set a limit on the actual number of work days missed for which an employee would be provided full pay.

As a result, it does appear that Rule 10.9 of the Rules for the Administration of the Virginia Personnel Act is in conflict with § 44-93 and should be revised.

1Section 44-93 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 of 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."

2Rule 10.9 of the Rules for the Administration of the Virginia Personnel Act provides in part:
"Grants of all military leave shall be in addition to leave otherwise allowable.
An employee who is absent for annual active duty for training as a member of the reserve components of the United States Army, Navy, Air Force, Marine Corps, Coast Guard, Public Health Service, or United States Coast and Geodetic Survey shall be entitled to leave of absence at full pay for not exceeding fifteen calendar days per calendar year. A copy of the official orders for duty must accompany the request for leave.
If annual active duty training is fragmented, military leave with full pay will be limited to 10 work days in a calendar year. Military leave with pay is not allowable for regular training activities or for any part of extended active duty.
An employee who is absent for duty with the National Guard or Naval Militia under orders of the Governor pursuant to Section 44-75 of the Code of Virginia shall be entitled to leave of absence with full pay for the period of ordered absence."
The Honorable Mary A. Marshall  
Member, House of Delegates

You ask two questions regarding the eligibility of part-time faculty for continuing contracts.

Continuing Contract

You first ask whether a division school board may allow teachers currently on continuing contracts to retain such contracts during good behavior and competent service if they change from full to part-time employment in that division's schools. It is clear that under applicable State law and regulations a part-time teacher is not entitled to a continuing contract. However, I am of the opinion that a school board is not prohibited from providing by regulation that a part-time teacher may be given a right of employment conditioned on good behavior and competent service.

Article 2 of Ch. 11 of Title 22 of the Code of Virginia (1950), as amended, provides that "teachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service...." This section is amplified by the provisions of § 22-217.2, and deals with "Terms of Employment of Teachers" which clearly contemplates written contracts with full-time public school teachers only, since it specifically excludes the authority for written contracts with those teachers employed on a temporary basis. The section further authorizes the State Board of Education to promulgate rules and regulations to carry into effect the purpose of Art. 2, Section II of the board's regulation, "Contractual Agreements with Professional Personnel" provides that "only full-time instructional personnel employed under the supervision and control of the school board and paid on order of the school board are eligible for continuing contracts."

However, the local school board has considerable power to determine conditions of employment. See § 22-72(5); Report of the Attorney General (1969-1970) at 233. Accordingly, the board would not be precluded from providing by regulation that teachers on continuing contract who wished to teach part-time could be able to hold part-time employment on a continuing basis conditioned on good behavior and competent service. While the law does not mandate such a policy, a school board is free to adopt such policies.

Continuing Contracts for Part-Time Faculty Completing a Probationary Period

Your second question is whether the school division may issue a continuing contract to part-time teachers who have completed a specified probationary period. The same considerations which apply in my answer to your first question would apply to this one. By regulation the board could specify that after a probationary period (of whatever duration the board determines to be appropriate) the right of dismissal for cause could be conferred upon part-time teachers.
Section 22.217.2 provides:
"Written contracts shall be made by the school board with all public school teachers, except those temporarily employed as substitute teachers, before they enter upon their duties, in a form to be prescribed by the Superintendent of Public Instruction. Such contracts shall be signed in duplicate, with a copy thereof furnished to both parties.
"The State Board of Education shall promulgate rules and regulations to effectuate the purposes of this article."

SCHOOLS. DAY CARE CENTERS. LOCAL SCHOOL BOARDS DO NOT HAVE LEGAL AUTHORITY TO OPERATE DAY CARE CENTERS UPON SCHOOL PROPERTY WITH SCHOOL BOARD EMPLOYED PERSONNEL.

December 11, 1978

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You advise that counsel for the Fairfax County School Board has advised the board that it may not operate a day care center, and you ask my opinion whether that advice is correct. You state that the school board currently operates three day care centers in certain elementary schools. These centers are operated from approximately 7 a.m. until 6:15 p.m., with children through the sixth grade eligible to attend. The centers are equipped with educational games and books and are staffed by day care center teachers who are not required to be certified, although they do fulfill some educational functions incidental to the operation of the center.

The powers of school boards are limited to those expressly granted, necessarily implied, or essential and indispensable to the functions of such board. Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). No statute expressly authorizes county school boards to provide day care centers. For a power to be necessarily or fairly implied, it must be consistent with, and directly related to, a stated power or function of the board.

The nature of day care activities is essentially custodial in nature by providing care and supervision for children in the place of their parents or guardians. Day care centers are not essentially related to education, nor are its functions primarily directed toward education. Therefore, there is no necessarily implied relationship between the authority granted by the Virginia Constitution to the local school board to supervise the schools in the division and the operation of day care centers.

Therefore, it is my opinion that the local school board is not presently legally authorized to operate the day care centers which you describe.

Section 22-164.1 of the Code of Virginia (1950), as amended, authorizes the board to permit other uses of school property. This would not give the board the authority to engage in an activity not otherwise authorized by law. However, the board could allow a day care center operated by another entity to
use school property. This would suggest a possibility that the school board could develop a relationship with some appropriate party which would permit the operation of the center by that party on school property.

SCHOOLS. HANDICAPPED CHILDREN. STATE AND FEDERAL LAW NOW PROVIDE FOR FREE APPROPRIATE PUBLIC EDUCATION FOR THE HANDICAPPED.

January 23, 1979

The Honorable Lewis P. Fickett, Jr.
Member, House of Delegates

You have asked when physical and occupational therapy are to be provided at no cost to the parents by local school divisions as a part of a free program of special education. State1 and federal2 law now provide for a free appropriate public education for the handicapped. A free appropriate education is defined as special education and related services.3 Physical and occupational therapy may be related services when they are "required or appropriate" components of an educational program.4 However, medical services must be provided as a component of a free appropriate education only when they are for diagnostic or evaluation purposes.5

Thus, whether occupational and physical therapy are related services which must be provided free of charge or are medical services depends upon the purpose for which they are provided. This is a question of fact to be resolved in each instance based on the particular circumstances.

Special education is provided pursuant to an Individualized Education Program (IEP). 20 U.S.C. § 1401(18); see also 45 C.F.R. § 121a4. The IEP is a written statement describing a handicapped child's needs and the specific special education and related services to be provided. If physical and occupational therapy are identified in the IEP as being necessary related services, then by definition the school division would have the obligation to fund these services.

1Section 22-10.3 of the Code of Virginia (1950), as amended.
3Section 22-10.3(b).
4Related services are defined as:
   "...[T]ransportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training." 20 U.S.C. § 1401(17); 45 C.F.R. § 219.
5Ibid.
SCHOOLS. LIABILITY FOR INSTITUTIONAL COSTS WHERE LOCAL SCHOOL DIVISION UNABLE TO PROVIDE APPROPRIATE EDUCATIONAL PROGRAM FOR CHILD. EDUCATION IN STATE HOSPITAL OR MENTAL RETARDATION FACILITY.

July 31, 1978

The Honorable Jean L. Harris, M.D.
Secretary of Human Resources

You ask whether local school divisions are liable for the institutional costs in cases where the local school division is unable to provide an appropriate educational program for a child and agrees that the child can best be educated in a state hospital or mental retardation facility under the jurisdiction of the Department of Mental Health and Mental Retardation.

The answer to your question requires analysis of several interrelated State and federal laws affecting the respective duties of the Department of Mental Health and Mental Retardation and of local school divisions. At issue is whether parents may be required to pay for institutional costs, and if not, whether local school divisions can be required to pay such costs. For the reasons discussed below, I conclude that local school divisions have responsibility only when the placement is for education rather than care or treatment. In the case of placements for care or treatment, the State facility must provide a free education program, and parents may still be required to pay additional institutional costs.

Section 37.1-105 of the Code of Virginia (1950), as amended, provides that the persons legally liable for the support of any person admitted to any State hospital shall be liable for the expenses of his care, treatment and maintenance in such hospital. "State hospital" is defined in § 37.1-1(20) as including both State mental hospitals and State mental retardation facilities. Parents and guardians are assessed costs on the basis of their financial ability to pay. The funds to pay the excess costs are derived from state appropriations and payments from third party sources, such as medicaid. In some instances, third party payees will not reimburse such facilities for the costs of providing educational programs. See, e.g., 42 C.F.R. § 449.10(c)(2).

The Education for All Handicapped Children Act of 1975, as amended by Pub.L. 94-142, 20 U.S.C. § 1401, ("P.L. 94-142") and the regulations enacted to implement that statute, 42 Fed. Reg. 42474, provide that all handicapped children must be receiving a free, appropriate public education no later than September 1, 1978. Under the 1978 amendments to §§ 22-10.4 and 22-10.5 (Ch. 386 [1978] Acts of Assembly 551), which become effective on September 1, 1978, local school divisions must provide a free and appropriate special education designed to meet the reasonable educational needs of all handicapped children residing within their jurisdiction. Section 22-10.8 requires the local school divisions who lack such programs to place children in private schools when education is not appropriately available in a State facility.

A "free, appropriate public education" means special education and related services which are necessary or appropriate to enable handicapped children to benefit from special education. P.L. 94-142 Regulations §§ 121a.4, 121a.13; Virginia Code § 22-10.3(b), (Ch. 386 [1978] Acts of Assembly 55151). A local school division may educate such children in its own schools or place them in a state or private non-sectarian school which can more appropriately
provide special education for those children. See § 22-10.6. If a local school division must place a child in a state or private, residential program for special education and related services, the program, including non-medical care and room and board, must be at no cost to the parent or guardian of the child. P.L. 94-142 Regulations § 121a.302; see also § 22-10.8.

P.L. 94-142 and the Virginia laws are, however, designed primarily to apply to handicapped children in local school divisions. Programs for children whose education is provided by the State, including children in state residential facilities, are governed by § 121 of Title I, Elementary and Secondary Education Act, as amended by P.L. 93-380, 20 U.S.C. § 241c-1, ("ESEA"), and the Regulations enacted to implement that statute, 43 Fed. Reg. 16262. Under the ESEA, parents of handicapped children may not be charged for room, board and non-medical care provided in a residential care facility in which the child is placed for educational purposes. ESEA Regulations § 116b.62. Parents may be charged for these services when placement is for other purposes, such as care and treatment.

The primary purpose of state mental health and mental retardation facilities is to provide care and treatment, both medical and non-medical, for mentally ill and mentally retarded children. Appropriate programs of special education are provided for such children as part of the treatment program and are provided at no cost to parents by these institutions. See § 22-9.1:04. But these facilities are treatment facilities rather than schools, and by definition placement in such facilities is made for other than educational purposes.

In my opinion, therefore, § 37.1-105 does not conflict with P.L. 94-142 or the Virginia laws for the education of the handicapped. While appropriate programs of special education must be provided for children in state mental health and mental retardation facilities at public expense, parents and guardians may be required to pay charges for room, board and non-medical services under § 37.1-105.

This does not mean that a local school division may not contract to have a child educated in a state mental health or mental retardation facility rather than in a private school. In that case, placement in such a facility would be for educational purposes, and the local school division would be required to pay all the costs of the day or residential program in the same manner that it is required to pay the costs of children it places in private special education programs.

In my opinion, therefore, educational programs are provided for children in such facilities at no cost to the parents by the Department of Mental Health and Mental Retardation, while parents and guardians are legally liable for payment of charges for room, board and non-medical services under § 37.1-105. When a local school division contracts to place a child in a state mental health and mental retardation facility for the purpose of providing an appropriate program of special education for the child, it is responsible for payment of the costs of room, board, educational programs and non-medical services. In all other cases, when placements in state mental health and mental retardation facilities are made according to the statutory procedures, local school divisions are not liable for the charges for services provided by those facilities.
SCHOOLS. SCHOOL BOARDS. APPOINTMENT OF MEMBERS TO COUNTY SCHOOL BOARD GOVERNED BY § 15.1-708.

December 13, 1978

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

You have asked about appointments of members to the Scott County School Board by the Board of Supervisors.

You have told me that Scott County operates under the county form of government and that there are five members of the school board. You have also indicated that the county is not composed of separate town school districts as allowed by § 15.1-708 of the Code of Virginia (1950), as amended.

You first ask if the number of school board members may be increased by appointment by the Board of Supervisors and if so what manner membership may be. Section 15.1-708 governs the appointment of school board members in counties having the county board form of government. See also Report of the Attorney General (1971-1972) at page 334. This Code section authorizes the Board of Supervisors to increase membership on the school board, provided total membership does not exceed six. Therefore, the membership of the school board may be increased to six.

You have also asked about the dates or terms of office for the new additional members. Section 15.1-708, provides in part that: "If the trustees or members so chosen shall be four or five in number...all subsequent appointments of trustees or members chosen by the board of county supervisors shall be for the terms of such number of years as there are trustees or members of the board chosen by the board of county supervisors." Should the Board of Supervisors of Scott County appoint a sixth member to the school board, the new appointee would serve for a term of six years.

SCHOOLS. SCHOOL BOARDS. AUTHORITY TO ADMINISTER TEACHERS' PERSONAL FUND.

May 2, 1979

The Honorable Johnny S. Joannou
Member, House of Delegates

You ask whether the local school administration may require that certain funds collected personally by teachers be paid into the division's general fund. You also ask if not whether the school division may agree to administer the funds.

You state that individual public school teachers have set up a fund which is used for such purposes as the purchase of get-well cards, flowers and similar purposes. The monies are contributed voluntarily to this fund and are
REPORT OF THE ATTORNEY GENERAL

collected upon school division property during school hours. They come solely from the teachers' personal funds, and the determination as to how such monies will be spent is made by the teachers. The actual administration or handling of the fund is handled by an individual selected by agreement.

Required Administration

The initial consideration is whether the monies collected in this matter are "school funds" as such are defined by § 22-116 of the Code of Virginia (1950), as amended. Based upon the circumstances which you have described, these sums are not directly related to the establishment, support and maintenance of the public schools as required by that section. Further, they are clearly not "state funds" as defined therein, since they are neither appropriations made nor state taxes ordered to be levied by the General Assembly for public school purposes. Nor do these funds fit the definition of "local funds" of § 22-116, since they are neither appropriations made nor funds raised by levy by the local governing body, nor donations or the income therefrom, nor funds set apart for local school purposes.

In addition to school funds as defined in § 22-116, the Board of Education has also created school Activity Funds by Regulation. Regulations of the Board of Education (1975) p. 87. These are defined as funds generated by school activities not included in § 22-116, and it is provided that the school board may determine which funds shall be excluded. However, since the funds you describe are personal funds of the teachers, the Board has no authority to make them activity funds.

Optional Administration

Since the only authority for the school board to administer funds is contained in the foregoing provisions, the Board is not authorized to administer others. This means that there is no authority for the Board to administer the teachers' fund as a school fund.

While I conclude that there is no authority for the Board to administer the described funds, I am informed that such a custom is prevalent. In such a case the relationship would exist by agreement, the fund would not be subject to regulation or audit by the state and the accountability for loss would depend on any understanding reached by the parties.

1Section 22-116 states:
"The fund applicable annually to the establishment, support and maintenance of public schools in the Commonwealth shall consist 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 such 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."

2The regulation, "School Activity Funds (Internal Accounts)" provides in pertinent part as follows:
"All funds derived from extracurricular school activities, such as entertainments, athletic contests, cafeterias, club dues, etc., and from any and all activities of the school involving school personnel, students, or property, are hereby classified as school activity funds (internal accounts). The local school boards shall be responsible for the administration of these regulations in the schools under their control, and may determine which specific funds in any school may be excluded from those subject to these regulations. (Funds defined by law as public funds are not subject to these regulations and are to be handled as provided by law.)"

SCHOOLS. SCHOOL BOARDS. AUTHORITY TO ADOPT PROCEDURE CHANNELLING RECOMMENDATIONS TO THEM FROM EMPLOYEE GROUPS REGARDING TERMS AND CONDITIONS OF EMPLOYMENT.

May 7, 1979

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You have asked for my opinion concerning the legality of a procedure proposed by the Fairfax School Board which is intended to channel to the board recommendations for changes in their policies, as may be suggested by teacher representatives. Although the principle embodied in the proposal--facilitating communications between teachers and their employer--is lawful, it is my opinion that the procedure as it now stands contains wording which could be construed as elements of a collective bargaining agreement and could therefore be ruled illegal.

As you know, in Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977), the Virginia Supreme Court held that local school boards lacked the legislative authority or power to bargain collectively or to recognize exclusively an employee group as the sole bargaining agent for public employees over the terms and conditions of their employment. Of importance in this decision was that exclusive recognition resulted in restricting the right of public employees to negotiate individually with the school board through the office of the division superintendent; and furthermore, unlawfully intruded upon the board's management duties imposed by law on the board. Each of the questioned activities of the board was lawful, but the court held that taken as a totality they constituted a prohibited collective bargaining agreement.

After the Arlington County Board decision, Governor Godwin issued an interpretative statement, dated February 23, 1977, which noted in part:

"The ruling of the Court concluded a suit instituted by the Attorney General at my request to obtain a definitive statement of the Virginia law applicable to collective bargaining for public employees. Repeatedly over the years I have publicly proclaimed my personal and political conviction that collective bargaining in the public sector ultimately means that the power to control public policy would be placed in the hands of those who are not directly responsible to the people and that it diminishes the sovereignty of every unit of government which participates in the practice...."
While local public bodies and officials are forbidden to negotiate, bargain or enter into any agreement with public employee organizations or unions, public officials may and should freely discuss with local employees any subject related to their service. Local officials should communicate with local employees to obtain the benefits of the knowledge and experience, as well as apprise themselves of the concerns and aspirations, of those who serve the public. Whether through the medium of public hearings or private meetings, the channels of communication should always be kept open. The willingness of public officials to listen to public employees and give appropriate consideration to what they hear should be an established principle of local government.

Governor Dalton has reemphasized this interpretation in a similar statement issued on February 6, 1979.

The procedure you have forwarded to me states its purpose as:

"[T]o implement School Board Policy 4024.1 in such a way as to provide an opportunity for discussions between designees of the Division Superintendent and the Fairfax Education Association, Inc., regarding matters that affect the organization's members as employees of the Fairfax County Public Schools. The goal of the discussions will be to develop a recommendation(s) acceptable to the membership of the Fairfax Education Association, Inc., and the Division Superintendent's representatives. The recommendation(s) will be submitted to the Division Superintendent for his/her consideration and submission to the School Board."

Under the procedure, teacher representatives may offer their recommendations to the division superintendent who will then refer their suggestions to a study committee consisting of representatives chosen by the teachers and representatives chosen by the division superintendent. The committee will then recommend its decision to the division superintendent. The division superintendent is then bound to submit to the School Board the committee's recommendation. However, the division superintendent and the teacher representatives retain the right to file separate recommendations with the board.

You have further stated that this procedure is not intended to supplement the existing grievance procedure.

This Office has previously ruled that, in spite of the Commonwealth's policy against collective bargaining, school boards are nevertheless free to discuss terms of employment with any group, including teacher's associations; see Report of the Attorney General (1969-1970) at 231; and may authorize their employees to meet with representatives of employee groups to reach a preliminary decision regarding terms of employment subject to board consideration. See Report of the Attorney General (1974-1975) at 22. As the foregoing Opinions point out, and as emphasized in the two decisions previously referred to, public employees may not be precluded from being heard individually, membership in an association or employee group can not be made a condition of public employment, and the local school board must retain unfettered the right to make the final decision on such recommendations.
The procedure you have forwarded to me for review does not appear on its face to abrogate or restrict the right of school employees to bargain individually. Also, this procedure does not appear to divest the school board of any of its constitutional supervisory or management prerogatives since the matters involved are in the nature of recommendations only without obligation upon the board to adopt them. Indeed, the procedure expressly provides: "In all cases, the School Board must be able to make an independent decision on the committee's recommendations." See, e.g., School Board v. Parham, 243 S.E.2d 468 (Va., 1978).

However, certain sections of the procedure contain references which could be construed in a way as to constitute collective bargaining, and these references must be changed if this procedure is to comply fully with Virginia law:

1) Although you have stated that the procedure applies equally to all employee groups and individuals and is not limited to any one group, by its terms the procedure applies only to the Fairfax Education Association, Inc. The procedure should be amended so that no employee organization appears to have exclusive recognition by the Fairfax School Board.1

2) As noted above, the procedure states: "the goal of the discussions will be to develop a recommendation(s) acceptable to the membership of the Fairfax Education Association, Inc., and the Division Superintendent's representative." Although it is clear that the school board will make the final decision whether to accept the recommendation, this sentence implies a bargaining procedure which runs counter to the decision in Commonwealth v. Arlington County Board. It is advisable that this sentence be changed in a manner which reaffirms the intent of the procedure, which is to improve communications between teachers and their employers.

If the recommended changes are made in the procedure, it is my opinion that the procedure will be legal. However, in light of the holding in Commonwealth v. Arlington County Board, supra, that the court will look at the effect of otherwise lawful actions, the board must be alert to the fact that this procedure may not be implemented in such a way so as to constitute a collective bargaining agreement. See Report of the Attorney General (1974-1975) at 77.

1Note that it has been held that where a policy exists of holding discussions with one employee group, there must be a rational basis for declining to hold such discussion with others. See O'Brien v. Leidinger, 452 F.Supp. 720 (E.D. Va. 1978); Cf. City of Charlotte v. Local 660, Intern. Ass'n of Firefighters, 426 U.S. 281 (1976).

SCHOOLS. SCHOOL BOARDS. AUTHORITY TO GRANT EXCLUSIVE BROADCAST, NEWSPAPERS OR PHOTOGRAPHERS RIGHTS TO HIGH SCHOOL SPORTING EVENTS.

October 16, 1978

The Honorable James T. Edmunds
Member, Senate of Virginia
You ask (1) whether a county school board has the power to grant exclusive broadcast rights to their high school sporting events, and if such exclusive coverage may be extended to selected newspapers or photographers. You further ask (2) whether the school board may charge a fee for such exclusive coverage, and (3) if the board must follow any competitive bidding procedure in granting such exclusive rights. I shall answer your questions in order.

1. May county school boards grant exclusive broadcast rights to their high school sporting events, and extend such rights to selected newspapers or photographers?

Although school boards do not expressly have the power to grant exclusive broadcast rights, I am of the opinion that such a power exists by implication from their express supervisory authority and responsibility over school affairs and property, subject however, to constitutional principles and the antitrust laws. County school boards are vested with broad discretion in managing and supervising their school affairs and school property. Article VIII, § 7, of the Constitution of Virginia (1971); §§ 22-72 and 22-164.1 of the Code of Virginia (1950), as amended. Furthermore, § 22-164.1 expressly grants school boards broad discretion in determining who will use their property and in what manner. See also, School Board of City of Richmond v. Parham, 243 S.E.2d 468 (Va. 1978); Commonwealth of Virginia v. Board of Arlington County, 217 Va. 558 (1977); Howard v. School Board, 203 Va. 55 (1961); Kellam v. School Board of City of Norfolk, 202 Va. 252 (1960).

The exercise of such power is necessarily circumscribed by constitutional principles of free speech, press and equal protection of the laws, Avery v. Midland County, 390 U.S. 474 (1968), as the grant of such exclusive rights necessarily denies others equal access to gathering and reporting newsworthy information. These constitutional guarantees protect not only news reporters, but also radio and television representatives and others who seek to communicate and convey information to the public. Lovell v. Griffin, 303 U.S. 444 (1938).

It has long been recognized that news gathering, as well as subsequent reporting, qualifies for protection under the First and Fourteenth Amendments to the U.S. Constitution. Branzburg v. Hayes, 408 U.S. 665 (1972). However, the protection in news gathering is limited to information that is generally available to the public, and subject to reasonable rules and restrictions that are imposed equally on the public. Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975); Pell v. Procunier, 417 U.S. 817 (1974). Accordingly, such right is limited "as the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Branzburg, supra, at 684. See also Washington Post Company v. Kleindienist 494 F.2d 994 (D.C. Cir. 1974); Lewis v. Baxley, 368 F.Supp. 768 (M.D. Ala. 1973).

The foregoing principle is applicable to sporting events which are generally open to the public. The press and broadcast representatives and others have the right to be present at such events as does any other member of the general public. However, as noted in Branzburg, the right to gather information for public dissemination is not absolute. The rights of the press and others must be balanced against competing interests, and may be restricted or denied when necessary to further a legitimate governmental objective.
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The question is a relative one to be answered in the context of individual cases in order to reconcile and accommodate the interest which the public has in preserving a free press as well as other legitimate interests with which such freedom may clash or come in conflict. Kovach v. Maddux, 238 F.Supp. 835, 839 (M.D. Tenn. 1965); see also Near v. State of Minn., 283 U.S. 697 (1931).

Clearly, access to sporting events by the press, photographers and broadcasters may be restricted or denied by the school boards if necessary to preserve order, safety or security. Estes, supra. And, boards may reasonably regulate the place and manner in which such coverage is undertaken at their games. Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971). See also Nickas v. Nickas, 306 A.2d 51 (N.H. 1973); and Sigma Delta Chi v. Speaker, 310 A.2d 146 (Md. 1973), where it was held that all tape recording and broadcasting equipment could be excluded from a public event as a reasonable regulation on the manner of news reporting when the media was permitted in any case to be present to take notes for subsequent reporting.

But the question becomes increasingly difficult when access to news gathering is extended to one, but denied to another. It would be permissible for the school boards to deny others equal access because of the lack of available facilities or broadcasting equipment, Kovach v. Maddux, supra, Red Lion Broadcasting Company v. F.C.C., 395 U.S. 367 (1969), as the Constitution does not require that school boards actively subsidize the exercise of constitutional rights of others in purchasing additional equipment for them, or in making available additional facilities already reasonably accommodating to the needs of the press. Public Interest Research Group v. Elkins, 565 F.2d 864 (4th Cir. 1977), cert. den., ___ U.S. ___ (1978); Luparar v. Stoneman, 382 F.Supp. 495 (D. Vt. 1975). School board discretion in determining who would benefit from limited press and broadcasting equipment and facilities would be permissible so long as any discriminating classification was consistent with the First and Fourteenth Amendments to the U.S. Constitution. For example, school boards could not condition press privileges upon the race, sex, national origin or religion of the reporting interest, nor deny such access because it disagrees with the views or positions adopted by a reporting interest. Westinghouse Broadcasting Company, Inc. v. Dukakis, 409 F.Supp. 895 (D. Mass. 1975); Police Dept. v. Mosley, 408 U.S. 92 (1972).

Furthermore, it has been held that the right to broadcast a sporting event is a valuable commodity or property right, National Exhibition Company v. Fass, 143 N.Y.S. 2d 767 (Sup. Ct., 1955), and school boards may legitimately seek to maximize the value of this right by granting it on an exclusive basis, which in turn will increase the game proceeds available to further school board objectives. University Interscholastic League v. Midwestern University, 255 S.W.2d 177 (Tex. 1973). See also Southwestern Broadcasting Co. v. Oil Center Broadcasting Company, et al., 210 S.W.2d 230 (Tex. 1947) where the court stated, in upholding exclusive broadcast rights to football games, that:
"There is no essential difference between the exclusive right to sell programs, cushions and refreshments at such games and the privilege of broadcasting a play by play account thereof." p. 233.

And only recently, the U.S. Supreme Court has recognized that states may act to protect the economic value in a performance by prohibiting unauthorized broadcasts. Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977). Accordingly, school boards could exclude other broadcasting representatives from setting up their transmission equipment at the games in order to protect the economic value of an exclusive broadcast. See, e.g., Southwestern Broadcasting, supra, and University Interscholastic League, supra.

The foregoing principles would be equally applicable to exclusive rights granted to commercial photographers. See, e.g., La Porte v. Escanaba Area Public Schools, 214 N.W.2d 840 (Mich. 1974), upholding an exclusive franchise to photographers and a regulation barring others from exercising such rights in order to protect the economic value of the franchise.

School boards however, may not prohibit the subsequent publication by members of the press as to any information which they have seen or heard at the sporting event. Craig v. Harney, 331 U.S. 367 (1947). Furthermore, the school board's discretion in this area is further subject to antitrust legislation.1

2. May county school boards impose a charge for such exclusive broadcast rights?

School boards possess a valuable property right in the broadcast of sporting events under their control. Section 22-164.1 grants school boards wide discretion in establishing the terms and conditions for which property under their control may be used. Accordingly, I am of the opinion that school boards may impose a reasonable charge for this privilege.

3. Must school boards first advertise that exclusive broadcast rights are available for competitive bidding purposes?

There is no general statutory provision requiring a county school board to first advertise for competitive bids for such purpose, or to grant the exclusive broadcast right to the lowest bidder. The procedure is left to the sound discretion of the school board, absent any local policy. See Report of the Attorney General (1974-1975) at 351; see also Gaynor Construction Company v. Board of Trustees, 233 S.W.2d 472 (Tex. 1950), where a contract was upheld even though there was no competitive bidding so long as the agreement was in the public interest.

1See §§ 59.1-9.1 et seq., generally outlaw restraints of trade, attempts to monopolize, or contracts intended to substantially lessen competition. The applicability of this law would have to be judged on a case by case basis considering the motivation of the school board and the impact upon the local competitive market.
SCHOOLS' SCHOOL BOARDS. HAVE NO AUTHORITY UNDER §§ 22-161 AND 15.1-262 TO MAKE GIFT OF LAND TO INDEPENDENT CITY.

January 18, 1979

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

You ask if the Wise County School Board may convey its school property without consideration to the City of Norton pursuant to § 22-1611 of the Code of Virginia (1950), as amended.

By virtue of § 22-147, the title to county school property is vested in the respective school boards. Disposition of such property is governed by §§ 22-161 and 15.1-262.

County school boards hold their school property in trust for the benefit of their county taxpayers. School Board v. School Board, 197 Va. 845, 91 S.E.2d 654 (1956). This Office has previously ruled that §§ 22-161 and 15.1-262 do not authorize donative conveyances of school property which are not "for the benefit of the school district, and consistent with good business judgment and sound business principles." See Reports of the Attorney General (1946-1947) at 131; (1958-1959) at 249; (1963-1964) at 268; (1964-1965) at 290; (1966-1967) at 32; (1967-1968) at 239; (1970-1971) at 340; (1973-1974) at 312; (1974-1975) at 371; and 78 C.J.S. Schools and School Districts § 244. See also Harvey v. Board of Public Schools, 133 So. 868 (Fla. 1931); Lutfey v. Roper and Sons, 115 P. 2d. 160 (Ariz. 1941); School Board, supra and Emporia City v. Greensville County, 213 Va. 11 (1972), where the Virginia Supreme Court has observed a general legislative policy that cities must adequately compensate counties for appropriation of county school property.

I am also of the opinion that the foregoing sections which authorize a "sale" or "exchange" of school properties, do not include the power to make a "gift" of school property to an independent city. See Reports of the Attorney General (1963-1964) at 268; (1967-1968) at 239; (1970-1971) at 340; and (1974-1975) at 371. And, furthermore, a transfer of school property for nominal consideration would be tantamount to a gift, see Black's Law Dictionary Revised Fourth Edition (1968), and normally would likewise not be authorized by the foregoing sections absent some adequate consideration. See Reports of the Attorney General (1963-1964) at 268; and (1970-1971) at 340. See also Ind. Sch. Dist. v. DeWilde, 53 N.W.2d 256 (Ia., 1952); and Kettermers v. Ind. Sch. Dist., 79 N.W.2d 428 (Minn. 1956).

Accordingly, for the reasons cited above, I am of the opinion that a county school board may not convey their school property without consideration to the City of Norton.2

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2Section 22-161 provides in part as follows:

"The school board shall have the same power to sell or exchange and convey the real and personal school property of the county as the governing body of the county has with reference to the power of sale, exchange and conveyance of other county property under § 15.1-262, provided that, in
addition thereto, the school board shall have the power to lease, either as lessor or lessee, such property...capital repairs and improvements on such property provided that the lease is for a term equal to or longer than the useful life of such repairs or improvements."

2A county school board may convey school property to the board of supervisors of the county because the board of supervisors appropriates the monies to the school board. See Report of the Attorney General (1973-1974) at 312.

SCHOOLS. SCHOOL BOARDS. IF TEACHER WAIVED STATUTORY HEARING, SCHOOL BOARD COULD ALLOW INDEPENDENT PARTY TO REVIEW EVIDENCE AND MAKE RECOMMENDATION. SCHOOL BOARD MUST MAKE ULTIMATE DECISION. MAY PAY ONE-HALF OF ARBITRATOR'S FEE.

July 28, 1978

The Honorable Mary A. Marshall
Member, House of Delegates

You ask whether a school board may adopt a policy allowing a teacher recommended for dismissal, suspension or probation by the division superintendent to have a hearing before an arbitrator instead of the hearing authorized before the school board by § 22-217.6 of the Code of Virginia (1950), as amended. The arbitrator would make findings of fact and submit a recommendation to the school board, which would review the hearing transcript and the findings and recommendation and make the ultimate decision. The cost of the arbitrator would be divided equally between the parties.

Under § 22-217.6 a teacher who has been notified that he or she is being dismissed, suspended or placed on probation may within fifteen days request a hearing before the school board. If no request is made, the hearing is deemed to be waived. See Report of the Attorney General (1973-1974) at 317.

As long as a teacher waived the statutory hearing, it is my opinion that a school board could allow an independent party to review the evidence and make a recommendation to the school board as long as the school board itself made the ultimate decision. It would also be permissible for the school board to pay for one-half of the arbitrator's fee.1

1I am enclosing a copy of an Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated May 11, 1978, to the effect that a local school board may, with State Board of Education approval, voluntarily adopt a grievance procedure with a binding arbitration component, and a copy of an Opinion to the Honorable William L. Lemmon, Member, House of Delegates, dated July 28, 1978, to the effect that House Bill 750, passed by the 1978 General Assembly and vetoed by the Governor, and which would have required school boards to offer an advisory hearing when requested by an employee recommended for dismissal or probation, is constitutional.

SCHOOLS. SCHOOL BOARDS. NOT AUTHORIZED TO REQUIRE DIVISION SUPERINTENDENT, A STATE OFFICER, TO BE RESIDENT OF CITY ABSENT EXPRESS AUTHORIZATION FROM GENERAL ASSEMBLY OR BOARD OF EDUCATION.
October 20, 1978

The Honorable M. D. Aldridge, Jr.
Commonwealth's Attorney for the City of Hopewell

You have asked whether the School Board of the City of Hopewell may adopt a policy requiring the superintendent to live within the city limits of the City of Hopewell.

Section 22-97 of the Code of Virginia (1950), as amended, enumerates the powers and duties of a city school board, and § 22-32 provides for the appointment of a division superintendent by the local school board. However, the superintendent is still considered a state officer. He must take and subscribe to the oath administered to all officers of the State, and only the Board of Education is vested with the authority to punish a division superintendent for official misconduct or malfeasance. Furthermore, § 22-36 states that the powers and duties of the division superintendents shall be fixed by the Board of Education.

The division superintendent, appointed pursuant to § 22-32, is selected from a list of eligibles certified by the Board of Education. Article VIII, § 5(c), of the Constitution of Virginia (1971), requires the State Board to provide each school division with a list of eligible candidates. If a school division fails to choose a superintendent, then Art. VIII, § 5(c) further provides that the Board of Education shall appoint an eligible person to that position.

No person is eligible for appointment unless he meets the minimum qualifications set up by the State Board. The qualifications of a division superintendent are set forth in the regulations of the Board of Education, and the Board has discretion to determine what are reasonable academic and business qualifications for division superintendents. To this date, residency in the local school division has not been made a qualification for employment by the Board.

Thus, the school board is not authorized to require the superintendent, a state officer, to be a resident of that city absent express authorization from the General Assembly or the Board of Education. However, at the expiration of a superintendent's term, the Board would be free to appoint any eligible candidate and would not be prohibited from considering whether he would reside in the city. See McCarthy v. Philadelphia Civil Services Commission, 424 U.S. 645 (1976).

1Section 22-39 provides:
"Every division superintendent, before entering upon the discharge of his office, shall take and subscribe the oath prescribed for all officers of the State, which oath shall be made and subscribed before a circuit or corporation court having jurisdiction in his division, or before the judge or clerk thereof in vacation. As soon as the oath shall have been taken, subscribed and certified, a minute of the fact shall be entered in the records of the court and a certificate of the clerk, setting forth the qualifications and its record shall be furnished the superintendent of public instruction for record in his office."
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Section 22-40 provides:
"The State Board shall punish division superintendents of schools for neglect of duty, or for any official misconduct, by reasonable fines, to be deducted from their pay, by suspension from office for a limited period, or by removal from office."

Section 22-31 provides:
"No one shall be eligible for appointment as division superintendent unless he meets the minimum qualifications set up by the State Board, and in order that an applicant for the position of division superintendent may know what qualifications are required of him, the State Board is required to publish on the first of February of the year in which such election is to take place, a statement showing the minimum qualifications for the position of division superintendent of schools, which statement shall be furnished to all applicants."


SCHOOLS. SCHOOL BOARDS. NOT REQUIRED TO USE COUNTY’S CENTRAL PURCHASING OFFICE FOR CAPITAL IMPROVEMENT CONTRACTS.

October 13, 1978

The Honorable B. Randolph Boyd
Commonwealth’s Attorney for the
County of Charles City

In your recent letter concerning local school board contracts, you state that the county has adopted a Central Purchasing Office pursuant to §§ 15.1-1111 and 15.1-1272. You ask whether the school board may enter into capital improvement contracts directly with third party vendors for an addition to an existing school, for new roofs, for school buildings, and for the drilling of new wells.

The answer to your question will depend upon whether capital outlay contracts are subject to the terms of the statute.

The terms "supplies, equipment, materials and commodities" are not specifically defined in Art. 8 of Title 15.1, nor has this statute been judicially construed by Virginia courts. According to familiar principles of statutory construction in interpreting this section, these words must be taken and interpreted together in harmony with the statute as a whole. Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 183 S.E.2d 170 (1971). The term "supplies" has been defined as something used directly in carrying on work. Smull v. Delaney, 175 Misc. 795, 25 N.Y.S.2d 387, 394 (Sup.Ct., 1941). Within the context of a purchasing statute, "materials or supplies" have been identified as those items for which standard specifications can be supplied. Schwartz and Nagles Tires, Inc. v. Board of Chosen Freeholders of Middlesex County, 6 N.J. Super. 79, 69 A.2d 885, 887 (Super. Ct. App. Div. 1949). "Commodities" are articles of commerce. Rohrer v. Traina, 342 N.E.2d 390, 392 (Ill. App. Ct. 1976). "Equipment" means the implements used in an operation or activity. Haltz v. Babcock, 389 P.2d 869, 874 (Mont. 1963).

In harmony with these definitions, "supplies, equipment, materials and commodities" mean those categories of goods which are used or consumed in the day-to-day operation of county departments and offices, including the
Section 15.1-127 does not apply to goods obtained for, and used in, the actual construction of capital improvements, nor to the obtaining of services, whether for such construction or otherwise. See Report of the Attorney General (1960-1961) at 260.

Thus the contracts previously described are capital outlay or improvement contracts involving construction for additions, improvements or repairs to school board buildings or property. Consequently, the school board may enter into these capital improvement contracts directly with third party vendors.

1Section 15.1-115 of the Code of Virginia (1950), as amended. This section further provides that where the words "executive secretary" appear in Art. 8, Ch. 2, of Title 15.1, it shall be deemed to mean "county administrator."

2Section 15.1-127, part of Art. 8, Ch. 2, Title 15.1, provides:
"The governing body of any county having an executive secretary is authorized to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers and employees of the county, including the county school board and the board of public welfare or social services (all of which are in §§ 15.1-129 and 15.1-130 referred to as departments). Such purchasing shall be done by the executive secretary under the supervision of the governing body of the county."

3Such a definition is consistent with the definition of these terms in Art. 7, Ch. 2, of Title 15.1 as "any and all articles or things which shall be used by or furnished to any department...board or other agency of the county government." See § 15.1-106.

SCHOOLS. SCHOOL BOARDS. RELEASE OF DIRECTORY INFORMATION IN STUDENT RECORDS. RELEASE OF STUDENT RECORDS TO LAW ENFORCEMENT OFFICIALS.

April 30, 1979

The Honorable Mary A. Marshall
Member, House of Delegates

You ask two questions regarding information in the possession of a school division which might affect the privacy rights of parents and students. In order to answer these questions, it will be necessary to consider the statutory requirements of both the Family Educational Rights and Privacy Act of 1974 (the "Act"), 20 U.S.C. § 1232g, more commonly known and hereinafter referred to as the Buckley Amendment, as well as the requirements of Ch. 12.1 of Title 22 of the Code of Virginia (1950), as amended, and in particular, § 22-275.26 thereof.

Publication of Directory Information

You first ask assuming that directory information includes information as name, address, telephone number, dates of attendance, participation in activities, and other like information, does § 22-275.26 prohibit publication of student "directory information?"

As to your first question, the Buckley Amendment prohibits the use or making available of federal funds under any program to any educational agency, whether state or local school division, which permits the release of education
records as defined in the Act without the written consent of the student's parents to any individual, agency or organization subject to certain exceptions. Parenthetically, the Buckley Amendment applies the same restriction to "personally identifiable information" contained within educational records other than directory information which is defined by subsection (5)(A) of § 1232g. Subsection (5)(A) defines "directory information" as including a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the educational agency or institution most recently previously attended by the student. This section further provides for certain notice requirements which must be complied with before such information is made public in order to allow parents to inform the school that all or part of such information should not be released without the parents' prior consent.

Although the release of such directory information would not be in conflict with the federal legislation, the Virginia statute dealing with the release of pupil records is much more narrowly written in this regard. Section 22-275.26 has no specific exemption which would appear to authorize the release by any employee of a school division or a school board member of what would be classified as directory information. The statute begins as follows:

"No teacher, principal or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school in any class to any person except under judicial process unless the person is one of the following:..."

The section then lists seven classes of individuals to whom release or access of written records concerning a pupil may be permitted without judicial process. The only exception for information which comes within the Buckley Amendment definition of "directory information" is a proviso that this section is not intended to interfere with the giving of information by school personnel concerning participation in athletics and other school activities, the winning of scholarship or other honors and awards and other like information. In this context, however, "other like information" cannot be interpreted to include the student's name, address, telephone listing, date and place of birth and major field of study. Accordingly, with the exception of information concerning participation in athletics, school activities, the winning of scholastic or other honors and awards, such "directory information" may not be released under the provisions of Virginia law.

Release of Information to Law Enforcement Officials

You next ask whether local school officials can release information from written records of students to state or local law enforcement officers without prior consent of parents or eligible students or without a judicial order or subpoena.

Your second question presents a situation in which the Buckley Amendment appears more restrictive than Virginia law. Section 22-275.26(5) permits access to written records concerning a particular student to state or local law enforcement officers, including probation officers, parole officers or members of a parole board seeking information in the course of their duties.
However, the prohibition of the Buckley Amendment that no personally identifiable information in educational records, other than directory information as discussed previously, or as permitted by express exceptions, shall be permitted unless "such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution or agency." Section 1232(b)(2)(B). Therefore, it is my opinion that federal law will preclude the local school division from releasing educational records which contain the personally identifiable information about a student to state or local law enforcement officers, unless they present a lawfully issued subpoena or other judicial order to support their request.

SCHOOLS. SCHOOL BOARDS. RIGHT TO REJECT BIDS OBTAINED BY CENTRAL PURCHASING AGENT.

October 13, 1978

The Honorable Robert M. Galumbeck
County Attorney for Tazewell County

You ask whether it is necessary for the county's central purchasing agent to obtain the approval of the local school board before formally accepting bids for supplies for school purposes.

You say that your county administrator is empowered to act as the county's purchasing agent. The Board of Supervisors has provided that among the purchasing agent's duties is the duty to make centralized competitive purchasing of all supplies, materials and commodities for the School Board.

This Office has on several occasions considered and approved procedures adopted by boards of supervisors requiring that all purchases of supplies, equipment, materials and commodities for a county's school board be performed by the central purchasing agent. See Report of the Attorney General (1975-1976) at 301. However, school boards retain the authority to decide what supplies, materials and commodities it may need and the costs thereof. See Opinion to the Honorable Rhea F. Moore, Clerk of the Board of Supervisors of Tazewell County, found in Report of the Attorney General (1964-1965) at 19, a copy of which is enclosed. The Moore Opinion construed § 133 of the Constitution of Virginia (1902) to that effect. That provision is Art. VIII, § 7, of the present Constitution, and the result of the Moore Opinion is consistent with the recent decision in School Board of the City of Richmond v. Parham, 218 Va. ___, 243 S.E.2d 468 (1978).

Since the school board retains authority to approve the costs of its purchases, the purchasing agent would have to obtain approval of the school board prior to acceptance of a bid.

1Section 15.1-117(12) of the Code of Virginia (1950), as amended, authorizes the county administrator, "To act as purchasing agent for the county; to make all purchases for the county subject to such exception as may be allowed by the governing body. He shall have authority to make transfer of supplies, materials and equipment
between departments and officers, and employees; to sell any surplus supplies, materials and equipment and to make such other sales as may be authorized by the governing body. He shall have power, with consent of the governing body, to establish suitable specifications or standards for all supplies, materials and equipment to be purchased for the county, and to inspect all deliveries to determine their compliance with such specifications and standards, and if such deliveries are not in accordance with such specifications and standards it shall be his duty and he is empowered to reject the same. He shall have charge of such storerooms and warehouses of the county as the governing body may provide. He shall have the care and charge of all public buildings and the furnishings and fixtures therein under the control of the governing body.

All purchases and sales shall be made under such rules and regulations as the governing body may by ordinance or resolution establish. Subject to such exception as the governing body may provide, he shall before making any purchase or sale invite competitive bidding under such rules and regulations as the governing body may by ordinance or resolution establish. He shall not furnish any supplies, materials, equipment or contractual services to any department or office or employee, except upon receipt of a properly approved requisition and unless there be an unencumbered balance sufficient to pay the same.

Section 15.1-127 provides:
"The governing body of any county having an executive secretary is authorized to provide for the centralized competitive purchasing of all supplies, equipment, materials and commodities for all departments, officers and employees of the county, including the county school board and the board of public welfare or social services (all of which are in §§ 15.1-129 and 15.1-130 referred to as departments). Such purchasing shall be done by the executive secretary under the supervision of the governing body of the county."

SCHOOLS. SELECTION OF SCHOOL BOARD MEMBERS. RETURN TO TRADITIONAL FORM OF COUNTY GOVERNMENT. RETURN TO SELECTION BY SCHOOL TRUSTEE ELECTORAL BOARD.

June 20, 1979

The Honorable James E. Buchholtz
County Attorney for the County of Roanoke

You ask two questions about appointment of school board members when a county returns to the traditional form of county government from the county executive form. Under the county executive form, appointment of school board members is by the Board of Supervisors. See § 15.1-609 of the Code of Virginia (1950), as amended.

School Trustee Electoral Board

Your first question is whether return to the traditional form of county government means return, by operation of law, to appointment of school board members by a school trustee electoral board.

At the time of your county's referendum to return to the traditional form, the petition for the referendum mentioned the traditional form "which existed in [the county] prior to adoption of the County Executive form...." Opinion to the Honorable C. Richard Cranwell, Member, House of Delegates,
dated October 26, 1977, found in Report of the Attorney General (1977-1978) at 146. I am advised, however, that the ballot question for the referendum mentioned only return to the traditional form, without regard to possible modifications.

In the traditional form of county government, members of the school board are appointed by a school trustee electoral board, §§ 22-60 and 22-61, absent a change as provided by law. Accordingly, I find return to the traditional form, in the present case, means a return, by operation of law, to appointment of school board members by a school trustee electoral board.

No Authority for Referendum to Change From Method Not "Presently" in Effect

Your second question is whether a referendum pursuant to § 22-79.4 can be held prior to the county's transition from the county executive form to the traditional form.

Section 22-79.4, which authorizes the referendum, also prescribes the form of ballot. The form of ballot restricts the referendum to a change in the "present method of selecting members of the county school board...." The "present method" is for appointment of school board members by the governing board rather than by a school trustee electoral board. The statute is precise about wording of the ballot, even though it does not prescribe wording for the petition. See Opinion to the Honorable Lawrence R. Ambrogi, Commonwealth's Attorney for Frederick County, dated July 28, 1977, found in Report of the Attorney General (1977-1978) at 148. There is no authority to hold a referendum with any question on the ballot except that prescribed by § 22-79.4. Accordingly, I find the county may not hold a referendum pursuant to § 22-79.4 prior to the county's transition to the traditional form.

SCHOOLS. VIRGINIA SCHOOL FOR THE DEAF AND THE BLIND (VSDB). VSDB IS NOT SCHOOL DIVISION OR PUBLIC SCHOOL. IT IS A PUBLIC INSTITUTION GOVERNED BY BOARD OF VISITORS. VSDB IS NOT A REGIONAL CENTER FOR MULTI-HANDICAPPED. TO MAKE IT SUCH A CENTER REQUIRES LEGISLATION OR ACTION BY BOARD OF VISITORS.

January 26, 1979

The Honorable William P. Robinson, Sr.
Member, House of Delegates

You have asked (1) whether the Virginia Schools for the Deaf and the Blind (VSDB) is a public school division, and if not (2) whether it can be a regional center for the multi-handicapped.

(1) VSDB is a statutorily created public corporation governed by a board of visitors. Thus it is not a school division or a public school. The institution is subject to the rules and regulations promulgated by its board of visitors, and currently no state agency (other than the Board of Education which approves the curriculum) has jurisdiction to control the activities at either school.

(2) Each year the Department of Education submits an annual program plan to the United States Department of Health, Education, and Welfare in order to continue eligibility for funding under The Funding of Education of All
Handicapped Act. That law does not require that a state establish residential centers for the multi-handicapped. However, the current plan does refer to VSDB. But the mere reference to VSDB in the annual plan as such a center does not change its status. VSDB is not now a regional center for the multi-handicapped. To make it such a center would require legislation or action of the board of visitors.

1Section 23-254 of the Code of Virginia (1950), as amended, provides as follows: "A. There is hereby established the board of visitors of the Virginia Schools for the Deaf and the Blind...which shall be a corporation under the name of the Virginia Schools for the Deaf and the Blind."

2The institution was created by the merger of the Virginia School for the Deaf and Blind at Staunton and the Virginia School at Hampton, and now retains both campuses.


SHERIFFS. BOARDS OF SUPERVISORS. NO AUTHORITY TO CONTROL MANNER IN WHICH SHERIFF PERFORMS HIS RESPONSIBILITIES. SUPERVISION OF DOG WARDEN IS VOLUNTARY. SALARY SUPPLEMENT.

July 31, 1978

The Honorable M. W. Swoope
Sheriff of Alleghany County and
the City of Covington

You indicate that the Board of Supervisors of Alleghany County has transferred to you the responsibility for supervising the county animal warden. As a result, you are directing the operations of this officer. You ask whether you may be required by the board to supervise the office of county animal warden. You also request my opinion whether you may receive additional compensation for this responsibility.

The position of county sheriff is a constitutional office created pursuant to Art. VII, § 4, of the Constitution of Virginia (1971). As a constitutional officer, the sheriff is not subject to the control and jurisdiction of the governing body. Constitutional officers are independent of, and not responsible to, such bodies. See Opinion to the Honorable Charles A. Reid, Treasurer for Greensville County, dated July 6, 1977, a copy of which is enclosed, and Opinions to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated January 13, 1977, and the Honorable James E. Durant, Treasurer for the City of Falls Church, dated January 10, 1975, and found in Reports of the Attorney General (1976-1977) at 47 and (1974-1975) at 559, respectively.

Section 29-213.8 of the Code of Virginia (1950), as amended, authorizes a county governing body to appoint an animal warden. The animal warden is charged with the responsibility of enforcing the Virginia Dog Laws of 1977, and all local ordinances enacted pursuant thereto. Because a board of supervisors has no authority to control the manner in which a sheriff performs his responsibilities, that body may not designate the sheriff as supervisor of the animal warden, without his consent.
The Virginia Dog Laws of 1977 do, however, authorize actions by a sheriff in enforcing that Act, as well as local ordinances for the protection of domestic animals. See §§ 29-213.6D, 29-213.10, 29-213.16, 29-213.24 and 29-213.26. The responsibility of a sheriff to enforce these provisions is fixed by action of the General Assembly, and not by that of a local governing body.

Although you may not be required by the board of supervisors to supervise the county's dog warden, you may, at your discretion, assume this duty. If you are asked by the board of supervisors to perform this function, you may seek to have your salary supplemented by the governing body pursuant to § 14.1-11.4. That statute permits a local governing body, "in its discretion," to supplement the salary of a constitutional officer "in such amounts as it may deem expedient." Because a decision to supervise the dog warden must be purely voluntary, and is not a statutorily mandated responsibility of a sheriff, a salary supplement may be warranted.

SHERIFFS. CONFLICT OF INTERESTS. AGREEMENT WITH AGENCY OF FEDERAL GOVERNMENT FOR FUNDS TO PROVIDE INCREASED SERVICES ON LAND OF CONCURRENT JURISDICTION NOT IN VIOLATION OF CONFLICT OF INTERESTS ACT.

December 19, 1978

The Honorable H. Selwyn Smith
Secretary of Public Safety

You ask whether an agreement between the sheriff of a locality and an agency of the federal government, under which the sheriff would, with federal funds, provide increased law enforcement services on property over which the United States and the Commonwealth enjoy concurrent legislative jurisdiction, would cause the sheriff to be in violation of § 2.1-349(a)(4) of the Code of Virginia (1950), as amended, a provision of the Virginia Conflict of Interests Act. Where concurrent jurisdiction exists, State and local laws are enforceable on federal property.

The contract in question is not an agreement with the sheriff in his personal capacity, but rather in his official capacity as the head of a law enforcement agency. The purpose is to supplement local law enforcement efforts where federal and local authorities share jurisdiction. Even absent the agreement, enforcement of State and local laws on such property is within the scope of the sheriff's official duties. The funds received from the federal government would be deposited in the local treasury, and disbursed only in accordance with a properly adopted budget. Both the local governing body and the State Compensation Board must approve increased staffing and expenses. See Art. 9, Ch. 1, Title 14.1.

Clearly, whatever portion of the federal funding which the sheriff ever receives personally must be considered within the "compensation...paid...or approved for him by the governmental agency of which he is an officer." Cf. Report of the Attorney General (1969-1970) at 302; (1970-1971) at 407. Accordingly, a sheriff entering into such a contract would not be in violation of the Conflict of Interests Act.
Section 2.1-349(a)(4) provides:

"(a) No officer or employee of any governmental agency shall:
(4) Solicit or accept money or other thing of value in addition to compensation, expenses or other remuneration paid directly to him or approved for him by the governmental agency of which he is an officer or employee for services performed within the scope of his official duties."

SHERIFFS. NOTICES TO PAY OR QUIT PREMISES. SHERIFFS MUST SERVE SUCH NOTICES WHEN REQUESTED.

September 26, 1978

The Honorable Emmett L. Wingo
Sheriff of Chesterfield County

You ask whether the sheriff is required to serve a tenant with the notice to pay or quit the premises as provided in the Virginia Residential Landlord and Tenant Act. A similar notice to pay or quit may be issued pursuant to § 55-225 as well. You say that such notices consist of letters from the landlord to the tenant which are given to you by the landlord to serve.

Under Art. VII, § 4, of the Constitution of Virginia (1971), the sheriff is a constitutional officer, and his duties are regulated and defined by statute. Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151 (1957). Sheriffs have the mandatory duty of serving process issued by a court. Narrows Grocery Co. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933). Section 1-13.23:1 construes the word "process" to include subpoenas in chancery, notices to commence actions at law, process in statutory actions and writs of scire facias. All of these are examples of process issued by a court.

The "notice" referred to in §§ 55-248.31 and 55-225 does not inform the tenant of a suit or action. However, the landlord cannot terminate the lease and proceed to obtain possession of the premises until five days after he notifies the tenant to pay or quit, after which time he may institute an action for unlawful entry or detainer (pursuant to § 8.01-124). Moreover, the General Assembly used the words "written notice by the landlord" and "written notice of nonpayment given by the landlord" in the statute. This notice is manifestly a private act of the landlord and not required to be issued by a court to be effective.

As a general rule, "notice" is not "process." 62 Am. Jur. 2d Process § 1 (1972). However, § 8.01-285, which defines the terms used in Virginia civil procedure, defines "process" to include notice. Thus the answer to your question turns on whether including notice in the definition of process includes any notice--or just the notices to commence an action referred to in § 1-13.23:1.

Simply because no statute requires the court to issue a notice does not relieve a sheriff of the duty to serve it. In Leas v. McVitty, 132 F. 510 (C.C.W.D. Va., 1904), the court approved service of ejectment notices issued.
by plaintiff's attorney according to the provisions of the Code of Virginia of 1887, § 3211, as being the equivalent of process.

In a prior Opinion of the Attorney General found in Report of the Attorney General (1942-1943) at 231, it was ruled that where a statute provided for the service of "notice," the sheriff would be required to serve "notices to vacate" or "notices not to trespass" despite the fact that the notice could be served by a private individual as well. In an Opinion found in Report of the Attorney General (1959-1960) at 327, it was noted that statutory notice in the nature of process must be served by the sheriff when requested, even if the statute provided alternative means of service.

Therefore because process includes notice and the term notice includes the statutory notices to pay or quit, I am of the opinion that it is the duty of a sheriff to serve such notices when requested.

Section 55-248.31 of the Code of Virginia (1950), as amended, provides in part:

"If rent is unpaid when due and the tenant fails to pay rent within five days after written notice by the landlord of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement and proceed to obtain possession of the premises as provided in § 55-248.35...."

Section 8.01-285 provides that, "For the purposes of this chapter: 1. The term 'process' shall be deemed to include notice...."

See § 3487 of the Virginia Code of 1942. The "notice to vacate" referred to the notice to quit premises required to be served by § 5516 as a precondition to recovery of the premises at the conclusion of the term. This language now appears as § 55-222. The "notice not to trespass" referred to § 4480a, which is now § 18.2-119.

Section 58-860 authorized commissioners of revenue to summons delinquent taxpayers "by registered letter, or otherwise."

SOCIAL SERVICES BOARD. AUTHORITY. NO INHERENT AUTHORITY TO DIRECTLY CONTRACT FOR AND ISSUE WARRANTS IN PAYMENT OF GOODS, SERVICES AND CAPITAL FACILITIES, NOR TO HOLD TITLE TO AUTOMOBILES.

October 31, 1978

The Honorable Robert M. Galumbeck
County Attorney for Tazewell County

You have asked several questions concerning the authority of the local department of social services to enter contracts for goods, services and capital facilities, to issue warrants for payment of expenses, and to title automobiles used by it in its name. Each of your questions is controlled by Dillon's Rule, which holds that the authority of local government units is fixed by statute and is only that which is conferred expressly or by necessary implication. Commonwealth v. County Board, 217 Va. 558 (1977); Report of the Attorney General (1974-1975) at 57. Under this Rule, one must first determine whether a particular power exists at all; if the power cannot be found in the statute, the inquiry is at an end. Commonwealth v. County Board, supra at 575. Any doubt will be resolved against the existence of the power. City of Richmond v. County Board, 199 Va. 679, 684 (1958).
Authority of Local Social Services Boards

The functions, powers and duties of local boards are found in §§ 63.1-50 through 63.1-58.1 of the Code of Virginia (1950), as amended, and the powers and duties of their local directors are set forth in §§ 63.1-67.1 through 63.1-67.7. The local board is granted authority to administer the provisions of Chapters 3, 4 and 6 of Title 63.1 within its political subdivision. See § 63.1-50.

Authority to Contract for Goods and Services

Neither the local board of social services nor its director is expressly authorized to contract for goods and services; if that power exists, it must be implied necessarily from the power of the board and the director to administer local welfare programs. There are a number of statutes, however, which directly relate to central purchasing of goods and services by counties. The county administrator in a traditional form county must act as purchasing agent for the county, unless the board of supervisors appoints one under § 15.1-103. Unless the board of supervisors excludes the board of social services from central purchasing, the latter board has no authority to do its own purchasing. See § 15.1-117(12); Report of the Attorney General (1975-1976) at 80. If, on the other hand, the board of supervisors has made the exclusion, the board of social services and its director may exercise their necessarily implied power to contract for those goods and services required to administer their programs.

Authority to Contract for Capital Facilities

You next ask whether the local board of social services, or its director, is authorized to contract for the design and construction of a new facility to house the department. Neither the board nor its director is expressly authorized to so contract. Because the General Assembly has vested the authority to construct county buildings in the board of supervisors, see § 15.1-266, it is my opinion that the local board of social services has no implied power to do so.

Authority to Issue Warrants to Pay Expenses

You next ask whether the local board of social services or its director has authority to issue warrants drawn on county funds for the payment of employees salaries and other administrative expenses. Neither the local board of social services nor its director has express authority to issue such warrants. That authority is vested in the county administrator, who is required to issue warrants in settlement of all claims for all agencies of the county, including the board of social services. See §§ 15.1-117(11) and 15.1-117(17).

Authority to Title Automobiles

You finally ask whether the local board of social services or its director may title automobiles used in the name of the local department. Neither the local board nor its director has express authority to do so. Unless the county has excluded the local board of social services from its central purchasing program, it is my opinion that any car bought by the county for the use of the local board of social services remains the property of the county and must be titled in its name.
STATE POLICE. RELEASE OR DISSEMINATION OF INVESTIGATION REPORT IS MATTER WITHIN DISCRETION AND POLICY OF CRIMINAL JUSTICE AGENCY.

June 12, 1979

Colonel D. M. Slane, Superintendent
Department of State Police

You have asked whether a copy of State police criminal investigation reports should be furnished to any State agency which is not a part of the criminal justice system.

Although dissemination of criminal history record information¹ (commonly known as "rap sheet" entries) is restricted to recipients specified in § 19.2-389, criminal justice investigative information may be released to noncriminal justice agencies. Whether to make a particular release or dissemination of an investigative report is a matter within the discretion and policy of the criminal justice agency.² See §§ 9-111.3B(viii) and 9-111.3C.

You also inquired whether a State agency technically within the criminal justice system, but itself involved as a subject of an investigation, would be entitled to a copy of the investigative report.

I find no statutory authority which would entitle such an agency to receive the investigative report. Providing a copy of the report to that agency would be a policy decision which should be made on a case-by-case basis.³

Your next inquiry is whether a recipient of an investigative report is bound by the same confidentiality safeguards as the police agency which conducted the investigation and originated the report.

The Virginia Freedom of Information Act specifically excludes from its disclosure requirements "memoranda, correspondence, evidence and complaints related to criminal investigations." See § 2.1-342(b)(1). Furthermore, the Supreme Court of Virginia has recently reaffirmed the confidentiality of State police investigative reports in Virginia. Disclosure of certain criminal investigative files of the State police had been sought by a party to a civil lawsuit, and disclosure had been ordered by a circuit court. On application of the State police the Supreme Court issued a writ of prohibition directing the circuit court judge to refrain and desist from enforcing any order.


²The board of social services is authorized by § 63.1-51 to receive and disburse all public assistance funds deposited to its credit in the county treasury. Employees of the board may be authorized to draw warrants on the treasurer for the disbursement of such public assistance funds, and must, before beginning this duty, enter into a bond with approved surety. See § 63.1-65. This procedure applies only to public assistance funds; it does not apply to funds in the county treasury for the board's salary and administrative expenses.

³See §§ 9-111.3B(viii) and 9-111.3C.
requiring the State police to disclose its investigative files concerning one particular individual or any other person. In Re: Commonwealth of Virginia, Department of State Police, Petitioner, Record No. 781249, October 4, 1978.

In a prior Opinion of the Attorney General it was ruled that a State police investigative report relative to criminal conduct would not be subject to required disclosure by the Department of State Police or any other public body or governmental agency which may have possession of the report. See Opinion to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated February 10, 1977, found in Report of the Attorney General (1976-1977) at 317. The question remains, however, whether a recipient of the investigative report is legally prevented from further disseminating its copy of the report.

Despite the fact that as a matter of policy an agency receiving an investigative report should not disseminate it without approval of the originating criminal justice agency, I am unaware of any statutory authority in Virginia that would prevent such dissemination.

Lastly, you ask whether an unauthorized dissemination would negate confidentiality claims by the State police. I am of the opinion that it would not. The fact that information has been leaked or released by government officials without authorization does not vitiate the confidentiality of the government's records. See Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir. 1975) cert. denied, 421 U.S. 992 (1975).

1Section 9-108.1C of the Code of Virginia (1950), as amended, defines criminal history record information as "records and data collected by criminal justice agencies on adult individuals consisting of identifiable descriptions and notations of arrests, detentions and indictments, informations, or other formal charges, and any disposition arising therefrom." Investigative information is expressly excluded from the definition.

2As a matter of policy it would be appropriate to consult the Commonwealth's Attorney concerned before disseminating an investigative report to a non-criminal justice agency, if the report reveals evidence of criminal offenses. In deciding whether to release such reports, a factor to be considered is the agency's need for such information. Where no need exists there would appear to be no reason to release investigative reports.

3Consultation with the Commonwealth's Attorney would again be appropriate.

STATUTES. CONSTRUING WORD "BUSINESS" IN VIRGINIA STATUTES, COURTS HAVE GIVEN IT BROAD CONSTRUCTION.

April 23, 1979

The Honorable Edward E. Willey
Member, Senate of Virginia

You have asked whether Blue Cross-Blue Shield of Virginia, a prepaid health plan, may own a life insurance agency without violating § 38.1-828 of the Code of Virginia (1950), as amended. That provision of law specifies, in pertinent part, that "[i]f the agent of a plan is a corporation, the corporation shall not engage in any other business...." (Emphasis added.) In
order to answer your question, it is first necessary to determine the relationship between Blue Cross-Blue Shield of Virginia and its subsidiary life insurance agency.

I am advised that Blue Cross-Blue Shield of Virginia totally owns the Monticello Service Agency, Inc., a life insurance agency. This subsidiary was chartered in July 1973, and Blue Cross-Blue Shield of Virginia acquired all of its stock in October 1973. I am further advised that this subsidiary sells life insurance only in connection with Blue Cross-Blue Shield of Virginia through salesmen who are also licensed to sell Blue Cross-Blue Shield coverage. Moreover, the records of the State Corporation Commission reveal that four of the five officers of the subsidiary are likewise officers in Blue Cross of Virginia and that three of the five are also officers in Blue Shield of Virginia. In the case of the subsidiary's board of directors, three are on the board of Blue Cross of Virginia and three are on the board of Blue Shield of Virginia. The subsidiary's offices are also at the same location in Richmond as the offices of Blue Cross-Blue Shield of Virginia.


This principle of law, however, does not apply if the facts demonstrate that the subsidiary corporation is completely dominated by the parent corporation. Id. Thus, where "[I]t appears that the business carried on by the subsidiary is a part of the business of the holding company, and the holding company dominates the affairs of the subsidiary through its stock ownership and common officers, and actually directs the affairs of the subsidiary as a part of its own business, for which purpose the subsidiary was organized,...the courts will look through the corporate form and hold that in such cases a subsidiary is a mere adjunct to or instrumentality for carrying on the business of the holding company." Centmont Corporation v. Marsch, supra at 463.

In this particular case, all of the facts taken together demonstrate a close and intimate relationship. Accordingly, it appears that Monticello Service Agency, Inc., is not truly independent of Blue Cross-Blue Shield of Virginia. Their close relationship with one another justifies disregarding the separate corporate forms.

Having so concluded, your inquiry concerning whether Blue Cross-Blue Shield of Virginia may properly own Monticello Service Agency, Inc., in view of § 38.1-828 may be answered. That provision of law, as stated above, provides that a corporate agent of a prepaid health plan "...shall not engage in any other business...." This language is simple and straightforward. The words of a statute should be given their ordinary and reasonable meaning. See, e.g., Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 222 S.E.2d 793...
In my opinion, a reasonable reading of § 38.1-828 is that a prepaid health plan cannot legitimately engage in the business of life insurance.

However, I am advised that Monticello Service Agency, Inc., does not underwrite life insurance policies; rather, it places the coverage in other insurance companies. Accordingly, it is arguable that Blue Cross-Blue Shield of Virginia is not engaged in the business of life insurance because companies, other than itself or Monticello Service Agency, Inc., bear the risks attributable to the business of life insurance. The word "business", though, has ordinarily received a broader construction than this argument would allow. Compare Board of Supervisors v. Boaz, 176 Va. 126, 10 S.E.2d 498 (1940), with Bott v. Commonwealth, 187 Va. 745, 48 S.E.2d 235 (1948), and Jones v. Rhea, 130 Va. 345, 107 S.E. 814 (1921).

Moreover, two other provisions of Title 38.1 lead me to conclude that the relationship between Blue Cross-Blue Shield of Virginia and Monticello Service Agency, Inc., is not proper. First, § 38.1-818 specifies that only certain general provisions of the Title apply to the operation of prepaid health plans whereas other insurers must comply with the applicable provisions of the entire Title. It appears from this that the General Assembly intended prepaid health plans to be treated, in effect, as exceptions to the law relating generally to insurers. Alternatives For Regulation Of Blue Cross And Blue Shield Plans In Virginia, supra, note 7, at 5, 9, 20. Exceptions to any law should be construed strictly. See, e.g., United States v. Hughes Memorial Home, 396 F.Supp. 544, 550 W.D.Va., 1975. This rule of statutory construction undercuts the argument that a prepaid health plan may conduct another business.

Second, § 38.1-813.1 states that: "...no plan...shall be organized, conducted or offered in this Commonwealth other than in the manner set forth in this chapter." (Emphasis added.) The 1979 General Assembly added this provision to the enabling legislation and enacted it as emergency legislation to become effective upon signature by the Governor. See Ch. 721 [1979] Acts of Assembly, which became effective April 2, 1979. This statement of the General Assembly indicates the intention to confer only those powers granted expressly or by necessary implication. Such a construction of the statute is required. As stated in Sutherland Statutory Construction, Vol. 2A, § 47.27 (4th ed., 1973), "[w]hen what is expressed in a statute is creative, and not in a proceeding according to the course of the common law, it is exclusive, and the power exists only to the extent plainly granted. In Virginia, this principle of construction is particularly applicable to statutes. Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).

In my opinion, § 38.1-813.1 makes clear that prepaid health plans may not establish a relationship such as Blue Cross-Blue Shield of Virginia has with the Monticello Service Agency, Inc. Such a relationship essentially transforms Blue Cross-Blue Shield of Virginia into a life insurance company as opposed to just a health insurance company. Because nothing in Title 38.1 authorizes a prepaid health plan to function as a life insurance agency, the total ownership and domination of the Monticello Service Agency, Inc., by Blue Cross-Blue Shield of Virginia is not permitted by statute.

1Blue Cross-Blue Shield of Virginia is actually two corporations: Blue Cross of Virginia and Blue Shield of Virginia. Aside from their respective chairmen and vice-chairmen of their boards, they share common officers and
operate out of the same facility in Richmond. For the purposes of this letter, they will be referred to as Blue Cross-Blue Shield of Virginia.

Section 38.1-828 was formerly § 32-195.15 of the Code. The 1979 General Assembly, in its recodification of Title 32, transferred the enabling legislation for Blue Cross-Blue Shield of Virginia to Title 38.1. See Ch. 721 [1979] Acts of Assembly, which became effective April 2, 1979.

Alden E. Flory, Hovey S. Dabney, Langhorne H. Smith and Conway H. Spiers.

Alden E. Flory, Langhorne H. Smith, and Conway H. Spiers.

Alden E. Flory, Hovey S. Dabney, and Lucius J. Kellam, III.

Alden E. Flory, Dr. William D. Liddle, Jr., and Dr. Thomas W. Murrell, Jr.

These cases indicate that a "business" is any regular endeavor for the purpose of livelihood or profit. I am mindful of the fact that the ability to sell life insurance coverage must give Blue Cross-Blue Shield of Virginia some competitive advantage over commercial insurers which sell health and life insurance policies but which must also comply with certain regulatory and tax requirements from which Blue Cross-Blue Shield of Virginia is exempt. Such a competitive advantage may not have been intended by the General Assembly. See Bureau of Insurance, State Corporation Commission,

Alternatives For Regulations of Blue Cross and Blue Shield Plans
In Virginia, 27-28 (October 1978).

Section 38.1-818 provides: "Application of certain provisions of law relating to insurance; payments under plan.--Unless otherwise specifically provided, no provision of this title except this chapter and §§ 38.1-29, 38.1-44 to 38.1-57, 38.1-99 to 38.1-104, 38.1-159 to 38.1-165, 38.1-174 to 38.1-178, 38.1-342.1, 38.1-342.2, 38.1-348.6, 38.1-348.7, 38.1-348.8, and 38.1-348.10 shall, insofar as they are not consistent with this chapter, apply to the operation of a plan. No payments shall be made by a plan to a person included in a subscription contract unless it be for breach of contract or unless it be for contractually included costs incurred by such person or for services received by such person and rendered by a nonparticipating hospital or physician." See Ch. 721 [1979] Acts of Assembly, which became effective April 2, 1979.


Blue Cross-Blue Shield could rely upon Connecticut Gen. Life Ins. Co. v. Superintendent of Ins., supra, for the proposition that it could legally own a life insurance agency. However, a close reading of that case reveals that the New York Court of Appeals placed great reliance upon the statutory language involved in that case which, in parts, referred to subsidiaries and affiliates but which did not do so in those parts pertinent to the case. Id. at 176 N.E.2d 66. The Virginia statute, however, does not contain similar distinctions in language.

This conclusion does not mean that a prepaid health plan could not make some necessary, incidental business investments such as those customarily made by corporate entities. In this case, however, the control of the subsidiary corporation is neither necessary nor incidental although it may be desirable insofar as the prepaid health plan is concerned. Nevertheless, the General Assembly has given the plans certain business advantages in the area of taxes and regulatory controls, and until the General Assembly sees fit to amend the law, it is not unreasonable to expect the plans' ability to engage in other business endeavors to be circumscribed in exchange for these business advantages. See also note 7, supra.
You ask about the retroactive application of a statute providing that the giving of a "covenant not to sue" does not discharge other tort feasors. The statute, § 8.01-35.1 of the Code of Virginia (1950), as amended, was enacted by the General Assembly during its 1979 Session, to take effect July 1, 1979. You ask whether it would be applicable to a covenant not to sue executed after the effective date of the statute, July 1, 1979, and which involved a claim for personal injury arising out of an automobile collision which had occurred before that date.

I am of the opinion that the new statute would be applicable in the case you present since such an application would disturb no vested right and would be in accord with the rules of statutory construction.

This statute changes the existing law on two points. Presently, when a plaintiff effects an accord and satisfaction with one tort feasor, his claim against the others responsible for his injuries is also discharged—whether or not the plaintiff attempts to reserve the right to sue the others and whether the transaction is styled a covenant not to sue or a release. Shortt v. Hudson Supply and Equipment Co., 191 Va. 306, 313, 60 S.E.2d 900, 904 (1950). The law also now provides that, "Contribution among wrongdoers may be enforced when the wrong results from negligence and involves no moral turpitude." See § 8.01-34. No special rule is provided for cases involving a covenant not to sue.

It is clear, of course, that retrospective application of the statute would not be allowed if it were to destroy or impair vested rights. This principle was clearly set forth in Duffy v. Hartsock, 187 Va. 406, 416, 46 S.E.2d 570, 574 (1948). In defining what is meant by the term "vested right," the court has said that it is "a right so fixed that it is not dependent on any future act, contingency or decision to make it more secure." Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 45, 124 S.E. 482, 484 (1924).

In the case of a covenant not to sue, it is the satisfaction of plaintiff's claim by a wrongdoer which extinguishes the liability of others responsible for the same injury—and not the form of the instrument. Shortt, supra, 191 Va. at 313. Therefore, until such time as satisfaction is actually made, the discharge of a tort feasor remains contingent upon a future event and cannot be considered vested. Consequently, the application of § 8.01-35.1 to a covenant executed after July 1, 1979, cannot be said to disturb any vested right of discharge—even where the covenant applies to a cause of action which arose before that date.

Likewise, the right of contribution arises only when one tort feasor has paid or settled a claim for which other wrongdoers are also liable. Bartlett v. Roberts Recapping, Inc., 207 Va. 789, 793, 153 S.E.2d 193, 196 (1967). Until such payment or settlement has been made, the right of contribution
remains a mere possibility, dependent upon a future contingency in order for it to vest. Therefore, if a covenant is not executed until after July 1, 1979, no right of contribution could accrue therefrom until after the effective date of the new legislation. Consequently, the application of the statute to covenants executed after that date would in no way disturb vested rights of contribution, regardless of when the cause of action arose.

I am also of the opinion that such an application of § 8.01-35.1 is in accord with the rules of statutory construction. In Virginia, it has been a generally accepted rule that "remedial statutes are not retrospective in their application in the absence of clear legislative intent." Phipps, Adm'r v. Sutherland, 201 Va. 448, 452, 111 S.E.2d 422, 425 (1959). Admittedly, no such intent was expressed by the General Assembly when it enacted § 8.01-35.1; but this point does not settle the question because the Phipps rule does not apply in every instance.

In Walke v. Dallas, Inc., 209 Va. 32, 36, 161 S.E.2d 722, 724-725 (1968), the court stopped short of overruling Phipps, but nevertheless decided that the long arm statutes then before it "are not the type to which the [Phipps] rule applies. They create no new cause of action and take away no existing right or remedy. They only provide a forum for asserting an existing right." In my opinion, § 8.01-35.1 is also the type of statute to which the Phipps rule does not apply. It is excluded from the operation of this rule for reasons similar to those for which the long arm statutes were excluded.

Like the long arm statutes, § 8.01-35.1 creates no new cause of action and takes away no existing rights. While the new law does not provide plaintiffs with a new forum, it nevertheless provides them with a new method by which they may pursue their claims. In both cases, the statutes only operate in furtherance of the remedy of rights already existing. It is my opinion that this degree of similarity with the long arm statute is sufficient to include § 8.01-35.1 in the category of those statutes to which the Phipps rule does not apply.

I am also of the opinion that the application of the new statute to covenants executed after July 1, 1979, is not prevented by § 1-16. This section provides:

"No new law shall be construed to repeal a former law, as to...any right accrued, or claim arising under the former law, or in any way whatever to affect...any right accrued, or claim arising before the new law takes effect;..."

It could be argued that the new statute would "affect" a personal injury claim arising before July 1, 1979, if it enabled that claim to survive a covenant which would otherwise discharge it. But the better view, in my opinion is that the new statute would not affect the claim itself, but would merely affect the covenant so as to alter the consequences which such a subsequent, collateral event would have upon the claim.

In support of this view, I would cite the court's decision in Hurdle & Foelak v. Prinz & Meihm, 218 Va. 134, 235 S.E.2d 354 (1977). In that case, personal injury causes of action accrued while the plaintiffs were still minors and before the operative date of the 1972 statute lowering the age of majority. The plaintiffs contended that, under § 1-16, the law in force at the time their claims accrued controlled the date from which the statute of
limitations commenced to run on their right to sue. Consequently, they argued, the new age of majority statute could not be applied so as to reduce the time within which their suits could be filed. The court rejected this view, declaring:

"The statute affecting limitations here (citations omitted) are of the remedy only and procedural; the plaintiffs acquired no vested right therein at the time their causes of action accrued. Consequently...the portions of § 1-16 relied on by the plaintiffs have no application to this case...."

The implications of this decision are clear. In the Hurdle case, restricting the remedy by which plaintiffs' claims could be pursued was not equivalent to affecting the claims themselves in violation of § 1-16. Similarly, in the case you present, expanding to remedies available to a plaintiff in pursuing his claim must be distinguished from affecting the claim itself. Section 8.01-35.1 expands the remedy available in personal injury cases, but leaves the claim unaltered. Consequently, § 1-16 is not relevant to the question you present.

For the foregoing reasons, I am of the opinion that § 8.01-35.1 would apply in personal injury cases to covenants executed after July 1, 1979, even where the cause of action arose before that date.

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1Section 8.01-35.1 provides the following:

"Covenants not to sue and right to contribution. A. When a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. It shall not discharge any of the other tort feasors from liability for the injury or wrongful death unless its terms so provide; but it shall reduce the claim against the others to the extent of any amount stipulated by the covenant, or in the amount of the consideration paid for it, whichever is the greater; and

2. It shall discharge the tort feasor to whom it is given from all liability for contribution to any other tort feasor.

B. A tort feasor who enters into a settlement with a claimant is not entitled to recover contributions from another tort feasor whose liability for the injury or wrongful death is not extinguished by the settlement, nor in respect to any amount paid in a settlement which is in excess of what was reasonable."

STATUTES. SIXTY-DAY SUSPENSION PERIOD FOR PUBLIC SCHOOL TEACHERS MEANS SIXTY CALENDAR DAYS.

November 27, 1978

The Honorable George H. Heilig, Jr.
Member, House of Delegates

You have asked two questions regarding the construction of § 22-217.8:1 of the Code of Virginia (1950), as amended.1
Meaning of the Phrase "Sixty Days"

You first asked whether the sixty-day suspension period for public school teachers mentioned in § 22-217.8:1 means sixty work days or sixty calendar days.

Ordinarily, the word "day," as used in the legal sense, means a calendar day. The legislature has not chosen to define "days" as work days in this section. Therefore, reliance must be placed on the ordinary meaning of the word "days," and in my opinion, the phrase sixty days means sixty calendar days.

Sixty Days' Suspension Period

You next asked whether there is any authority for suspending a teacher for a period longer than sixty days.

Section 22-217.8:1 states that in no event shall any teacher be suspended for longer than sixty days. The obvious implication of this statute is that a teacher may be suspended for sixty days but not one day more. If a teacher is suspended by a school board for a period in excess of five days, then that teacher is entitled to written notification and an opportunity for a hearing, except when a teacher is suspended due to a criminal charge of moral turpitude. However, even in a situation involving a criminal charge, a teacher cannot be suspended for more than sixty days.

Therefore, given the plain language of the statute, authority does not exist in § 22-217.8:1 for suspension of a teacher for a period in excess of sixty days. I note, however, that a teacher could agree to a suspension in excess of sixty days. This would be particularly applicable in a case where grounds for termination exist and a long suspension is imposed in lieu of dismissal.

Section 22-217.8:1 provides:

"A. Except when a teacher is suspended because of being charged by summons, warrant, indictment or information with the commission of a crime of moral turpitude, a division superintendent or appropriate central office designee shall not suspend a teacher for a period in excess of five days unless such teacher is advised in writing of the reason for the suspension and afforded an opportunity for a hearing in accordance with §§ 22-217.6 through 22-217.8 and, in no event, shall any teacher be suspended, under this subsection, for longer than sixty days. Any teacher so suspended shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise.

B. Any teacher suspended because of being charged by summons, warrant, information or indictment with a crime of moral turpitude may be suspended with or without pay. In the event a teacher is suspended without pay, an amount equal to said teacher's salary while on suspended status shall be placed in an interest-bearing demand escrow account. Upon being found not guilty of a crime of moral turpitude or upon the dismissal or nolle prosequi of said charge, such teacher shall be reinstated with all unpaid salary and accrued interest from said escrow account, less any earnings received by the teacher during the period of suspension, but in no event shall such payment exceed one year's salary.

C. In the event a teacher is found guilty by an appropriate court of a crime of moral turpitude and, after all available appeals have been exhausted.
and such conviction is upheld, all salary during such period of suspension and accrued interest in said escrow account accumulated shall be repaid to the local school board.

D. No teacher shall have his or her insurance benefits suspended or terminated because of such suspension in accordance with this section.

E. Nothing in this section shall be construed to limit the authority of a school board to dismiss or place on probation a teacher pursuant to §§ 22-217.5 through 22-217.8."

286 C.J.S. Time § 12, p. 846 (1954). See also In Re Opinion of the Justices, 42 So.2d 27 (1949), and City of Hapeville v. Jones, et al., 20 S.E.2d 599, 194 Ga. 57 (1942). Note in the Opinion of the Justices, Sunday is excepted from the run of the six-day period in question due to a constitutional provision providing for Sunday's exception. In Virginia, when a statute says nothing about Sunday, it is included unless the last day falls on Sunday, in which case the succeeding day is generally applicable. See Harris v. Sparrow, 132 S.E. 694, 146 Va. 747 (1926).

STATUTES: STATUTES DO NOT OPERATE RETROACTIVELY IN ABSENCE OF LEGISLATIVE INTENT THAT THEY DO SO.

January 26, 1979

The Honorable Richard C. Grizzard
Commonwealth's Attorney for Southampton County

You have asked about the required length of notice to terminate a contract between a regional library board and a participating political subdivision. The contract itself provides that either party may terminate it at the end of a fiscal year by giving notice to the other party more than ninety days before the end of the fiscal year. Section 42.1-42 of the Code of Virginia (1950), as amended, which was enacted after this contract was entered into, requires that a county or city participating in a regional library system give two years notice of withdrawal to other participants.

In order for the provisions of § 42.1-42 to supersede those of a preexisting contract, the statute would have to operate retrospectively. Retroactive application of a statute is never presumed by Virginia courts. In Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 30 S.E.2d 686 (1944), the Virginia Supreme Court stated:

"The general rule is that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts, rights of action, or suits, and especially vested rights, unless the intention that it shall so operate is expressly declared; the courts will apply new statutes only to future cases unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retrospective action." Id. at 875, 30 S.E.2d at 688-689.

In an Opinion to the Honorable V. Earl Dickinson, Member, House of Delegates, and found in Report of the Attorney General (1975-1976) at 66, it was held that in the absence of any indication of legislative intent that a statute have retroactive application, it would not alter preexisting contractual obligations.
Accordingly, it is my opinion that the provisions of the statute requiring a two year notice of withdrawal must be given prospective effect only and the ninety-day notice provision in the contract controls.

STATUTES. STATUTE OF GENERAL APPLICABILITY DOES NOT BIND SOVEREIGN STATE.

February 8, 1979

The Honorable Robert Carter, Chairman
Virginia Health Services Cost Review Commission

You have asked me whether state-owned medical institutions, such as the Medical College of Virginia and the mental hospitals operated by the Department of Mental Health and Mental Retardation fall within the definition of a "health care institution" as set forth in § 9-156(3) of the Code of Virginia (1950), as amended. If they do, these institutions are required to file certain financial information with the Virginia Health Services Cost Review Commission. See § 9-159.

Because the definition of a "health care institution" depends specifically upon an institution's licensure status, the inquiry becomes whether these state institutions are licensed pursuant to either Ch. 16 of Title 32 or Ch. 8 of Title 37.1.

Section 32-298 exempts the Medical College of Virginia and the University of Virginia Hospital as "institutions...subject to [the] control of the...medical or educational institutions of the State..." from the licensure provisions of Ch. 16 of Title 32. Thus, these two facilities do not fall within the definition of § 9-156(3), i.e., "health care institution," because they need not be licensed by the Commonwealth. They are, therefore, not required to file any financial information with the Virginia Health Services Cost Review Commission.

Section 37.1-179(2) specifies those facilities required to be licensed upon Ch. 8 of that Title. That provision of law does not explicitly refer to state institutions. It is a statute of general applicability, and does not bind a sovereign state. See, e.g., U.S. v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); cf. Commonwealth v. Safe Deposit Co., 155 Va. 458 (1930); see also C.J.S. Statutes § 317 (1953). As the Supreme Court of North Carolina succinctly expressed this principle: "Laws are prima facie made for the government of the citizen and not of the State herself." State v. Garland, 29 N.C. 48 (1846); see also Yancey v. North Carolina St. Highway & Pub. Wks. Com., 222 N.C. 106, 22 S.E.2d 256 (1942).

Accordingly, I conclude that state mental hospitals do not fall within the definition of a "health care institution" in § 9-156(3) because § 37.1-179, being a general statute, does not expressly make state mental hospitals subject to the licensure requirements of Ch. 8 of Title 37.1. Thus, these institutions also do not need to file with the Virginia Health Services Cost Review Commission.

1§ 9-156(3) states: "'Health care institution' means a general hospital, ordinary hospital, or out-patient surgical hospital licensed pursuant to chapter 16 of Title 32 (§ 32-297 et seq.) and mental or psychiatric hospital
licensed pursuant to chapter 8 of Title 37.1 (§ 37.1-179 et seq.), but in no event shall such term be construed to include any physician's office, nursing home, intermediate care facility, extended nursing care facility, nursing care facility of a religious body which depends upon prayer alone for healing, independent laboratory or outpatient clinic; "

§ 37.1-179(2) states: "The term 'facility' or 'institution' as used herein shall mean any facility or institution not operated by an agency of the federal government by whatever name or designation which provides care or treatment for mentally ill or mentally retarded persons, or persons addicted to the intemperate use of narcotic drugs, alcohol or other stimulants including the detoxification, treatment or rehabilitation of drug addicts through the use of the controlled drug methadone. Such institution or facility shall include a hospital as defined in subsection (2) of § 32-298 of this Code, out-patient clinic, special school, halfway house, sanatorium, home and any other similar or related facility."

STREETS. DEDICATION OF STREETS TO PUBLIC. APPROVAL OF SUBDIVISION BY BOARD OF SUPERVISORS.

July 31, 1978

The Honorable J. Monroe Burke, Jr. 
Commissioner of the Revenue for Warren County

You ask two questions concerning the dedication of streets to the public.

Approval of Subdivisions

You first ask whether the approval of a subdivision by a board of supervisors results in the transfer to the county of title to streets dedicated by the developer for public use, when no action is taken otherwise to accept the streets as tax-exempt public property. It is my opinion that no further action beyond approval is required.

Any county or municipal corporation is authorized to require, as part of its subdivision ordinance, certification by the developer that he has paid street construction costs, or assurances from him that sufficient funds are, or will be, made available for street construction. See § 15.1-466 of the Code of Virginia (1950), as amended.1 No subdivision plat that is subject to any subdivision ordinance may be admitted to record until it has been approved by the planning commission or governing body. See § 15.1-473(b). Once the subdivision plat is recorded, title to that property dedicated for streets, alleys, and other public use is transferred to the local government. See § 15.1-478. Therefore, in answer to your inquiry, the governing body may require a certification or assurances that the streets will be constructed properly before it must approve the subdivision plat; however, once that plat has been admitted to record, title to that property dedicated for public use becomes vested in the local government, and that property is exempt from local taxation.

Obligation for Maintenance of Roads

Approval of the subdivision plat does not, however, imply acceptance of the obligation to maintain the road. See Opinion to the Honorable John P.
Alderman, Commonwealth's Attorney for Carroll County, dated January 14, 1977, and found in Report of the Attorney General (1976-1977) at 102. Even though a street or alley may be dedicated to public use, the road does not become a public highway until established or accepted by competent authority. See Payne v. Godwin, 147 Va. 1019, 1026, 133 S.E. 481, 483 (1926). Nor does mere recordation create that obligation. See § 15.1-479. The governing body must take some affirmative action beyond approval and recordation of the plat before it is deemed to have undertaken the obligation to maintain the street or road. See Opinion to the Honorable Raymond R. Guest, Jr., Member, House of Delegates—dated October 9, 1975, and found in Report of the Attorney General (1975-1976) at 333.

Developments Which Are Not Subdivisions

You also ask whether, if the development in question is not a subdivision within the meaning of the local subdivision ordinance, title to property dedicated to public use becomes vested in the local government by recordation, or whether further action by the governing body is required.

Section 15.1-478, by which recordation of a subdivision plat results in transfer of title to streets to the local government, is applicable only to subdivisions, within the meaning of § 15.1-465. See Opinion to the Honorable Lawrence R. Ambrogi, Commonwealth's Attorney for Frederick County, dated March 20, 1974, and found in Report of the Attorney General (1973-1974) at 106. A division of a tract of land into parcels of five acres or more, as you suggest, is not a subdivision, and title to property dedicated for public use is not transferred to the local government when the plat is recorded. See Opinion to the Honorable Catesby Graham Jones, Jr., Commonwealth's Attorney for Gloucester County, dated August 21, 1973, and found in Report of the Attorney General (1973-1974) at 341. Some further action by the governing body is required to constitute acceptance of these properties as public streets. See Washington-Virginia Railway Co. v. Fisher, 121 Va. 229, 92 S.E. 809 (1917). Until the property becomes public, it cannot be exempted from taxes.

1Section 15.1-466(f) provides:
"(f) For the acceptance of dedication for public use of any right-of-way located within any subdivision which has constructed therein, or proposed to be constructed therein, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement, financed or to be financed in whole or in part by private funds only if the owner or developer (1) certifies to the governing body that the construction costs have been paid to the person constructing such facilities, or (2) furnishes to the governing body a certified check in the amount of the estimated costs of construction or a bond, with surety satisfactory to the governing body, in an amount sufficient for and conditioned upon the construction of such facilities, or a contract for the construction of such facilities and the contractor's bond, with like surety, in like amount and so conditioned; provided, however, in the event a governing body of a county, wherein the highway system is maintained by the Virginia Department of Highways and Transportation, has accepted the dedication of a road for public use and such road due to factors other than its quality of construction is not acceptable into the State Highway System, then such governing body may, if so provided by its subdivision ordinance, require the subdivider or developer to furnish the county with a maintenance and indemnifying bond, with surety satisfactory to the governing body, in an amount sufficient for and
conditioned upon the maintenance of such road until such time as it is accepted into the State Highway System. 'Maintenance of such road' shall be deemed to mean maintenance of the streets, curb, gutter, drainage facilities, utilities or other street improvements, including the correction of defects or damages and the removal of snow, water or debris, so as to keep such road reasonably open for public usage;..."

SUBDIVISIONS. COUNTIES, CITIES AND TOWNS. LOCALITY MAY REQUIRE DEDICATION OF IMPROVEMENTS TO SERVE PEDESTRIAN OR VEHICULAR NEEDS OF SUBDIVISION OR WATER OR SEWERAGE FACILITIES FOR DEVELOPMENT AS PRECONDITION FOR SUBDIVISION PLAT APPROVAL.

December 19, 1978

The Honorable Frederick H. Creekmore
Member, House of Delegates

You ask three questions regarding subdivision exactions in Virginia.

Mandatory Dedication Of Land

You ask whether a developer may be required to dedicate land for park, school, or recreational purposes as a precondition to subdivision plat approval.

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 expressly 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).

The authority to enact ordinances regulating the subdivision of land has been delegated by statute to localities. See Title 15.1, Ch. 11, Art. 7, of the Code of Virginia (1950), as amended. Section 15.1-466(f) provides that a subdivision ordinance shall provide "[f]or the acceptance of dedication for public use of any right-of-way located within any subdivision which has constructed therein, or proposed to be constructed therein, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement...." (Emphasis added.) Section 15.1-478 provides that the recordation of a subdivision plat operates to transfer, in fee simple, to the local government "such portion of the premises platted as is on such plat set apart for streets, alleys or other public use...."

In Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), the Virginia Supreme Court ruled that localities may "accept dedications by subdividers for certain public facilities." Although the question of mandatory dedication was not before it, the court stated that it was arguable that the language of these statutes "would support an inference that local governing bodies, in the exercise of their authority to grant or withhold subdivision approval, are empowered to require an offer and acceptance of dedications for access roads and other public facilities as the

The mandatory dedication which you question is for land to be used for park, school, or recreational facilities. In addition to the facilities specifically enumerated therein, § 15.1-466(f) permits dedication of land for "other improvement(s)." The nature of the other improvements for which mandatory dedication may be required is limited by those improvements specifically authorized. In addition, the nature of the improvements which may be dedicated under § 15.1-466(f) is limited by the subdivision development itself. In the Rowe case the court ruled that the facilities which may be dedicated must "substantially relate" to the needs of the proposed development. A subdivider cannot be required, as a precondition to subdivision plat approval, to dedicate land for improvements, the need for which is not substantially generated by the development itself. Board of Supervisors of James City County v. Rowe, supra, at 138-139.

The facilities for which mandatory dedication is specifically authorized by § 15.1-466(f) are all public improvements to serve the vehicular or pedestrian needs of the subdivision or water or sewerage facilities for the development. The ability to mandate the dedication of land for educational or recreational facilities may not be implied from the powers expressly granted by § 15.1-466(f). I therefore conclude that a subdivider may not be required to dedicate land for public park, school or recreational purposes as a precondition of plat approval.

Cash Fees

You also ask if a subdivider may be required to pay a cash fee in lieu of land dedication for the facilities authorized in § 15.1-466(f). Since this procedure will not result in the dedication of land within the subdivision, it is likely that the cash fees may be used to pay for improvements located outside the development. The Code of Virginia authorizes the mandatory payment of the costs of improvements located outside the subdivision for only sewerage and drainage facilities. See § 15.1-466(j). The Virginia Supreme Court has refused to permit the imposition of additional fees, other than those expressly authorized, as part of the subdivision approval process. Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 163 S.E.2d 154 (1968). Because there is no express or implied authority in § 15.1-466 for the imposition of cash fees in lieu of land dedication, I am of the opinion that such fees may not be mandated.

Compensation For Unauthorized Dedication

You also ask whether the city would be required to compensate developers who had been required to dedicate land for park, school, or recreational purposes, if the Virginia Supreme Court were subsequently to rule that a locality lacks authority to enact such a regulation.
In view of my answer to your first question that localities have no authority to enact such ordinances, it is not necessary that I respond to this question.

SUBDIVISIONS. ORDNANCES. REQUIREMENTS PLACED ON DEVELOPERS AS TO SEWERAGE AND DRAINAGE FACILITIES. PROVISIONS OF § 15.1-466(j) MANDATORY AND EXCLUSIVE.

April 24, 1979

The Honorable D. Wayne O'Bryan
Member, House of Delegates

You ask whether Hanover County is required to comply with the provisions of § 15.1-466(j) of the Code of Virginia (1950), as amended,1 that a subdivision ordinance include regulations to provide for payment by a subdivider or developer of his pro rata share of the cost of providing those sewerage and drainage facilities which are necessitated by his subdivision.

I am informed that Hanover's subdivision ordinance does not contain the provisions of § 15.1-466(j). Rather, the county's sewer system was established under § 15.1-320 to serve existing needs and a different method of collecting fees from the builder is provided.

The requirement that the subdivision ordinance contain the provision of § 15.1-466(j) is mandatory. See Report of the Attorney General (1976-1977) at 338. A locality has no discretion in determining whether the requirements and procedures of § 15.1-466(j) will be included within its ordinance. The statute provides that the payment by developers of their pro rata share pursuant to § 15.1-466(j) is only required for those "reasonable and necessary" sewerage and drainage facilities located outside the developer's land which are "necessitated or required, at least in part, by the construction or improvement of his subdivision or development." As to such development, alternative procedures to those specified in the statute may not be adopted. See Report of the Attorney General (1975-1976) at 165, in which it was held that the county had to follow the payment provision of § 15.1-466(j) rather than require capital contributions from developers.

1Section 15.1-466(j) provides:

"For payment by a subdivider or developer of land of his pro rata share of the cost of providing reasonable and necessary sewerage and drainage facilities, located outside the property limits of the land owned or controlled by him but necessitated or required, at least in part, by the construction or improvement of his subdivision or development; provided, however, that no such payment shall be required until such time as the governing body or a designated department or agency thereof shall have established a general sewer and drainage improvement program for an area having related and common sewer and drainage conditions and within which the land owned or controlled by the subdivider or developer is located. Such regulations shall set forth and establish reasonable standards to determine the proportionate share of total estimated cost of ultimate sewerage and drainage facilities required adequately to serve a related and common area, when and if fully developed in accord with the adopted comprehensive plan, that shall be borne by each subdivider or developer within the area. Such share shall be limited to the proportion of such total estimated cost which
the increased sewage flow and/or increased volume and velocity of storm water runoff to be actually caused by his subdivision or development bears to total estimated volume and velocity of such sewage and/or runoff from such area in its fully developed state.

Each such payment received shall be expended only for the construction of those facilities for which the payment was required, and until so expended shall be held in an interest-bearing account for the benefit of the subdivider or developer; provided, however, that in lieu of such payment the governing body may provide for the posting of a personal, corporate or property bond, cash escrow or other method of performance guarantee satisfactory to it conditioned on payment at commencement of such construction. Such bond, escrow or other guarantee shall be released within thirty days of written notice by the subdivider or developer to the governing body of satisfactory completion of construction, unless such subdivider or developer is notified in writing of a delay in such release and the reasons therefor. The ordinance may further provide for the partial release of any bond, escrow or guarantee posted in lieu of payment as a portion or portions of such construction progresses and is approved as completed by the governing body or a designated department or agency thereof." (Emphasis added.)

SUBDIVISIONS. RECORDED SUBDIVISION PLAT MUST BE VACATED PURSUANT TO § 15.1-482 AFTER SALE OF LOT.

December 7, 1978

The Honorable William N. Alexander, II
Commonwealth's Attorney for Franklin County

You state that a subdivision plat was approved and recorded in accordance with Franklin County's subdivision ordinance. A portion of the plat was divided into lots of less than five acres. Several of these parcels have been sold. Other portions of the plat contain parcels of five acres or more. The developer now seeks to vacate the plat and subdivide the larger parcels into lots of less than five acres in size. You inquire whether the provisions of § 15.1-482 of the Code of Virginia (1950), as amended, must be followed in order to vacate the plat.

Section 15.1-482 establishes the procedures which must be followed in order to vacate a recorded subdivision plat after the sale of any lot. See Opinion to the Honorable Benjamin L. Pinckard, Commissioner of the Revenue of Franklin County, dated September 26, 1978, a copy of which is enclosed. I am informed that, pursuant to § 15.1-430(1), the Franklin County subdivision ordinance defines a subdivision as the division of land into lots, "any of which" are less than five acres in size. Since portions of the recorded plat contain lots of less than five acres in size, and several of these parcels have been sold, the entire recorded plat is subject to the provisions of § 15.1-482.

I therefore conclude that the plat must be vacated pursuant to § 15.1-482 in order to subdivide those portions of the plat which contain parcels of five acres or more into lots of less than five acres in size.
SUBDIVISIONS. VACATION OF PLAT. PROCEDURES TO BE FOLLOWED.

September 26, 1978

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have told me that after selling several lots in a subdivision in Franklin County, a developer revised his subdivision plat already duly recorded and submitted it to the county administrator for approval. The revised plat was signed by the county administrator as agent for the Board of Supervisors, and the plat was then recorded in the office of the Circuit Court Clerk.

Vacation of a Subdivision Plat

You first ask whether the developer was required to vacate the original plat pursuant to § 15.1-482 of the Code of Virginia (1950), as amended.

Revision of a recorded subdivision plat results in vacation of the prior-approved plan. This Office has ruled that § 15.1-482 establishes the procedures which must be followed in order to vacate a recorded plat after the sale of any lot. This section is mandatory and must be conformed with in order to alter or vacate a recorded plat after the sale of a lot. See Opinion to the Honorable J. Warren White, Jr., Member, House of Delegates, dated August 15, 1973, and found in Report of the Attorney General (1973-1974) at 343.

Authority of the County Administrator

You also ask, if the county administrator has exceeded his authority in approving the revised plat, whether the county is bound by his actions.

The responsibility for enforcing and administering subdivision regulations rests with the governing body. The authority of the governing body to designate an agent for the approval of new or revised subdivision plats is limited to those situations in which it is expressly authorized. See §§ 15.1-475 and 15.1-481. There is no authority for a county administrator to serve as agent for the governing body to approve revision of a plat after the sale of lots. I am therefore of the opinion that since the administrator had no authority to act as agent for the governing body, his actions in approving the plat were in excess of his authority and the county is not bound by them. 63 Am.Jur.2d Public Officers and Employees § 269 (1978), 1A M.J. Agency § 9 (1967).

Section 15.1-482 provides:

"In cases where any lot has been sold, the plat or part thereof may be vacated according to either of the following methods:

(a) By instrument in writing agreeing to said vacation signed by all the owners of lots shown on said plat and also signed on behalf of the governing body of the county or municipality in which the land shown on the plat or part thereof to be vacated lies for the purpose of showing the approval of such vacation by the governing body. The word 'owners' shall not include lien creditors except those whose debts are secured by a recorded deed of trust or mortgage and shall not include any consort of an owner. The instrument of
vacation shall be acknowledged in the manner of a deed and filed for record in the clerk's office of any court in which said plat is recorded.

(b) By ordinance of the governing body of the county or municipality in which the land shown on the plat or part thereof to be vacated lies on motion of one of its members or on application of any interested person. Such ordinance shall not be adopted until after notice has been given as required by § 15.1-431. Said notice shall clearly describe the plat or portion thereof to be vacated and state the time and place of the meeting of the governing body at which the adoption of the ordinance will be voted upon. Any person may appear at said meeting for the purpose of objecting to the adoption of the ordinance. An appeal from the adoption of the ordinance may be filed within thirty days with the circuit court having jurisdiction of the land shown on the plat or part thereof to be vacated. Upon such appeal the court may nullify the ordinance if it finds that the owner of any lot shown on the plat will be irreparably damaged. If no appeal from the adoption of the ordinance is filed within the time above provided or if the ordinance is upheld on appeal, a certified copy of the ordinance of vacation may be recorded in the clerk's office of any court in which the plat is recorded.

2Section 15.1-474 provides:

"The administration and enforcement of subdivision regulations insofar as they pertain to public improvements as authorized in § 15.1-466 shall be vested in the governing body of the political subdivision in which the improvements are or are to be located.

Except as provided above, the governing body shall be responsible for administering and enforcing the provisions of such subdivision regulations, through its planning commission or otherwise."

SUNDAY CLOSING LAW: FLORISTS NOT EXEMPT.

January 18, 1979

The Honorable William H. Fuller, III
Commonwealth's Attorney for the City of Danville

You have asked whether florists would be permitted to remain open for business on Sunday in a jurisdiction in which the Sunday Closing Law is in force.

The Sunday Closing Law prohibits persons from engaging in work, labor or business on Sundays, or engaging others to do the same. However, the statute exempts from coverage various industries and businesses, one of which is "agriculture, including the operating of nurseries." It is my opinion, however, that florists do not come within this exemption because florists engage in the business of selling flowers and ornamental plants rather than growing plants for sale, growing crops, or producing shrubs for transplanting. I find no other exception in those listed by the statute which would allow a florist to operate on Sunday.

1Section 18.2-341(a) of the Code of Virginia (1950), as amended.

TAXATION. AGRICULTURAL AND FORESTAL DISTRICTS ACT, AND LAND USE ACT. PROPERTY TAX DEFERRAL OR RELIEF.
You have asked two questions concerning the Agricultural and Forestal Districts Act (AFDA), §§ 15.1-1506 et seq. of the Code of Virginia (1950), as amended.

1. You first ask whether the enactment of an ordinance creating an agricultural and forestal district within your county in accordance with the AFDA would qualify the forestal lands within the district for land use valuation, even if your county has not implemented land use valuation and taxation for forest land in accordance with the provisions of §§ 58-769.1 et seq. (popularly known as the Land Use Act).

This Office has ruled in an Opinion to you dated January 3, 1978, with which I concur, that in enacting the AFDA the General Assembly intended that an agricultural and forestal district may be created within a locality irrespective of whether the locality has lawfully adopted land use valuation and taxation for agricultural and forestal land as provided for by the Land Use Act. Further, the tax benefits available under the AFDA accrue upon the lawful enactment of the agricultural and forestal district. See § 15.1-1512A.

2. You next ask if the answer to the first question is affirmative whether the result violates the "uniformity" requirement of Art. X, § 1, of the Constitution of Virginia (1971).

Article X, § 1, of the Constitution of Virginia provides, in part, that all taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax...." (Emphasis supplied.) The "uniformity" requirement of Art. X, § 1, must be viewed in conjunction with Art. X, § 2, of the Constitution which provides, in part, that:

"1. The General Assembly may define and classify real estate devoted to agricultural and forestal uses, and

2. The General Assembly may by general law authorize a local government to allow tax relief or deferral on real estate so classified, provided

3. The General Assembly first determines that classification of such real estate for such purposes is in the public interest for the preservation or conservation of real estate for such uses."

In exercising its power to "define and classify" real estate devoted to agricultural and forestal uses, the General Assembly has determined, in my opinion, that the creation of an agricultural and forestal district is "in the public interest for the preservation or conservation of real estate for such uses." See § 15.1-1507. It is also my opinion that an "agricultural and forestal district" constitutes a valid legislative "class" of real estate devoted to agricultural and forestal uses within the meaning of Art. X, § 2, of the Constitution.

Since an agricultural or forestal district constitutes the "class of subjects within the territorial limits of the authority [the county] levying the tax,..." the "uniformity" requirement of Art. X, § 1, is not violated, in
my opinion, if real estate devoted to agricultural and/or forestal uses within a "district" is accorded different tax treatment from real estate devoted to similar uses but located elsewhere within the same county.

This result does not relieve the local governing body from meeting the requirement of Art. X, § 1, that all land within the "territorial limits of the authority levying the tax" be uniformly treated. This Office has previously held that all applications for creation of the district must be measured by the same objective criteria by which all such applications are judged. See § 15.1-1511C for guidance. Thus, the AFDA may not be used by a locality to accord tax preference to a particular parcel or parcels of real estate in the locality at the tax expense of owners of essentially similar real estate. See Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated January 6, 1978, a copy of which is enclosed.

TAXATION. ASSESSMENTS. TAXPAYER'S REcourse FOR LAND ASSESSED AS SUITABLE FOR BUILDING BUT LATER FOUND NOT TO PERCOLATE.

July 6, 1978

The Honorable Stanley R. Lewis
Commissioner of the Revenue for Middlesex County

You have asked (1) what recourse a taxpayer has if his land is assessed as suitable for building but is later found not to percolate, (2) whether the answer in question (1) is affected by the fact that the taxpayer advised the board of assessors at the time of the assessment hearing that in his opinion the land would not percolate, (3) whether the commissioner of the revenue has any authority to adjust the value of the timberland if timber is removed between reassessments, and (4) whether the commissioner of the revenue has authority to change the assessed value of the land in order to correct "obvious errors." I will answer your questions in the order asked.

1. The general rule is that between general or annual reassessments the sole remedy available to a taxpayer aggrieved by any tax assessment is to petition the local circuit court for relief within three years from the thirty-first day of December of the year in which the assessment is made. Certain exceptions to this general rule, not applicable to the instant factual situation, are discussed in response to your fourth question. Consequently, it is my opinion in this instance that the taxpayer's sole remedy is to petition the circuit court as provided for by § 58-1145.

2. Whenever a reassessment or a change in the assessment of any real estate takes place, notice shall be given the landowner. Such notice shall set out the time and place at which the taxpayer may appear before the officers making the assessment and present objection thereto. If the assessing officer(s) rejects the taxpayer's objection, the taxpayer's only opportunity for relief, as stated in the answer to question (1), is to petition the circuit court as provided for by § 58-1145.

3. Section 58-813 provides that if a taxpayer owns land and the timber thereon, and the timberland is reduced in value to the extent of two hundred dollars or more by the removal of the timber, the commissioner shall reassess the entire tract to reflect the value of the tract after the timber is removed.
4. The commissioner has the authority to change the valuation of the land between general reassessments in the following circumstances: 1) to allow the addition of the value of improvements; 2) to value individually the lots which comprise a newly platted and recorded subdivision; 3) to value land which has been rezoned; 4) to value a tract or lot which becomes the property of different owners in two or more parcels; 5) when standing timber is transferred, to value the real property separately from the timber; 6) if authorized by local ordinance, to value substantially completed new buildings; 7) to value any building which has been totally destroyed or reduced in value below one hundred dollars from natural decay or other causes; 8) to value a building which has been reduced in value by one hundred dollars or more due to violence and to reduce the value of land wherein standing timber has been removed as set forth in response to the third question herein; 9) to correct mere clerical or calculation errors.

Section 58-1142 vests the commissioner with the power to correct certain assessments upon proper application. However, you say that a board of assessors was convened to value the real estate in the last general reassessment. It is my opinion, and this office has previously opined, that the commissioner of the revenue is not authorized under § 58-1142 to correct an error in the valuation of real estate made by the board of assessors during the last general reassessment. Any relief from an error of the board of assessors must be obtained from the proper circuit court as provided for by § 58-1145, et seq. See Reports of the Attorney General (1972-1973) at 83-84; (1961-1962) at 247.

1See § 58-1145 of the Code of Virginia (1950), as amended.
2See § 58-792.01.
3Sections 58-763 and 58-772.1.
4Section 58-772.
5Section 58-772.1.
6Section 58-773.
7Section 58-803.
8Section 58-811.1.
9Section 58-813.
10Section 58-813.
11Section 58-1142.

TAXATION. COLLECTION. DELINQUENT REAL ESTATE TAXES. TREASURER MAY ADOPT PRACTICE OF APPLYING PAYMENTS TO OLDEST OUTSTANDING TAX BILL, ABSENT TAXPAYER INSTRUCTIONS.

October 19, 1978

The Honorable William W. Bennett, Jr.
Commonwealth's Attorney for the
City of South Boston

You have asked whether the city treasurer may adopt a practice whereby the treasurer would apply the receipt of real property taxes on land for which tax bills are outstanding for more than one taxable year towards the oldest outstanding tax bill. In amplification of your question, you have enclosed a letter from the city manager which states in part:
"For years the City of South Boston, in the receipt of payment for real estate taxes, has applied payments against the oldest outstanding tax bill. For example, if a taxpayer were delinquent on their 1977 real estate tax the City will not accept payment on 1978 real estate taxes but rather applies the amount received against the delinquent amount, including penalty and interest."

It is my opinion that, as a matter of administrative procedure, the treasurer may adopt a practice of applying real estate taxes received against the oldest outstanding tax bill in the absence of specific instructions from the taxpayer to the contrary. However, it is my further opinion that the taxpayer may direct the treasurer to apply the payment to a particular year for which the taxes remain unpaid.

Delinquent Taxes

Section 58-983(b) of the Code of Virginia (1950), as amended, provides that:

"If the taxes and levies on any real estate...are not paid by the third anniversary of the original due date thereof, a lien shall be recorded by the treasurer in the appropriate clerk's office or other office in which such liens are customarily recorded...."

The lien arises under § 58-1023. Moreover, § 58-1117.1 provides that:

"When any taxes on any real estate...are delinquent on December thirty-one following the third anniversary of the date on which such taxes have become due, such real estate may be sold for the purpose of collecting all delinquent taxes on such property."

The objective of a tax sale is to force the thoughtless and negligent citizen to pay his taxes in obedience to the law. It is never to take away one's land unjustly since the protection of property rights is one of the leading principles of the law. See 21 A.L.R.2d 1269, 1280 (1950). One of the fundamental elements in a legal assessment of taxes is the right of the owner to go to the proper authorities, pay the amount of the taxes assessed against him and obtain a release of the tax lien. City of Norfolk v. Stephenson, 185 Va. 305, 310, 38 S.E.2d 570, 572, 171 A.L.R. 1344, 1347 (1946). A good faith tender by a taxpayer of the taxes for a particular year or years which is either refused by the treasurer or is otherwise frustrated by the mistake or negligence of the tax collector will not cut off the taxpayer's right to redeem or make payment of his taxes. Furthermore, it will be treated as the equivalent of payment, at least insofar as canceling subsequent tax foreclosures is concerned, since the taxpayer has done all the law requires of him in paying his taxes. 21 A.L.R.2d 1269, 1300, 1305, 1307 (1950). On the other hand, some jurisdictions have held that, absent instructions from the taxpayer, the treasurer could apply payments to the most recent taxes owed. Id. at 1307. I find no provision in Title 58 which prescribes the method of applying payments against delinquent real estate taxes. Therefore, I am of the opinion that the treasurer may adopt a uniformly applied administrative procedure for crediting real estate tax payments against the oldest outstanding tax bill in the absence of instructions by the delinquent taxpayer to the treasurer to apply his payment against a particular year or years for which the taxes are delinquent."
Current Taxes

I am of the further opinion that the same principles operate where the taxpayer directs the treasurer to apply the payment tendered to the current taxes due instead of the delinquent taxes. Where separate and independent taxes have been levied against the property of the taxpayer, he has a right to pay the full amount of any one tax without paying the others; that is, he may pay the amount of any one tax listed against him without offering to pay the taxes on other parts. The right to make such a payment may be enforced by mandamus. 72 Am.Jur.2d State and Local Taxation § 846 (1974). As noted above, the good faith effort of a property owner to pay taxes which is frustrated by the refusal of the treasurer to accept payment is the equivalent of payment, at least to the extent that it would discharge tax liens subsequently declared against the land, and will effectively bar sales for nonpayment of taxes. Id. § 951. Depending upon the rates of penalty and interest which may be adopted locally pursuant to § 58-847, it may be to the taxpayer's advantage to avoid the imposition of a penalty on the current tax liability while permitting interest to accrue on prior tax liabilities although he may, thereby, subject his property to the jeopardy of a tax sale. Based upon the authority cited, it is my opinion that the taxpayer has the right to elect which of his outstanding tax bills are to be satisfied from the payment tendered.

TAXATION. COLLECTION OF LOCAL TAXES OR LEVIES FROM THIRD PARTY. TAXPAYER AFFORDED SUBSTANTIAL DUE PROCESS TO CONTEST TAXES PRIOR TO ENFORCEMENT ACTION.

July 19, 1978

The Honorable Frank M. Morton, III
County Attorney for James City County

You have asked whether the nonjudicial remedy for the collection of local taxes or levies authorized by § 58-1010 of the Code of Virginia (1950), as amended,1 is constitutionally invalid under a recent line of United States Supreme Court cases.2 You have expressed concern that this line of cases may require that, before the satisfaction of the lien arising under § 58-1010, a judicial hearing be held for which the taxpayer must be given notice and opportunity to be heard and the tax liability be reduced to judgment. It is my opinion that the line of cases cited is expressly inapplicable to proceedings for the collection of taxes; and, even if they did apply, the taxpayer is afforded substantial due process to contest the taxes or levies assessed prior to the initiation of the § 58-1010 enforcement action.

Three of the four cases cited recognize that summary seizure of the property of the debtor may meet the requirements of due process in extraordinary situations.3 Two of those three cases expressly acknowledge that the collection of revenue by the government is such an extraordinary situation.4 Therefore, the due process elements enunciated by the court are without application to a proceeding for the collection of local taxes or levies as provided for in § 58-1010.

If we assume, for the sake of argument, that the cases do apply to a § 58-1010 proceeding, they would require that prior to the seizure of debts or estate of the taxpayer in the hands of a third party:
1. The taxpayer be given notice and opportunity to be heard;
2. The hearing be before a neutral hearing officer;
3. The hearing officer look behind the pleadings to review the facts in the case;
4. A bond be posted by the taxing authority; and
5. If the taking were authorized by the hearing officer it be followed promptly by a judicial resolution of the taxpayer's liability.

A proceeding under § 58-1010 may only be initiated against "a person assessed with taxes or levies." The assessment of the tax liability gives notice. The opportunity to be heard, the existence of a neutral hearing officer, the review of the facts and the judicial determination of the tax liability are all provided by §§ 58-1145 to 58-1151. The requirement for the bond is irrelevant since the taxpayer has the opportunity to obtain a judicial determination of his liability prior to the taking. The fact that the taxpayer may not have availed himself of this opportunity can hardly be said, thereby, to require the § 58-1010 proceeding to be characterized as constitutionally invalid prejudgment garnishment. In summary, the Supreme Court's prejudgment garnishment cases are inapplicable to § 58-1010, but even if they were applicable, due process is afforded the taxpayer.

1Section 58-1010. "Any person indebted to or having in his hands estate of a person assessed with taxes or levies may be applied to in writing by the officer for payment thereof out of such debt or estate and a payment by such person of such taxes or levies, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. From the time of the service by such officer of any such application, the taxes and levies shall constitute a lien on the debt so due from such person or on the estate in his hands...."
3Mitchell at 611; Fuentes at 90; Sniadach at 339.
5See Mitchell at 610.

TAXATION. DELINQUENT. REAL ESTATE. REDEMPTION BY LESS THAN ALL OWNERS OF SUCH REAL ESTATE.

May 9, 1979

The Honorable Donald W. Devine
Commonwealth's Attorney for the
County of Loudoun

You ask whether one tenant in common may redeem real estate under § 58-1117.10 of the Code of Virginia (1950), as amended, before the real estate is subjected to a judicial sale for delinquent taxes. Your question has
arisen because of some uncertainty as to the meaning of the term "owner" in § 58-1117.10.

It must be noted that § 58-1117.10 is remedial in nature, in that it prevents the forfeiture of property rights, and that its language should be liberally construed to meet those cases which clearly fall within its spirit and purpose. City of Richmond v. Richmond Metropolitan Authority, 210 Va. 645, 172 S.E.2d 831 (1970). Section 58-1117.10 provides that "[a]ny owner..., or his or their heirs, successors and assigns, shall have the right to redeem such real estate prior to the date set for a judicial sale...." (Emphasis added.) This section recognizes that land may be owned by more than one party and that it may also devolve to more than one party. This practicality is reflected in §§ 58-770 and 58-770.1, which permit assessments to be made in the name of one owner, when there are multiple owners, or against unknown owners. It would be inequitable indeed to allow property taxes to be assessed in the name of only one owner, but to require, for purposes of redemption, that all owners participate. This result is avoided because § 58-1117.10 permits "any" owner to redeem real property prior to a judicial sale for delinquent taxes, and one tenant in common is one such owner. This interpretation is fully consistent with both the letter and spirit of the statute. Therefore, I am of the opinion that when the court is satisfied that an individual is a tenant in common with one or more other tenants in common, known or unknown, then such individual may redeem the real property pursuant to § 58-1117.10.

TAXATION. DELINQUENT. TENDER OF PAYMENT OF LOCAL LEVY MAY NOT BE APPLIED BY TREASURER TO ANOTHER SPECIE OF LOCAL LEVY.

June 13, 1979

The Honorable Dudley J. Emick, Jr.
Member, Senate of Virginia

You have asked whether the enactment in 1979 of House Bill 1594, amending and reenacting § 58-961 of the Code of Virginia (1950), as amended, Ch. 259 [1979] Acts of Assembly requires treasurers "to credit the payment of money for the payment of real estate taxes to earlier delinquent personal property taxes." (Emphasis added.) It is my opinion that the new provisions in § 58-961, effective July 1, 1979, do not require treasurers to apply the tender by the taxpayer of payment for one type of tax to an earlier delinquency of another type of tax.

The patron of 1979 House Bill 1594 is the Honorable Frank M. Slayton, Member, House of Delegates, representing the City of South Boston. The Bill was introduced in the first session of the General Assembly following an Opinion of this Office to the Honorable William W. Bennett, Jr., Commonwealth's Attorney for the City of South Boston, dated October 19, 1978, a copy of which is enclosed. That Opinion held that, in the absence of a statutory provision, "the treasurer may adopt the practice of applying real estate taxes received against the oldest outstanding [real estate] tax bill in the absence of specific instructions from the taxpayer to the contrary." That Opinion also observed that:

"Where separate and independent taxes have been levied against the property of the taxpayer, he has a right to pay the full amount of any
one tax without paying the others; that is, he may pay the amount of any one tax listed against him without offering to pay the taxes on other parts. The right to make such a payment may be enforced by mandamus. 72 Am. Jur. 2d State and Local Taxation § 846 (1974)."

In my judgment, an interpretation of § 58-961 requiring the treasurer to apply tender of payment of personal property taxes to real estate taxes, or other taxes not of the same specie, would violate this legal principle and cause an unlawful result. Thus, effective July 1, 1979, the tender of payment by a taxpayer towards personal property taxes must be applied to the most delinquent personal property tax levy and, similarly, the tender of payment by the taxpayer of real estate taxes must be applied to the most delinquent real estate tax assessment, so long as the local governing body has not provided otherwise by ordinance. There is, of course, the additional proviso that the collection of the delinquent tax is not subject to a defense of an applicable statute of limitations.

Section 58-961. "When treasurer to receive taxes and levies without penalty. Each treasurer shall commence to receive the State taxes and local levies as soon as he receives copies of the commissioner's books and continues to receive the same up to and including the fifth day of December of each year. Unless otherwise provided by ordinance of the governing body, any payment of local levies received shall be credited first against the most delinquent local account, the collection of which is not subject to a defense of an applicable statute of limitations. The assessment and collection of individual and fiduciary income taxes being provided for in the chapter on income taxes, neither this section, nor the two preceding sections (§§ 58-959, 58-960), nor the four following sections (§§ 58-962, 58-963, 58-964, 58-965), shall apply thereto."

TAXATION. EXEMPTION. REAL PROPERTY OF ELDERLY AND HANDICAPPED. MAY BE CONDITIONED ON PROMPT PAYMENT OF PORTION NOT EXEMPTED.

October 27, 1978

The Honorable Elinor W. Downey
Commissioner of the Revenue for the
City of Clifton Forge

You have asked whether a local ordinance adopted in accordance with § 58-760.1 of the Code of Virginia (1950), as amended, granting exemption from real estate taxation to certain elderly and handicapped persons may include a provision whereby the exemption is lost if the taxpayer, who was otherwise qualified, fails to pay the taxes on time. It is my opinion that such a provision does not violate either the Constitution of Virginia or § 58-760.1.

Section 58-760.1 provides that:

"(a) The governing body of any county, city or town may, by ordinance, provide for the exemption from, or deferral of, taxation of real estate, or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe...subject to the following restrictions and conditions:

***
(b) Changes in respect to income, financial worth, ownership of property or other factors occurring during the taxable year...having the effect of exceeding or violating the limitations and conditions provided herein or by county, city or town ordinance shall nullify any exemption or deferral for the then current taxable year and the taxable year immediately following.

***

(d) The General Assembly hereby deems those persons falling within the limitations and conditions provided in paragraphs (a) and (b) of this section to be bearing an extraordinary tax burden on the real estate described herein in relation to their income and financial worth."

You have provided a copy of an ordinance of the City of Clifton Forge which authorizes a twenty-five percent exemption from real estate taxation to certain elderly and permanently and totally disabled persons under terms which generally follow § 58-760.1. The ordinance further provides, "[i]n order to be eligible for this exemption, taxes must be paid by the installment due dates..." which are elsewhere established as December 5, 1978, and June 5, 1979, at which time the real estate tax is due and payable in two equal installments.

The Constitution of Virginia, Art. X § 6(b), is the source of authority for these Code and ordinance provisions.1 Section 6(f) of that Article also provides that this exemption shall be strictly construed.2 In the absence of any Code or charter restriction, the nature and extent of the exemption from taxation are wholly matters of legislative discretion and the ordinance is controlling on the subject where there is no special provision of the State Constitution which dictates otherwise. 71 Am.Jur.2d State and Local Taxation § 309 (1973). In the case of ordinances drafted under the authority of § 58-760.1, localities are given latitude in tailoring their local ordinance. See Report of the Attorney General (1976-1977) at 278. I find nothing in the Constitution of Virginia or § 58-760.1, which would prevent the City of Clifton Forge from requiring those who wish to take advantage of the exemption to pay their taxes on time.

The constitutional mandate that statutory provisions for exemptions from taxation are to be strictly construed requires that the exemption be denied if there is any doubt that the one who asserts the claim of exemption meets all of the requirements for eligibility. 71 Am.Jur.2d State and Local Taxation § 334 (1973). I share your concern that elderly and handicapped persons who fail to make their payments of taxes due on time will be penalized with the loss of their exemption. However, the United States Supreme Court long ago held that provisions similar to these do not invalidate the ordinance since the inequality of result comes from the failure of certain taxpayers to avail themselves of privileges offered to all. See Merchant's & Manufacturer's National Bank v. Pennsylvania, 167 U.S. 461, 464 (1897); 72 Am.Jur.2d State and Local Taxation § 855 (1974). Therefore, I am of the opinion that the ordinance of the City of Clifton Forge, granting real estate tax relief to certain elderly and handicapped persons, is neither unconstitutional nor does it violate § 58-760.1 because it causes the exemption to be forfeited if the taxes are not paid on the date which they become due.

1"The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local real property taxation, or a portion thereof, within such
restrictions and upon such conditions as may be prescribed, of real estate owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said real estate in relation to their income and financial worth."

2"Exemptions of property from taxation as established or authorized hereby shall be strictly construed...."

TAXATION. "HOTSPOTTING." MAY BE AUTHORIZED IN LOCALITY WHICH REASSESSES BIENNIALY, UPON PROPER FACTUAL SHOWING.

November 17, 1978

The Honorable Lee T. Keyes
Commissioner of the Revenue for the County of Loudoun

You first ask whether the appraisal technique known as "hotspotting," which was defined by the Virginia Supreme Court in Perkins v. Albemarle, 214 Va. 416, 200 S.E.2d 566 (1973) (rehearing), may be used in a locality which reassesses real property biennially under § 58-778.1 of the Code of Virginia (1950), as amended.

"Hotspotting" is defined by the court as an appraisal-assessment technique which "enable[s] the taxing authority to conduct an annual review of all tax parcels within its jurisdiction and make selective reappraisals where value changes are disproportionate...." Id., 214 Va. at 418, 200 S.E.2d at 569 (emphasis in original). After the "selective reappraisals" are made, new assessments can be made based thereon. Also, the value of parcels for which no new reappraisal is made can be carried forward on the basis of the last assessment made even though all parcels are not visually inspected on an annual basis. The court did point out, however, that tax uniformity was a necessary goal and the technique "cannot be applied arbitrarily to all tax parcels within one geographic segment of the tax jurisdiction to the exclusion of all tax parcels in other geographic segments." Id., 214 Va. at 419, 200 S.E.2d at 569 (emphasis in original).

Unlike your locality, the Perkins decision arose in a locality which reassesses annually. The principal rationale for the court's approval of "hotspotting," however, was the factual determination that a visual inspection of each parcel each year would impose upon both the taxing authority and the taxpayer "an unreasonable, if not impossible, burden...." Id., 214 Va. 418, 200 S.E.2d at 568. I see no reason that conclusion reached by the court concerning "hotspotting" should be confined to localities which reassess annually.

Consequently, to the extent that the court's rationale is applicable, as a factual matter, to all localities which reassess on a biennial basis and to your specific county due to local conditions, it is my opinion that the appraisal technique of "hotspotting" may be used in your locality.

2. You next ask if a locality which reassesses biennially may annually change the valuation of land enrolled in a land use taxation program to conform with suggested ranges of "use values" annually published by the State Land Evaluation Advisory Committee (SLEAC).
The general rule is that the assessed valuation of land may be reassessed only in accordance with the method of reassessment selected by your locality. See § 58-758. In your case, reassessment may be made every two years. In certain situations, however, the commissioner of the revenue may deviate from the general rule and adjust the last general reassessment valuation to reflect a particular improvement or event which affects the value of the land. See, for example, §§ 58-809 through 58-813.

Under § 58-769.11, SLEAC is required annually to publish and provide each locality under land use taxation a suggested range of values for land put to a qualifying "use" under land use taxation. Nothing in § 58-769.11, however, indicates that the annual publication of such suggested ranges of use values vests the local assessing officer with the authority to deviate from the general rule of § 58-758.

Consequently, it is my opinion that SLEAC's annual publication of suggested ranges of use values neither requires nor authorizes the local assessing officer to reassess land under land use taxation between general reassessments.

TAXATION. LAND USE ASSESSMENTS. OWNER DOES NOT HAVE DISCRETION TO APPLY FOR LAND USE ASSESSMENT ON PORTION OF PARCEL OF REAL ESTATE.

April 2, 1979

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have asked several questions concerning land use taxation and the business license tax.

Land Use Taxation

You first ask if an applicant for land use taxation may obtain enrollment of only a portion of a parcel of land which is separately stated on the local land book. For the reasons set forth below, the answer to this question is no.

Article X, § 2, of the Virginia Constitution (1971), provides that the General Assembly alone "shall prescribe the limits, conditions, and extent of such [tax] deferral or relief."

Pursuant to the constitutional grant of authority, the General Assembly enacted what is popularly known as the Land Use Assessment Act (hereinafter the "Act"), §§ 58-769.4, et seq., of the Code of Virginia (1950), as amended. The Act explicitly sets forth the limits, conditions and extent of the tax relief available. Further, this Office has ruled previously that even a local government is without authority to modify the conditions and standards established by the General Assembly for land use taxation relief. See Opinion 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.

The Act specifically requires that application for land use taxation must be made upon each parcel of land owned by the applicant, as such parcel
appears on the land book. See §§ 58-769.8 and 58-769.7. The requirement that each parcel be valued as a whole and readily identifiable by reference to the local land book is necessary because an inchoate tax lien exists against the parcel from the moment it is accorded preferable tax treatment upon a change in use of the parcel. See § 58-769.10.

Based upon the foregoing, it is my opinion that a landowner may not obtain preferable land use tax treatment on less than the full acreage of a parcel of real estate, as such parcel is described upon the land book.

Business License Tax on Vending Machine Operator

You next ask whether a county, which has a tax on merchants' capital, may impose a license tax on the gross receipts of a vending machine operator under § 58-266.1A(12).

Section 58-266.1 provides the exclusive authority by which a county may impose a license tax on merchants. Section 58-266.1A(5), however, provides the following limitation:

"Whenever any county imposes a county license tax on merchants, the same shall be in lieu of a county property tax on the capital of merchants, as defined in § 58-833."

This section prohibits a county which imposes a license tax on merchants from also imposing a tax on merchants' capital. Even though not expressly stated, I conclude that this statute also prohibits the converse by inference as it cannot be assumed that the legislature would condition the legality of a tax upon the chronological order in which local tax ordinances may be enacted. I am advised that this result is in agreement with the position taken by the Department of Taxation that a county must abolish its merchants' capital tax if it enacts a local merchants' license tax. See Department of Taxation manual "Basic Training Program for Assessment Officers" at IV-34 (revised, 1977).

Therefore, if a vending machine operator is otherwise liable for a tax on merchants' capital, it is my opinion that a county which imposes a tax on merchants' capital may not impose a license tax on the same business under § 58-266.1.

Business License Tax on Business Leasing

Coin Operated Laundry Machines

You finally ask whether a locality is precluded from collecting a license tax under §§ 58-266.1A(11) and 58-266.1A(12) from a company which rents, leases or furnishes coin operated washers and dryers.

Paragraphs A(11) and A(12) of § 58-266.1 both require the merchant to be an "operator" as a condition precedent to the imposition of a license tax thereunder. An "operator" means "any person, firm or corporation selling, leasing, renting or otherwise furnishing...a coin-operated machine or device." § 58-266.1A(11). Section 58-359, however, states:

"The coin machine operator's license tax authorized by § 58-266.1A(11) shall not be applicable to...operators of vending machines which are so constructed as to do nothing but...provide service only...."
While a company which rents, leases or furnishes coin operated washers and dryers would be properly classified as an "operator," washers and dryers are machines which provide a service only. Therefore, no tax may be levied against the operator under § 58-266.1A(11).

Section 58-266.1A(12) provides for a tax on "gross receipts actually received by the operator from coin machines or devices...." It is not clear from your question whether the operator actually receives gross receipts from the machines. If the operator receives a fixed sum as rent, it is not receiving gross receipts from the machine. Hence, no tax may be levied under § 58-266.1A(12).

If, however, the operator receives as rent a percentage of gross receipts from the machine(s), the tax authorized by paragraph A(12) may be imposed.

Consequently, it is my opinion that a tax authorized under § 58-266.1A(11) may not be imposed against the lessor or furnisher of coin operated washers and dryers. The tax authorized under § 58-266.1A(12) may be imposed in those instances where the lessor-operator receives a percentage of the gross receipts of the machine.

TAXATION. LAND USE TAXATION. AREA OF LAND EXCLUDED FROM USE VALUE ASSESSMENT, AS BEING USED IN CONJUNCTION WITH NON-QUALIFYING STRUCTURES, MUST BE DETERMINED WITH REASONABLE CERTAINTY. THREE ACRE "RULE OF THUMB," USED FOR PURPOSES OF ADMINISTRATIVE CONVENIENCE, NOT PROPER.

May 16, 1979
The Honorable Julia M. Taylor
County Attorney for Loudoun County

You ask whether a local assessing officer may use a three acre "rule of thumb" to determine the extent of land excluded from special use assessment as "additional real estate as may be actually used in connection with, the farmhouse or home or any other structure not related to such special use..." as provided under § 58-769.9(b) of the Code of Virginia (1950), as amended (a portion of the Land Use Taxation Act (§§ 58-769.4, et seq.)) It appears that this "rule of thumb" is used for purposes of administrative convenience.

Analysis

Article X, § 2, of the Virginia Constitution (1971), provides that if the General Assembly grants land use tax relief or deferral "it shall prescribe the limits, conditions, and extent of such deferral or relief." Under the Act, the General Assembly dealt specifically with the question you ask. Section 58-769.9(b) provides, in part:

"(b)...real estate under, and such additional real estate as may be actually used in connection with, the farmhouse or home or any other structure not related to such special use shall be excluded in determining such total area [eligible for land use taxation]." (Emphasis added.)

The key issue, then, is the proper meaning of the word "actually."
It is a universally recognized rule of statutory construction that plain and unambiguous words ought to be accorded their ordinary meaning. 17 M.J. Statutes § 37 (1951). Webster's New Collegiate Dictionary (1977 ed.) defines "actually" to mean:

1. in act or in fact: REALLY...
2. at the present moment...
3. in point of fact: in truth...."

Another generally recognized rule of construction is that the meaning of a work should be determined with reference to the context in which it appears. 17 M.J. Statutes §§ 41 and 42 (1951). Applying these two rules of construction, it appears that the assessing officer may not apply a three acre "rule of thumb," although to do so may be administratively expedient.

First, the plain meaning of the word "actually" demands a more precise determination of the land to be excluded. While it is impractical to require a survey to determine the area of excluded land, the statute certainly requires that the assessing officer make a reasonable, personal judgment as to the amount of land really put to the nonexempt use. Second, land use tax relief operates as an exemption or deferral from taxation. Consequently, all provisions of the Act ought to be strictly construed against the taxpayer. See, e.g., Manassas Lodge No. 1380, Loyal Order of Moose, Inc. v. County of Prince William, 218 Va. 220, 237 S.E.2d 102 (1977). To the extent that the administrative practice would tend to grant the landowner tax relief or deferral in more property than was intended by the General Assembly, such practice is erroneous.

It is suggested that the assessing officer has the administrative discretion to use the "three acre" rule for two reasons: (1) the practice is a reasonable exercise of his authority under § 58-769.9(c), and (2) by excluding the three acres from special assessment, he is assessing home sites throughout the A-3 zone equally, whether or not the home sites are attached to acreage receiving special assessment. Neither contention is valid.

First, § 58-769.9(c) provides only that the land and structures which do not qualify for land use taxation "shall be valued, assessed and taxed by the same standards, methods and procedures as other taxable structures and other real estate in the locality." This section deals only with valuation. It has nothing to do with determining the "extent" of qualifying or non-qualifying land, which is what the assessor is required to do under § 58-769.9(b).

Second, this Office has previously found that "the use of the land rather than its zoning classification is the basis for qualification for land use taxation." See Report of the Attorney General (1975-1976) at 357. Consequently, the zoning status of the land has no bearing on the question you ask.

Based upon the foregoing, it is my opinion that the local assessor does not have the discretion, for purposes of administrative convenience, to apply a standard "three-acre" rule to determine the area of real estate not put to a special use within the meaning of § 58-769.9(b).

1You say that large portions of your county are zoned "A-3," an agricultural/residential category which requires a minimum of three acres for every home site.
TAXATION. LICENSE TAX. COIN-OPERATED MACHINES. GROSS RECEIPTS TO OPERATOR INCLUDE ENTIRE PROCEEDS.

October 19, 1978

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have asked (1) whether the gross receipts of an operator of coin-operated machines subject to a local gross receipts license tax1 includes all the revenue generated by such machines when the operator has adopted the practice of dividing the proceeds between himself and the businessmen who have the coin-operated machines at their places of business. You have also asked (2) whether such distributions made by the operator to the businessmen would be an expense item to the operator and, if not, whether the operator and the businessmen would be considered to be in business together.

It is my opinion that the gross receipts of the operator include the entire amount of the proceeds from the coin-operated machine prior to dividing such amount with the businessmen. Based upon the limited information provided in your letter, it is my further opinion that the operator's distributions to the businessmen would be a business expense to the operator for income tax purposes and that there is no partnership between the operator and the businessmen under the circumstances you have described which would have income tax consequences.

(1) Gross receipts: You have indicated in your letter "that the operator has complete control of the money before it is divided at the places of business." Although § 58-266.1A(12)2 provides that the tax is to be imposed upon "the gross receipts actually received by the operator,..." the actual receipt occurs at the time the proceeds are removed from the machine and not after any receipts have been shared by subsequent distribution of a portion of the proceeds to the businessmen where the coin-operated machines are located. In the absence of a specific statutory definition pertaining to the license tax, the words "gross receipts" must be given their ordinary meaning. The Supreme Court of Virginia has determined that the words "gross receipts" mean "whole, entire, total receipts." Savage v. Commonwealth, 186 Va. 1012, 1018, 45 S.E.2d 313, 317 (1947).

Although the Savage case dealt with the application of a gross receipts tax on motor vehicle carriers, the circumstances in that case provide a useful analogy. Savage was a motor vehicle carrier who had more shipping business than he could accommodate with his own equipment and he used the services of other carriers to meet the demand. He contended that the amounts paid other carriers for the use of their equipment in transporting his freight should be considered as revenue of the other carriers. The court said:

"The amounts paid to the other carriers for the use of their equipment was but an item of the cost of appellant's operation. It matters little whether the agreement for the use of the vehicle of the other carrier be termed a lease, or a payment for use, or rent for service. The use of the vehicles of others saved Savage the expense of using his own equipment. The amounts paid out by Savage were just as any other expense of operation, rent, wages, or commissions. The vehicles of the other carriers were merely the agency for the transportation of the cargoes of
Savage. Savage received the payments for the transportation. The payments constituted a part of his gross receipts in the transaction of his business." Savage at 1018.

I am, therefore, of the opinion that the operator's gross receipts include any amounts which he may share with businessmen for the privilege of locating his coin-operated machines at their places of business. Moreover, the Savage case stands for the proposition that the operator's distribution of a portion of the proceeds to the businessmen would be a business expense for income tax purposes. The characterization of gross receipts for license tax purposes is unrelated to and not determinative of the treatment of those receipts under the income tax laws.

(2) Business expense: In view of the above analysis, it is unnecessary to address the last part of your second question. However, I would offer the observation that the division of gross receipts between two businesses does not, standing alone, create a partnership having income tax consequences. Commonwealth v. Shenandoah River Light & Power, 135 Va. 47, 59, 115 SE 695, 698 (1923). For a more complete discussion of the factors which must be considered, I would refer you to 59 Am.Jur.2d Partnership § 39 (1971).

1Authorized by § 58-266.1A(12) of the Code of Virginia (1950), as amended. 2Section 58-266.1A(12). "In addition to any tax imposable pursuant to the provisions of paragraph (11) of this section, any 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...."

TAXATION. LICENSE TAX. FOREIGN CORPORATION DOING BUSINESS WITHIN CITY OF BEDFORD. SELLING FROZEN FOODS AT WHOLESALE AND AT RETAIL.

July 19, 1978

The Honorable Joseph Saunders, Jr.
Commissioner of Revenue for the City of Bedford

You have asked whether the City of Bedford may impose a license tax upon a foreign corporation doing business within the city, under a city ordinance adopted by authority of §§ 58-266.1 and 58-340 of the Code of Virginia (1950), as amended.

Facts

The organization in question is incorporated in Minnesota and maintains its home office there. The corporation operates from a warehouse within the Bedford city limits and is in the business of selling frozen foods, both at wholesale and at retail. A part of this business involves the employment of agents who work door-to-door selling such frozen foods directly to the ultimate consumer. Such door-to-door activity occurs both within and without the Bedford city limits.

You wish to impose two license taxes upon this organization; one upon that portion of the corporation's business which falls into the category of
wholesale-retail merchant, and the other upon those activities constituting retail peddling. The corporation contends that the imposition of these license taxes upon a multistate corporation would violate Art. 2, § 8 of the United States Constitution (the commerce clause) and relies upon the legal authority of Nippert v. City of Richmond, 327 U.S. 416 (1946), to support that position.

Analysis

The Nippert case involved the arrest and fining of a person engaged as a solicitor, who had not previously procured the required city license. The solicitor merely accepted orders which were sent to the home office from where delivery was made. The only connection between the city and the out-of-state company was the five-day visit of the company's solicitor within the city. The tax was $50, and one half of one per cent of the gross receipts or commissions for the preceding license year in excess of $1,000. The Richmond tax was found to be an unconstitutional burden on interstate commerce because it had the effect of excluding interstate competition. The court found that the tax bore no relationship to the activity or volume of business of the taxpayer within the City of Richmond.

The Nippert case expressly stated that not all burdens upon commerce are forbidden and that interstate commerce can be made to pay its way. Only undue or discriminatory burdens on such commerce is constitutionally prohibited. Moreover, Nippert's applicability is limited to situations where state or local government is attempting to impose a "flat sum privilege tax on an interstate enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State." Dunbar-Stanley Studios, Inc. v. State of Alabama, 393 U.S. 537 (1969). The issue is whether the activity taxed is an essentially local activity or such an integral part of interstate commerce that it cannot realistically be separated from it. Engaging in a local business may constitutionally be made subject to local taxation. Dunbar-Stanley Studios, Inc. v. State of Alabama, 393 U.S. at 540-541.

In addition, the United States Supreme Court in two recent decisions has held that a state, under appropriate circumstances, may directly tax the privilege of conducting an interstate business. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Department of Revenue v. Association of Washington Stevedoring Companies, 46 L.W. 4363 (1978). Such taxation may occur where the tax is applied to an activity having a substantial nexus with the state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

The Minnesota corporation involved here maintains a warehouse in Bedford. From this place of business, the taxpayer runs a wholesale-retail operation. Once a shipment of frozen food from the home office has come to rest in the Bedford warehouse, the sale of such products, either at wholesale or at retail, is an essentially local activity. The interstate journey of the goods has come to an end and the local taxes are applicable. See Minnesota v. Blasius, 290 U.S. 1 (1933). Even if the operation of the company retained some of its interstate character, so long as the tax was non-discriminatory and fairly apportioned to reflect the volume of business actually done in Bedford, the city could assess its license taxes under an ordinance adopted pursuant to §§ 58-266.1.
1It should be noted that retail peddlers who sell meats, poultry, fish, oysters, and other family supplies of a perishable nature are not subject to the State retail peddler's license. See § 58-340. Section 58-344 prohibits cities and towns from imposing a local license tax upon those retail peddlers exempted from State licensure under § 58-340. Thus Bedford may not impose a local retail peddlers' tax on this company's door-to-door salesman. However, the gross receipts attributable to those door-to-door sales may be included in the company's total tax base for purposes of determining the retail merchant's license tax.

TAXATION. LOCAL BUSINESS LICENSE. SPECIAL ASSESSMENT FOR DOWNTOWN REVITALIZATION PROJECTS.

October 12, 1978

The Honorable Victor J. Smith
Commissioner of Revenue for the City of Harrisonburg

You have asked whether the City of Harrisonburg, in order to finance "downtown revitalization" projects, may levy a special assessment on the business licenses of all those businesses within the geographical area to benefit from the specific restoration project. It is also intended that the special assessment will be used to fund the committee organized to coordinate the ideas and plans for improving the downtown area.

Section 58-266.10 of the Code of Virginia (1950), as amended (effective January 1, 1979), provides that it "shall apply to cities...as though this section were their sole authority for levying the taxes described herein." (Emphasis added.) Section 58-266.1 provides for business, professional, and occupational license taxes and also provides for certain ceilings on the rates which may be levied against those businesses. Nowhere does § 58-266.1 authorize the levying of special business license assessments.

Article X, § 3, of the Virginia Constitution (1971) permits the General Assembly, by general law, to authorize local governing bodies "to impose taxes or assessments upon abutting property owners for such local public improvements as may be designated by the General Assembly...." (Emphasis added.) Section 15.1-239 effectuates the grant of authority conferred by the Constitution. The General Assembly has not enacted any other legislation authorizing "special assessments," as contemplated by Art. X, § 3.

I am of the opinion that the City of Harrisonburg may not impose a special assessment on business license taxes. Municipal corporations have no powers of taxation unless the power is plainly conferred, and laws conferring such powers are strictly construed against the municipality. City of Richmond v. Valentine, 203 Va. 642, 125 S.E.2d 854, 857 (1962). Section 58-266.1, which authorizes local license taxation, does not plainly confer the power to levy special assessments. Moreover, such taxation would also run afoul of the requirement that a license tax must operate uniformly and equally on all those engaged in the same business and operating under the same circumstances. Williams v. City of Richmond, 177 Va. 477, 491, 14 S.E.2d 287, 292 (1941). The proposed special assessment license tax would result in certain businesses within the Harrisonburg city limits being subject to the
tax, while other similarly situated businesses in the city (except for geographical location) would not. This result would violate the uniformity requirement of Art. X, § 1, of the Virginia Constitution.

I am advised that other cities have relief upon Art. X, § 3 and § 15.1-239 to finance certain center city revitalization projects, such as downtown shopping malls. Such special assessments are limited to property owners abutting the local public improvement and limited to the value of the peculiar benefits conferred by said improvements and are in the nature of an additional property tax levy. The levy contemplated by the City of Harrisonburg does not meet those narrow limits and, therefore, may not legally be imposed.

TAXATION. LOCAL LICENSE TAX. UNAPPORTIONED GROSS RECEIPTS. TAX IMPOSED UPON MULTISTATE OPERATION VIOLATES COMMERCE CLAUSE OF UNITED STATES CONSTITUTION.

December 1, 1978

The Honorable George W. Titus
Treasurer of the County of Loudoun

You have asked whether Loudoun County may impose a business license tax on a maintenance contractor under the situs requirements of § 58-266.5 of the Code of Virginia (1950), as amended.

Facts

The business is conducted by a District of Columbia corporation which has its only office in Loudoun County. The maintenance contractor's service contracts are all with Arlington County and Maryland customers. The corporation's business involves servicing various hospitals and office buildings, with the majority of its employees working exclusively in either Arlington County or Maryland. Only a few employees work out of the Loudoun office, performing overall administrative and clerical functions. The corporation has no maintenance contracts in Loudoun County, and all of its gross receipts are derived from the maintenance activities performed in Arlington County and Maryland.

You have asked the following questions:

1. May Loudoun County impose its business license tax upon all the gross receipts of the taxpayer, including those derived from Maryland activities, without violating the commerce clause of the United States Constitution?

   You say that the employees work exclusively in Maryland and that the gross receipts attributable to operating in Maryland are derived totally from activities conducted in Maryland.

   Therefore, it is clear that a Loudoun County business license tax based upon all the gross receipts of the maintenance contractor would be, in part, a direct tax upon receipts received from activities in interstate commerce. Such a tax would not be apportioned to bear some reasonable relationship to the benefits conferred by Loudoun County and would violate the interstate commerce clause by subjecting the taxpayer to the risk of double taxation, a risk to which intrastate commerce is not exposed. See Evco v. Jones, 409 U.S. 91 (1972); J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938).
I must conclude that an unapportioned business license tax would constitute an impermissible burden on interstate commerce in this situation.

2. If it is necessary to apportion the gross receipts between the activities conducted in Virginia and those conducted in Maryland, may the County Treasurer adopt his own reasonable formula for that purpose?

Sections 58-266.5(a), 58-266.5(b), and 58-266.5(f) provide the apportionment formulas which local government may adopt by ordinance. A gross receipts tax is generally susceptible to ease of administration in terms of determining from where the receipts are derived. If a gross receipts base is used, then the gross receipts earned in Maryland must be deducted from the tax base, even if Maryland has chosen not to tax those receipts.

3. Must the taxable volume of the contractor's business be apportioned between Arlington County and Loudoun County, when the business has no office in Arlington County but performs its contracts there?

Your letter assumes that the maintenance contractor has no definite place of business in Arlington County. However, it appears that certain of the corporation's employees work exclusively in Arlington County and pursuant to the service contracts are more or less permanently assigned to a particular building for the duration of a contract. A continuous and regular course of dealing at one location would seem to constitute each such location a "definite place of business" in Arlington County and permit Arlington to impose its business license tax upon that portion of the business operations of the maintenance contractor. See Krauss v. City of Norfolk, 214 Va. 93, 197 S.E.2d 205 (1973); Young v. Town of Vienna, 203 Va. 265, 123 S.E.2d 388 (1962); Goldstein v. State Revenue Commission, 50 Ga. App. 317, 178 S.E. 164 (1934).

Therefore, to the extent that Arlington County actually and legally imposes a business license tax upon this contractor, Loudoun County must allow the taxpayer to deduct the gross receipts already taxed from the base against which Loudoun County imposes its tax. See City of Richmond v. Pollok, 218 Va. 693, 239 S.E.2d 915 (1978); Stork Diaper Service, Inc. v. City of Richmond, 210 Va. 705, 173 S.E.2d 859 (1970). Again, the means of apportioning the gross receipts between the two counties are provided for under §§ 58-266.5(a), 58-266.5(b), and 58-266.5(f).

TAXATION. LOCAL TAX COLLECTION. DISCOUNTS TO TAXPAYERS MUST BE AUTHORIZED BY STATUTE OR CHARTER.

October 18, 1978

The Honorable J. H. Ryals
Commissioner of the Revenue for the City of Emporia

You have asked whether the city council may grant a discount to taxpayers to compensate them for the collection of two locally imposed taxes, a tax on the purchase of meals and a tax on the purchase of utility services, similar to the discount allowed dealers on the State Sales Tax authorized by § 58-441.25 of the Code of Virginia (1950), as amended. It is my opinion that the city may not provide for such a discount on local taxes absent statutory or charter authority from the General Assembly.
It is well settled that the State may allow a discount or rebate for the prompt payment of taxes so long as the right to discount is extended uniformly to all who desire to take its benefit. See Merchants' & Manufacturers' Nat. Bank v. Pennsylvania, 167 U.S. 461 (1897); 51 A.L.R. 281 (1927); 72 Am.Jur.2d State and Local Taxation § 855 (1974). Section 58-441.25 extends such a discount to dealers collecting the State Sales Tax to the extent of three percent of the amount of tax due, for the purpose of compensating a dealer for accounting for and remitting the sales tax, provided the amount due is not delinquent at the time of payment. However, in extending to localities the authority to levy a general retail sales tax at the rate of one percent under § 58-441.49, the General Assembly also provided "that no discount under § 58-441.25 shall be allowed on a local sales tax." Thus, the General Assembly has reserved to itself the power to grant a discount or rebate on local sales taxes collected.

Under the familiar rule of Judge Dillon adopted in the Commonwealth:

"[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied." City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958).

I find no express grant of power to extend a discount or rebate on local taxes in either Art. 2, § 2, of Title 15.1 or the Charter of the City of Emporia. In view of the fact that the General Assembly has indicated its intention to reserve the power to grant a discount rebate in the case of local sales taxes, it is my opinion that it is neither necessarily or fairly implied to be incidental to the express power to tax nor is it indispensable to the declared objects and purposes of the corporation. See 72 Am.Jur.2d State and Local Taxation § 854 (1974). Therefore, I am of the opinion that the city does not possess the authority to grant a discount to compensate for the collection of local taxes.

TAXATION. MERCHANTS' CAPITAL. COUNTY IMPOSED MERCHANTS' CAPITAL TAX IS VALIDLY LEVIED ON BUSINESS WITH SITUS IN AN INCORPORATED TOWN LOCATED WITHIN THE COUNTY, EVEN IF TOWN IMPOSES LICENSE TAX ON SAME BUSINESS.

February 16, 1979

The Honorable Robertine H. Jordan
Commissioner of the Revenue for the County of Montgomery

You ask if a county may impose a merchants' capital tax upon a business which also pays a local license tax to an incorporated town located within the county.

Facts Presented

The county imposes a merchants' capital tax as provided in §§ 58-832, et seq., of the Code of Virginia (1950), as amended. The town imposes a license tax on the gross receipts of the business. The principal place of business is physically located in the town.
Discussion

This question is answered by the application of three general rules recognized in Virginia, unless some statute provides otherwise.

First, all property taxes apply within the territorial boundaries of the county, including any towns located therein. Watkins v. Barrow, 121 Va. 236, 240, 92 S.E. 908, 909 (1917). Because the merchants' capital tax is a tax on property, its effect is county-wide.

Second, a town may impose a non-property tax which affects only that town. Ashland v. Board of Supervisors, 202 Va. 409, 413-414, 117 S.E.2d 679, 682 (1961).

Third, a license tax is not a property tax. Ashland v. Board of Supervisors, supra, 202 Va. at 413, 117 S.E.2d at 682.

Applying these principles to the facts, I conclude that the county tax on merchants' capital, being a property tax, applies within all political subdivisions in the county. Consequently, the tax extends to all businesses located in the town. Further, the town may impose a license tax (a non-property tax) upon any business located within its jurisdiction. Hence, the town's license tax is valid.

The question remains whether the result reached by application of these general rules has been modified by statute.

Section 58-266.1A(5), as amended, which became effective January 1, 1979, provides that "[w]henever any county, city or town imposes a license tax on merchants, the same shall be in lieu of a tax on the capital of merchants, as defined by § 58-833."

This statute is susceptible of two interpretations. First, if a town imposes a license tax on merchants, a county tax on merchants' capital is of no effect in the town. Second, if a town imposes a license tax on merchants, a tax on merchants' capital is void only if imposed by the town.

The first interpretation must be discarded because it is in conflict with Art. X, § 1, of the Constitution of Virginia (1971), which provides that "[a]ll [property] taxes shall be levied and collected under the general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax..." If a county-imposed merchants' capital tax was not applicable in a town located within the county the result would be in conflict with the "uniformity" requirement of the Constitution.

No constitutional infirmity exists with the second interpretation.

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 & Western Railway Co., 205 Va. 949, 955, 140 S.E.2d 700, 704 (1965).

Based upon the foregoing, it is my opinion that a tax imposed by a county on merchants' capital under § 58-833 is applicable in a town located within the county, even though the town has imposed a license tax on the same business under § 58-266.1.
TAXATION. MOTOR VEHICLES. LOCAL LICENSE FEES. IMPOSED WHERE OWNER IS RESIDENT. PERSONAL PROPERTY TAXES ASSESSED WHERE VEHICLE REGULARLY GARAGED OR PARKED.

July 20, 1978

The Honorable Richard R. G. Hobson
Member, House of Delegates

You have asked three questions regarding taxation of automobiles under § 58-834 of the Code of Virginia (1950), as amended.

1. You first ask if motor vehicles registered in the State of Virginia in the name of an Alexandria business, but garaged outside the Commonwealth, are subject to personal property taxation in the Commonwealth.

Section 58-834 provides that "the situs for purposes of assessment of motor vehicles...shall be the...city where the vehicle is normally garaged...or parked...." This Office has consistently held that the proper situs for taxation is the place where the vehicle customarily is garaged, and not the location of the business that owns it. See Reports of the Attorney General (1975-1976) at 245-246; (1972-1973) at 292-293; (1965-1966) at 286; (1964-1965) at 333; (1959-1960) at 354; see also Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957). Moreover, the place of issuance of the registration and license tags is not controlling in determining the situs of the vehicle for the purpose of personal property taxation. See Report of the Attorney General (1966-1967) at 205-206.

The Supreme Court of Virginia in Arlington County v. Stull, 217 Va. 238, 227 S.E.2d 698 (1976), considered the "normally garaged and parked" standard and approved it as a workable one for purposes of determining tax situs. Your letter says that the vehicles in question are "garaged outside the Commonwealth," and I must conclude that neither the City of Alexandria nor any other Virginia locality has the authority to assess these vehicles for purposes of personal property taxation.

2. You next ask if personal property taxes may be assessed on such vehicles even if they are driven from the city at nights only for the convenience of officers and employees of the company and garaged outside the Commonwealth.

Since the vehicles are "garaged outside the Commonwealth," the answer is the same as question (1) and the City of Alexandria has no authority to assess these automobiles for personal property taxes. See Report of the Attorney General (1965-1966) at 294.

3. You next ask if the answer would change if the vehicles were driven from the city at night in furtherance of the business affairs of the company and garaged outside the Commonwealth.

The "normally garaged and parked" standard is to be applied notwithstanding the purpose behind driving the vehicles out of Alexandria at night. Since the automobiles in question are garaged outside the Commonwealth, Alexandria has no authority to assess them for personal property taxes.
TAXATION. RECORDATION. EXEMPTION FROM ADDITIONAL TAX EXTENDED TO DEED OF GIFT CONTAINING ADDITIONAL LANGUAGE.

July 5, 1978

The Honorable Jesse D. Clift, Clerk
Circuit Court of the City of Martinsville

You have asked whether the exemption from additional recordation tax granted by § 58-61 of the Code of Virginia (1950), as amended, may be extended to a deed which states therein that it is a deed of gift but contains additional language to the effect that the grantor "does hereby bargain, sell, grant and convey with general warranty of title unto the..." grantee to be held, administered, and distributed according to the provisions of a trust agreement between the grantor and the grantee. The deed further recites that the consideration for the deed is "the desire of the said Grantor to make the conveyance herein." It is my opinion that such deed is exempt from additional recordation tax.

After setting out a basis for exemption not relevant here, § 58-61 of the Code provides:

"Nor shall any additional recordation tax be required for admitting to record any deed of gift between an individual grantor or grantors and an individual grantee or grantees, irrespective of tenancy; provided, however, that any such deed shall state therein that it is a deed of gift. Any clerk recording a deed of gift shall notify the Department of Taxation quarterly, on forms provided by the Department, of each such gift and the grantor and grantee thereof."

The deed in question begins "This Gift Deed" and, as noted above, indicates that no monetary consideration is passing between the grantor and the grantee. Therefore, this deed meets the statutory requirements for exemption from recordation tax under § 58-61. The fact that the draftsman of the deed has incorporated language normally associated only with deeds under which monetary consideration passes between the parties does not operate to alter what is in fact a deed of gift. See Report of the Attorney General (1972-1973) at 436.

You have also asked whether a document which you describe as a "trust agreement conveying a large amount of real estate and other property to a trust fund..." is exempt from recordation tax. Upon careful examination of this second document, I find no evidence that it constitutes a deed conveying any real property. On the contrary, the document represents that it is a short form of a living trust agreement, not admitted to record, between the same grantor and grantee who are parties to the deed of gift described above. The short form is admitted to record "for the purpose of clarifying the record title to such properties and protecting any person or entity dealing with the Trustee." It merely indicates the actual state of the record owner's title and the interest of the beneficiaries of the trust in the lands conveyed to the trustees by the deed of gift. Therefore, it is not taxable under § 58-54, nor is it a contract relating to real property within the purview of § 58-58. It is my opinion that the document is not subject to a recordation tax, but that the usual clerk's fees for its recordation should be collected. See Report of the Attorney General (1972-1973) at 438.
TAXATION. RECORDATION. SUBORDINATION AGREEMENT IS TAXABLE UNDER § 58-58.

July 5, 1978

The Honorable H. C. DeJarnette, Clerk
Circuit Court of Orange County

You have asked whether a prior Opinion of this Office to the Honorable B. B. Roane, Clerk, Circuit Court of Gloucester County, dated November 17, 1959, and found in Report of the Attorney General (1959-1960) at 364, affirming the applicability of the recordation tax to an agreement of subordination, governs the subordination of the lien of one deed of trust to another. You have also asked whether any distinction should be drawn between an agreement of subordination which is presented for admission to record as a separate document and one which is incorporated within the body of a later deed of trust. It is my opinion that such subordination agreements are subject to the recordation tax and that the tax must be paid regardless of whether the agreement is presented as a separate document or whether it is incorporated into another document presented for admission to record.

Black's Law Dictionary 1595 (4th ed. rev. 1968), defines the word "subordinate" as follows: "[p]laced in a lower order, class or rank; occupying a lower position in a regular descending series; inferior in order, nature, dignity, power, importance, or the like; belonging to an inferior order in classification, and having a lower position in recognized scale; secondary, minor." Section 58-58 of the Code of Virginia (1950), as amended, provides in part, "[o]n every contract or memorandum thereof, relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for...." In addition to the Opinion you have cited, this Office has held that an agreement of subordination among a lender, a landlord and a tenant falls within § 58-58 and is subject to recordation tax. See Report of the Attorney General (1976-1977) at 298. It is my opinion that an agreement to subordinate the lien of one deed of trust to another falls squarely within the definition of a subordination agreement and § 58-58.

The fact that an individual wishing to exercise the privilege of admitting a document to record presents a single document purporting to perform more than one function which, if presented as separate documents, would each be subject to recordation tax, cannot operate to relieve such individual from paying such tax on each of the functions performed by the document. See Reports of the Attorney General (1972-1973) at 435; (1969-1970) at 283(3).

TAXATION. TANGIBLE PERSONAL PROPERTY TAX. WHEN PROPERTY "OWNED" BY UNITED STATES GOVERNMENT TAXABLE IN HANDS OF BENEFICIAL USER.

October 3, 1978

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

You have asked whether a tax on tangible personal property may be imposed in the following situation.
Facts

A real estate construction company (taxpayer) has contracted with the General Services Administration (GSA), an agency of the United States Government, to build a new federal building in Norfolk. Taxpayer is in possession of certain office equipment and other tangible personal property which it uses at the construction site in conjunction with the project. Taxpayer and GSA assert that GSA owns the property and such property is merely on "loan" to the taxpayer for the term of the construction project.

Question

Whether the taxpayer is liable for tangible personal property taxes upon the value of the "loaned" property?

Analysis

It is the general rule in Virginia to impose real estate and tangible personal property taxes upon the "owners" of the property. See §§ 58-796 and 58-837 of the Code of Virginia (1950), as amended.

When used in taxing statutes, the word "owner" consistently has been construed to include any person who has the usufruct or control of the property. City of Richmond v. McKinney, 194 Va. 427, 73 S.E.2d 414 (1952); Ceroli v. City of Clifton Forge, 192 Va. 118, 53 S.E.2d 781 (1951); Stark v. City of Norfolk, 183 Va. 282, 32 S.E.2d 59 (1944). In harmony with this judicial construction, the General Assembly has determined that the holders of leasehold interests in real estate and tangible personal property shall be taxed as if the lessees of such interests were the owners of the property, except where the lessee is an agency or political subdivision of the federal, state or local governments. See §§ 58-758, 58-758.1, 58-821.1 and 58-831.2.

Section 58-831.2 provides that any company engaged in business for profit, which leases from any agency of the federal government tangible personal property to be used in such business, shall be liable for local property taxes on such property as if the lessee were the owner thereof, unless the property or the lessee is otherwise tax exempt by State or local laws.

In this instance, the facts clearly show, and it is my opinion, that the taxpayer is a company engaged in business for profit; that the property is used in the business; that the property was obtained from an agency of the federal government; and that no exemption provision is applicable.

The sole issue, then, is whether the "loan" of property between the parties constitutes a lease within the meaning of § 58-831.2.

In a general sense, a "lease" is a contractual letting out of property for use during an ascertainable period, always for a shorter term than the lessor has in the property. See Greene Line Terminal Co. v. Martin, 122 W.Va. 483, 10 S.E.2d 901 (1940).

Article 25 of the contract between the parties provides that the GSA will reimburse the contractor taxpayer for:
1) the costs of all jobsite materials used;
2) the costs of renting equipment from others;
3) a reasonable rental rate on equipment owned by the contractor and used in the performance of the contract; and
4) costs of expendable supplies consumed in performing the work.

Based upon the facts presented, it appears that the property in question falls into one or more of the above-mentioned categories of reimbursable property. Consequently, if the GSA did not provide the taxpayer with the property in question, the taxpayer would rent or purchase the property and demand reimbursement from GSA. Since the taxpayer enjoys the benefits of and controls the use of the property, and the taxpayer has the right under the contract to purchase or rent similar property and demand reimbursement from GSA, I conclude that the "loan" by the GSA is actually the letting of property for valuable consideration.

Based upon the foregoing, it is my opinion that the property in question constitutes leased tangible personal property within the meaning of § 58-831.2 and the taxpayer is subject to the tangible personal property tax thereon.

TAXATION. TAX ASSESSORS. TAX ASSESSOR MAY SERVE AS MEMBER OF BOARD OF PUBLIC WELFARE.

March 5, 1979

The Honorable S. W. Coleman, III, Judge
Thirtieth Judicial Circuit

You ask whether a county tax assessor may serve as a member of a board of public welfare. In my opinion he can so serve.

The reassessment of real estate in a county is conducted by tax assessors appointed by the circuit court of that county pursuant to § 58-787 of the Code of Virginia (1950), as amended. The receipt and disbursement of funds for the purpose of aiding needy persons in a locality is managed by the board of public welfare. See § 63.1-51.

There is no statutory provision which controls whether a tax assessor may serve on a board of public welfare. Thus, service in both offices is proper unless the positions are incompatible with one another. The common law incompatibility of public offices results from their character and the nature of the duties which attach to them. Incompatibility exists where there is a conflict in the duties of the offices, so that the performance of the duties of one interferes with the performance of the other. One person is thus unable to retain both offices because of the inability to discharge each without conflict. 63 Am.Jur.2d Public Officers and Employees § 73 (1972). Questions of the incompatibility of these two offices arise because it is the duty of the tax assessor to determine the value of real property for taxation. The welfare board expends public funds, raised partly by taxation, in order to carry on its programs. An increased assessment will thus not necessarily result in an increase in the funds available to the board of public welfare.

Since the duties of the two positions have no inherent conflict, I therefore conclude that the two positions are not incompatible with one another. Thus, I am of the opinion that a tax assessor may serve as a member of a local board of public welfare.
TOWNS: COUNTY-WIDE ORDINANCES: EFFECTIVE WITHIN TOWNS.

May 2, 1979

The Honorable Floyd C. Bagley
Member, House of Delegates

You ask whether the Loudoun County ordinance regulating the sale of disposable carbonated beverage containers is in effect within the Town of Leesburg, an incorporated town lying wholly within Loudoun County.

Towns are not exclusive of the counties in which they are located. For county-wide purposes, incorporated towns are an integral part of a county, subject to the jurisdiction of county authorities and to taxation for county purposes. Whether or not a county-wide function is involved is sometimes specified by the General Assembly in the general law or special act which authorizes local jurisdictions to act. One recent example was in the "Virginia Dog Laws of 1976" codified as Title 29, Ch. 9.2, where authority was delegated directly to the towns and counties separately. See Opinion to the Honorable Earl E. Bell, Member, House of Delegates, dated September 13, 1977, found in Report of the Attorney General (1977-1978) at 132.

When the delegation is not explicit, resort must be had to general principles of construction. Since the town is part of the county, the incorporated town has much the same relationship with the county and state as the incorporated city has with the state alone. General ordinances of the county are deemed to apply county-wide unless there is some express or necessarily implied restriction against such application. The Loudoun County beverage container ordinance by its terms applies throughout the county. 13B M.J. 10 Municipal Corporations § 3 (1978); Supervisors v. Saltville Land Co., 99 Va. 640, 644-645, 39 S.E. 704 (1901); Nexsen v. Board of Supervisors, 142 Va. 313, 318, 128 S.E. 570 (1925), quoted with approval in County of Fairfax v. City of Alexandria, 193 Va. 82, 90, 68 S.E.2d 101 (1951); City of Colonial Heights v. County of Chesterfield, 196 Va. 155, 167, 82 S.E.2d 566 (1954).

If necessary, rules are available to reconcile or resolve inconsistencies or conflicts between town ordinances and county-wide ordinances. See, for example, King v. County of Arlington, 195 Va. 1084, 1090-1091, 81 S.E.2d 587 (1954), and Opinion to the Honorable R. Garnett Bledsoe, Jr., Commonwealth's Attorney for Halifax County, dated November 14, 1972, and found in Report of the Attorney General (1972-1973) at 112.

The basic statement of the relationship between counties and incorporated towns is found in the Saltville Land and Nexsen cases cited above in this Opinion, and in many Opinions of the Virginia Supreme Court. Accordingly, I am of the opinion the Loudoun County ordinance regulating the sale of disposable carbonated beverage containers is in effect within the Town of Leesburg.

1Code provisions such as §§ 15.1-510.6 and 15.1-522 do not recognize an independent status for incorporated towns. Rather, they recognize the reach of county-wide ordinances into incorporated towns, and restrict that reach as to specific Code provisions.
REPORT OF THE ATTORNEY GENERAL

TREASURERS. NOT SUBJECT TO CONTROL OF BOARD OF SUPERVISORS IN DETERMINING WHAT TAX COLLECTION METHODS TO EMPLOY.

April 2, 1979

The Honorable C. Dean Foster, Jr.
County Attorney for Scott County

You have asked several questions with respect to the relationship between the Board of Supervisors and the treasurer in a county operating under the county board form of government, as provided in Art. 5 of Ch. 14, Title 15.1 of the Code of Virginia (1950), as amended.

1. You first ask if § 58-922 is broad enough to require the treasurer to deduct past due local taxes from warrants (paychecks) drawn to the order of county employees, including school personnel.

Section 58-922 deals with "allowances made against the Commonwealth," a source of funds against which paychecks for county employees is unlikely to be drawn. However, § 58-921 and the general principles of set-off permit the treasurer to credit a taxpayer's delinquent tax bill by the amount of a warrant drawn in that taxpayer's favor. This authority includes the ability to deduct post due local taxes from the paychecks of county employees. See Report of the Attorney General (1964-1965) at 320.

Although § 58-921 permits the treasurer to use set-off principles to collect local taxes, it is not written in mandatory terms and the treasurer is not required to use the procedure. See Report of the Attorney General (1964-1965) at 320; Report of the Attorney General (1958-1959) at 280; Report of the Attorney General (1940-1941) at 185.

2. You next ask if the treasurer is required to include delinquent consumer utility taxes in his annual delinquent tax list pursuant to § 58-978.

Section 58-978 concerns the listing of delinquent property taxes on real, tangible, or intangible property, which are generally assessed and paid on an annual basis. A consumer utility tax is not a property tax and, therefore, is not included within the mandatory language of § 58-978. See § 58-617.2. Note, however, that this result will be reversed on July 1, 1979, when Ch. 240 [1979] Acts of Assembly (signed March 14, 1979) becomes effective.

3. You also ask if the treasurer may be required to maintain a continuously updated list by name, address, account number, and amount of tax due from each taxpayer who has failed to remit the consumer utility tax.

Although there is no express statutory requirement that the treasurer provide the information on delinquent consumer taxes in the form you wish, § 58-924 permits the Board of Supervisors, "[a]s often and in such manner" as they choose, to require that the county treasurer "furnish an account of his receipts...and a statement of his account as such county...treasurer." (Emphasis added.) Use of this authority would allow the Board of Supervisors to require a monthly accounting of the receipts remitted in payment of the consumer utility tax.

I am advised that most localities which have adopted local ordinances under § 58-587.1 have also adopted administrative provisions which designate
the utility as an agent or tax collector for the locality for the purpose of collecting the tax. The utility remits the amounts collected in payment of the tax on a monthly basis along with a list of delinquent taxpayers. Such a procedure allows for ease of administration as well as permitting either the locality or the utility to institute collection processes.

4. You ask whether the single act of mailing a duplicate tax bill to a delinquent taxpayer, with no further action being taken, is sufficient to meet the requirements of § 58-965.

Section 58-965 requires the treasurer to "call upon each person chargeable with taxes and levies who has not paid the same..." by the due date "and upon failure or refusal of such person...to pay the same he shall proceed to collect them by distress or otherwise." (Emphasis added.) The mailing of a duplicate bill apparently satisfies the requirement that the treasurer "call upon" each delinquent taxpayer; however, § 58-965 also requires that the treasurer "shall proceed to collect." The treasurer is charged, by law with the duty to collect taxes, and while he is generally free to adopt the method of collection, the key word in § 58-965, and the primary function of the treasurer, is to collect taxes. Therefore, I am of the opinion that the collection procedure must be a bona fide attempt to collect, that is, using all the methods provided by the General Assembly within the physical and fiscal constraints of the particular office. The mere mailing of duplicate tax bills would fall short of a bona fide attempt to collect.

5. You ask if the treasurer may refuse to accept part payment or an offer of partial payment with the balance to follow on a given schedule.

In the absence of specific statutory language to the contrary, the treasurer is under no duty to accept a part payment of a given tax or to accept an amount less than the entire tax due. 72 Am.Jur.2d State and Local Taxation § 845 (1974). The Code of Virginia nowhere requires the treasurer to accept part payment or partial payment plans. The treasurer, in his discretion, may accept part payment of a tax and credit it against the tax assessed. He may accept such arrangements so long as his conduct is free of discrimination and does not work to the detriment of the locality.

If the treasurer does accept a partial payment or partial payment schedule, he is of course subject to the accounting requirement of §§ 58-919 and 58-924. Should the taxpayer fail to adhere to the payment schedule, then the treasurer's duty is to collect the unpaid balance "by distress or otherwise." See § 58-965.

6. You ask if the county attorney has the power to enforce collection of any delinquent taxes pursuant to § 58-1010.

Under § 58-991, the Board of Supervisors, one year after the date of the delinquent list, may employ a local delinquent tax collector, who "shall have all the power and authority to enforce collection by levy, distress or otherwise..." as the treasurer possesses. H.B. 1575, mentioned in question 2, amended § 58-991 and permits such appointment to be made after a tax has been delinquent for two months or more. It should be noted that § 58-991 specifically excludes real estate taxes from its coverage. If the Board of Supervisors should appoint the county attorney delinquent tax collector, then the county attorney could act under § 58-1010, as well as under the other summary collection provisions found in Art. 8 of Ch. 20 of Title 58. In
addition, Art. 9 provides for the collection of taxes by lawsuit, and there is no requirement that the taxes first be included on the treasurer's delinquent list before resort to that procedure is had. See Report of the Attorney General (1971-1972) at 448.

7. You ask whether the county Board of Supervisors has standing to seek a writ of mandamus to compel the treasurer to fulfill his accounting or collection duties?

The treasurer has a mandatory duty to account for his receipts and disbursements, and the Board of Supervisors may prescribe the accounting system. See §§ 58-919 and 58-924. Such functions are ministerial and mandamus lies to compel their performances. 12B M.J. Mandamus § 14, at 36. Generally speaking, the methods used by a treasurer to collect taxes are within his discretion and mandamus does not lie to direct the manner in which he exercises that discretion; however, it is equally clear that it is the treasurer's duty to collect such taxes. See § 58-965; Drewry v. Baugh & Sons, supra. Therefore, if the treasurer refuses to exercise his discretion altogether (here to collect), he may be compelled to do so by mandamus, so long as no attempt is made to control the manner of its exercise. Richmond Funeral Directors' Association, et al. v. Groth, 202 Va. 792, 120 S.E.2d 467 (1961).

When a writ of mandamus is sought to enforce the performance of a public duty, the public at large is the real party in interest and the petition may be brought in the name of a private individual. 12B M.J. Mandamus § 25 at 81. The Board of Supervisors are the elected representatives of the public and may maintain proceedings in mandamus to compel other officers to perform ministerial acts which are necessary to be performed to enable the board to perform its own duties. 12B M.J. Mandamus § 25 at 83.

8. You have asked whether the responses to the preceding questions are affected when a locality operates under a county board form of government, pursuant to §§ 15.1-697 to 15.1-721.

Sections 15.1-697 to 15.1-721 set forth the county board form of government, and § 15.1-701 states the board's powers and duties. Section 15.1-706 discusses certain constitutional officers, including the treasurer. Subsection (d) thereunder states as follows:

"Each officer...shall be accountable to the board of county supervisors in all matters affecting the county and shall perform such duties, not inconsistent with his office, as the board of county supervisors shall direct." (Emphasis added.)

Contrasted with the language of § 15.1-706(d) is the fact that this Office has consistently ruled that elected constitutional officers are not subject to the control and jurisdiction of a local governing body. See Art. VII, § 4, of the Constitution of Virginia (1971); Report of the Attorney General (1974-1975) at 558. The traditional concept which governs these positions is that constitutional officers are independent of, and not responsible to, such bodies. Their duties are not defined in the Constitution itself, but left to the discretion of the General Assembly, which has defined those duties in considerable detail. See, generally, Titles 15.1 and 58. This concept has served as the foundation for opinions that a city has no authority to compel the retirement of a deputy commissioner of the revenue at
age 70 (Report of the Attorney General (1973-1974) at 67); that a county
cannot dictate what method is to be used in collecting taxes (Report of the
Attorney General (1972-1973) at 39); that a county cannot mandate how a
sheriff will use his cars from day to day (Report of the Attorney General
558; (1975-1976) at 62; and (1976-1977) at 46.

The treasurer's primary duties are the receipt, collection, and
disbursement of public monies. For these actions, he is held strictly
accountable. See § 58-925; County of Mecklenburg v. Beales, 111 Va. 691, 69
S.E. 1032 (1911). In the matter of performing his duties, I am of the opinion
that a treasurer under a county board form of government retains his
discretion to perform his duties by any method allowed by law which appears to
him to be most suitable under the circumstances. See Opinion to the Honorable
Frederick Lee Ruck, County Attorney for Fairfax County, dated December 18,
1978, copy enclosed.

Section 15.1-706(d) merely authorizes the Board of Supervisors to
increase the number of duties to be performed by the treasurer, so long as
those additional duties are consistent with the office of the treasurer. For
example, the board may order the compilation of certain financial or
statistical data, such as salary information or lists of taxpayers delinquent
on their consumer utility taxes. See Report of the Attorney General
(1969-1970) at 317(2). Therefore, the board can require the recordkeeping
which questions 3 and 6 concerned, but cannot dictate the methods of
collection.

1Reports of the Attorney General (1972-1973) at 39; (1960-1961) at 312;
4See §§ 58-1001 to 58-1117.1.

UNIFORM STATEWIDE BUILDING CODE. PENALTY FOR VIOLATION OF PROVISIONS.
Penalties may be assessed against contractors and subcontractors as well as
owners of buildings under construction.

December 14, 1978

The Honorable Henry Lee Carter
Commonwealth's Attorney for Orange County

You ask whether the penalty provided in § 36-106 of the Code of Virginia
(1950), as amended, for violation of the Uniform Statewide Building Code is
applicable to contractors or subcontractors as well as to the owners of
buildings under construction. Section 36-106 provides that:

"It shall be unlawful for any owner or any other person, firm or
corporation, on or after the effective date of any Code provisions, to
violate any such provisions. Any such violation shall be deemed a
misdemeanor and any owner or any other person, firm or corporation
convicted of such a violation shall be punished by a fine of not more
than one thousand dollars." (Emphasis added.)
It is possible for either an owner or a contractor or subcontractor to violate a Building Code provision. Under the provisions of §§ 121.0 and 122.0 of the Uniform Statewide Building Code, for example, a notice of violation or stopwork order may be issued to a contractor as well as an owner. The notice is directed to the person "responsible for the...construction,...use or occupancy" in violation of the Building Code. The stopwork order may be directed to "the person doing the work," and failure to heed the order is unlawful. It is therefore my opinion that the penalty in § 36-106 may be assessed against any person responsible for a violation, which might include contractors and subcontractors as well as owners.

VENUE. DIVORCE DEGREE. MAY BE TRANSFERRED FROM ONE JUVENILE COURT TO ANOTHER FOR ENFORCEMENT AFTER CIRCUIT COURT HAS ORIGINALLY TRANSFERRED THE MATTER.

May 18, 1979

The Honorable John H. Thomas, Judge
Juvenile and Domestic Relations District Court
Twelfth Judicial District

You have asked whether a decree adjudicating matters of custody and support which has been referred for enforcement from the circuit court of "A" County specifically to the juvenile and domestic relations district court of "A" County can subsequently be transferred by the latter court to the juvenile and domestic relations district court in "B" County if the defendant resides therein. If so, you then ask if the transfer could be made where the circuit court decree simply ordered the defendant to make the support payments payable through the juvenile and domestic relations district court of "A" County.

The factual situation and issue set forth in your first question are indistinguishable from those found in a prior official opinion issued to the Honorable M. Crockett Hughes, Jr. See Report of the Attorney General (1977-1978) at 400. That opinion implied, in part, that such a transfer from one juvenile and domestic relations district court to another was appropriate. In addition, § 20-83.1 of the Code of Virginia (1950), as amended, permits a court where an original petition was filed to transfer the case to the county or city in which the spouse or child or accused resides. I am, therefore, of the opinion that the transfer of a decree for enforcement purposes from the juvenile and domestic relations district court in "A" County to its counterpart in "B" County would be appropriate even though the original transfer from the circuit court was to the juvenile and domestic relations court in "A" County.

In response to your second inquiry, a juvenile and domestic relations district court can enforce a circuit court's final order for support and/or maintenance if the latter court certifies such enforcement in accordance with § 20-79(c). See § 20-113. The latter statute also authorizes a circuit court to transfer any other matters pertaining to support, maintenance, care and/or custody. It is my opinion, however, that those statutes only authorize the lower court to rule on or enforce those matters specifically transferred to it by the circuit court. See Report of the Attorney General (1977-1978) at 400. Therefore, if a circuit court simply orders the defendant to make support payment payable through the juvenile and domestic relations district court of "A" County, that lower court would be unable to entertain matters of custody
and support, including the enforcement thereof. I am, therefore, of the opinion that the juvenile and domestic relations district court of "A" County would be unable to transfer any such powers to "B" County.

The official Opinion to Judge Hughes, Jr., dated October 4, 1977, and found in Report of the Attorney General (1977-1978) at 400, states in part, as follows:

"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,..." Id. at 401.

Section 20-83.1 states, in part, that:

"[T]he court in which the original petition was filed may transfer the case to the court having original jurisdiction to hear such petitions in the county or city in this State in which the spouse or child or accused resides."

VENUE. SUPPORT. MAY BE TRANSFERRED FROM ONE JUVENILE COURT TO ANOTHER FOR ENFORCEMENT IF INITIAL PETITION WAS FILED BEFORE ALL PARTIES MOVED OUT OF FIRST COURT'S JURISDICTION.

May 16, 1979

The Honorable Herbert I. L. Feild, Judge
Juvenile and Domestic Relations District Court
Ninth Judicial District

You have stated that a support case was transferred from a circuit court to the juvenile and domestic relations district court pursuant to § 20-79(c) of the Code of Virginia (1950), as amended. You then ask whether the latter court can transfer that case to another such court, in the county or city of residence of one or both of the spouses, after all parties and children have moved from the jurisdiction of the first court.

A circuit court has exclusive jurisdiction of suits for divorce. See § 20-96. The circuit court may, however, in any decree of divorce, transfer to the juvenile and domestic relations district court responsibility to enforce the terms of its decree pertaining to support and maintenance. See §§ 20-113 and 20-79(c). After such a transfer, all proceedings thereafter must conform to the provisions of Ch. 5 of Title 20. See § 20-113. Any proceedings in the juvenile and domestic relations district court subsequent to the above-described transfer would be instituted by petition. See § 20-64.

Section 20-83.1(a) provides the statutory basis for the transfer of a case from one juvenile and domestic relations district court to another for the type of proceeding you have described. That statute provides that when a spouse or child files an original petition and then leaves the jurisdiction, the court in which the original petition was filed may transfer the case to the court having original jurisdiction to hear such petitions in the county or city in this State in which the spouse or child or accused resides.¹ The use of the word "petition" in § 20-83.1(a) refers to the type of petition which is required by Ch. 5 of Title 20. From this I conclude that, unless the original petition was filed prior to leaving the first jurisdiction, that court would have no statutory authority subsequently to transfer the case to the county or
city in this State where the spouse or child or accused now resides. The spouse in the situation you present would have to petition the circuit court which entered the original order to have the matter transferred to the county or city in this State in which the spouse or child or accused resides. See Report of Attorney General (1977-1978) at 400.

Section 20-83.1(a) states:
"In the event that a spouse or dependent child has left the jurisdiction of the court in which the original petition was filed, but is still within the State, and the accused is not within the jurisdiction embraced by such court, on motion of the spouse or child, or accused or the person having custody of such child, the court in which the original petition was filed may transfer the case to the court having original jurisdiction to hear such petitions in the county or city in this State in which the spouse or child or accused resides. The court to which such case has been transferred shall have power to enforce such orders and decrees as may have been made in the court transferring the case as though the petition had been originally filed therein, and to make such other orders and decrees as may be necessary to enforce the provisions of this chapter."

VIRGINIA ANTITRUST ACT. "SHOWER FLOW RESTRICTORS" FREE DISTRIBUTION TO PROMOTE ENERGY CONSERVATION MIGHT VIOLATE ANTITRUST LAWS; STATE ACTION EXEMPTION WOULD PROVIDE NO SAFETY.

November 14, 1978

The Honorable Elliot S. Schewel
Member, Senate of Virginia

This responds to your recent letter which asked whether a proposed but unimplemented program of the Energy Division (the "Division") of the State Office of Emergency and Energy Services "could possibly be a violation of the antitrust laws."

The Division intended to distribute, free of charge, approximately one million "shower flow restrictors" to citizens of the Commonwealth. Shower flow restrictors are small plastic devices which decrease water flow by one-half when placed in a shower head. The Division's program was to focus attention on the Commonwealth's shortage of water and energy.

The Research Division of Virginia Polytechnic Institute and State University located a manufacturer which agreed to give restrictors to the Commonwealth. The manufacturer's motives in supplying the restrictors free of charge were to promote energy conservation while, at the same time, increasing demand for the device. A competitor of the manufacturer, upon learning of the program, objected that its commercial marketing of some six million restrictors would be hampered by the give-away program. Although the Commonwealth offered to distribute the competitor's restrictors if given to the Commonwealth, the competitor refused because it planned to sell them to the public. For several reasons, including threat of litigation by the competitor, the Division terminated its plans to distribute the restrictor.

To ascertain whether the program "could possibly be a violation of the antitrust laws," two questions must be answered. First, is the program
violative of any substantive antitrust principle? Second, if the program otherwise violates antitrust laws, is it protected by the State action exemption?

Substantive Antitrust Principles

Section 1 of the Sherman Act, 15 U.S.C. § 1, and its State counterpart, § 59.1-9.5 of the Code of Virginia (1950), as amended, which is part of the Virginia Antitrust Act, prohibit "[e]very contract...in restraint of trade or commerce." Section 59.1-9.17 requires a state court to apply federal precedent in interpreting the Virginia Antitrust Act.

The agreement between the Commonwealth and the manufacturer, by which restrictors would be supplied free of charge, is a "contract" within the meaning of federal and state antitrust law. Every contract, however, restrains trade to some extent; what is purchased (or received free of charge) from one person will not be purchased from another. Therefore, the antitrust laws are not read literally; rather, only contracts which unreasonably restrain trade are illegal. See generally Chicago Board of Trade v. United States, 246 U.S. 231 (1918). The reasonableness of a restraint depends upon its competitive impact. National Society of Professional Engineers v. United States, 98 S.Ct. 1355 (1978). Some restraints, such as price-fixing, because of their "pernicious effect on competition and lack of any redeeming virtue,..." Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958), are unreasonable per se, and thus no elaborate inquiry need be made concerning reasonableness. Other restraints must be examined more carefully under the rule of reason before competitive impact, and therefore legality, can be determined. See generally Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

While there is no case directly on point, it appears that the program must be judged under a full-blown rule of reason inquiry rather than the per se rule. The potential anticompetitive impact of the proposed program is market foreclosure flowing from the competitor's possible loss of sales to individuals receiving the restrictor free of charge. See generally Standard Oil Co. v. United States, 337 U.S. 293 (1949). To determine whether foreclosure is substantial enough to warrant illegality, the general standards enunciated in Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 328-29 (1961) (interpreting § 3 of the Clayton Act, 15 U.S.C. § 14), should be used:

"[T]he competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited....

To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which preemption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence."
Also, I think it important that the competitor was given the same opportunity as the supplier to have its restrictor distributed. Finally, because at present there is no market for the restrictor, it may be that the program would benefit both the competitor and competition in general by creating a market for both manufacturers' restrictors.

Unfortunately, I have insufficient information to conduct the necessary analysis. My market information is limited, and thus I cannot predict long-run competitive impact. While, based on the information I have, the program may "possibly" violate the antitrust laws, I do not think that that violation is probable.

The State Action Exemption

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act was not intended "to restrain state action or official action directed by a state." 317 U.S. at 351. The Court noted that the challenged action was mandated by the legislature and did not emanate from private agreement. While the exemption has been construed broadly by lower courts, see, e.g., Washington Gas Light Co. v. Virginia Electric & Power Co., 438 F.2d 248 (4th Cir. 1971), recent Supreme Court decisions have narrowed the exception. See City of Lafayette v. Louisiana Power & Light Co., 98 S.Ct. 1123 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison Co., 428 U.S. 579 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

In Goldfarb, the court held that the Virginia State Bar, a State agency, was not exempt because its anticompetitive conduct was not mandated by any sovereign branch of State government, e.g., the legislature. More on point is Cantor v. Detroit Edison Co., supra, in which Detroit Edison's program of giving free lightbulbs to its customers was denied an exemption even though the program had been approved by the State's public utility commission. Because the program was not mandated by the legislature and because Detroit Edison had participated substantially in the decision to commence the program, the court held that private rather than State action predominated.

While there are substantial differences between the instant facts and those in Cantor, I find Cantor dispositive. The Division's proposed action was not mandated by the Legislature and is more akin to a private agreement between the Commonwealth and the manufacturer than to state action. In sum, there is no "authorized state action clearly intended to displace antitrust law." I P. Areeda and D. Turner, Antitrust Law: An Analysis of Antitrust Principles and Their Application 66 (1978). Accordingly, I conclude that the Division's proposed program, if implemented, would not have been shielded from federal antitrust challenge by the state action exemption.

Finally, I do not think that the program would have been exempted from challenge under the Virginia Antitrust Act by § 59.1-9.4(b), which exempts "conduct that is authorized, regulated or approved...by an administrative...agency of this State...having authority to consider the anticompetitive effect, if any, of such conduct." Before this exemption is triggered, the agency must have an affirmative duty to consider anticompetitive effects; any other interpretation would emasculate the provision because all actions by state agencies would enjoy complete immunity.
Conclusion

For the reasons stated, I conclude that the Division's proposed program might violate the antitrust laws, but I do not think that violation is probable (as noted, there is no way to reach a definitive conclusion with such limited information). If the program were a violation, however, the state action exemption would provide no safety.

VIRGINIA CONFLICT OF INTERESTS ACT. CITY COUNCIL AND FIRE DEPARTMENT ARE SEPARATE GOVERNMENTAL AGENCIES.

December 21, 1978

The Honorable W. Alan Maust
Commonwealth's Attorney for the City of Hampton

You have rendered an Opinion to an officer of the City of Hampton concerning the Virginia Conflict of Interests Act (the "Act"). You concluded that the facts presented constitute a violation of the Act and the officer has requested, pursuant to § 2.1-356 of the Code of Virginia (1950), as amended, that I review your decision. I revoke your decision.

You ask whether a member of the Hampton City Council may enter into a contract to supply uniforms to the Hampton Fire Department. I am informed that provisions of the Code of the City of Hampton require that the contract be negotiated for the fire department by the department of purchasing, and will be made in the name of the City of Hampton.

Section 2.1-349(a)(1) prohibits an officer of a governmental agency from contracting with his own agency. Section 2.1-349(a)(2) authorizes an officer of a governmental agency to contract with an agency other than that of which he is an officer if certain requirements regarding disclosure of the officer's material financial interest are satisfied. As a member of city council, the individual is an officer of a governmental agency. This Office has consistently ruled, however, that the Act requires that each department of a city government be considered a separate governmental agency. Otherwise employees of one city department would not be able to contract with other city departments. See Opinion to the Honorable J. M. H. Willis, Jr., Commonwealth's Attorney for the City of Fredericksburg, dated September 17, 1970, and found in Report of the Attorney General (1970-1971) at 409. A city council and fire department are separate governmental agencies. See Opinion to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated March 23, 1973, and found in Report of the Attorney General (1972-1973) at 165.

Although the contract will be made in the name of the City of Hampton, the contract is with the department of purchasing. The contract is thus one between an officer of a governmental agency and an agency other than that of which he is an officer. I am of the opinion that pursuant to § 2.1-349(b)(2) the individual may enter into the contract with the department of purchasing. That statute requires, however, that certain procedures be followed prior to entering into the contract. The individual must disclose his interest in the contract in writing to the city council and department of purchasing. In addition, the department of purchasing may only let the contract after competitive bidding. In the alternative, if the contract is for property or services which, in the judgment of the governing body or administrative head
of the governmental agency, should not be acquired through competitive bidding, the contract may be let without such bidding. Such a determination must, however, be made in writing and as a matter of public record.

Your opinion that the described contract is in violation of the Act is not without logic. However, in light of the consistent construction of the Act by this Office over a period of years the result I reach is dictated. Localities have the power to adopt ordinances which impose higher standards than does the State law. See Opinion to the Honorable B. Randolph Boyd, Commonwealth's Attorney for Charles City County, dated January 13, 1977, and found in Report of the Attorney General (1976-1977) at 195, a copy of which is enclosed. Council may wish to consider addressing this problem by adoption of an appropriate ordinance.

1Section 2.1-349(a)(1) provides:
"Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiation shall be irrelevant; or"

2Section 2.1-349(a)(2) provides:
"Be a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee, unless written disclosure of the existence of the interest of such officer or employee be made in advance, both to the governmental agency of which he is an officer or employee and to the governmental agency with which such contract or subcontract is proposed to be made, and either (i) such contract be let after competitive bidding, or (ii) such contract be for property or services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding; or"

VIRGINIA CONFLICT OF INTERESTS ACT. DISCLOSURE OF REAL ESTATE INTERESTS AND HOLDINGS BY CANDIDATES FOR AND HOLDERS OF CERTAIN LOCAL OFFICES.

August 3, 1978

The Honorable Raymond E. Vickery, Jr.
Member, House of Delegates

You ask several questions concerning the real estate disclosure requirements in the Virginia Conflict of Interests Act (the "Act")1 which apply to candidates for, and holders of, certain local elective and appointive offices.

Filing Report

You first ask if members of a candidate's family have to file real estate disclosures in order to have the candidate's name placed on the ballot. No separate filing by family members is required. However, candidates for
election to a county Board of Supervisors or city or town council in any jurisdiction with a population greater than thirty-five hundred persons themselves must file disclosure forms that detail their real estate holdings. Any candidate who fails to file such a form is not entitled to have his name printed on the ballot. Moreover, the form must disclose all real estate holdings of the candidate and his immediate family (or spouse or any other relative who resides in the same household).

Children

You next ask if § 2.1-353.1 applies to children who reside in the household and who are over the age of eighteen years. The age of the relative is not a factor in determining whether his or her real estate holdings must be disclosed. The language of the statute thus includes children who reside in the household, regardless of age. The disclosure form must include their real estate holdings, if they reside in the candidate's household.

Penalties

You finally ask if there are any penalties for office holders who do not comply with § 2.1-353.1. That statute penalizes candidates for local public office who do not disclose their real estate holdings by not permitting their names to be printed on the ballot. Incumbent officers who do not file disclosure forms are subject to the sanctions imposed by § 2.1-354, which makes any willful violation of the Act malfeasance in office. In addition, any willful violation is punishable as a misdemeanor which, upon conviction, shall result in forfeiture of office and any fine or penalty prescribed by law. Note, however, that failure to file a disclosure form as required by § 2.1-353.1 shall not invalidate any official acts performed by a public officer or employee.

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1Chapter 22, Title 2.1, Code of Virginia (1950), as amended.
2Section 2.1-353.1 requires the disclosure of real estate interests and holdings by certain local elected and appointed officials. See Opinion to the Honorable Charles A. Christophersen, Director, Department of Intergovernmental Affairs, dated May 27, 1975, and found in Report of the Attorney General (1974-1975) at 563. The same requirements are applicable also to members of planning commissions, boards of zoning appeal, real estate assessors, county managers, county executives, city and town managers, and their immediate families.

VIRGINIA CONFLICT OF INTERESTS ACT. EMPLOYMENT BY AGENCY. EXEMPTION UNDER § 2.1-349(B)(6). TOWN MAYOR MAY SERVE AS PART-TIME CONSTRUCTION MANAGER FOR TOWN SEWAGE PROJECT.

May 25, 1979

The Honorable Franklin P. Hall
Member, House of Delegates

You ask about the application of the Virginia Conflict of Interests Act (the "Act") to a former mayor of a town who while serving as mayor accepted employment as part-time construction manager of the town's sewage project. You
state that the town has fewer than 10,000 people and the total of the contracts between the former mayor and the town government was less than $10,000 per year.

Section 2.1-349(b)(6) of the Code of Virginia (1950), as amended, provides that the Act does not apply to contracts between an officer of a town and the town where the total of the contracts is less than $10,000 per year and the population is less than 10,000. Accordingly, there is no violation of the Act in the circumstances you describe.

Appointment of the mayor as construction manager would violate the prohibition of § 15.1-800 against council members filling offices appointed by council only if the position of construction manager is found to be an office.

I find, however, that the post occupied by the former mayor is not a public office. I have located no statute creating or specifying such a post, its term or its duties. The mayor's sewage post was part-time employment at an hourly rate, not to exceed 80 hours per month, and limited to the construction phase of the town sewage project. The post is much like the post of "Clerk of Works," which has been found to be not a public office. See Opinion to the Honorable Catesby Graham Jones, Jr., Commonwealth's Attorney for Gloucester County, dated October 28, 1974, found in Report of the Attorney General (1974-1975) at 374.

1Generally, the town mayor is a member of council, but charter provisions might vary this. See, for example, Opinion to the Honorable William J. McGhee, County Attorney for Montgomery County, dated September 24, 1976, found in Report of the Attorney General (1976-1977) at 159, and Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated April 29, 1976, found in Report of the Attorney General (1975-1976) at 219.

VIRGINIA CONFLICT OF INTERESTS ACT. GOVERNMENT EMPLOYEE MUST DISCLOSE HIS INTEREST TO AGENCY PRIOR TO ENTERING INTO AGREEMENT. EMPLOYEE MAY SELL TRAILER TO DEPARTMENT OF CORRECTIONS.

November 3, 1978

The Honorable Terrell Don Hutto, Director
Department of Corrections

You state that an employee at one of the correctional units within the Department of Corrections has recently been transferred to another unit. At his previous unit, the employee lived in a mobile trailer which he owned and which is installed on the unit property. He is now interested in selling his mobile trailer to the Bureau of Correctional Units. You inquire whether the employee may sell the trailer to the Bureau of Correctional Units without violating the Virginia Conflict of Interests Act (the "Act").

Section 2.1-349(a)(1) of the Code of Virginia (1950), as amended, provides that with certain exceptions no governmental employee may contract with his own agency.1 See Opinion to the Honorable Henry S. Hathaway, Commonwealth's Attorney for Northumberland County, dated July 22, 1974, and found in Report of the Attorney General (1974-1975) at 564. Section
2.1-349(b)(5) exempts from this restriction nonsupervisory employees who do not have authority to participate in the procurement of the contract or to effect the approval or disapproval of its performance. See Opinion to the Honorable Roger W. Mullins, Commonwealth's Attorney for Tazewell County, dated June 16, 1978, a copy of which is enclosed. See also Opinion to the Honorable Richard Crawford Grizzled, Commonwealth's Attorney for Southampton County, dated July 17, 1972, and found in Report of the Attorney General (1972-1973) at 477. I am informed that this employee does not have authority to participate in the making of the contract or to effect its approval or disapproval. The decision to purchase the mobile trailer would be made by the Bureau of Correctional Units based upon its analysis of the benefits of such a contract.

These factors indicate that the employee comes within the exception of the Act permitted by § 2.1-349(b)(5). I therefore conclude that the employee in question may enter into a contract with the Bureau of Correctional Units for the purchase of his mobile trailer without violating the Act. The employee must, however, disclose his interest in the contract in writing to the Bureau of Correctional Units prior to entering into the agreement.

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1Section 2.1-349(a)(1) provides in part:

"No officer or employee of any governmental agency shall:

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

2Section 2.1-349(b)(5) provides that § 2.1-349(a)(1) shall not apply:

"To an employee of a governmental agency whose duties are nonsupervisory and who does not on behalf of such agency participate in or have authority to participate in the procurement or letting of the contract or subcontract or in any manner effect the approval or disapproval of its performance, and provided, further, that the employee's interest in the contract or subcontract is disclosed in writing to such agency in advance;..."

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VIRGINIA CONFLICT OF INTERESTS ACT. MEMBER OF BOARD OF SUPERVISORS MAY SERVE AS DIRECTOR OF FINANCIAL INSTITUTION WHICH IS DEPOSITORY OF COUNTY FUNDS.

March 28, 1979

The Honorable Edwin B. Baker
Commonwealth's Attorney for Charlotte County

You ask whether a member of the Charlotte County Board of Supervisors may serve as an officer of a financial institution which is a depository for county funds.

There is no provision of the Code of Virginia (1950), as amended, which expressly prohibits the simultaneous holding of these two positions. Section 2.1-349(a)(1) of the Virginia Conflict of Interests Act, however, prohibits an officer of a governmental agency from contracting with, or having a material financial interest in, a contract with his agency. See Opinion to the Honorable Joseph N. Cridlin, Judge, Thirtieth Judicial Circuit, dated July 9,
1974, and found in Report of the Attorney General (1974-1975) at 558. The decision to deposit public funds in the financial institution of which the supervisor is an officer is made by the Treasurer of Charlotte County. The treasurer has sole responsibility for the deposit of these funds. See Opinion to the Honorable C. B. Covington, Jr., Treasurer for the City of Newport News, dated June 19, 1975, and found in Report of the Attorney General (1974-1975) at 535. The treasurer is an independent constitutional officer. See Opinion to the Honorable James E. Durant, Treasurer, City of Falls Church, dated January 10, 1975, and found in Report of the Attorney General (1974-1975) at 559.

The Board of Supervisors does not participate in the decision to deposit public funds in the institution. There is no contract, therefore, between the Board of Supervisors and the financial institution in which public funds are deposited. As a result, no violation of § 2.1-349(a)(1) occurs by the service of a member of the Board of Supervisors as an officer of a financial institution which is a depository of public funds.

VIRGINIA CONFLICT OF INTERESTS ACT. OFFICER OR EMPLOYEE OF GOVERNMENTAL OR ADVISORY AGENCY MAY NOT HAVE MATERIAL FINANCIAL INTEREST IN CONTRACT WITH HIS AGENCY, OTHER THAN HIS OWN CONTRACT OF EMPLOYMENT.

January 31, 1979

The Honorable Prince B. Woodard, President
Mary Washington College

You have told me that Mary Washington College is seeking a Dean of the College who would be the chief administrative officer of the institution. The Dean would be responsible for control of the instructional program, faculty recruitment, the instructional budget (including faculty salaries), performance evaluations and promotions. You ask whether the Virginia Conflict of Interests Act (the "Act") would prohibit the hiring of an individual for this position whose spouse is employed as a full-time faculty member by Mary Washington College.

The Act prohibits an officer or employee of a governmental or advisory agency from having a material financial interest in a contract with his agency, other than his own contract of employment. The material financial interest of the spouse of an employee is imputed to the employee. See Opinions to the Honorable Richard C. Grizzard, Commonwealth's Attorney of Southampton County, dated June 18, 1970, and to the Honorable John V. Fentress, Clerk, Circuit Court of the City of Virginia Beach, dated October 28, 1970, found in Reports of the Attorney General (1969-1970) at 310 and (1970-1971) at 426, respectively. Thus, an employee whose spouse is also employed by the same agency may have a material financial interest in the spouse's contract with the agency. An employee having a material financial interest in a spouse's contract of employment with his governmental or advisory agency would violate the Act.

An exception to this rule is provided by § 2.1-348(f)(4) of the Code of Virginia (1950), as amended. See Opinion to the Honorable C. Russell Burnette, Member, House of Delegates, dated March 15, 1971, and found in Report of the Attorney General (1970-1971) at 422. This provision exempts from the definition of "material financial interest" the employment by the same governmental agency of an officer or employee and his or her spouse except
when one of the persons is employed in a direct supervisory and/or administrative position with respect to the spouse and the salary of the subordinate is ten thousand dollars or more. See Opinion to the Honorable J. A. Bussard, Judge, Craigsville Municipal Court, dated August 21, 1973, and found in Report of the Attorney General (1973-1974) at 133.

A person hired as Dean of the College would have direct supervisory or administrative responsibility over faculty members. If his spouse were on the faculty and had an annual salary over ten thousand dollars, the Dean would have a material financial interest in the spouse's contract.

Thus I am of the opinion that the hiring of such an individual for the position of Dean would be prohibited by the Act.

1Sections 2.1-348(f) and 2.1-349(a).

VIRGINIA CONFLICT OF INTERESTS ACT. TRANSACTION "NOT OF GENERAL APPLICATION." SCHOOL PRINCIPAL AND INSTRUCTIONAL SUPERVISOR AS MEMBERS OF GOVERNMENT BODY MUST ABSTAIN ON SELECTION OF SCHOOL BOARD MEMBERS.

June 18, 1979

The Honorable Alson H. Smith, Jr.
Member, House of Delegates

You ask whether a principal and an instructional supervisor in a county school system, who are members of the county's Board of Supervisors, may participate in the appointment of school board members by the Board of Supervisors.

As noted in my informal letter to you of November 28, 1978, it is well-settled that a teacher may serve on a governing board. See Opinions to the Honorable B. Randolph Boyd, Commonwealth's Attorney for Charles City County, dated June 5, 1979, a copy of which is enclosed; Curtis A. Sumpter, Commonwealth's Attorney for Floyd County, dated June 16, 1975, and found in Report of the Attorney General (1974-1975) at 560. Teachers serving on the governing board may vote on appointments to the school board. See Opinion to the Honorable Benjamin J. Lambert, III, Member, House of Delegates, dated June 26, 1978 and found in Report of the Attorney General (1977-1978) at 480. Your inquiry necessitates that it be determined whether the result is different when a school employee is given greater management responsibility.

The Principal

Section 2.1-352 of the Code of Virginia (1950), as amended, requires that a public employee disqualify himself from participation in any transaction "not of general application" in which he has a material financial interest. The principal has a material financial interest in his salary as determined by the school board. See Opinion to the Honorable Richard C. Grizzard, Commonwealth's Attorney for Southampton County, dated June 18, 1970, and found in Report of the Attorney General (1969-1970) at 310.

What is a transaction "not of general application" must be determined on a case-by-case basis. See Opinion to the Honorable Benjamin J. Lambert, III, Member, House of Delegates, dated May 26, 1978, and found in Report of the
Attorney General (1977-1978) at 480. Where the material financial interest is employment at a general salary level where all employees within a class are treated equally, and the salary in question is not directly related to the identity of a specific employee, a vote by the governing body affecting the general salary level of that class is a transaction "of general application," and the school employee sitting on the governing body may vote on the proposed school board budget, which necessarily includes the salary level for school employees generally. See Lambert Opinion, supra.

The situation changes as higher level employees become involved, and the material financial interest is employment at levels where school board decisions affect only a few employees, and salary matters are necessarily directly related to the identity of a specific employee. This Office has previously held that employment as school principal makes for such a relationship between the principal and the school board, that the appointment of school board members is not a "transaction of general application" for a principal sitting on the governing body. See 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. See also Opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated July 3, 1973, and found in Report of the Attorney General (1973-1974) at 438 (member of governing body serving as administrator for county utilities and service authority to refrain from voting on any "action which affects his position with the authority").

You have been kind enough to submit information about the employment relationship of the school principal in question, but I find nothing in the information which distinguishes the principal's situation from the facts in the Hansen Opinion. Accordingly, I find the principal should not participate in appointment of the school board members by the Board of Supervisors.

The Instructional Supervisor

The same principles apply to the case of the instructional supervisor, even though the facts are slightly different. The instructional supervisor must abstain if his employment is at a level where school board decisions affect only a few employees, and school board decisions on his salary and employment are directly related to the identity of a specific employee--himself.

The material you were kind enough to submit about the instructional supervisor indicates he is a member of the school board's central supervisory staff, working directly under the county superintendent of schools and the county director of instruction. There are two junior high schools and one senior high school in the county, and the instructional supervisor has responsibility for supervising the instructional program for those three schools. Whereas the county has three principals at the junior and senior high school level, it has only one instructional supervisor for that level. The instructional supervisor is therefore at a level that requires that he abstain from participating in the appointment of school board members by the Board of Supervisors.

VIRGINIA EDUCATION LOAN AUTHORITY. INDEPENDENT POLITICAL SUBDIVISION OF STATE.
July 13, 1978

The Honorable John R. McCutcheon, Director
Department of Planning and Budget

You have asked two questions with regard to the status of the Virginia Education Loan Authority ("Authority"), created pursuant to §§ 23-38.30 to 23-38.44 of the Code of Virginia (1950), as amended. Your questions will be answered in the order asked and must be considered in light of the following factual background.

Facts

The Authority was created by the General Assembly in its 1972 Session (See Ch. 864 [1972] Acts of Assembly 1593), but was not activated until the Summer of 1977, when its first executive director was appointed by the Governor. The Authority has never received a State appropriation, and the 1978 Appropriations Act (Appropriations Act, Item 235, § 92, Ch. 850 [1978] Acts of Assembly 1631) does not contain a general fund appropriation for the 1978-1980 biennium. However, the 1978 Appropriations Act does contain a special fund appropriation for the Authority, under the heading "Trust and Agency Fund."

In order to provide initial financing for the Authority's operations during the 1977-1978 fiscal year, and prior to the enactment of the 1978 Appropriations Act, the State Education Assistance Authority ("SEAA"), on May 11, 1977, authorized a loan of $200,000 from the SEAA trust fund to the Authority. The proceeds of the loan have been made available as needed by transfers, authorized by the Department of Planning and Budget, from the SEAA to accounts established on the books of the State Comptroller for the Virginia Education Loan Authority.

On the understanding that the Authority was an independent political subdivision of the Commonwealth, the executive director of the Authority has taken the following actions:

1) entered into a three-year lease of office space;
2) entered into leases of data processing equipment and purchased a computer software system;
3) retained independent public accountants;
4) established commercial bank accounts;
5) established employee positions with different job descriptions and titles than prescribed by the State Personnel System; and
6) issued $1,257,500 of bond anticipation notes and used the proceeds to purchase student loans.

The proceeds from the sale of the notes were not deposited with the State Treasurer, and the purchase price of the student loans was not appropriated by the General Assembly.

Your questions have arisen because the actions of the Authority do not conform to those permitted a State "agency" receiving State "appropriations."
Question 1:

Is the Authority a State agency within the meaning of § 2 of the 1978 Appropriations Act or is it an independent political subdivision of the Commonwealth?

A determination of whether an organization is truly an entity separate and independent of the State must rest upon the peculiar features and characteristics of the body being considered and, ultimately, depends upon the statutory provisions creating the entity in question. See Hope Natural Gas Co. v. West Virginia Turnpike Commission, 105 S.E.2d 630 (W. Va. 1958).

In an Opinion to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated September 21, 1977, this Office considered whether the Peninsula Transportation District Commission possessed those characteristics and powers embodied by the term "agency," on the one hand, or the term "political subdivision," on the other. The Diamonstein Opinion used the following definitions to differentiate between the two terms.

An instrumentality of a state 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). Examples of instrumentalities of the State include agencies, educational institutions, boards, and commissions.

A political subdivision, on the other hand, 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. 56 Am.Jur.2d Municipal Corporations §§ 10, 12 (1971).

The Diamonstein Opinion then proceeded to consider whether the Peninsula Transportation District Commission possessed portions of the sovereignty's powers by analyzing the provisions creating the Commission. Such an analysis must also be used with regard to the Virginia Education Loan Authority.

The Authority is "created and constituted [as] a political subdivision of the Commonwealth..." and its exercise of powers is "deemed...to be the performance of an essential governmental function." See § 23-38.32. The Authority is empowered to make direct loans to students attending institutions of higher education and is authorized to issue revenue bonds and borrow money in anticipation of such bonds in order to make, buy, and sell student loans. See §§ 23-38.31 and 23-38.33. The Governor appoints the members of the board of directors, as well as the executive director, and such members are subject to removal in the same manner as are state, county, town, and district officers. See § 23-38.32. Without the prior approval of any governmental entity, the Authority may exercise the powers listed in § 23-38.33; and property acquired by the Authority is taken in the name of the Authority, and not in the name of the Commonwealth. See § 23-38.34. The Authority is
permitted to employ consultants, attorneys, accountants and financial experts, superintendents, managers, and other such employees and "to fix their compensation to be payable from funds made payable to the Authority by law." See § 23-38.33(g). Such funds may be derived only according to the chapter creating the Authority, and the debts incurred by the Authority do not constitute debts of the Commonwealth or any other political subdivision of the Commonwealth, or a pledge of the faith and credit of the Commonwealth or any of its subdivisions. See § 23-38.31. The Authority's bond proceeds and revenues constitute a trust fund and are subject only to the purposes provided in the chapter creating the Authority, and such funds may be deposited in a qualified depository of the Authority's choosing. See § 23-38.38.

As a matter of State law, I am of the opinion that the Virginia Education Loan Authority possesses those statutory powers and functions embodied in the term "political subdivision." However, the inquiry must go beyond the statutory provision under which the Authority was created and operated. The actual functioning of the Authority must be reviewed to determine factually whether the Authority is operated as an agency or a political subdivision of the State. See Hope Natural Gas Co. v. West Virginia Turnpike Commission, supra.

There are many facts indicating that the Authority is operated as an independent political subdivision of the Commonwealth of Virginia. These facts were listed in the last two paragraphs of the statement of facts and demonstrate that the Authority is making full use of the powers delegated to it. Against this background, certain countervailing factors must be weighed.

The financing of an entity through warrants drawn on the Office of the Comptroller generally is indicative of an agency relationship. That view, however, is not tenable when the loan arrangement between the Authority and the SEAA is examined. The loan from the SEAA to the Authority was not disbursed to the Authority; instead, the Authority was only authorized to draw on the SEAA account with the State Treasurer. This structuring of the loan through the Comptroller's office was at the insistence of the SEAA and was part of the agreement reached by the two organizations. Such an agreement does not cause the Authority to lose its status as an independent political subdivision of the State. The arrangement was merely for the mutual benefit of both organizations.

The other major factors, which could be construed as indicating an agency relationship, are found in the 1978 Appropriations Act, that is, (1) § 2; (2) Item 235 §92; and (3) § 4-16.01.

Section 2 states that the term "State agency" is applicable to units of State Government, including "department," "institution," "commission," "board," "council," or other such body, however designated. The term is certainly broad enough to encompass authorities; however, it only includes authorities actually operated as State agencies, and not those operated as political subdivisions. The SEAA and the Virginia Port Authority fall within the meaning of "State agency," because they are operated as agencies of the State and are somewhat dependent on State appropriations for their continued viability. The Virginia Housing Development Authority and the various industrial development authorities (created pursuant to §§ 15.1-1373 to 15.1-1390) are also designated as authorities and are operated as independent political subdivisions of the State. As true political subdivisions of the Commonwealth, they are not State agencies within the meaning of § 2. The Department of Planning and Budget recognizes their independent status.
A review of the various enabling acts creating the many entities, denominated as authorities, reveals that no two acts are identical. However, the authorities which are considered agencies possess one common characteristic, they are dependent on State appropriations and subject to State control to a great degree. The authorities which are truly independent also possess such a common feature, they are financially independent and can act within their designated area without prior administrative approval or post-administrative veto. The Loan Authority possesses those features characteristic of a political subdivision.

Item 235 § 92 of the Appropriations Act appropriates special fund money to the Authority. Such an appropriation is not necessarily inconsistent with the status of being a political subdivision of the State. The source of funding of the appropriation is designated as "Trust and Agency." An examination of the chapter creating the Authority demonstrates that it is to be funded through the exercise of the powers permitted by § 23-38.33 and that no State appropriation is necessary for the Authority to operate. What the appropriation does do is suggest certain spending limits for the Authority, for its administrative and support service programs. As a creature of the General Assembly, the Authority is subject to certain legislative controls. See § 23-38.30(a).

Section 4-16.01 repeals all acts and parts of acts inconsistent with the provisions of the 1978 Appropriations Act. The legislation creating the Authority is not inconsistent with any of the provisions of the Appropriations Act, and this repealer clause is of no effect with regard to the Authority.

The Virginia Education Loan Authority was expressly created by the General Assembly to facilitate the college and vocational education of the residents of this State. In order to achieve this purpose, the Authority was vested with a portion of the sovereign's power and granted a degree of independence not possessed by mere agencies or instrumentalities of the State. The facts demonstrate that the Authority has utilized this power and independence to an extent not permitted of State agencies.

Based on an examination of the statutory provisions creating the Authority and its actual use of the statutory powers granted, I am of the opinion that the Virginia Education Loan Authority is an independent political subdivision of the State.

Question 2:

To what extent is Art. X, § 7, of the Constitution of Virginia applicable to the operations of the Authority?

Article X, § 7 requires that all revenues of the Commonwealth be paid into the State Treasury. However, the moneys received by the Authority are not State revenues. See § 23-38.38. These moneys are separate and distinct from State funds, and this constitutional requirement is not applicable. See Button v. Day, 203 Va. 687, 694-695, 127 S.E.2d 122, 128 (1962).

VIRGINIA FAIR HOUSING LAW. V.M.I. HOUSING REGULATIONS GIVE PREFERENCE TO MARRIED FACULTY MEMBERS WITH FAMILIES. NOT UNLAWFULLY DISCRIMINATORY.
November 17, 1978

The Honorable Elliot S. Schewel
Member, Senate of Virginia

You have questioned housing regulations of the Virginia Military Institute which provide that married faculty members with families will be given preference over unmarried faculty members in the assignment of housing, where practicable. Your question relates to whether such a policy is unlawfully discriminatory.

No federal or State laws prohibit discrimination per se. See Bradington v. I.B.M., 360 F.Supp. 845, 854 (D.Md. 1973), aff'd, 492 F.2d 1240 (4th Cir. 1974). Rather what the various laws against discrimination generally prohibit is discrimination in housing or employment, for example, on the basis of race, color, religion, sex and national origin. From the facts which you have provided, the above-mentioned Virginia Military Institute housing regulation would not appear to discriminate on the basis of any such factors. Specifically, there is no indication that the policy would constitute sex discrimination since it would apply and grant a preference equally to male and female married faculty with families. Such discrimination on the basis of marital status is not in and of itself unlawful and would constitute discrimination on the basis of sex only where the policy involving marital status was applied differently for men and women. Stroud v. Delta Air Lines, Inc., 544 F.2d 892 (5th Cir.), cert. denied, 434 U.S. 844 (1977).

As measured against equal protection and due process standards, the policy would also stand. This is because a rational basis for such a preference can be found in an equitable interest in assigning housing first to those faculty members having greater responsibilities, i.e., married faculty with families.2

In view of the foregoing, I am of the opinion that the Virginia Military Institute's housing policy is not unlawfully discriminatory.

1See e.g., Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3604, dealing with housing discrimination; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), dealing with employment discrimination; Virginia Fair Housing Law, § 36-87 of the Code of Virginia (1950), as amended; Governor Dalton's Executive Order Number One (78), dealing with equal employment opportunities.

2The rationality of the policy is bolstered by the fact that it is flexible and not absolute. It applies, for example, only "where practicable" and it appears to allow for exceptions in cases of hardship. Virginia Military Institute Housing Regulations of August 1, 1972, at ¶ 2.
You have asked whether, upon proper request, the county administrator is required to disclose county records revealing the names and salaries of all county employees earning more than $10,000 annually.

Chapter 810 [1978] Acts of Assembly 1393, amended the Freedom of Information and Privacy Acts, effective July 1, 1978, and requires public disclosure, upon proper request, of records of the position, job classification, official salary or rate of pay, and expense reimbursements paid to any public officer, official or employee at any level of State, local or regional government. The amendment specifically exempts from required disclosure salaries of employees whose annual pay is $10,000 or less.1

Prior to its amendment by Ch. 810, the Freedom of Information Act (the "Act") had been interpreted as not requiring the disclosure of salary records of individually named public employees. See Reports of the Attorney General (1973-1974) at 454 and (1975-1976) at 416. The Act had never been interpreted to exempt from required disclosure records of the salary or salary range assigned to a public job or position, as distinguished from the salary of a named employee or official holding such position. Thus, Ch. 810 obviously requires disclosure of more than salary ranges. The amendment modifies the Freedom of Information and Privacy Acts to require disclosure of salary records of named individuals, previously exempt from disclosure under the personnel records exemption.

I, therefore, conclude that the county administrator is required by the Act to disclose, upon proper request, the names and salaries of county employees who earn more than $10,000 annually.

1Chapter 810 [1978] Acts of Assembly, enacted as §§ 2.1-342(c) and 2.1-382C., provides, in relevant portion:

"Neither any provision of this chapter nor any provision of Chapter 26 [Chapter 21 for § 2.1-382C.] of this title shall be construed as denying public access to records of the position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of State, local or regional government in this Commonwealth whatsoever; provided, however, that the provisions of this subsection shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is ten thousand dollars or less."

VIRGINIA FREEDOM OF INFORMATION ACT. AMENDMENT REQUIRING PUBLIC DISCLOSURE OF JOB CLASSIFICATION, SALARY AND EXPENSE REIMBURSEMENT RECORDS OF OFFICERS AND EMPLOYEES OF STATE, LOCAL AND REGIONAL GOVERNMENT. APPLICABLE TO OFFICIALS AND EMPLOYEES OF UNIVERSITY OF VIRGINIA.

July 5, 1978

The Honorable Frank L. Hereford, Jr., President
University of Virginia

You have asked whether Ch. 810 [1978] Acts of Assembly 1393, effective July 1, 1978, which amends the Virginia Freedom of Information and Privacy Protection Acts by requiring public disclosure of job classification, salary and expense reimbursement records of employees of any "level of state, local or regional government..." is applicable to officials and employees of the University of Virginia.
The Freedom of Information Act (the "Act") requires that the official records of all public bodies, State governmental agencies and institutions shall be open to public inspection, except as otherwise specifically provided by law. See §§ 2.1-341(a) and 2.1-341(c). The records disclosure requirements have consistently been interpreted to apply to the records of State-supported colleges and universities. See Opinion to the Honorable Thomas A. Graves, dated December 3, 1973, and found in Report of the Attorney General (1973-1974) at 454, 455; Opinion to the Honorable Lewis P. Fickett, Jr., dated July 24, 1975, and found in Report of the Attorney General (1975-1976) at 416, 417. This interpretation is confirmed by certain provisions of the Act, for example § 2.1-342(b)(4), which provides a specific exemption from disclosure requirements for the records of the president of a State-supported university.

Prior to the enactment of Ch. 810 [1978] Acts of Assembly, records of salaries of university officials and employees were exempt from public disclosure under the provisions of § 2.1-342(b)(3) which exempts "personnel records" from required disclosure. See Fickett Opinion, supra. The "personnel records" exemption has been interpreted to apply similarly to salaries of employees of other public bodies, for example, county employees. See Opinion to the Honorable Jerry K. Emrich, dated January 12, 1978 (copy enclosed).

Chapter 810 [1978] Acts of Assembly, effective July 1, 1978, takes away the disclosure exemption for certain personnel records, including "records of the position, job classification, official salary or rate of pay...and...reimbursements for expenses paid to any public officer, official or employee at any level of State, local or regional government in this Commonwealth whatsoever ..." I find nothing in the provisions of Ch. 810 which indicates that its application to employees of State "government" was intended to apply to fewer agencies than the public bodies subject to the Act. Accordingly, I am of the opinion that an employee of the University of Virginia is an employee of State government so that his salary is subject to disclosure under the Act.

You have called to my attention the Opinion to the Honorable John R. Thompson, dated February 12, 1971, and found in Report of the Attorney General (1970-1971) at 60, which ruled that a university professor was not a salaried officer of State government for purposes of § 4 of Art. IV of the Virginia Constitution, which prohibits any member of the General Assembly from holding a salaried office under State government. It is, however, also clearly stated in the Thompson Opinion that a university professor is an employee of a State governmental agency as distinguished from an officer of State government. Chapter 810 [1978] Acts of Assembly applies to the records of employees of governmental agencies at all levels of government.

I, therefore, conclude that the records of the position, job classification, salary or rate of pay and expense reimbursements paid to officials and employees of the University of Virginia are subject to required disclosure as provided in the Act, as amended by Ch. 810 [1978] Acts of Assembly, effective July 1, 1978.

1This section applies to "any legislative body, authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations or agencies in the State, supported wholly or principally by public funds."
VIRGINIA FREEDOM OF INFORMATION ACT. DISCLOSURE OF COUNTY BUILDING PERMIT RECORDS.

June 18, 1979

The Honorable John M. Lohr
Commonwealth's Attorney for Highland County

You have asked whether the Virginia Freedom of Information Act requires the County Building and Zoning Department to allow inspection of county building permits by citizens other than the permit holder. You also ask whether permitting such inspection would violate the Privacy Protection Act.

Building permits issued by the county are clearly "official records" as defined by the Freedom of Information Act. See § 2.1-341(b) of the Code of Virginia (1950), as amended. They are, therefore, subject to required disclosure upon proper request by any citizen of this State, unless exempt under §§ 2.1-342(b)(1) through 2.1-342(b)(6) or other provisions of law. None of the exceptions to required disclosure contained in §§ 2.1-342(b)(1) through 2.1-342(b)(6) applies to such building permits and I know of no other provision of law providing for their confidentiality. Accordingly, I conclude that the Freedom of Information Act requires that such records be disclosed for inspection upon citizen request. See § 2.1-342(a).

The information contained on building permits may, as you point out, contain "personal information" as defined by the Privacy Protection Act in § 2.1-379(2). The Privacy Protection Act, however, does not itself prohibit the dissemination of records containing personal information where such records are subject to required disclosure under other provisions of law. See § 2.1-380(1).

I am, therefore, of the opinion that disclosure of such building permit records does not violate the Privacy Protection Act and that permission of the permit holder would not be required prior to such disclosure.

VIRGINIA FREEDOM OF INFORMATION ACT. DISCLOSURE OF MINUTES OF LEGALLY AUTHORIZED EXECUTIVE MEETINGS. DISCLOSURE OF TRANSCRIPT OF EXECUTIVE MEETING ON EMPLOYEE DISMISSAL.

June 15, 1979

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

You have asked whether the Virginia Freedom of Information Act (the "Act") requires public disclosure of the following records: (1) minutes taken during a legally authorized executive meeting of a public body, and (2) the transcript of an executive meeting of a school board considering the dismissal of a school board employee.

The Act requires that minutes be recorded at all public meetings of public bodies. See § 2.1-343, Code of Virginia (1950), as amended. Minutes are not required during legally authorized executive meetings. The General Assembly, by authorizing executive meetings for specified purposes, has determined that the interest of public bodies in confidential discussion of certain subjects outweighs the interests of public disclosure of such
discussions. In cases where minutes are recorded during properly called executive meetings their required public disclosure as official records would, therefore, be at cross purposes with the provisions of the Act authorizing executive meetings. All votes or other official action taken in proper executive meetings must, of course, be reaffirmed by a recorded vote in public session. See § 2.1-344(c). I conclude that minutes recorded during a lawful executive meeting of a public body are not subject to required public disclosure.

It is clear that a school board may hold an executive meeting to consider the possible dismissal of one of its employees. See § 2.1-344(a)(1). The transcript of such a meeting is simply a verbatim form of meeting minutes. For the same reasons stated above, I am of the opinion that the transcript is not subject to required public disclosure.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETING OF COUNTY BOARD OF SUPERVISORS FOR DISCUSSION OF PRIVATE COLLEGE'S EXPANSION.

June 21, 1979

The Honorable Joseph P. Crouch
Member, House of Delegates

You ask whether the county Board of Supervisors can lawfully meet in executive session with representatives of a local church-college, presently established and operating in the county, to discuss the college's proposed expansion. Your letter indicates that the proposed expansion may involve acquisition of real property by the college. It is my further understanding that prior to the executive meeting in question a local newspaper had reported the proposed expansion.

The Virginia Freedom of Information Act requires that public bodies meet in public except as otherwise specifically provided by law. See § 2.1-343, Code of Virginia (1950), as amended. Sections 2.1-344(a)(1) through 2.1-344(a)(6) authorize executive meetings for specified purposes; I conclude, however, that none of these exceptions authorizing executive meetings is applicable to the situation you describe.

Section 2.1-344(a)(2) authorizes public bodies to discuss privately the acquisition or use of real estate for public purpose, even where the land in question is not owned or to be acquired by the public body itself. See Opinion to the Honorable William A. Truban, Member, Senate of Virginia, dated April 10, 1979, a copy of which is enclosed. In the present instance, however, proposed land acquisitions by a privately funded church-college would not come within the term "public purpose" in § 2.1-344(a)(2).

Section 2.1-344(a)(4) authorizes executive meetings for discussion "concerning a prospective business or industry where no previous announcement has been made of the business' or industry's interest in locating in the community." This provision would not apply to the present facts since it is clear that the college is already established and operating in the community and there has been a previous public announcement of the proposed expansion. It is not, therefore, necessary to determine whether the college is a "business or industry" as the terms are used in § 2.1-344(a)(4).
Accordingly, I am of the opinion that the county Board of Supervisors may not meet in executive session to discuss the proposed expansion of the college.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. DISCUSSION OF LOCATION OF STATE HIGHWAY BRIDGE.

April 10, 1979

The Honorable William A. Truban
Member, Senate of Virginia

You have asked whether a town council may meet in executive session for discussion of the proposed location of a State highway bridge, where the bridge would not be located upon town property and where the town would not be involved in the acquisition of easements for the bridge right-of-way.

The Virginia Freedom of Information Act (the "Act") sets forth in §§ 2.1-344(a)(1) through 2.1-344(a)(6), Code of Virginia (1950), as amended, the specific matters which public bodies may discuss in executive session. Section 2.1-344(a)(2) permits public bodies to meet in executive session to discuss the "condition, acquisition or use of real property for public purpose, or the disposition of publicly held property." Under the factual circumstances you suggest, the town council is not involved in obtaining easements for the proposed bridge from private parties and no town lands are involved. Since the council would be, nevertheless, discussing acquisition of land for a public purpose, I am of the view that § 2.1-342(a)(2) would apply.

Although the Act is to be construed liberally to promote its stated purposes, one of which is to open meetings of public bodies, the plain wording of the statute must be controlling. Commonwealth v. Gregory, 193 Va. 721, 71 S.E.2d 80 (1952). Accordingly, I am of the opinion that a town council may meet in executive session for discussion of the proposed location of a State highway bridge under the circumstances you describe.

VIRGINIA FREEDOM OF INFORMATION ACT. FINANCIAL STATEMENTS CITY REQUIRES MERCHANTS TO FILE WITH ITS PURCHASING DEPARTMENT ARE OFFICIAL RECORDS OF CITY AND, AS SUCH, ARE SUBJECT TO REQUIRED PUBLIC DISCLOSURE UPON PROPER REQUEST.

January 23, 1979

The Honorable Calvin W. Fowler
Member, House of Delegates

You have asked whether the Virginia Freedom of Information Act requires public disclosure of financial statements which the City of Danville requires all merchants selling goods and services to the city to file with the city purchasing department.

The Virginia Freedom of Information Act provides in § 2.1-342(a) of the Code of Virginia (1950), as amended, that, except as otherwise specifically provided by law, all official records of governmental agencies are public records and shall be available for inspection and copying upon request. The records you describe are clearly official records within the meaning of that
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term as set out in § 2.1-341(b). None of the specific exemptions in §§ 2.1-342(b)(1) through 2.1-342(b)(6) applies to these records. I, therefore, conclude that the financial statements you describe are official records of the city and are subject to required public disclosure upon proper request in accordance with the Virginia Freedom of Information Act.

VIRGINIA FREEDOM OF INFORMATION ACT. OPEN MEETINGS. MAYOR'S CITIZEN ADVISORY COMMITTEE.
April 3, 1979

The Honorable Frederick H. Creekmore
Member, House of Delegates

This is in reply to your recent letter wherein you ask if the Chesapeake Citizens Advisory Committee ("Committee") is a public body subject to the requirements of the Virginia Freedom of Information Act. You advise that the Committee is composed of citizens appointed by the mayor to review city charter provisions and recommend possible changes to the mayor. It is also my understanding that the Committee reports only to the mayor, not the city council, and that no public funds are used to support the activities of the Committee.

Section 2.1-341(a) of the Code of Virginia (1950), as amended, sets forth the kinds of public bodies subject to the requirements of the Virginia Freedom of Information Act and includes therein:

"[A]ny legislative body, authority, board, bureau, commission, district or agency of the State or of any political subdivision of the State, including cities, towns and counties; municipal councils, governing bodies of counties, school boards and planning commissions; and other organizations, corporations, or agencies in the State, supported wholly or principally by public funds."

The Committee you describe is not created by a public body, does not perform delegated functions of a public body, does not advise a public body, and does not receive public funding. I, therefore, conclude that the Committee in question would not be a public body within the ambit of the Virginia Freedom of Information Act.

VIRGINIA FREEDOM OF INFORMATION ACT. PENSION RECORDS.
April 13, 1979

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You have asked whether or not records revealing the pensions paid to former Arlington County employees and a former Chairman of the County Board of Supervisors are subject to required public disclosure under the Virginia Freedom of Information Act (the "Act").

Prior to the Act's amendment in 1978, all personnel records of identifiable individuals, including salary records, were exempt from required disclosure under § 2.1-342(b)(3). See Opinion to the Honorable Jerry K. Emrich, County Attorney for Arlington County, dated January 12, 1978, and
found in Report of the Attorney General (1977-1978) at 489. Pension records of employees or former employees would, in my view, be "personnel records" under § 2.1-342(b)(3).

Section 2.1-342(c), enacted in 1978, provides for required disclosure of records of the "position, job classification, official salary or rate of pay of, and to records of the allowances or reimbursements for expenses paid to any public officer, official or employee at any level of State, local or regional government..." whose salary or rate of pay exceeds $10,000 per year. Section 2.1-342(c) does not, however, provide that pension records shall be subject to public disclosure. I am, therefore, of the opinion that pension records of county employees and officials are personnel records which are not subject to required public disclosure under the Act. See § 2.1-342(b)(3).

VIRGINIA FREEDOM OF INFORMATION ACT. PERSONNEL RECORDS OF INDIVIDUAL TEACHERS' PROFESSIONAL QUALIFICATIONS ARE EXEMPT FROM REQUIRED PUBLIC DISCLOSURE. ACT DOES PERMIT THEIR DISCLOSURE.

December 20, 1978

The Honorable Elise B. Heinz
Member, House of Delegates

You have asked whether the Freedom of Information Act requires the school board to make individual teachers' professional qualifications public, and whether the Privacy Protection Act prohibits the school board from making individual teachers' professional qualifications public.

The Freedom of Information Act exempts personnel records of public bodies from required disclosure. See § 2.1-342(b)(3) of the Code of Virginia (1950), as amended. Records of the professional qualifications of public school teachers maintained by the school board are, in my opinion, personnel records. I, therefore, conclude that the Freedom of Information Act does not require public disclosure of teacher qualifications. The fact that such records are not subject to required public disclosure does not prohibit their disclosure.

I, further, conclude that the Privacy Protection Act does not prohibit public disclosure of a teacher's professional qualifications records. Such records are records which contain "personal information" as defined in § 2.1-379(2). The Privacy Protection Act, however, does not prohibit the dissemination of records containing personal information where dissemination of such records is otherwise required or permitted by law. See § 2.1-380(1). Inasmuch as dissemination of the records in question is permitted, though not required by the Freedom of Information Act, the Privacy Protection Act does not prohibit their disclosure.

VIRGINIA FREEDOM OF INFORMATION ACT. REPORTS TO PUBLIC BODIES ARE "OFFICIAL RECORDS" WHICH ARE SUBJECT TO PUBLIC ACCESS REQUIREMENTS WHEN THOSE REPORTS COME INTO POSSESSION OF PUBLIC BODIES.

January 31, 1979

The Honorable J. Paul Councill, Jr.
Member, House of Delegates
You have asked whether a report to a public body becomes an "official record" subject to public access under the Freedom of Information Act (the "Act") when the document is in the possession of the public body or at such time as the public body takes some action with respect to the report.

The Act defines the term "official record" to include any document, report or other material "prepared, owned, or in the possession of a public body in the transaction of public business." See § 2.1-341(b) of the Code of Virginia (1950), as amended. The explicit language of § 2.1-341(b) indicates that possession of a document by a public body is sufficient to make it an official record if it pertains to the business of the public body. Many records held by public bodies do not require any action by the public body after their receipt. I, therefore, conclude that a report is an "official record" subject to public access requirements of the Act when the report comes into the possession of the public body.

VIRGINIA FREEDOM OF INFORMATION ACT. UNEMPLOYMENT COMPENSATION HEARING. WHEN EMPLOYER IS ENTITLED TO TRANSCRIBED COPY OF TAPE RECORDINGS OF.

August 16, 1978

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

You have asked whether the Virginia Freedom of Information Act (the "Act") entitles an employer to a transcribed copy of the tape recordings of a Virginia Employment Commission hearing regarding a former employee's eligibility for unemployment compensation. You indicate that the employer was a party to the commission hearing and that the commission found the former employee eligible for unemployment benefits. No appeal was taken. No transcript has been made. It is also my understanding that the employer wishes a copy of a transcript of the hearing for purposes of a suit filed in another state against the employer by the former employee involving matters distinct from unemployment compensation.

The Act provides that the official records of any governmental body or agency in the State shall, except as otherwise specifically provided by law, be available for inspection and copying by any citizen of this State. See § 2.1-342(a) of the Code of Virginia (1950), as amended. Commission hearings of unemployment compensation appeals are provided for in § 60.1-64. Section 60.1-651 requires that a complete record of such commission hearings be kept and that all testimony shall be recorded. The commission's usual practice is to record its hearings on tape. Such hearing records would be "official records" of the commission within the meaning of § 2.1-341(b), and inspection and copying thereof would be required unless otherwise specifically provided by law. See § 2.1-342(a).

Section 60.1-65, however, specifically provides that the recorded testimony of commission hearings need not be transcribed unless a further appeal of the commission's decision is pending. Section 60.1-65 further provides that the commission may, in its discretion, furnish copies of the transcript of hearings to any party thereto. It is my conclusion that under § 60.1-65, the commission is not required to maintain the record of hearings in transcribed form unless an appeal from the commission decision is pending. If an appeal is pending and the commission does have a transcript of the commission hearing, the provisions of § 60.1-65 would apply, thereby leaving
it to the discretion of the commission whether to furnish parties copies. The proviso that information shall not be published means that a party to the decision would not have a right to review the tapes. Testimony at the hearings would be "information furnished the Commission under the provisions of this chapter." The chapter deals mainly with testimony at hearings.

The proviso in § 2.1-342(a), "except as otherwise provided by law..." incorporates by reference § 60.1-65. Reading §§ 2.1-342(a) and 60.1-65 together, I conclude that the commission would not be required to furnish the employer with the transcript, but the commission would not be prohibited from furnishing a copy.

1Section 60.1-65 provides:

"The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers, and the conduct of hearings and appeals before any deputy, appeal tribunal or the Commission shall be in accordance with regulations prescribed by the Commission for determining the rights of the parties, whether or not such regulations conform to common law or statutory rules of evidence and other technical rules of procedure. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded, but need not be transcribed unless the disputed claim is further appealed.

Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties, nor used in any judicial or administrative proceeding other than one arising out of the provisions of this title; provided, however, that the Commission may, in its discretion, furnish copies of the transcript of hearings to any party thereto."

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT. TENANT MAY RECOVER SECURITY, DAMAGES AND ATTORNEY'S FEES EITHER BY PROVING LANDLORD WILLFULLY FAILED TO COMPLY WITH § 55-248.11, OR FAILED, WILLFULLY OR OTHERWISE, TO RETURN SECURITY AND INTEREST DUE TENANT.

November 27, 1978

The Honorable Robert C. Scott
Member, House of Delegates

You ask whether § 55-248.11(a) of the Code of Virginia (1950), as amended, requires that a tenant must prove that a landlord "willfully" failed to return security and interest due the tenant at the termination of a lease agreement in order to recover damages and attorney's fees, or whether any failure to return monies ultimately shown to be due the tenant entitles the tenant to recover.

Section 55-248.11(a) states in part that "If the landlord willfully fails to comply with this section or if he fails to return any security and interest required to be paid to the tenant under this chapter..." the tenant can recover the security due him together with actual damages and reasonable attorney's fees. It is to be noted that the above quoted language is in the disjunctive. The word "or" denotes an alternative between the two phrases it connects. See State v. Elder, 165 S.E.2d 108, 152 W.Va. 571 (1968). Since the adverb "willfully" is included in the first of two independent clauses but not
in the second, it is my opinion that that adverb is intended to modify the verb "fails" only in the first clause, and that therefore a tenant may recover the security, damages and attorney's fees either by proving that the landlord willfully failed to comply with § 55-248.11, or alternately, that the landlord failed, willfully or otherwise, to return security and interest due the tenant.

VIRGINIA SCHOOLS FOR THE DEAF AND BLIND. BOARD MAY SELL LAND, RETAIN PROCEEDS AND EXPEND FUNDS FOR CAPITAL OUTLAY SUBJECT TO CERTAIN RESTRICTIONS.

June 20, 1979

The Honorable John A. Clem, 3rd, President
Board of Visitors
The Virginia Schools for the Deaf and the Blind

You have asked whether the Board of Visitors of the Virginia School for the Deaf and the Blind at Hampton may dispose of a tract of surplus land, known as the Parker Farm property, and use the proceeds from sale for capital improvements. It is my opinion that you can do this, but only with the Governor's approval and compliance with other provisions of law regulating capital expenditures.

It has been previously held by this Office that proceeds of the sale of property owned by educational institutions should be used for the same purpose as is provided in the deed. See Opinion to the Honorable L. M. Kuhn, Director, Division of the Budget, dated November 1, 1961, and found in Report of the Attorney General (1961-1962) at 243. A copy is enclosed.

A deed conveying Parker Farm provides no purpose or restriction for its use. Furthermore, unlike the transaction in the Kuhn Opinion, State funds were used to acquire the Parker Farm tract. This fact, however, is immaterial in construing § 23-4.1 of the Code of Virginia (1950), as amended. See Opinion to the Honorable Mills E. Godwin, Jr., Governor of Virginia, dated June 15, 1976, and found in Report of the Attorney General (1975-1976) at 48.

Section 23-4.1 provides that the proceeds from sales shall be used and administered in the same manner as all other gifts and bequests are used and administered.¹ The permissible uses of these proceeds are very broad,² and the expenditure of funds for capital improvement is subject to the regulations of the Appropriations Act.³ Section 23-4.1 does require the Governor's signature before conveyance, and he may condition his signature upon the purposes for which the proceeds are to be utilized.

Accordingly, the board may sell the land, retain the proceeds and expend the funds for capital outlay or other purposes, subject to the Governor's approval and his execution of the deed of conveyance.

¹Section 23-4.1 provides in part:
"The boards of visitors or trustees of all State educational institutions, with the approval of the Governor first obtained, are hereby authorized to lease or sell and convey whatever interest they may have in real property that has been or may hereafter be acquired by purchase, will or deed of gift."
The proceeds from such leases, sales and conveyances shall be held, used and administered in the same manner as all other gifts and bequests are held, used and administered.

Nothing in this section shall be construed as authorizing or empowering the lease, or sale and conveyance of such real property contrary to the terms and conditions of the will or deed of gift."


VIRGINIA SCHOOLS FOR THE DEAF AND BLIND. MEMBERS OF BOARDS OF VIRGINIA SCHOOL AT HAMPTON AND VIRGINIA SCHOOL FOR THE DEAF AND BLIND. ELIGIBILITY FOR REAPPOINTMENT TO NEWLY CREATED BOARD OF VIRGINIA SCHOOLS FOR DEAF AND BLIND.

July 12, 1978

The Honorable William P. Robinson, Sr.
Member, House of Delegates

You ask whether the members of the boards of the Virginia School at Hampton and the Virginia School for the Deaf and Blind are eligible for reappointment to the newly created board of the Virginia Schools for the Deaf and Blind.

Section 23-254 of the Code of Virginia (1950), as amended, established a single public corporation to take the place of the two former corporations which had governed the residential schools at Hampton and Staunton. This corporation was established effective July 1, 1978. The new board consists of eleven members, which is the number of combined members of the previous boards. Section 23-254B provides that those members of the former boards in office on July 1, 1978, shall automatically be members of the new board until their terms expire.1

The statute further provides, as did both of the former statutes, that no person shall be eligible to serve more than two successive terms, and that incumbency on July 1, 1978 shall constitute the first of the two terms for purposes of reappointment.

Certain of the members of the former boards of visitors have terms which run from July 1, 1976, to June 30, 1980. These incumbents may serve their present term and be eligible for a second appointment from July 1, 1980, to June 30, 1984, regardless of whether the term expiring in 1980 is their first or second term. Such a person would thus be eligible to serve twelve years, six with the new board.2

In addition, certain members of the former boards had terms which expired June 30, 1978. As to those persons who have as of that date served two full terms, it is my opinion that they would not be eligible for reappointment to the newly constituted board. Section 23-254 clearly indicates that the Virginia Schools for the Deaf and Blind is intended as successor corporation, and instead of creating all new appointments the statute allows the incumbents to continue on the board until their terms expire. Also, both the two old and the successor statute carry the two successive term limitation.
Those board members whose first term expired on June 30, 1978, would obviously be eligible for reappointment effective July 1, 1978. That would, however, be the last appointment for which they would be eligible, since as of June 30, 1982 they would have served two successive terms.

1Section 23-254B provides that: "[T]he members of the board of visitors of the Virginia School for the Deaf and the Blind and the members of the board of visitors of the Virginia School at Hampton in office on July one, nineteen hundred seventy-eight shall be the members of the board of visitors of the Virginia Schools for the Deaf and the Blind until the terms for which they were appointed to such boards of visitors expire."


WARRANTS. CRIMINAL CASES. JURISDICTION OF CORPORATE AUTHORITIES INVOLVING OFFENSES AGAINST COMMONWEALTH EXTENDS TO ONE MILE BEYOND CITY LIMITS.

September 21, 1978

The Honorable Andre Evans
Commonwealth's Attorney for the City of Virginia Beach

You have asked whether a warrant can be issued in Virginia Beach for the State criminal offense of assault when the offense occurs outside of, but within one mile of, the corporate limits of the City of Virginia Beach.

Section 19.2-250 of the Code of Virginia (1950), as amended, provides, generally, that in criminal cases involving offenses against the Commonwealth, the jurisdiction of the corporate authorities of cities extends one mile beyond the corporate limits of such cities.1

A predecessor of § 19.2-250 was construed in Murray v. Roanoke, 192 Va. 321, 64 S.E.2d 804 (1951), and the Virginia Supreme Court found that the purpose was to "confer on the corporation courts of cities (now deemed circuit courts pursuant to § 17-116.1 et seq. of the Code) power to enforce the police regulations and law of the area involved." Id. at 326-327, 808.

The Virginia Supreme Court made it clear in Squire v. Commonwealth, 214 Va. 260, 199 S.E.2d 534 (1973), that the holding in Murray applies to courts not of record as well as courts of record, and it was held in Squire that the municipal court of Charlottesville (now deemed general district courts pursuant to § 15.1-69.5) had jurisdiction over a State offense occurring in Albemarle County within one mile of the city limits.

This grant of jurisdiction is not affected by § 19.2-72, commanding that after arrest the accused be brought before the appropriate court in "the county, city or town in which the offense was allegedly committed."2 To say, on the one hand, that the Virginia Beach courts have jurisdiction over the offense in question (§ 19.2-250), but on the other hand, that after arrest the accused must be taken before the court in the jurisdiction where the offense occurred (§ 19.2-72(iv)), would negate the provisions of § 19.2-250 and render it meaningless. Therefore, § 19.2-72 must be read in conjunction with § 19.2-250. The statutes pertain to the same subject matter and should be construed together.3
The same rationale would apply as to § 19.2-44 to the extent to which that section may appear to prevent a Virginia Beach magistrate from issuing a warrant for an offense occurring outside of his judicial district.\(^4\)

Accordingly, it is my opinion that a warrant can be issued in Virginia Beach for a violation of the State criminal code occurring within one mile of its corporate limits.

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\(^1\)Section 19.2-250 provides: "Notwithstanding any other provision of this article, the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the State one mile beyond the corporate limits of such town or city; except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of three hundred inhabitants per square mile, or in counties adjacent to cities having a population of one hundred and seventy thousand or more, shall extend for three hundred yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for three hundred yards within such town."

\(^2\)Section 19.2-72 provides in part: "The warrant shall... (iv) command that the accused be arrested and brought before a court of appropriate jurisdiction in the county, city or town in which the offense was allegedly committed...."

\(^3\)In pari materia statutes should be harmonized. Report of the Attorney General (1974-1975) at 220.

\(^4\)Section 19.2-44 provides: "A magistrate shall exercise the powers conferred by this title only in the judicial district for which he is appointed."

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**WATER AND SEWERAGE SYSTEMS. STATE HEALTH DEPARTMENT APPROVED WATER AND SEWERAGE SYSTEMS UNNECESSARY FOR CERTAIN CLASSES OF "SELF-SERVICE" SERVICE STATIONS.**

September 27, 1978

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

You have asked whether a "self-service" gas station, which sells only gas, oil and minor automobile accessories, in addition to cigarettes, candy, and soft drinks in machines, must provide toilet facilities, sewage disposal devices and a water supply for its patrons.

Section 32-63(1) of the Code of Virginia (1950), as amended, defines service station as "an establishment whose principal business is selling or offering for sale gasoline, oil, automobile accessories and minor automotive repair services...." (Emphasis added.) Section 32-63(4) then provides "[e]very service station... shall be provided with approved toilet facilities, and an approved sewage disposal device, [and] an approved water supply for patrons and employees...."

To fall within the definition of service station, an establishment must sell, as its principal business, four distinct items: gasoline, oil, automobile accessories and minor automotive repair services. The enumeration of items which must be sold is stated in the conjunctive, rather than the disjunctive. It is true that, where essential to the execution of clear legislative intent, the conjunctive "and" may be construed to mean the
disjunctive "or." I.D.A. v. LaFrance Cleaners, 216 Va. 277 (1975). However, no obvious justification for construing away the clear meaning of the language the General Assembly used appears here. The words of a statute must be given their ordinary meaning unless a contrary meaning is clearly intended. McCarron v. Commonwealth, 169 Va. 387 (1937).

The establishment you describe sells gasoline, oil, and minor automobile accessories; it does not sell "minor automotive repair services." In my opinion, minor automotive repair services must also be offered for such an establishment to fall within the statutory definition of service station. Accordingly, I am of the opinion that § 32-63 does not require "self-service" gas stations offering the services you cite to provide toilet facilities and an approved water supply for patrons of such stations.

WEAPONS CARRYING UNCONCEALED PISTOL ON PERSON USE OR DISPLAY OF WEAPON IN UNLAWFUL MANNER.

August 7, 1978

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked whether it is unlawful to "carry a pistol in a holster not concealed" for one's "own personal protection."

The only provision of the Virginia Code which prohibits the carrying of an unconcealed weapon is § 18.2-283 of the Code of Virginia (1950), as amended, which makes it a Class 4 misdemeanor to carry a dangerous weapon, including a pistol, into a place of worship without "good and sufficient reason." Whether the carrying of a pistol into a place of worship for one's own personal protection would be considered "good and sufficient reason" is, of course, a matter to be determined by a court in light of all of the circumstances preceding the incident.

Although there is no specific provision of the Virginia Code which prohibits the carrying of an unconcealed weapon on the person, there are various statutes which prohibit the use or display of such a weapon in an unlawful manner. In this regard, it is a felony to use, brandish in threatening manner, or attempt to use a pistol or other firearm to commit murder, rape, robbery, burglary or abduction under the provisions of § 18.2-53.1. Moreover, §§ 18.2-279 and 18.2-280 prohibit the malicious and willful discharge of a firearm in an occupied building and public places, respectively, without justifiable excuse. Section 18.2-282 prohibits pointing or brandishing a firearm in the presence of any person in such a manner as to reasonably induce fear without justifiable excuse, § 18.2-285 prohibits persons from hunting with firearms under the influence of intoxicants, and § 18.2-286 prohibits anyone to discharge a firearm within 100 yards of a roadway without justifiable excuse.

You should also be aware that, even though the Code of Virginia does not specifically prohibit the carrying of an unconcealed weapon, it does authorize the localities to adopt ordinances prohibiting possession of loaded firearms in a stationary vehicle where the occupant does not have a license to hunt on either side of the roadway, and to prohibit transporting a loaded rifle or shotgun on a public street or highway within such locality unless the possession is for personal safety. Again, whether possession of firearms under
the above statutes is for "personal safety" and, consequently, justifiable and lawful is a matter to be determined by the court under a given set of circumstances. Since the question you pose arises within the jurisdiction of the City of Waynesboro, you should inquire of the Commonwealth's Attorney whether there are local ordinances prohibiting possession of unconcealed weapons within the context of the Code of Virginia.

I am, therefore, of the opinion that the carrying of an unconcealed pistol about the person in a holster does not of itself violate the provisions of the Code. Unless there is a local ordinance prohibiting the carrying of a weapon in certain circumstances as authorized by the Virginia Code, it may be worn unconcealed upon the person.

WELFARE BOARD. AUTHORITY TO ESTABLISH PERSONNEL PLAN INCLUDING SUCH RULES AND REGULATIONS NECESSARY TO SYSTEM OF PERSONNEL ADMINISTRATION IN LOCAL DEPARTMENTS OF WELFARE IS VESTED IN STATE BOARD OF WELFARE.

December 14, 1978
The Honorable Frank D. Harris
Commonwealth's Attorney for the County of Mecklenburg

You ask several questions concerning the conditions to employment of local welfare department personnel.

Local Personnel Plan Inapplicable

You first ask whether the employees of a local welfare department are subject to the personnel plan or system adopted by the local governing body. Section 63.1-26 of the Code of Virginia (1950), as amended, provides that the authority to establish minimum entrance and performance standards for personnel employed by local boards and superintendents of welfare, including such rules and regulations necessary to a system of personnel administration, rests with the State Board of Welfare. All employees of a local department of welfare are employed subject to the personnel standards, rules and regulations promulgated by the State Board and serve at the pleasure of its local board, and superintendent, subject to the provisions of the merit system plan as defined in § 63.1-87. See §§ 63.1-60 and 63.1-61. The locality is required to pay these employees such compensation as shall be fixed by the local board within the compensation plan provided in the State merit system plan. See § 63.1-66. Any employee who does not meet the personnel standards established by the State Board may be removed by the Commissioner of Welfare. See § 63.1-62. Finally, § 15.1-7.1 expressly excludes employees of local welfare departments and local welfare boards from the personnel system of the locality.

Local Grievance Procedure Applies

You next ask whether such employees have the right to be included under the grievance procedures adopted by the local governing body. The grievance procedure promulgated by the Governor for State employees applies to personnel employed by local boards and local superintendents unless the local governing body elects to include such employees under its own grievance procedure adopted pursuant to § 15.1-7.1. See § 63.1-26. It is my understanding that such an election has been made by your county and by the local board of welfare, and that personnel of the local department are entitled to such relief as is afforded by the county's grievance procedure.
Personnel Regulations

You finally ask whether such employees are subject to the general regulations for other personnel employed by the locality, including allotment for holidays, vacation and sick leave. The State Board's authority to promulgate regulations for personnel administration encompasses such matters of general administration as salaries, and allotment for vacation, holidays and sick leave. See §§ 63.1-26, 63.1-60, and 63.1-66. Pursuant to this statutory grant of authority the State Board has promulgated regulations for the general administration of local departments of welfare. The Manual of Policy and Procedure for Local Welfare Departments1 ("Manual") provides that the working hours and holidays of local department employees will be consistent with the practice of other governmental agencies in the locality. How annual leave and sick leave are accrued and may be used, however, is expressly stated in the Manual, and is not subject to change by the local government. See Vol. I, Ch. E, at 43.

Conclusion

The authority to promulgate rules and regulations governing personnel administration of local departments of welfare resides with the State Board of Welfare, rather than the local governing body. Employees of the local board of welfare may properly be included under the grievance procedures of the locality. Pursuant to regulations promulgated by the State Board of Welfare and published in the Manual, local boards shall adopt holidays and a schedule of working hours consistent with the practice of other governmental agencies in the locality.

1See Vol. I, Ch. E, at 40.

WETLANDS ACT. PUBLIC NOTICE AND HEARING REQUIRED WHEN PERMITTEE SEEKS MODIFICATION IN CONDITIONS AND LIMITATIONS OF PERMIT.

June 20, 1979

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You ask whether a local wetlands board followed lawful procedure when it modified a permit at an "administrative" meeting. The permit had been granted over a year earlier after a public hearing held pursuant to §§ 6 and 7 of the Wetlands Zoning Ordinance prescribed by § 62.1-13.5 of the Code of Virginia (1950), as amended.

You have advised me that the board follows the practice of holding an administrative meeting on the first Tuesday of each month. These meetings are scheduled on the annual calendar of the local government as to date and location, and are open to the public. There is no compliance, however, with § 6 of the Ordinance, as no agenda items are advertised for these meetings. The board also holds a public hearing or meeting on the third Tuesday of each month. Agenda items for these meetings are advertised in compliance with § 6 of the Ordinance.

The permit in question had been granted over a year earlier, but changed circumstances now prevent the permittees from complying with the conditions
and limitations of the permit. At two recent administrative meetings, the permittees requested modifications in spoil sites and bond requirements. There was to be no change in the encroachment on the wetlands. At the first administrative meeting, the board decided to set the matter for public hearing. At the second administrative meeting, the board reconsidered and granted the modification. Appeal has been taken to the commission by 25 or more freeholders pursuant to § 62.1-13.11(3), alleging the modification was made upon unlawful procedure. See § 62.1-13.13(2)(c). I am advised that these appellants were not at the second administrative meeting, and did not know the modification was then under consideration.

Section 8 of the Ordinance provides that if a permittee fails to comply with the conditions and limitations in an issued permit, the permittee is entitled to a hearing before the permit can be suspended or revoked. Also, under § 9(a) of the Ordinance, the board may grant applications in modified form, but in so doing the board shall base its decision on matters raised through testimony of any person in support of or in rebuttal to the permit application. See Ordinance § 9(a)(1). Without notice pursuant to § 6 of the Ordinance, there may be no opportunity for rebuttal testimony.

Accordingly, I find that the decision of the board was made upon unlawful procedure. The commission should modify or reverse the decision of the board if the commission finds that the substantial rights of appellants have been prejudiced because of the unlawful procedure. See § 62.1-13.13(2).

WET SETTLEMENT ACT. AVAILABILITY AND DISBURSEMENT OF LOAN PROCEEDS BY CERTAIN LENDERS.

July 31, 1978

The Honorable Richard R. G. Hobson
Member, House of Delegates

You have asked a number of questions concerning the interpretation of § 6.1-2.6 of the Code of Virginia (1950), as amended, popularly known as the Wet Settlement Act, governing the availability and disbursement of loan proceeds by certain lenders. All but one of your questions are addressed in an Opinion to the Honorable Joseph V. Gartlan, Member, Senate of Virginia, dated July 17, 1978, a copy of which is enclosed.

Your remaining question concerns the statutory requirement that the lender have proceeds available for disbursement within three days. You ask whether the word "available" means that the lender must have the proceeds available in its own account ready to disburse to the settlement attorney, or whether it means that the lender must have proceeds in the hands of the settlement attorney.

The statute provides that mailing the proceeds to the borrower or the settlement agent constitutes disbursement if either requests disbursement by mail. Obviously the proceeds in cash, or its equivalent, can neither be mailed to the borrower or received by the person responsible for the closing or settlement of the transaction while they are still in the lender's own account. Therefore, it is my opinion that the word "available" necessarily contemplates that the proceeds will be in the hands of the settlement attorney or mailed in accordance with the statute.
Section 6.1-2.6 also prohibits the charging or collection of interest by the lender until the proceeds have been disbursed.

WET SETTLEMENT ACT. AVAILABILITY AND DISBURSEMENT OF LOAN PROCEEDS BY CERTAIN LENDERS.

November 3, 1978

The Honorable Peter K. Babalas
Member, Senate of Virginia

You ask whether § 6.1-2.6 of the Code of Virginia (1950), as amended, popularly known as the Wet Settlement Act, is violated if an attorney closes loans on residential property by issuing postdated checks from his escrow account prior to the time the check received from the lender has been collected. You further inquire whether the lender may refuse to approve the attorney for future closings where, in the above circumstances, the attorney refused to disburse until the check had been collected. You indicate that the lender provides the proceeds of the loan by checks and not in cash or its equivalent and that the lender charges interest to the borrower from the time the closing attorney receives the check from the lender.

Disbursement of Proceeds

If the lender does not provide the proceeds of the loan in cash or its equivalent and charges interest to the borrower starting on the date the closing attorney receives the lender's check, it is my opinion that the lender is in violation of § 6.1-2.6. A check which is not a certified or cashier's check would not be cash or its equivalent. See Opinion to the Honorable Joseph V. Gartlan, Jr., Member, Senate of Virginia, dated July 17, 1978, a copy of which is enclosed.

Failure to Approve the Attorney

Section 6.1-330.23 states that in the case of loans on one to four family residences, the lender may not require the borrower to use the services of a particular attorney, but that the lender has the right to approve any attorney selected by the borrower as long as the approval is not unreasonably withheld. If the borrower selects an attorney and the lender's refusal to approve that attorney is because the attorney will not issue checks on his escrow account prior to the time the lender's check has cleared, I am of the opinion that this refusal is unreasonable, and that the lender is in violation of § 6.1-330.23.

WET SETTLEMENT ACT. AVAILABILITY AND DISBURSEMENT OF LOAN PROCEEDS BY CERTAIN LENDERS.

July 17, 1978

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia
You have asked a number of questions concerning the interpretation of the provisions of § 6.1-2.61 of the Code of Virginia (1950), as amended, popularly known as the Wet Settlement Act (the "Act") which pertains to availability and disbursement of loan proceeds by certain lenders.

1. You ask whether § 6.1-2.6 affects all loans made by lenders engaged in the business of making first mortgages or deed of trust loans, other than construction loans or only loans secured by real estate containing not more than four residential units.

Section 6.1-2.6 applies to "any lender engaged in the business of making first mortgage or deed of trust loans, other than construction loans, secured by real estate containing not more than four residential dwelling units..." This means that application of the Act is limited to first mortgage loans secured by real estate containing not more than four residential units.

2. You ask whether a loan secured by a combination of commercial and residential property but containing not more than four residential units is subject to the Act.

Since there is no provision in the Act for excluding loans from coverage when the residential units are combined with commercial units, such a loan would be subject to the provisions of the Act.

3. You ask whether the term "proceeds of the loan" as used in the Act means the entire loan amount or the amount reduced by the lender's charges.

The term "proceeds of the loan" applies in the context of the Act to money transferred to the settlement agent by the lender for disbursement to the holders of prior liens and the seller. Thus absent any apparent intent by the General Assembly to define "proceeds" to mean the entire loan amount, the term "proceeds" as used in § 6.1-2.6 may refer to the amount of the loan to which the borrower is entitled after the lender's charges are deducted.

4. You ask at what time and at what place funds "available for disbursement." You present three examples and pose the question of whether disbursement has been made in a timely manner under the Act in each example.

"Example (a): The settlement agent receives the loan proceeds on Monday morning. Settlement takes place Monday afternoon. The settlement agent records on Tuesday. The settlement agent pays the seller and prior mortgagees on Wednesday."

In Example (a) the disbursement to the seller has been made properly since the settlement agent has made disbursement within 3 days of receipt of the loan proceeds and after having recorded.

"Example (b): The facts are the same as in (a) above except settlement agent does not record until Friday and effects payouts immediately following recording."

In Example (b) the settlement agent does not disburse the proceeds until four days after receipt, and this is in violation of the Act. The Act requires disbursement within three days as long as a first lien is available upon disbursement. Since the Act imposes the penalty on the lender rather than on
the settlement agent, the lender may find it advisable to provide by contract for reimbursement by the settlement agent for penalties imposed on the lender as a result of actions by the settlement agent.

It should be noted that disbursement is not required if a first lien is not available upon disbursement. This means that the Act is written so as to justify a delay in disbursement when a first lien would not in fact be available upon disbursement. In most cases this problem should arise only when a lien is placed on the property during the period when the lender has made available the proceeds and the lender's first lien has not been recorded.

"Example (c): The settlement agent closes the transaction on Monday and the executed papers are delivered to the lender for review. The settlement agent receives the approved papers from the lender on Wednesday with the proceeds. Interest is charged from this date. The settlement agent records on Thursday. The settlement agent pays seller, prior mortgagees and others on Friday-within 3 days of receipt."

In Example (c) the settlement agent has disbursed properly since he has done so within 3 days of receipt of the proceeds but after recording.

In connection with the above examples, you ask what event triggers the running of the three business-day period within which the disbursement to the borrower must be made. In my opinion, the disbursement must be made within 3 days of receipt by the settlement agent of the loan proceeds in cash or its equivalent, assuming that a first lien will be available upon disbursement.

5. You ask which, if any, of the following are the equivalent of cash: a bank check, a sight draft, a certified check, a cashier's check, a wire transfer.

The word "cash" is defined in Webster's Third New International Dictionary as "[r]eady money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)...broadly: bank deposits and certain readily negotiable paper (as checks, drafts, notes, bearer bonds, coupons)." Such a broad definition would seem to include all of the means of payment listed above were it not for the rule in Virginia that "words in a statute must be given their ordinary meaning unless a contrary meaning is clearly intended." McCarron v. Commonwealth, 169 Va. 387, 394, 193 S.E. 509, 512 (1937). I think that such a contrary meaning is clearly intended in the Act, for the ability of the settlement agent to disburse within three business days presupposes that the lender must give the settlement agent the proceeds in a form that does not lend itself to the use of a stop-order and which will clear soon enough to allow him to disburse from his trust account without doing so on uncollected funds. Of the examples you list, only the certified check, cashier's check and wire transfer have these characteristics, and therefore only they are the equivalent of currency.

6. You ask whether the loan security instrument can be a duly recorded first lien prior to the time when discharge or release of record has been completed with respect to prior mortgages, judgments, mechanics' liens, taxes, etc.

The term "first lien" ordinarily means a lien prior to all other liens. 17 Words and Phrases First Lien and Charges at 105. In the absence of evidence that the General Assembly intended to apply any other meaning in the Act, I
must conclude that it adopted the ordinary meaning of the term, so that a lien
does not constitute a first lien unless that lien has precedence over all
pre-existing liens of record.

You ask whether, if the answer to the preceding question is in the
negative, recording of the releases must be effected within the three-day
period. Since the Act does not address the question of when the settlement
agent is to record these releases, I cannot conclude that the agent is
required by this statute to do so within the three-day period, although it
would be prudent to do so. The lender is protected because disbursement is
made only when he will have a first lien upon disbursement.

7. Your final question concerns the language of the final paragraph of
the Act, which provides:

"Any lender violating the provisions of this section shall, in lieu
of any other penalty provided by law, forfeit to the borrower a sum
equal to twice the amount of one day's interest for each day of
violation, not to exceed a total penalty of thirty days' interest,
and any interest charged or collected before disbursement of such
loan proceeds. In addition, such lender shall be liable to the
borrower for the borrower's reasonable attorneys' fees, if the
services of an attorney are required to enforce such forfeitures."

You ask what the total penalty is for violation of the Act.

It is my opinion that the maximum penalty possible is thirty days'
interest (twice the interest for each of fifteen days) plus interest charged
or collected before disbursement of loan proceeds. In addition to this, the
Act provides that the lender is liable to the borrower for attorneys' fees.
Since the Act includes the provision that the lender must have upon
disbursement a duly recorded first lien with the language setting forth the
duty of the settlement agent to disburse within three business days of receipt
of the proceeds, it is my opinion that the duty to record that first lien is
that of the settlement agent and not that of the lender. Consequently, failure
to record the first lien should not be a violation of the provisions of the
Act by the lender.

1This statute provides in its entirety as follows:
"Any lender engaged in the business of making first mortgage or deed of
trust loans, other than construction loans, secured by real estate containing
not more than four residential dwelling units, shall have the proceeds of the
loan available for disbursement, in cash or its equivalent, and all of the
proceeds due to be disbursed shall be disbursed by the person responsible for
the closing or settlement of the transaction to the party or parties to whom
the proceeds are due and payable within three business days after such
proceeds are received; provided such lender has upon disbursement a duly
recorded first lien on the real estate which is security for payment of the
loan. No lender shall charge or collect interest on the principal of such
first mortgage or deed of trust loans until the proceeds of the loans are
disbursed to the borrower; however, disbursement to the borrower's attorney,
or to the person responsible for the closing or settlement of the transaction,
or to such other person as may be duly designated by the borrower, shall
constitute disbursement to the borrower under this section. If the borrower
or the borrower's attorney, or the person responsible for the closing or
settlement of the transaction requests that the proceeds of the loan be mailed
to the person responsible for the closing or settlement of the transaction, such mailing, postage prepaid, shall constitute disbursement to the borrower under this section.

Any lender violating the provisions of this section shall, in lieu of any other penalty provided by law, forfeit to the borrower a sum equal to twice the amount of one day's interest for each day of violation, not to exceed a total penalty of thirty days' interest, and any interest charged or collected before disbursement of such loan proceeds. In addition, such lender shall be liable to the borrower for the borrower's reasonable attorneys' fees, if the services of an attorney are required to enforce such forfeitures.

WILLS. PROBATE. SELF-PROVED CODICIL MAKES WILL SELF-PROVED.

November 14, 1978

The Honorable James E. Hoofnagle, Clerk
Circuit Court of Fairfax County

You have asked whether it is necessary to prove a will that has been republished by a codicil, to which is attached a self-proved acknowledgment executed in accordance with § 64.1-87.1 of the Code of Virginia (1950), as amended, when the will itself is not self-proved.

Proof of Wills and Codicils Generally

A valid codicil which refers to a will in such a way as to leave no doubt as to the identity of the will, and which contains words expressing an intent to incorporate the will by reference, subject to whatever provisions or modifications as may be contained in the codicil, acts as a republication of the will. 20 M. J. Wills § 52 (1952); 79 Am.Jur.2d Wills § 674 (1975). The effect of such a republication is to change the effective date of the will to the date of the codicil, so that both instruments are to be considered as speaking at the same date and taking effect at the same time. Section 64.1-72; 20 M. J., supra; 79 Am.Jur.2d, supra, at § 696. Furthermore, "a duly executed codicil may have the effect of establishing a will which has not been duly executed." Hamlet v. Hamlet, 183 Va. 453, 464, 32 S.E.2d 729, 733 (1945). In an Opinion of this Office rendered prior to the enactment of § 64.1-87.1, it was held that if a will is presented for probate, a codicil to that will must also be probated at the same time. This holding was based on the general principle that all of the papers must be produced to determine what is the last will and testament of the deceased. See Report of the Attorney General (1971-1972) at 484(1).

Effect of Self-Proving Acknowledgments

In another prior Opinion of this Office to the Honorable Bertha R. Drinkard, Clerk of the Corporation Court for the City of Bristol, dated October 11, 1972, and found in Report of the Attorney General (1972-1973) at 526(2), it was held that the requirements of § 64.1-87.1 speak to the date that the testamentary instrument is presented for admission to probate, and the fact that the instrument was executed prior to the effective date of § 64.1-87.1 did not affect the validity of the attached self-proved acknowledgment. Moreover, § 64.1-87.1 provides that a will may be self-proved "at the time of its execution or at any subsequent date." (Emphasis added.) Since the execution of a valid codicil to a will constitutes a republication of the will, the will is governed by § 64.1-87.1 which, though enacted...
subsequent to the execution of the will, was operative when the codicil was executed. 79 Am.Jur.2d, supra, at § 696. Thus, I am of the opinion that a duly executed codicil, to which is attached a self-proved acknowledgment, operates to give the benefit of § 64.1-87.1 to the will which was executed without such acknowledgment.

Section 64.1-87.1. "A will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, attached or annexed to the will in form and content substantially as follows:

[Form of certificate of acknowledgment omitted.]

The sworn statement of any such witnesses taken as herein provided shall be accepted by the court as if it had been taken ore tenus before such court.

All certificates to wills made pursuant to this section and taken before an officer authorized to administer oaths under the laws of this State on or before June one, nineteen hundred seventy-seven, so long as they were executed in this State, and such officer has failed to attach or affix his official seal thereto, shall be held, and the same are hereby declared, valid and effective in all respects if otherwise in accordance with the provisions of this section."

WITNESSES. DEFENDANT RESPONSIBLE FOR EXPENSES INCURRED IN SUMMONING OUT-OF-STATE WITNESSES ON HIS BEHALF.

August 16, 1978

The Honorable Lelia D. Bickers, Clerk
Greene County Circuit Court

You have asked whether in a criminal prosecution, a defendant who has summoned out-of-state witnesses is responsible for the payment of such witnesses' attendance and mileage expenses in the event that the accused is ultimately acquitted.

Section 19.2-329 of the Code of Virginia (1950), as amended, provides that §§ 14.1-190 through 14.1-194 shall apply to persons summoned as witnesses in a criminal case, except that the court shall fix the compensation for the attendance and travel of out-of-state witnesses. Once the court has made a determination of the compensation, then § 14.1-191 becomes the governing statute. That section sets forth the procedure under which witnesses are compensated for their services. In particular, § 14.1-191 provides that "[t]he sum to which a witness is entitled shall be paid [with certain stated exceptions] by the party for whom the summons issued."

Therefore, it is my opinion that the accused would be the party responsible for the reimbursement of the expenses incurred by those witnesses summoned on his behalf. This conclusion is in accord with previous Opinions from this Office. See Report of the Attorney General (1966-1967) at 108; Report of the Attorney General (1961-1962) at 279. See also Report of the Attorney General (1967-1968) at 79; Report of the Attorney General (1963-1964) at 93.
I would add that the above conclusion would be the same irrespective of whether the defendant ultimately was convicted or acquitted of the alleged offense. In the event a defendant is found not guilty, he cannot properly be made to pay the costs "incident to the prosecution." See § 19.2-336; Report of the Attorney General (1968-1969) at 46; Report of the Attorney General (1967-1968) at 78. In this regard, however, it is important to determine what expenses can be characterized as "costs." As the Supreme Court of Virginia stated in Anglea v. Commonwealth, 51 Va. (10 Gratt.) 696 (1853):

"[Costs] are exacted simply for the purpose of reimbursing to the public treasury the precise amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the state and its violated laws...The right to enforce payment of them is...vested in the commonwealth for the sole purpose of replacing in the treasury the amount which the defendant himself has caused to be withdrawn from it." 51 Va. at 701.

I am of the view that any expense incurred in bringing an out-of-state witness to testify on the defendant's behalf is an outlay unrelated to the expenses suffered by the Commonwealth in her prosecution of the case. Rather, it is simply a cost to be borne by the defendant as part of the overall expenditures for his defense. Accordingly, since the defendant's summoning of an out-of-state witness is not a "cost" "incident to the prosecution..." he would be responsible for the compensation of such witness, regardless of the eventual determination as to his guilt or innocence.

1Section 19.2-329 states in part: "Sections 14.1-190 to 14.1-194, inclusive, shall apply to a person attending as a witness, under a recognizance or summons in a criminal case...except that a person residing out of this State, who attends a court therein as a witness, shall be allowed by the court a proper compensation for attendance and travel to and from the place of his abode, the amount of the same to be fixed by the court."

WITNESSES. THREATS. NO VIOLATION OF § 18.2-460 WHERE WITNESS THREATENED BY SPECTATOR IN COURTROOM AFTER TRIAL.

September 28, 1978

The Honorable Steven F. Gibson
Commonwealth's Attorney for Buchanan County

You have asked whether the following actions would constitute unlawful intimidation of a witness.1 At the conclusion of a felony jury trial, the jury returned a guilty verdict against the defendant. After the trial court pronounced sentence in accordance with the jury's verdict, it adjourned until the next morning. Immediately thereafter, a spectator approached a witness who testified for the Commonwealth and who had remained in the courtroom, and threatened his life. At the time of the threat, the judge was still in the courtroom, but apparently failed to notice the actions of the spectator.

It seems clear that the witness in the present case had discharged his duties at the time that he received the threat from the spectator. The trial court having pronounced its sentence in accord with the jury's verdict, and the court having been adjourned, the witness's function had thus come to an
end. Section 18.2-460, by its own terms applies only to actions directed
against witnesses who are discharging their duties, and to actions which in
some manner disrupt a court's administration of justice.

I conclude that the present case would not represent a violation of
§ 18.2-460 since the threat did not relate to the discharge of a witness's
duty; moreover, it could not be characterized as obstructing or impeding
the administration of justice in a courtroom. The administration of justice
encompasses the trial of cases in the court, their judicial determination and
disposition by orderly procedure, and the putting of such judgments into
effect. It would seem self-evident that in the absence of a judicial
function, "there could hardly be a disruption of judicial business
constituting an obstruction of justice."

However, although the conduct you describe would not appear to violate
§ 18.2-460, it would seem to represent a ground for a summary finding of
contempt of court under § 18.2-456(2). This provision authorizes such an
action in the case of threats of violence to a witness attending or returning
from a court proceeding. Additionally, depending on the precise nature of the
facts in question, the spectator's threat might constitute a violation of two
other statutes of the Code. First, it might be viewed as an assault,
punishable under § 18.2-57. Second, the spectator's conduct could be construed
as violating § 18.2-416, which prohibits a person from using violent abusive
language to another, in such a way as is reasonably calculated to provoke a
breach of the peace.

1Section 18.2-460 of the Code of Virginia (1950), as amended, provides, in
part: "If any person, by threats, or force, attempt to intimidate or impede a
...witness...in the discharge of his duty, or to obstruct or impede the
administration of justice in any court, he shall be deemed to be guilty of a
Class 1 misdemeanor."

2See United States v. M'Leod, 119 F. 416 (C.C.N.D. Ala. 1902); Melton v.
the Attorney General (1966:907) at 112.


Massey v. City of Macon, 97 Ga.App. 790, 104 S.E.2d 518 (1958); State v.
Ballard, 294 S.W.2d 666 (Mo. 1956).

5Section 18.2-456(2) provides for a summary finding of contempt of court
for "threats of violence...to a...witness...going to, attending or returning
from the court, for or in respect of any act or proceeding had or to be had in
such court...." See State v. Totten, 117 W.Va. 209, 185 S.E. 221 (1936).

ZONING. ORDINANCES. "CONDITIONAL" ZONING. OWNER'S VOLUNTARY PROFERRING MAY BE
AMENDED AT HEARING BEFORE GOVERNING BODY WITHOUT READvertisement, SUBJECT TO
LIMITATIONS.

June 18, 1979

The Honorable George R. St. John
County Attorney for Albemarle County

You ask whether a governing body may act favorably upon an amended
voluntary proferring for "conditional" zoning, submitted pursuant to
§ 15.1-491.2, where the owner seeks to amend the proffering at the hearing before the governing body. Section 15.1-491.2 requires that proffers for "conditional" zoning be voluntary, for reasonable conditions, and made in writing prior to a public hearing before the governing body. See also § 15.1-491(a). The concept of flexibility without coercion, and § 15.1-491.2 is partially for protection of the owner, but not entirely.

Flexibility means an increased public willingness to allow rezoning, provided certain conditions are met. See § 15.1-491.1 and Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated July 28, 1977, found in Report of the Attorney General (1977-1978) at 515. The proffer serves to fix the conditions that may be exchanged for public consent to the rezoning.

Your inquiry concerns two fact situations, one involving an owner error, the other involving an owner concession.

Amendment - Owner Error

In the first fact situation, the proffer includes a plan for a commercial development, however, the owner asks at the hearing to amend the proffer because portions of the plan are infeasible.

Amendment - Owner Concession

In the second fact situation, the proffer is for 15 units per acre, when the rezoning requested would otherwise allow 20 units per acre. The existing classification allows only 80 units per acre. At the public hearing, it appears the proffer may be rejected for a variety of reasons, and the owner asks to amend the proffer to 12 units per acre.

Conclusion

Under § 15.1-493, the governing body may ordinarily allow amendments, without a rehearing after notice, so long as no land is rezoned to a more intensive use classification than was contained in the public notice. The notice gives the most intensive use to be allowed. All concerned may prepare accordingly. This section applies to conditional zoning as well.

Prior Opinions of the Attorney General have recognized the general rule that a requirement of advertisement and a hearing prior to amendment of an ordinance does not preclude amendments at or after the hearing without readvertising. See Reports of the Attorney General (1967-1968) at 31; (1957-1958) at 194; (1956-1957) at 278.

Accordingly, I find that in both of the cases you describe the amendments may be made at the hearing without republication of the proposed amendments.

Footnote:

1 Conditional zoning is defined in § 15.1-430(q) of the Code of Virginia (1950), as amended, as: "[P]art of classifying land within a governmental entity into areas and districts by legislative action, the allowing of reasonable conditions governing the use of such property, such conditions being in addition to the regulations provided for a particular zoning district or zone by the overall zoning ordinance."
This year the format of the headnotes for the Opinions of the Attorney General has been changed. As in previous editions, the main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.

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