OPINIONS

of the

ATTORNEY GENERAL

and

REPORT

to the

GOVERNOR OF VIRGINIA

From July 1, 1979 to June 30, 1980

Commonwealth of Virginia

Office of the Attorney General

Richmond

1980
# REPORT OF THE ATTORNEY GENERAL

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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, 1979, through June 30, 1980. The Report contains official Opinions which were rendered during the year in order to promote 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 1978-1979 Report.

Federal intrusion into legitimate State functions continued to be a major concern of this Office during the past year.

In a case before the United States Supreme Court, we successfully defended the Supreme Court of Virginia on an issue that threatened the fundamental independence of our judiciary.

In *Supreme Court of Virginia v. Consumers' Union*, the question was whether the act of adopting a rule later determined to be unconstitutional justified the awarding of attorneys' fees against the court. The legislative immunity of the Virginia Supreme Court was upheld 8-0, with one abstention.

In *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, I argued that standards for exclusion of the public and press from a state criminal trial should be set by the states themselves.

I have proposed legislation to the General Assembly to set such standards for trial judges under Virginia law. Public criminal trials are an important part of our system of justice, and the public and press should under most circumstances have free access to trials. I believe that the public interest is best served by determination through the legislative process of the circumstances when closure is required to assure the accused of a fair trial.

In January, the United States District Court in Big Stone Gap rendered a long-awaited decision that several key sections of the 1977 Surface Mining Control and Reclamation Act are unconstitutional under the Tenth and Fifth Amendments to the United States Constitution.

Of particular importance was the court's finding that the Act intrudes upon traditional state powers to regulate land use. The court enjoined enforcement of those portions of the Act which required restoration of mined lands to original contour and prohibited federal closing of mines without a hearing.

The decision has been appealed directly to the Supreme Court. I expect to argue the case early in 1981.
REPORT OF THE ATTORNEY GENERAL

In February, my Office filed suit in federal court in Roanoke to prevent the takeover of Virginia's job safety program by the Occupational Safety and Health Administration (OSHA).

The Commonwealth is one of several states which have chosen to enforce safety standards themselves. Our regulations allow due process through Virginia's courts. But OSHA has insisted that Virginia establish a new administrative court system. The suit which we have filed asserts a Tenth Amendment right for Virginia to select its own enforcement mechanism.

Late in June, we filed suit in U. S. District Court in Washington, D.C., on behalf of Virginia and twelve other states, objecting to personnel levels which OSHA recently established for state occupational safety and health plans.

Ironically, nothing proposed by OSHA would actually improve Virginia's safety program, which ranks above the nation's average. We will continue to oppose this kind of regulation for regulation's sake.

CRIMINAL LAW

In the area of criminal law, my staff has continued to oppose endless legal tactics employed to delay the implementation of death sentences. Since Virginia's capital punishment statutes were amended in 1977, thirteen persons have been sentenced to death. Two convictions were reversed after automatic review by the Supreme Court of Virginia, but all the capital cases which have reached the Supreme Court of the United States have been upheld as constitutionally imposed.

The prospect of irreversible punishment dictates scrupulous judicial review of capital convictions. However, unlimited stays of execution undermine the public confidence which is vital to our system of justice. When due process of law has been accorded a convicted murderer, justice requires that the punishment be swiftly and humanely carried out.

As the population of Virginia's jails and prisons passed 13,000, litigation related to criminal convictions increased again this year. My Office defended the Commonwealth in 969 petitions for habeas corpus, 1,161 prisoner complaints and 100 appellate cases in State and federal courts. Prisoner suits seeking redress under the Civil Rights Act occupy five attorneys, whose role includes advising the Department of Corrections in an effort to forestall litigation and representing the Department's interests when legal issues arise.

These suits have proliferated since the early 1970's, and Virginia has one of the heaviest prisoner caseloads in the nation. Most such cases are pro se petitions and are resolved without a hearing, but the federal Attorneys Fees Awards Act of 1976, which permits the awarding of fees and costs to the prevailing party in a civil rights action, has resulted in a proliferation of such cases. Attorneys have become especially active in suits in which inmates have been injured by themselves or other inmates and seek money damages from prison and jail officials.
I have continued to be an advocate for more vigorous, more fair, and more effective law enforcement. In addition to our new anti-bidrigging statutes, adopted upon my recommendation in 1980, I proposed to the General Assembly an anti-crime package which included a uniform witness immunity act, establishment of a statewide grand jury, and an act opening special grand jury records to law enforcement officials for prosecutorial purposes.

I also made a new proposal to the General Assembly concerning uniform sentencing. This proposal would narrow the range of sentences that a judge or jury can give for any one class of felony or misdemeanor. It would also eliminate traditional forms of parole, including the controversial six months early release and discretionary parole.

**ENVIRONMENTAL PROTECTION**

In addition to our landmark challenge to the federal Surface Mining Act, my Office has also continued to represent Virginia's Department of Conservation and Economic Development in challenges to various federal regulations issued under the Act. Two decisions have been issued by the United States District Court for the District of Columbia. These rulings produced mixed results and it is expected that all parties will take further appeals.

In February, representing the State Air Pollution Control Board before the United States Court of Appeals for the District of Columbia, we presented the Board's challenge to the EPA national air quality standard for ozone. The Board believes that full implementation of that standard could cost Virginia millions of dollars without any corresponding benefit. The case is awaiting decision.

Federal litigation for recovery of damages and cleanup costs incurred by the State from the February 1976 and February 1978 Chesapeake Bay oil spills is continuing. My Office recently won an important decision in the 1976 oil spill case in the United States District Court for the Eastern District of Virginia. The decision established that Virginia has a right to recover for damages to natural wildlife resources as part of its duty to protect and preserve the public interest in those resources.

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. A number of injunctions were obtained in State and federal courts requiring compliance with NPDES permits. My Office obtained a full recovery for the 1979 fish kill in the Piney River and obtained an injunction requiring the safe disposal of the copperas spoils on the U. S. Titanium site in Nelson County.

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

HEALTH, WELFARE, MENTAL HEALTH

My Office has increased its efforts to monitor effectively the facilities licensed and regulated by the Department of Welfare. We have provided major assistance to the Department's Support Enforcement Program and have been responsible for a large increase in monies recovered for the State.

We have been involved in an increasing amount of litigation concerning the State Health Department. This litigation centers on reimbursement disputes in Medicaid or certificate of public need cases. Another area of increased activity has been the provision of legal services concerning various regulations on solid and hazardous wastes.

The Department of Health also required our assistance with the proposed recodification of State law on hotels, restaurants, and camps which will be submitted to the 1981 General Assembly. In addition, as the result of the 1979 recodification of the State's general statutes concerning health, the Office has spent considerable time assisting with the revision of Department rules and regulations.

The Department of Health Regulatory Boards, which includes the Boards of Medicine, Nursing, Dentistry, Pharmacy, Optometry, Funeral Directors and Embalmers, and Veterinary Medicine, continues to require various legal services. Under a recent staff realignment, a full-time attorney is provided to enforce Virginia's medical practice acts. In the past year, my Office has prosecuted more such cases than ever before. We also represented these boards in all appeals of administrative orders and other civil litigation in the State courts, and we assisted several boards in rewriting their rules and regulations.

The Department of Mental Health and Mental Retardation has been involved in a number of major civil rights actions. In addition to representing the Department in those matters, the Office has developed a manual which is to be distributed to local community services boards and their service providers. These materials fill a need for general discussions of questions which boards face on a daily basis. My staff has also been actively involved in developing community resources to provide forensic services to the courts.

TAXATION

Hundreds of citizens have written to this Office about the tax system, including many complaining about inequities in the tax structure. We have examined these complaints and have aided numerous citizens in understanding the legal processes through which redress may be sought.

The Office has received more than 75 requests from local government officials for opinions concerning the administration of local tax structures and related matters. My staff has also aided these officials by providing advice
and assistance in local matters through telephone contacts, informal letters and service as lecturers in continuing education programs.

My Office has challenged two tax-related decisions of the State Corporation Commission (SCC) on matters of consumer interest. Local government officials also received our assistance in an amicus curiae brief supporting the methodology for valuations of rental property for real estate assessment purposes.

CONSUMER PROTECTION

The protection of Virginians from fraudulent business practices remains an important priority for this Office. In this effort we have enjoyed statewide cooperation from retail business organizations.

In the past year, my Office took several important actions under the Virginia Consumer Protection Act. One action involved the International Gem Finders Society. We requested the company to substantiate questionable claims which it was making about the quality, rarity and value of "gem stones" being sold by mail order. The Office worked in cooperation with the Roanoke Better Business Bureau and the United States Postal Inspection Service and secured from the company an assurance that all of its prepaid advertisements containing misleading and deceptive claims would be cancelled. The company also agreed to allow all new advertising to be reviewed by the Office until the Postal Inspection Service concludes administrative hearings involving the company's mail order business. This assurance was incorporated in an order entered by the United States District Court for the Western District of Virginia.

My Office also investigated complaints alleging misrepresentation by Associated Consumer Club, Inc. The company operates a "buying club" in which memberships are sold on a yearly basis on the representation that members will then be able to order directly from manufacturers at a discount. Immediately after my Office began its investigation, the company sought reorganization under the federal Bankruptcy Act. A request was made by this Office to the United States trustee that the company be required to notify, as unsecured consumer creditors, those people who had purchased memberships, and that the company's president be removed from "debtor in possession" status. Upon motion by the United States trustee, an order was entered by the bankruptcy court accomplishing both of these requests.

An action for contempt of a decree entered in 1975 was brought against J. Eugene Hunsberger, proprietor of the "Hunsberger Biology Research Laboratory" in Richmond. Mr. Hunsberger claimed that the "Static-Air Floor Insulation" method which he sells could reduce medical expenses, illness, and indoor air pollution. It was alleged that these claims violated the provisions of a decree entered by the Circuit Court for the City of Richmond requiring Hunsberger to cease claims that his allergy-proofing services brought relief from specific illnesses or was a new discovery. A consent decree was entered in which Hunsberger was required to cease and
desist from advertising that the "Static-Air Insulation Method" reduces medical and doctoring expenses, and from stating that in "hundreds" of case experiences individuals and families have ceased to be ill after using the "Static-Air Insulating Method."

An action for an injunction, restitution to several hundred consumers and costs was initiated by my Office in Commonwealth v. Natural Figure, Inc., et al., arising from the sale of health spa memberships for facilities which never opened. The motion for judgment alleged that the companies involved and their officers advertised goods and services with the intention not to sell them as advertised.

In another important action this past year, my Office participated in consolidated appeals to the Virginia Supreme Court of orders of the SCC concerning credit life insurance. The Court's ruling resulted in a significant cost reduction for such insurance.

Credit life insurance rates in Virginia have been among the highest allowed in the nation. The rate charged in Virginia from 1973 until this case had been $.78 per $100 of debt. In many other states the rate was less than $.78 and in some situations there was no charge to the debtor for credit life insurance because it is considered to be so advantageous to the creditor. The regulations issued by the SCC, in addition to imposing uniform reporting requirements for companies selling credit life insurance in Virginia, have the effect of lowering the rates charged for such insurance. My Office argued that the Commission has the authority to promulgate extensive regulations governing the sale of credit life insurance in Virginia.

In its order on these consolidated appeals, the Virginia Supreme Court affirmed the power of the SCC to issue such regulations and substantially affirmed the regulations themselves. On the basis of the evidence presented at hearings before the Commission, the reduction would result in at least an $8,690,000 per year savings to Virginia citizens.

In increasing numbers, citizens are looking to the Attorney General's Office for information concerning such varied problems as harassment by debt collectors, credit application and credit reporting problems, landlord-tenant disputes, how to use the general district court and how to obtain information about business opportunity offerings. During the past year, we responded to over 1,000 inquiries by sending informational materials or referring citizens to other State agencies. Various consumer education presentations have been made by members of my staff.

PUBLIC UTILITIES

In order to ensure adequate representation of Virginia's citizens in public utility matters before the SCC, my Office has continued to participate in every major case (and in numerous minor ones), to present expert testimony to the Commission, and to seek the fairest rates possible for Virginia's utility customers.
The 1979 Session of the Virginia General Assembly directed the SCC to develop a procedure for investigating the earnings of public utilities. This procedure, a financial operating review, allows utilities to request rate relief based on the company's financial condition for the previous year.

During the past year, four electric utilities requested rate relief under this program. In June 1980, the Commission considered the Virginia Electric and Power Company's request for $72.6 million in additional revenue. My Office presented expert testimony to show that no rate increase was needed. Based on several suggested accounting adjustments, the testimony we presented indicated that the company was earning a reasonable rate of return. In addition, the Office argued that the legislative action was not intended to allow electric utilities a guaranteed rate of return. Instead, the Commission was urged to balance the interest of consumers with that of the utility by considering the number of non-fuel related increases already awarded to the Virginia Electric and Power Company over the past year.

My Office also participated in financial operating review cases involving Old Dominion Power Company, Potomac Edison Company, and Potomac Electric Power Company.

In the fall of 1979, the Office participated in financial operating review cases before the SCC involving the following gas companies: Virginia Electric and Power Company, Portsmouth Gas Company, and Washington Gas Light Company.

In the first quarter of 1980, the SCC heard telephone utility financial operating review cases involving the following companies: Continental Telephone Company of Virginia, General Telephone Company of the Southeast, and United Inter-Mountain Telephone Company. In the Continental case, we were successful in urging the Commission to deny the entire $2.8 million requested rate increase. We argued that the company had failed to prove that its financial condition warranted rate relief.

The Office also participated in eighteen fuel factor cases involving the six investor-owned electric utilities serving Virginia. Hearings were held in December 1979, to determine a 1980 levelized fuel factor for these companies. We urged the SCC to adopt the most conservative projections possible, in order to minimize the high burden already placed on ratepayers. In its order, the Commission reduced Virginia Electric and Power Company's projected 1980 Virginia jurisdictional fuel cost of $692.5 million by approximately $35 million. In addition, as we urged, the Commission did not adopt the company's 1980 projected generating unit performance levels for certain coal units, thus lowering the company's projected fuel costs.

My Office will continue to participate in electric utility fuel factor quarterly and annual hearings, to insure that consumers pay for prudently incurred fuel costs only. We will also continue to participate actively in proceedings before the SCC in which innovative rate design and other standards are considered under the Public Utility Regulatory Policies Act of 1978. As a possible solution to our
long-term energy problems, the Office has been a major proponent of time-of-day rates and load management techniques for electric utilities.

The Commission is currently considering electric and gas utility service standards in the following areas: utility advertising, termination of service, information to consumers, automatic adjustment clauses, and master metering. The termination and advertising standards involve Virginia's thirteen gas companies, in addition to the twenty electric utilities and cooperatives. The remaining three standards involve Virginia's fourteen electric cooperatives and six investor-owned electric utilities. In each of these cases, we have urged the SCC to adopt standards which are most fair to consumers.

EDUCATION

The Attorney General has initial responsibility for the legal affairs of the fifteen public colleges and universities, the 23 two-year colleges, the State Council of Higher Education, the Virginia Education Loan Authority, the State Education Assistance Authority and the Department of Education.

My Office has assisted these agencies in the preparation and review of rules and regulations, and provided them with legal advice on a daily basis. All contracts entered into by these public authorities are also being reviewed. The Office has also been active in providing advice to local school authorities at the elementary and secondary school levels with regard to fulfilling their legal responsibilities to the citizens of the Commonwealth. With increasing frequency, we have prepared formal opinions involving educational matters.

Litigation related to education issues has continued to be a major focus for us this past year. The Commonwealth's interests in public education have been successfully represented in such diverse areas as civil rights, personnel grievances and contract disputes. Consistent with a national trend, the Commonwealth has experienced a marked increase in litigation involving the rights of handicapped public school students to an appropriate, free public education. The Office has taken an active role in advising agencies and institutions on the need to fulfill their legal obligations in this regard.

A systematic effort is being made to keep public educational authorities abreast of developments in the law. Workshops have been developed and lecturers offered to public agencies on a continual basis. We have prepared a procedural manual for public distribution informing all concerned about the due process required in the placement of handicapped children in educational programs.

During the General Assembly session, I proposed legislation to give educators a greater voice in disciplining students and to make parents accountable for their children's acts of vandalism. I sought the passage of this legislation because a teacher should have the school's backing when a student needs to be removed from the class to avoid disruption. A lack of discipline erodes public confidence in
our schools and undermines efforts to maintain high quality education.

WHITE COLLAR CRIME

The Attorney General provides a wide range of services to the Commonwealth and her citizens to help ensure that they are not subjected to anti-competitive conduct which artificially inflates the prices of goods and services.

The Office's unprecedented involvement in the investigation of State purchasing procedures, which was discussed in last year's Report, is in its final stages. Our efforts have resulted in the recovery of over $100,000 in damages and the criminal convictions of several individuals. An outgrowth of these actions was my proposal of a State Governmental Frauds Act and its passage by the General Assembly. Among other things, this Act (which became effective July 1, 1980) made bidrigging on government contracts a felony.

An important recent activity has been the initiation by my Office of an investigation into bidrigging by State highway construction contractors. The investigation is being handled by a task force of attorneys pulled together from different sections of the Office. This matter is currently being given top priority by my Office.

TRANSPORTATION

My Office provides a variety of assistance in the area of transportation.

During the past year, we have supervised, reviewed, and, on occasion, participated in the trial of 1,248 right-of-way condemnation cases for our State Department of Highways and Transportation. There were 830 new condemnation cases instituted during this same period, and the Office supervised and reviewed the legal steps in the Department's acquisition of $58.2 million worth of right-of-way property.

Special Assistant Attorneys General are assigned to examine land titles and close real property transactions for the Department in each of the highway districts throughout the State. They examined a total of 2,309 titles, in addition to closing 1,923 real property transactions by deed. 591 unassigned titles, requiring a limited search in order to effect a closing, were also completed by these attorneys.

As counsel for the Highway Department, the Office has either completed or is currently involved in a total of nearly 200 court cases. These cases involved the full range of civil litigation including personal injury, Workmen's Compensation, property damage, contract, injunction, mandamus, actions against employees and agents of the Department, environmental concerns, eminent domain, and various other actions.

My Office continues to provide counsel and opinions to the Department and to other transportation agencies. In addition, we provided opinions concerning transportation
matters to judges and Commonwealth's, county, and city attorneys throughout the State.

In Northern Virginia, citizens and an environmental interest group sued the United States Secretary of Transportation and the State Department of Highways and Transportation in federal district court, attempting to enjoin Interstate 66 on the grounds that it is not being constructed in accordance with the conditions imposed upon its completion by the Secretary of Transportation or the National Environmental Policy Act. The case, which was dismissed by the lower court and appealed by the plaintiffs to the United States Court of Appeals for the Fourth Circuit, was decided favorably to the Commonwealth in March 1980 when the Fourth Circuit affirmed the lower court's decision.

As reported last year, the Office has pursued recovery in admiralty for 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 her 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 decision of the United States District Court for the Eastern District of Virginia in favor of the Commonwealth was affirmed by the United States Court of Appeals for the Fourth Circuit in January 1980.

After documentation of the Commonwealth's expenditures had been presented to counsel for the owners and operators of the vessel, negotiations ensued over certain disputed items. As a result of those discussions my Office reached a settlement, which you approved, recovering $9.7 million for the Commonwealth.

**Railroads**

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

The Office represented the Commonwealth before the Interstate Commerce Commission in hearings regarding the proposed merger between the Seaboard Coast Line Railroad and the Chessie System. If the merger is approved, it will become the largest railroad in the United States. The Commonwealth entered into an agreement with the merging railroads to assure practices by the railroads which will protect the ports in Hampton Roads and Richmond, and shippers who currently use the Chessie carfloat across Hampton Roads.
As counsel to the Virginia Port Authority, my Office has provided legal assistance to the Secretary of Transportation and to the Executive Director and Board of Commissioners of that agency in the management and development of Virginia's State-owned seaports.

I have been seriously concerned about the need to expand the shipment of coal through Hampton Roads. My Office has advised and consulted with the Port Authority, other State agencies and private interests in an effort to expedite coal exports which affect a large segment of Virginia's economy. The Port Authority is also being represented in matters relating to dredging the Hampton Roads harbor and channels to a depth of 55 feet, which will accommodate larger vessels and significantly enhance commerce at our ports.

Legal services provided on a regular basis include negotiations, advice and opinions relating to the broad range of other Port Authority activities, including the financing of capital improvements through bond issues, trade development, acquisition and leases of port facilities, personal injury and property damage claims, and port security.

Aviation

The Attorney General provides legal representation to the Department of Aviation, which replaced the State Corporation Commission's Division of Aeronautics as the Commonwealth's aviation regulatory agency on July 1, 1979.

The Department is required to review and approve all leases affecting local airports. My Office has reviewed these agreements to ensure their compliance with State law and the rules and regulations of the Aviation Commission.

We have continued our administrative challenges to the federal Civil Aeronautics Board's determinations of essential air service to small communities under the Airline Deregulation Act. The final determinations of essential air service were issued by the Board shortly before the end of this year. They are certain to have a negative effect on air service to seven Virginia communities. Following a detailed analysis of these determinations, my Office will seek administrative review. If no relief is obtained by that route, we will probably bring suit in federal court.

While this Annual Report cannot fully present a picture of the services provided by my Office, it does give an indication of the dedication and the high quality of legal service provided by the Attorney General's staff. I believe that in each task cited above, this Office has demonstrated its commitment to you, to the agencies of the Commonwealth, and to the citizens of Virginia.

Respectfully submitted,

Marshall Coleman
Attorney General
## Personnel of the Office

(Postal Office Address, Richmond)

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<tr>
<th>Name</th>
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<th>Official Title</th>
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<tr>
<td>Marshall Coleman</td>
<td>Staunton</td>
<td>Attorney General</td>
</tr>
<tr>
<td>Walter H. Ryland</td>
<td>Middlesex</td>
<td>Chief Deputy</td>
</tr>
<tr>
<td>James E. Kulp</td>
<td>Henrico</td>
<td>Deputy</td>
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<tr>
<td>Walter A. McFarlane</td>
<td>Chesterfield</td>
<td>Deputy</td>
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<tr>
<td>James E. Ryan, Jr.</td>
<td>Chesterfield</td>
<td>Deputy</td>
</tr>
<tr>
<td>C. Anson Franklin</td>
<td>Richmond</td>
<td>Director of Administration</td>
</tr>
<tr>
<td>Ben Ragsdale, Jr.</td>
<td>Henrico</td>
<td>Public Info. Officer</td>
</tr>
<tr>
<td>Cynthia Parker</td>
<td>Richmond</td>
<td>Fiscal Officer</td>
</tr>
<tr>
<td>Mary K. Musselwhite</td>
<td>Chesterfield</td>
<td>Librarian</td>
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<tr>
<td>Robert T. Adams</td>
<td>Henrico</td>
<td>Assistant</td>
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<tr>
<td>Robert H. Anderson, III</td>
<td>Richmond</td>
<td>Assistant</td>
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<tr>
<td>Thomas D. Bagwell</td>
<td>Chesterfield</td>
<td>Assistant</td>
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<td>Robert J. Barry</td>
<td>Richmond</td>
<td>Assistant</td>
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<tr>
<td>John J. Beall, Jr.</td>
<td>Richmond</td>
<td>Assistant</td>
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<tr>
<td>Cheryl C. Booker</td>
<td>Richmond</td>
<td>Assistant</td>
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<td>Robert E. Bradenham, II</td>
<td>Henrico</td>
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<td>Brian L. Buniva</td>
<td>Richmond</td>
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<td>John R. Butcher</td>
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<td>Roger L. Chaffe</td>
<td>Richmond</td>
<td>Assistant</td>
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<tr>
<td>Alexander E. Conlyn</td>
<td>Chesterfield</td>
<td>Assistant</td>
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<td>D. Brian Costello</td>
<td>Richmond</td>
<td>Assistant</td>
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<tr>
<td>Martin A. Donlan, Jr.</td>
<td>Richmond</td>
<td>Assistant</td>
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<td>Ronald W. Fahy</td>
<td>Henrico</td>
<td>Assistant</td>
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<td>Charles City</td>
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<td>Eric Fiske</td>
<td>Richmond</td>
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<tr>
<td>Paul J. Forch</td>
<td>Richmond</td>
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<tr>
<td>Anthony Gambardella, Jr.</td>
<td>Chesterfield</td>
<td>Assistant</td>
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<tr>
<td>Karen A. Gould</td>
<td>Richmond</td>
<td>Assistant</td>
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<tr>
<td>Leonard L. Hopkins, Jr.</td>
<td>Richmond</td>
<td>Assistant</td>
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REPORT OF THE ATTORNEY GENERAL

ATTORNEYS GENERAL OF VIRGINIA
FROM 1776 TO 1979

Edmund Randolph .......................................................... 1776-1786
James Innes................................................................. 1786-1796
Robert Brooke .............................................................. 1796-1799
Philip Norborne Nicholas .................................................. 1799-1819
John Robertson .............................................................. 1819-1834
Sidney S. Baxter ............................................................ 1834-1852
Willis P. Bocock ............................................................ 1852-1857
John Randolph Tucker ...................................................... 1857-1865
Thomas Russell Bowden .................................................... 1865-1869
Charles Whittlesey (military appointee) ................................ 1869-1870
James C. Taylor ............................................................ 1870-1874
Raleigh T. Daniel ........................................................... 1874-1877
James G. Field .............................................................. 1877-1882
Frank S. Blair ............................................................... 1882-1886
Rufus A. Ayers ............................................................... 1886-1890
R. Taylor Scott ............................................................. 1890-1897
R. Carter Scott ............................................................. 1897-1898
A. J. Montague .............................................................. 1898-1902
William A. Anderson ....................................................... 1902-1910
Samuel W. Williams ....................................................... 1910-1914
John Garland Pollard ..................................................... 1914-1918
*J. D. Hank, Jr. ............................................................. 1918-1918
John R. Saunders .......................................................... 1918-1934

*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. Harvey B. Apperson. Resigned September 16, 1957.  
**Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.  
***Hon. Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of Hon. A. S. Harrison, Jr., upon his resignation on April 30, 1961, and served until January 13, 1962.  
REPORT OF THE ATTORNEY GENERAL

CASES DECIDED IN THE SUPREME COURT OF VIRGINIA

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


Ashley v. Commonwealth. From Circuit Court, County of Isle of Wight. Admission of hearsay evidence. Affirmed.


Barksdale v. Department of Highways and Transportation. From Circuit Court, County of Campbell. Appeal from an award in a condemnation proceeding. Writ of error denied.


Blanton v. Wallace. From Circuit Court, County of Henrico. Petition to vacate order transferring possession of a motor vehicle. Dismissed.

Bridges v. Commonwealth. From Circuit Court, County of Fairfax. Petition for appeal from final order entering judgment in favor of Commonwealth. Petition dismissed.


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

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. Affirmed.


Dailey v. Superintendent. From Circuit Court, City of Norfolk. Whether the Circuit Court erred in denying petition for writ of habeas corpus. Affirmed.


Department of Alcoholic Beverage Control and Attorney General v. Younger Coggin Distributing Company and Virginia Beer Wholesalers Association, Inc. From Circuit Court, County of Richmond. Petition to dissolve temporary injunction enjoining suspension by department of its beer price posting regulations. Temporary injunction dissolved and suit dismissed.


Fairfax Circle Steak Ranches, Inc. t/a Renee's Supper Club v. Alcoholic Beverage Control Commission. From Circuit Court, County of Fairfax. Appeal from order sustaining Commission's demurrer for licensee's failure to timely perfect petition for review. Petition for appeal not timely perfected.


Hackman v. Commonwealth. From Circuit Court, City of Virginia Beach. Discovery; instruction regarding moral turpitude. Affirmed.

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 the robbery without violating the right against double jeopardy. Affirmed.

Herrink, et al. v. Elam & Funsten, et al. From Circuit Court, City of Richmond, Division I. Appeal from granting of writ of prohibition prohibiting Virginia Real Estate Commission from holding license hearings on alleged fair housing violations. Appeal denied.


In re Coleman. Writ of mandamus to compel State Board of Bar Examiners to furnish graded bar exam to failing applicant. Petition dismissed.

In re Cross. From Circuit Court, County of Accomack. Writ of mandamus to compel court to rule upon motion filed therein. Petition dismissed.

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

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

In re Jones, grievance. Appeal from a grievability determination under § 2.1-114. Decided.

In re Owens. From Circuit Court, City of Virginia Beach. Writ of mandamus to compel court to reopen discovery in case pending therein. Petition dismissed.

In re Roberts. From Circuit Court, County of Fairfax. Writ of mandamus to compel court of to make correction in Statement of Facts submitted by appellant from decision therein. Petition dismissed.
In re Rogers. From Circuit Court, County of Henrico. Petition for writ of mandamus. Petition dismissed.

In re Tinsley. From Circuit Court, City of Charlottesville. Petition for writ of mandamus. Dismissed.

Jones v. Commonwealth. From Circuit Court, City of Hampton. Double jeopardy and jurisdiction of juvenile court. Affirmed.

Justus v. Commonwealth. From Circuit Court, County of Montgomery. Appeal from capital murder conviction involving issues of denial of motion for change of venue, refusal of private psychiatric examination at State expense, refusal to order a post-conviction psychiatric examination, sufficiency of the evidence, propriety of allowing Commonwealth to make both an opening and closing argument before the jury at sentencing phase of bifurcated trial, refusal of instructions proffered by defendant, lawfulness of death sentence in the particular case, propriety of allowing testimony at first stage of bifurcated trial regarding victim's pregnancy, refusal to grant a mistrial, admissibility of photographs of victim, and denial of impartial jury. Reversed.


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


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. Affirmed.


Reese v. Commonwealth. From Circuit Court, County of Fairfax. Search and seizure, whether second inventory search was tainted by illegal first inventory search. Affirmed.

Richmond Newspapers, Inc., et al v. Commonwealth, et al. From Circuit Court, County of Hanover. Appeal from entry of closure order excluding the public and press from criminal trial and petitions for writs of mandamus and prohibition. Affirmed, and petitions for mandamus and prohibition denied.


Robinson v. Commonwealth. From Circuit Court, County of Henrico. Appeal from conviction of first degree murder. Commonwealth’s failure to provide victim’s arrest record. Affirmed.


Rosso & Mastracco, Inc. t/a Rich’s Super Market #R-60 v. Alcoholic Beverage Control Commission. From Circuit Court, City of Norfolk. Appeal from Court’s order affirming Commission’s denial of license. Petition denied.


State Highway and Transportation Commissioner v. Goad Indian Creek Recapping Co. From Circuit Court, County of Wise. Petition for appeal denied.


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

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. Decided in favor of Commonwealth.

State Highway and Transportation Commissioner v. Worthington Farms Corporation. From Circuit Court, City of Richmond, Division II. Appeal sought from an interlocutory decision in eminent domain. Writ denied, as being premature.


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


Virginia Real Estate Commission v. Century 21 Real Estate Corporation of Virginia. From Circuit Court, City of Richmond. Appeal from injunction prohibiting enforcement of Virginia Real Estate Commission regulations pertaining to real estate franchises. Appeal denied.


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

White Oak Lodge, Inc. v. Alcoholic Beverage Control Commission. From Circuit Court, City of Norfolk. Appeal from court's order affirming Commission's suspension and restriction of wine and beer off premises license. Petition denied.

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


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Abell v. Commonwealth. From Circuit Court, County of Chesterfield. Search and seizure and sufficiency of evidence.

Alcoholic Beverage Control Commission v. F P & R, Inc. From Circuit Court, City of Norfolk. Court affirmed suspension of wine and beer on and off premises license, but reversed suspension of mixed beverage license. Appeal granted. Pending.


Bilokur v. Commonwealth. From Circuit Court, City of Hampton. Appeal from convictions of malicious wounding, breaking and entering and assault and battery. Sufficiency of the evidence, right to confrontation of witnesses and whether or not question of effective assistance of counsel can be raised on direct appeal.

Blanchard v. Director, Central State Hospital. Pro se habeas corpus suit. Decision on defendant's motion to dismiss. Pending.

Blue v. Virginia State Bar. From Circuit Court, County of Hanover. Suspension of attorney's license.


Board of Supervisors of Fairfax County, et al. v. Nassif. Filed as amicus.

Boosters, Ltd. t/a Washington Redskins Boosters Club v. Alcoholic Beverage Control Commission. From Circuit Court, City of Norfolk. Appeal from Court's decision affirming Commission's revocation of license. Pending.

Briley v. Commonwealth. From Circuit Court, City of Richmond, Division I. Death penalty; change of venue; sufficiency of evidence. Pending.

Caldwell v. Commonwealth. From Circuit Court, City of Portsmouth. Appeal from conviction of various crimes while an inmate. Reading of Code section, including inapplicable portions, to jury.

Carl Parkers Drive In, Inc. v. Alcoholic Beverage Control Commission. From Circuit Court, City of Norfolk. Appeal from court's decision affirming Commission's revocation of license. Pending.

Cogdill v. First District Committee of the Virginia State Bar. From Circuit Court, City of Newport News. Appeal from decision revoking petition license to practice law. Sufficiency of evidence, admissibility to tape-recorded evidence, entrapment, previously disciplined for same offense.
Commonwealth v. Clore. Appeal of a Circuit Court decision dismissing an OSHA case for failure of OSHA inspector to warn of possible penalty if OSHA violations were found. Pending.


Commonwealth v. Gies. From Circuit Court, City of Newport News. Appeal from decision holding homestead exemption available to patient in State mental hospital.

Commonwealth v. Pike Electrical Contractors. From Circuit Court, County of Buchanan. Appeal from penalty imposed in OSHA case.

Commonwealth v. Refrigeration Sales. From Circuit Court, City of Richmond. Petition for appeal from the final judgment holding defendant in contempt for failure to comply with Special Grand Jury subpoenas. Pending.


Commonwealth, ex rel., State Water Control Board v. County Utilities Corporation and Kempsville Utilities Corporation. From Circuit Court, City of Virginia Beach. Appeal from reversal of State Water Control Board's issuance of NPDES permits.

Cox v. Barnes. From Circuit Court, County of Stafford. Appeal awarded to superintendent of order granting writ of habeas corpus.


Craft v. Commonwealth. From Circuit Court, County of Pittsylvania. Whether the removal of a bullet and clothing from criminal suspect by hospital personnel was Fourth Amendment search. Pending.

Department of Labor and Industry v. E. A. Clore and Sons, Inc. Appeal from dismissal of action by Circuit Court of Madison County; OSHA enforcement action.

Department of Mental Health and Mental Retardation v. Jefferson. From Circuit Court, County of Nottoway. Appeal granted and oral argument heard on petitioner's appeal of final judgment order in favor of appellant.
Dooley, et al. v. Ritchie, et al. From Circuit Court, City of Richmond. Appeal from dismissal of an action challenging the 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.


Godfrey v. Commonwealth. Appeal of Circuit Court's decision to reverse department decision denying a septic tank permit. Pending.

Gordon, et al. v. Commonwealth, Department of Highways and Transportation. From Circuit Court, County of Prince Edward. Appeal from final 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. Pending.


Hart v. Commonwealth. From Circuit Court, County of Fairfax. Search and seizure. Fruit of the poisonous tree. Pending.


Holloman v. Commonwealth. From Circuit Court, County of Prince George. Whether a pellet gun is a firearm under § 18.2-53.1. Pending.

Holshouser v. Commonwealth. From Circuit Court, County of Chesterfield. Search and seizure and sufficiency of the evidence.

James v. Jane. Attorney General, on behalf of Commonwealth of Virginia as amicus curiae, petitioned for rehearing of decision reversing the order entered below sustaining special pleas of sovereign immunity by physicians. Pending.

Jennings v. Director, Central State Hospital. Pro se habeas corpus suit. Dismissed.

Johnson v. Riddle. From Circuit Court, County of Madison. Appeal dismissing petitioner's petition for a writ of habeas corpus. Right of witness to assert Fifth Amendment.
Jones v. Virginia Employment Commission and Luv'n Time. From Circuit Court, City of Alexandria. Unemployment insurance benefits.


King v. Commonwealth. From Circuit Court, City of Fredericksburg. Appeal by heirs claiming inheritance by intestate succession through father of illegitimate child from order escheating net estate to the Commonwealth.

Lester Development Corp. v. State Highway and Transportation Commissioner. From Circuit Court, County of Tazewell. Condemnation proceeding. Pending.


Martin v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of capital murder. Numerous issues relating to death sentence for murder of Richmond City police officer.

Martin v. Commonwealth. From Circuit Court, County of Sussex. Appeal from conviction of robbery. Double jeopardy question.

McGhee v. Commonwealth. From Circuit Court, County of Franklin. Appeal from conviction of first degree murder. Sufficiency of evidence to convict as accessory before the fact.


Montgomery v. Commonwealth. From Circuit Court, County of Isle of Wight. Sufficiency of evidence in grand larceny conviction.


Parks v. Commonwealth. From Circuit Court, County of Henrico. Appeal from convictions of two charges of grand larceny by obtaining money by false pretenses. Legality of search and seizure, whether petitioner had a legitimate expectation of privacy (standing) to permit him to assert illegality of any search, and sufficiency of the evidence. Pending.

Patak v. Plasberg, Director, Central State Hospital. Habeas corpus suit based on denial of free transcript. Dismissed.


Rockingham Poultry Marketing Cooperative, Inc. v. Forst. From Circuit Court, County of Rockingham. Appeal of decision finding in favor of taxpayer for erroneous capital and income tax assessments. Companion case to Shen-Valley Meat Packers.


Smolka v. Virginia State Bar. From Circuit Court, County of James City. Suspension of attorney's license.

Spear v. Commonwealth. From Circuit Court, County of Franklin. Form of instructions and jury verdict.

Spruill v. Commonwealth. From Circuit Court, County of Mecklenburg. Admissibility of evidence; jury instructions. Pending.


State Highway and Transportation Commissioner v. Cantrell. From Circuit Court, County of Tazewell. Condemnation case. Pending.

State Highway and Transportation Commissioner v. Cities Service Oil Corporation. From Circuit Court, County of Fairfax. Appeal sought by Cities Service Corporation from an award in eminent domain. Pending.

State Highway and Transportation Commissioner v. Donelson. From Circuit Court, County of Russell. Condemnation case. Pending.
State Highway and Transportation Commissioner v. Garland. From Circuit Court, County of Northumberland. Appeal by Commissioner of condemnation award citing errors of the lower court in admitting improper appraisal testimony and in refusing to examine Commissioners concerning alleged misconduct. Pending.


State Highway and Transportation Commissioner v. Linsly. From Circuit Court, County of Middlesex. Appeal by Commissioner of condemnation award citing errors of the lower court in admitting evidence of damage due to reduction in access and improperly instructing Commissioners to consider such reduction in making the award. Pending.

State Highway and Transportation Commissioner v. Poole. From Circuit Court, County of Sussex. Appeal from order confirming the award of Commissioners in a condemnation proceeding. Pending.

State Highway and Transportation Commissioner v. Sprouse. From Circuit Court, County of Chesterfield. Appeal sought by Commissioner from an award in eminent domain due to the existence of a restrictive covenant. Writ of appeal granted. Pending.


Tharp v. Commonwealth. From Circuit Court, City of Hampton. Illegal arrest; admissibility of confession. Pending.

Turner v. Commonwealth. From Circuit Court, County of Southampton. Various issues in death penalty appeal.

Virginia Employment Commission v. A.I.M. Corporation. From Circuit Court, City of Richmond, Division II. Appeal from decision rendering company not subject to unemployment tax.

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

Virginia Employment Commission v. Raiford and Liebherr America, Inc. From Circuit Court, City of Newport News. Unemployment insurance benefits.
American Motors Sales Corporation, et al. v. Division of Motor Vehicles, et al. Appeal from decision holding that § 46.1-547(d) is constitutional. Reversed.


Clark v. Commonwealth. Petition for a writ of certiorari to judgment of Virginia Supreme Court. Admissibility of confession; denial of instructions on lesser included offenses; admissibility of certain evidence at sentencing; constitutionality of death penalty statutory scheme. Certiorari denied.

Coulston v. Hutto. Petition for writ of certiorari to judgment of Fourth Circuit Court of Appeals. Whether petitioner had been denied a jury properly selected from a cross-section of the community. Certiorari denied.

Davis v. Hutto, etc. Cruel and unusual punishment. Certiorari granted and decision of the Fourth Circuit Court of Appeals vacated and remanded.


Figgins v. Hudspeth. Petition for a writ of certiorari by a State correctional officer to review the decision of the Court of Appeals allowing a prisoner a trial as a result of a threat. Certiorari denied.

Green v. Summers. Petition for writ of certiorari to judgment of Fourth Circuit Court of Appeals. Whether Virginia law required that petitioner be prosecuted under § 18.2-93 rather than for common-law robbery, whether convictions of three charges of robbery arising from one transaction violate right against double jeopardy, and whether conviction for using a sawed-off shotgun in the perpetration of a crime of violence as well as the primary offense violated right against double jeopardy. Certiorari denied.

Hummel v. Commonwealth. Petition for a writ of certiorari to review the decision of the Supreme Court of Virginia denying a direct criminal appeal on the issue of a defendant being deprived of counsel by an improper listening device. Certiorari denied.

Kibert v. Blankenship. Appeal by a prisoner from the reversal by the Court of Appeals of the District Court's grant of a petition for a writ of habeas corpus. Certiorari denied.


Supreme Court of Virginia v. Consumers Union. Judgment awarding attorneys' fees vacated and remanded.


CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Bridges v. Commonwealth. Petition for writ of certiorari from dismissal of petition for appeal by the Supreme Court of Virginia.


Wright v. Zahradnick. Petition for a writ of certiorari to judgment of Fourth Circuit Court of Appeals sustaining denial of habeas corpus. Sufficiency of the evidence, whether the trial judge placed the burden of proof on the defendant to reduce the offense from second degree murder and thereby denied due process of law, and whether failure to make contemporaneous objection to comments and findings of the trial judge precludes federal habeas corpus relief. Pending.

CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE

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


Arlington Lodge #1315, Loyal Order of Moose v. Alcoholic Beverage Control Commission. Circuit Court, County of Fairfax. Appeal from Commission's refusal to grant a mixed beverage license. Reversed and remanded for new hearing.

Ashley v. SMHMRB. Circuit Court, City of Staunton. Wrongful death case arising at Western State Hospital. Pending.

Atkinson v. Commonwealth. Circuit Court, County of Hanover. Suit to permit examination and copying of adoption records. Agreement by biological mother that identifying information be provided to petitioner.

Augustine Day Care School, et al. v. Lukhard. Circuit Court, County of Fairfax. Petition for appeal and motion to stay enforcement of an administrative order denying renewal of child care center license. Motion denied and petition dismissed.

Austin v. Brown. Circuit Court, City of Staunton. Negligence suit seeking damages for failure to provide adequate protection for a resident of the Virginia School for the Deaf and Blind. Pending.

Bahen v. State Water Control Board. Circuit Court, City of Richmond, Division I. Appeal of State Water Control Board decision granting NPDES permit. Appeal denied. Petition for appeal to Supreme Court pending.


Bell v. Norfolk State University. Circuit Court, City of Richmond, Division I. Civil rights case. Dismissed agreed.


Board of Pharmacy v. Renewal America Corporation, et al. Circuit Court, City of Portsmouth. Action for injunctive relief relating to alleged illegal sale of drugs. Temporary injunction granted, action pending.
Board of Pharmacy v. S. P. Hite Company. Circuit Court, City of Roanoke. Appeal of board order following administrative hearing. Pending.

Board of Supervisors of Roanoke County v. Department of Corrections. Circuit Court, County of Roanoke. Does Department of Corrections have to take over Juvenile Probation Office of Roanoke County before they get appropriation to do so from the General Assembly. Pending.

Bombere v. Department of Corrections. Circuit Court, County of Fairfax. Probation Officer and Department of Corrections' liability for releasing juvenile committed to their care whom it is alleged they knew or should have known was dangerous or who after release violently attacked plaintiff. Pending.


Briggs v. Sjolund. Circuit Court, City of Virginia Beach. Denial of septic tank permit. Order submitted dismissing suit and remanding case back to State Health Department. Pending.

Bristol Steel and Iron Works v. Blake Construction Company and Virginia Commonwealth University v. Basic Construction Company and Cleveland Wrecking Company. Circuit Court, City of Richmond, Division II. Action instituted by structural steel contractor for new MCV Hospital project against the project general contractor and the owner (VCU) for additional compensation for additional work performed and for delays as well as for release of retainage monies. Foundation (Basic) and demolition (Cleveland) contractors named as third-party defendants by VCU. Pending.

Bristol Steel and Iron Works Incorporated v. Virginia Commonwealth University, et al. Circuit Court, City of Richmond, Division II. Action for retainage, extra work and damages arising out of construction of hospital. Pending.

Brooking v. Schlitz. Circuit Court, City of Richmond, Division I. 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. Out-of-court settlement reached.


Bureau of Support Enforcement, etc. v. Lowe. Circuit Court, County of Bedford. Petition to establish paternity and support. Appeal pending.


Carbaugh v. Solen. Circuit Court, County of Albemarle. Suit to enjoin the selling of raw goat’s milk for human consumption. Pending.


Cherry Rug Company v. Commonwealth, ex rel: Division of Purchases and Supply of Department of General Services. Circuit Court, City of Richmond, Division I. Action appealing decision of Purchases and Supply Appeal Board as to lowest responsible bidder on carpet contract for 14th Street Tower office building. Dismissed.

Chippenham v. Coleman, et al. Circuit Court, City of Richmond, Division II. Declaratory judgment action for permission to initiate open heart surgery without a certificate of public need. Injunction entered against the Commonwealth.

Christian v. White, et al. Circuit Court, City of Richmond, Division I. Action instituted by former VCU student against former VCU faculty member and several bookstores alleging improper publication and sale of book containing photograph of plaintiff without plaintiff’s consent and permission. Pending.

Clark v. Virginia Real Estate Commission. Circuit Court, City of Waynesboro. Appeal from administrative decision denying waiver of requirement for broker’s license. Pending.

Coleman v. DANO. Circuit Court, County of King George. Suit brought by Attorney General to enjoin construction of sewage sludge composting facility prior to obtaining permits required by law; injunctions entered. Pending.

Coleman v. Maciuk. Circuit Court, County of Dinwiddie. Suit to enjoin the cruel killing of exotic animals in the guise of a hunt. Injunction granted.


Coleman, et al. v. Chippenham. Circuit Court, City of Richmond, Division II. Denial of exemption from certificate of public need law for open heart surgery program. Petition for appeal denied.

Commonwealth v. Aydlett. Circuit Court, City of Richmond. Criminal action brought under § 18.2-499, conspiracy to injure another in his trade or profession. Conviction.

Commonwealth v. Brown. Circuit Court, City of Richmond, Division I. Appeal from decision limiting collection of non-support and amount of arrearages. Arrearages increased and authority granted to collect administratively.


Commonwealth v. Chamberlain. Circuit Court, City of Virginia Beach. Suit to enjoin alleged unlicensed activity. Settled by consent.


Commonwealth v. DANO. Circuit Court, County of King George. Action by Attorney General to require compliance with regulations of State Board of Health, State Water Control Board, and State Air Pollution Control Board. Decree enjoining defendants in effect.

Commonwealth v. Daniel Construction Company. Circuit Court, County of Surry. OSHA case involving Surry nuclear facility; demurrer granted to defendant. Appealed to Virginia Supreme Court.

Commonwealth v. Fourth Skyline Corporation, et al. Circuit Court, County of Fairfax. Suit to enjoin declarant of condominium from making use of easements the existence of which was allegedly not properly disclosed to unit owners. Nonsuit by Commonwealth.


Commonwealth v. Medical Center Hospitals. Circuit Court, City of Richmond, Division I. Dispute over division of monies owed to Commonwealth and defendant hospital.


Commonwealth v. Natural Figure, Inc., et al. Circuit Court, County of Henrico. Chancery. Pending.
Commonwealth v. New Sunken Meadow Beach Corp. Circuit Court, County of Surry. Suit to compel compliance with Health Department sewage, trailer park, waterworks, and restaurant regulations.

Commonwealth v. Padgett. Circuit Court, City of Richmond. Civil action brought under the Virginia Antitrust Act seeking civil recoveries of monies received and wrongfully paid by the Commonwealth. Pending.

Commonwealth v. Padgett. Circuit Court, City of Richmond. Criminal action brought under § 18.2-450, for receiving bribes. Convicted of bribery.


Commonwealth v. Petteway. Circuit Court, City of Richmond, Division I. Suit to enjoin operation of a home for adults without a license. Pending.

Commonwealth v. Reichard. Circuit Court, City of Richmond. Criminal action brought under § 18.2-447, for bribery. Conviction.

Commonwealth v. Richmond Auto Corporation. Circuit Court, City of Richmond. Civil action brought under the Virginia Antitrust Act for odometer tampering. Settled and funds being distributed.

Commonwealth v. Ruark and Burrell. Circuit Court, County of Middlesex. Action by State Health Department to enforce marina sewage pumpout regulations. Appeal denied by Supreme Court. Settled with respect to Ruark; pending on Burrell.

Commonwealth v. Samuels. Circuit Court, County of Henrico. Suit for injunctive relief for violation of operating a child welfare agency without a license. Injunction granted.

Commonwealth v. Sterling, et al. Circuit Court, City of Richmond, Division II. Suit to enjoin alleged fair housing violations. Pending.


Commonwealth, Bureau of Support Enforcement v. Roberts. Circuit Court, County of Orange. Child support; appealed from the Juvenile and Domestic Relations District Court. Pending.

Commonwealth, Bureau of Support Enforcement v. Wells. Circuit Court, City of Charlottesville. Paternity; appealed from the Juvenile and Domestic Relations District Court. Pending.
Commonwealth, Department of Welfare v. Bowman. Circuit Court, County of Roanoke. Attachment proceedings for child support debt in excess of $12,000. Pending.


Commonwealth, ex rel., State Comptroller v. Spotsylvania County. Circuit Court, County of Spotsylvania. Action to recover grant funds not spent in accordance with grant conditions. Demurrer sustained.


Commonwealth, ex rel., State Water Control Board v. C & R Battery Company, Inc. Circuit Court, City of Richmond, Division I. Suit for injunctive relief and civil penalties for violation of Water Control Board’s special order and discharge certificate. Pending.


Commonwealth, ex rel., State Water Control Board v. Cloverdale Sanitary System, Inc. Circuit Court, County of Botetourt. Suit for injunction and civil penalties for violation of NPDES permit; injunctions and finding of contempt entered. Pending.


Commonwealth, ex rel., State Water Control Board v. Delta Group, Inc. Circuit Court, City of Chesapeake. Suit for injunctive relief for violation of NPDES permit; injunction entered. Pending.


Commonwealth, ex rel., State Water Control Board v. Foltz. Circuit Court, County of Frederick. Suit for injunction for violation of NPDES permit. Pending.

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 Water Control Board no-discharge certificate; civil penalty paid; injunction entered. Pending.


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


Commonwealth, ex rel., State Water Control Board v. Mosier. Circuit Court, City of Chesapeake. Suit for injunction and penalties for violations of State Water Control Law; injunction entered. Pending.


Commonwealth, ex rel., State Water Control Board v. Presson. Circuit Court, City of Suffolk. Suit for civil penalties for pollution of Chuckatuck Creek by animal wastes; pending.


Commonwealth, ex rel., State Water Control Board v. Tides Inn, Inc. Circuit Court, County of Lancaster. Suit for injunctive relief for NPDES permit violations; injunction entered. Pending.

Commonwealth, ex rel., State Water Control Board v. Tolleson and Co. Circuit Court, County of Louisa. Suit for injunctive relief and civil penalties for violation of Water Control Board emergency special order and for discharge of sewage without permit. Pending.


Commonwealth, ex rel., State Water Control Board v. United States Titanium Corporation. Circuit Court, County of Nelson. Suit to enjoin compliance with Water Control Board special order and no-discharge certificate; injunctions entered. Pending.

Commonwealth, ex rel., State Water Control Board v. VP-5 Mining Company. Circuit Court, County of Buchanan. Suit for injunctive relief and civil penalties for violation of NPDES permit. Settled.


Cotton v. Board of Trustees, Virginia Supplemental Retirement System. Circuit Court, City of Hampton. Declaratory judgment as to the purchase of prior service credit. Pending.

County of Henry v. Knight and Commission of Outdoor Recreation. Circuit Court, County of Henry. Suit for declaratory judgment was filed but has remained dormant. Dispute which gave rise to it has been resolved.

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


Davis v. Virginia Commonwealth University and Wilson. Circuit Court, City of Richmond, Division I. 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, sustaining fatal head injuries. Nonsuit taken by plaintiff as to both defendants.


DeCapri t/a Lamplighter v. Layman, et al. Circuit Court, City of Richmond, Division I. Petition for review of Alcoholic Beverage Control Commission's License suspension and probation orders. Settled.

Department of Health v. Forehand. Circuit Court, City of Suffolk. Interpleader for medicaid lien. Relief denied.


Department of Labor and Industry v. Babcock and Wilcox. Circuit Court, City of Hopewell. OSHA case, de novo trial request.

Department of Labor and Industry v. Mount Rose Canning Co. Circuit Court, County of Prince William. Motion for judgment pursuant to § 40.1-51.1:1.
Department of Labor and Industry v. Roanoke Iron and Bridge Works, Inc. Circuit Court, City of Roanoke. Bill of complaint filed to obtain entry to conduct VOSH inspection.


Employees' Retirement System, Board of Trustees v. Virginia Supplemental Retirement System. Circuit Court, City of Richmond, Division I. Action to recover $61,000 allegedly wrongfully paid to VSRS on behalf of District Court Judges, clerks and personnel. Pending.


Fleetwood v. Commonwealth. Circuit Court, County of Hanover. Suit to permit examination and copying of adoption records. Agreement by biological mother that identifying information be provided to petitioner.


Goodall v. Medical College of Virginia Hospital/Virginia Commonwealth University. Circuit Court, City of Richmond, Division I. 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 medication (streptomycin) which allegedly caused hearing loss. Defendant's motion to dismiss on plea of sovereign immunity granted by the Circuit Court. Plaintiff's petition for appeal was denied by the Virginia Supreme Court.
Goodall v. Spicuzza, et al.  Circuit Court, City of Richmond, Division I. Same case as Goodall v. MCV Hospital, refiled following denial of appeal from dismissal on defendant's plea of sovereign immunity naming, in addition to MCV Hospitals, the members of the hospital housestaff who attended and treated plaintiff. Pending.

Hale v. Virginia Real Estate Commission.  Circuit Court, County of Pulaski. Seeking to enjoin disciplinary action by Virginia Real Estate Commission while civil suit is pending. Pending.


Hansbarger v. Womack and State Health Department.  Circuit Court, City of Lynchburg. Injunction order against Womack entered March 28, 1980, prohibiting interference with State Health Department pap smear program.


Head v. Newport News.  Circuit Court, City of Newport News. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act.

Heath (now Lathrop) v. Commonwealth.  Circuit Court, City of Richmond, Division I. Suit to permit examination and copying of adoption records. Court ordered identity of biological mother to be provided to petitioner pursuant to an agreement by the biological mother.


Higgs v. Virginia Real Estate Commission.  Circuit Court, County of Henrico. Appeal from administrative decision against license. Pending.

Hladys v. Commonwealth. Circuit Court, City of Richmond, Division I. Medicaid provider alleging the illegality of his contract termination with medicaid. Matter dismissed and remanded to State Health Commissioner.

Holland v. Commonwealth, Department of Welfare. Circuit Court, County of Roanoke. Suit seeking injunctive relief from support enforcement and mandamus of Commissioner. Dismissed.


Holler v. Registrar of Vital Statistics. Circuit Court, County of King and Queen. Case concerning request to amend death certificate. Pending.


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

Horn Point Club v. State Water Control Board. Circuit Court, City of Virginia Beach. Appeal of State Water Control Board issuance of no-discharge certificate. Pending.


IGW, Inc. t/a Denny's Sub Shop v. Alcoholic Beverage Control Commission. Circuit Court, City of Norfolk. Petition for review of Commission's license suspension order for allowing consumption of beer by a minor. Affirmed.

I Dunno Either v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Petition for review of Commission's license suspension and restriction order for allowing disorderly conduct and drinking in public place. Affirmed.

In re Adoption of J.P.B. Circuit Court, County of Rockingham. Unlawful placement. Pending.
In re Agee. Circuit Court, County of Roanoke. Petition to open sealed adoption records. Pending.


In re Andrews, grievance. Circuit Court, City of Chesapeake. Pending.


In re Bell. Circuit Court, County of Dinwiddie. Petition for appointment of guardian. Granted.

In re Bequest of Blank. Circuit Court, City of Williamsburg and County of James City. Suit for application of cy pres doctrine to terms of will. Pending.


In re Blizzard. Circuit Court, County of Smyth. Petition for determination of grievability. Determination of non-grievability by agency head upheld.


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


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

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

In re Collins. Circuit Court, County of Smyth. Petition for determination of grievability. Determination of non-grievability by agency head upheld.

In re Curry, grievance. Circuit Court, County of Dinwiddie. Granted.


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

In re Fleming. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

In re Fletcher. Circuit Court, County of Dinwiddie. Petition for appointment of guardian. Granted.

In re Fulcher t/a Old Country Store. Circuit Court, City of Roanoke. Petition for appeal from Alcoholic Beverage Control Commission granting a beer off premises license. Local objectors appealed decision. Affirmed.

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


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


In re Griffin. Circuit Court, County of Dinwiddie. Petition for appointment of guardian. Granted.

In re Hall. Circuit Court, County of Dinwiddie. Petition for appointment of guardian. Granted.

In re Heath t/a Sonny's. Circuit Court, City of Richmond, Division I. Petition for review of Virginia Alcoholic Beverage Control Commission's license suspension order for allowing disorderly conduct and selling beer to an intoxicated person. Affirmed.
In re Hess. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

In re Hester. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

In re Hester, grievance. Circuit Court, City of Chesapeake. Pending.


In re Kessinger. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

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

In re Kirby. Circuit Court, City of Staunton. Adoption records. Pending.

In re Lane. Circuit Court, County of Augusta. Petition for appointment of guardian. Granted.


In re Lemons. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

In re Lillard. Circuit Court, City of Chesapeake. Petition to release information in adoption records of Department of Welfare. Pending.

In re Maddox, grievance. Circuit Court, County of Amherst. Dismissed.


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

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

In re Neighborhood Bars t/a CopaCabana. Circuit Court, City of Richmond, Division I. Petition for review of Alcoholic Beverage Control Commission's suspension order for allowing consumption of beer by a minor. Affirmed.


In re Parr. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

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

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


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

In re Slominski. Circuit Court, City of Williamsburg and County of James City. Action claiming disability retirement benefits. Pending.

In re Special Grand Jury (Commonwealth v. Refrigeration Sales). Circuit Court, City of Richmond. First decision upheld the validity of two Special Grand Jury subpoenas. Second decision held defendant in contempt for failure to comply with Special Grand Jury subpoenas. Appeal taken.

In re Stewart. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.


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


In re Webb. Circuit Court, County of Carroll. Petition for determination of legal incapacity and appointment of guardian. Petition granted.

In re Welch. Circuit Court, County of Botetourt. Grievability determination case. Pending.

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

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

In re Winslow. Circuit Court, County of Dinwiddie. Petition for appointment of guardian. Granted.

In re Wood. Circuit Court, County of New Kent. Petition to release information in adoption records of Department of Welfare. Pending.


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

In re Worrell. Circuit Court, County of Augusta. Petition for appointment of guardian. Granted.

In the matter of Adoption of Lox. Circuit Court, County of Fairfax. Petition for access to and disclosure of personal information contained in a sealed adoption record. Order entered requiring Department of Social Services to advise natural parents of pending petition.

In the matter of Carroll. Circuit Court, County of Floyd. Pending.

In the matter of Goss. Circuit Court, City of Richmond, Division I. Amendment of birth certificate to indicate change of sex. Order requiring amendment entered.

In the matter of Speedwell-Seven Springs Public Water Supply. Circuit Court, County of Wythe. Action to compel compliance with State Health Department Waterworks Regulations. Waterworks authorized by court to operate without Health Department permit.


Karnitschnig v. Board of Medicine. Circuit Court, City of Richmond, Division I. Injunction sought under Virginia Freedom of Information Act, decision pending.

Kenley v. Douglas and Carver. Circuit Court, County of King George. Public water supply placed in receivership for failure to comply with Health Department Waterworks Regulations.


Khanna v. Khanna. Circuit Court, County of Fairfax. Petition to intervene in an action seeking enforcement of court ordered child support arrearages. Consent order entered and arrearage claim compromised in satisfaction of the support debt owed to the State.

Kight v. City of Richmond, et al. Circuit Court, City of Richmond. Suit by an inmate of the Department of Corrections alleging improper medical care and treatment in the Henrico Jail and the Department of Corrections. Pending.


Lukhard v. Braxton. Circuit Court, City of Roanoke. Petition seeking contempt citation for violation of permanent injunction against operation of home for adults without a license. Under advisement.

REPORT OF THE ATTORNEY GENERAL


Lukhard v. Petteway. Circuit Court, County of Henrico. Petition to enjoin operation of a Home for Adults without a license. Granted.


Marshall v. State Board of Medicine. Circuit Court, County of Floyd. Petition for writ of prohibition and motion to quash subpoena relating to license disciplinary action. Subpoena quashed, action remanded to administrative hearing officer.

Martin v. Director, Central State Hospital. Circuit Court, City of Richmond. Pro se habeas corpus. Dismissed.


Michael v. Stage and Paez. Circuit Court, County of Fairfax. Malpractice claim against physicians on the staff of the Northern Virginia Medical Health Institute. Pending.

Miller v. Wood, et al. Circuit Court, County of Rappahannock. Action by executor of decedents' estates against named and potential beneficiaries under decedents' will to determine proper distribution of assets of the estates. Pending.
Circuit Court, County of Wise. Action to resolve dispute between those claiming as beneficiaries as to entitlement to group life insurance proceeds. Settled and dismissed.


NCPAC v. Mahan, et al. Circuit Court, City of Richmond, Division I. Petition requesting delivery of voter registration material. Pending.


Norcross v. Norcross. Circuit Court, County of Prince William. Petition to revise divorce decree. Decree partially revised restoring parental support obligation along with remand to Juvenile and Domestic Relations District Court.


Oeters v. State Water Control Board. Circuit Court, City of Richmond, Division I. Suit for declaratory judgment regarding constitutionality of provisions of State Water Control Law. Pending.

Ostergren v. State Board of Elections, etc., et al. Circuit Court, City of Richmond, Division I. Petition to have candidate's name removed from ballot. Dismissed.


Petition of Davis. Circuit Court, County of Fairfax. Petition for disclosure of personal information contained in a sealed adoption record. Order entered requiring local Department of Social Services to advise natural parents of pending petition.

Pic Quik Market #7 v. Alcoholic Beverage Control Commission. Circuit Court, City of Roanoke. Petition for appeal from Commission's license suspension order for sale of beer to a minor. Affirmed.

Pierce v. State Board of Pharmacy. Circuit Court, County of Fairfax. Appeal of board order following administrative hearing. Appeal dismissed.

Poole v. Mitchell. Circuit Court, City of Richmond. Suit by an inmate of the penitentiary alleging that he has been harassed and discriminated against by various prison officials. Pending.

Purks v. Commonwealth. Circuit Court, County of Hanover. Suit to permit examination and copying of adoption records. Agreement by biological mother that identifying information be provided to petitioner.


Rapoport v. Board of Optometry. Circuit Court, City of Roanoke. Action for declaratory judgment relating to advertising under a trade name. Dismissed.


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


Rothrock v. Board of Trustees, Virginia Supplemental Retirement System. Circuit Court, City of Richmond, Division I. Declaratory judgment to determine retirement allowance and years of creditable service under judicial retirement system and to have H.B. 342 declared unconstitutional. Pending.

Royster v. Bureau of Support Enforcement. Circuit Court, City of Norfolk. Appeal from Juvenile and Domestic Relations District Court's order of support. Pending.

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 optometry and opticianry laws. Pending.

S. Galeski Optical Company v. Virginia Board of Optometry. Circuit Court, City of Richmond, Division I. Action for mandamus and attorneys fees under the Virginia Freedom of Information Act. Pending.

Salama v. Board of Medicine. Circuit Court, County of Fairfax. Appeal of license revocation. Trial pending.


Smith v. Board of Funeral Directors and Embalmers. Circuit Court, City of Richmond, Division I. Mandamus sought under Virginia Freedom of Information Act, decision pending.

Smith v. Dixon. Circuit Court, City of Richmond. Suit against a Department of Corrections employee by an inmate who was injured at the State Penitentiary. Pending.

Stanley and Loest v. State Board of Architects, Professional Engineers and Land Surveyors. Circuit Court, City of Richmond, Division I. Appeal from revocation of licenses to practice as professional engineers in Virginia. Pending.

State Fire Marshall v. Dan River Shopping Center, Inc. Circuit Court, City of Danville. Bill of complaint filed to enjoin operation of motel until fire code violations have been corrected; pending.


Stout v. Board of Medicine. Circuit Court, City of Richmond, Division I. Injunction sought under Virginia Freedom of Information Act, case dismissed.


Taliaferro v. Pross. Circuit Court, City of Richmond, Division I. Suit involved retirement dispute between Longwood College and a former professor. Settled.

Taylor v. Virginia State University. Circuit Court, County of Chesterfield. Writ of mandamus against President of Virginia State University. Settled.

The Southland Corporation v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Petition for review of Commission's decision granting a license restricted against the sale of chilled beverages. Pending.


Tony's Kitchen, Inc. v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Petition for review of Commission's license suspension order for allowing consumption by a minor, selling to and allowing consumption of beer by an intoxicated person. Affirmed.

Valentine v. Board of Nursing. Circuit Court, City of Richmond, Division I. Motion to dismiss. Pending.

Vandam v. Vandam. Circuit Court, County of Arlington. Petition for permanent injunction against the enforcement of a California URESA order. Consent order entered providing for a compromise settlement of arrearages and modification of prospective support obligation.

Virginia Hospital Association v. State Board of Health. Circuit Court, City of Richmond, Division II. Challenge to certificate of need regulations. Pending.


Ward v. College of William and Mary (VIMS). Circuit Court, City of Williamsburg and County of James City. Petition for submission of grievance to panel. Dismissed.

Weal v. Davis. Circuit Court, City of Richmond. Suit by an inmate of the penitentiary alleging that prison officials negligently put out his eye by shooting him with a stun gun. Pending.

Weaver v. Department of Rehabilitative Services. Circuit Court, County of Rockingham. Petition for a finding as to grievability under the State Grievance Procedure. Decision rendered November 2, 1979, finding in favor of the Department's decision on non-grievability.


Williamson d/b/a Stop In v. Alcoholic Beverage Control Commission. Circuit Court, City of Roanoke. Petition for review of Commission's license suspension order for sale of beer to a minor. Petition withdrawn.


Winston v. Commonwealth. Circuit Court, City of Richmond, Division I. Appeal from conviction of non-support for dependent children in Richmond City Juvenile and Domestic Relations District Court. Affirmed.


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


Blue Ridge Stone Corp. v. King, et al. Circuit Court, County of Giles. Lessee of property taken by eminent domain through an agreement after certificate filed a motion for declaratory judgment for damages to its leasehold interest. Pending.

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Commonwealth, et al. v. Creative Displays, Inc., et al. Circuit Court, City of Richmond. Department of Highways and Transportation seeks $1,000 compensatory damages and $4,000 punitive damages for cutting trees on State highway right of way. Pending.


Commonwealth, et al. v. Womack. Circuit Court, County of Chesterfield. Action by Department of Highways and Transportation to declare Womack Road a public road and to enjoin its closing by private landowners. 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.


Doyle (now known as Baber) and Baber v. Department of Highways and Transportation. Circuit Court, County of Fairfax. Inverse condemnation. Non-suited, reinstituted. Pending.


Entsminger v. Kline, et al. Circuit Court, County of Shenandoah. Suit to determine boundary line, which hinged on determination of width of Route 622. Department of Highways and Transportation as party defendant claimed interest in only 30-foot width, instead of 40 feet asserted by Kline. Final order entered declaring 622 to be a public road 30 feet wide, in accordance with Department of Highways and Transportation's claims.


Flinn v. Department of Highways and Transportation. Circuit Court, City of Richmond. Review of hiring procedures used in filling position Mr. Flinn applied for but did not get. Commissioner's decision of nonreivability affirmed and plaintiff's appeal dismissed.


Four Thirty Seven Land Corp. v. State Highway and Transportation Commissioner. Circuit Court, County of Loudoun. Complaint challenging the authority of the Commissioner to require off-site road improvements in connection with subdivider's entrance. Settled.

Garbe v. Ogden, et al. Circuit Court, City of Norfolk. Inverse condemnation for $20,000 resulting from loss of access during construction. Pending.


Haynes v. Robertson - Fowler Co., et al. 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. Dismissed on motion of Commonwealth.


Hinchey v. Ogden, et al. Circuit Court, City of Virginia Beach. Action to recover $1,500,000 for personal injury involving operation of the Norfolk-Virginia Beach Expressway. Pending.


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 the Matter of Smiley. Circuit Court, City of Richmond. Determination of grievability. Decided that issue was grievable.


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


Keelan v. Board of Supervisors of Surry County, et al. 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 denied.


Owens v. Doe. Circuit Court, County of Pulaski. Claim that a Department of Highways and Transportation vehicle was the unknown vehicle which caused an accident. Pending.

Patterson v. Ogden, et al. Circuit Court, City of Norfolk. Inverse condemnation for $1,000,000 resulting from loss of access during construction. Pending.


Reavis v. Department of Highways and Transportation. Circuit Court, County of Henry. Motion for judgment for damage to waterline. 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. Castle Brothers Track and Roller Co. Circuit Court, County of Wise. Motion seeking ejectment of tenant and back rent. Tenant ejected by court order. Issue of back rent pending.


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


Baum v. Commonwealth. General District Court, City of Norfolk. Petition to establish ownership of a 1963 Chevrolet. Title awarded to Petitioner.


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. Dismissed.


Car Sales, Inc. v. Wormley and Division of Motor Vehicles. Circuit Court, County of Henrico. Suit in equity to compel the issuing of a certificate of title for a motor vehicle. Pending.

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. Dismissed.

Causey v. Division of Motor Vehicles. Circuit Court, County of Fairfax. Petition to establish ownership of 1973 Harley Davidson Motorcycle. Title awarded to Petitioner.


Cline v. Hill. General District Court, County of Wythe. Petition for restoration of driving privileges under § 18.2-271.1(b). Pending.


Commonwealth v. Conley. Circuit Court, County of Prince William. Motion for rule to show cause why Commissioner should not be held in contempt for failure to reinstate driver's license. Petition denied.


Condit v. Division of Motor Vehicles. Circuit Court, County of Fairfax. Petition to establish ownership of 1970 Honda Motorcycle. Title awarded to Petitioner.


Copeland Toyota, Inc. v. Mid-Atlantic Toyota Distributors, Inc. Circuit Court, City of Hampton. Appeal of a hearing decision on the granting of an additional dealer franchise under § 46.1-547(d). Pending.

Corvette Center, Inc. v. Pross and Hill. Circuit Court, County of Pittsylvania. Motion for judgment for damages arising from sale of stolen vehicle. Dismissed.


Eubank v. Division of Motor Vehicles. Circuit Court, County of Roanoke. Petition for restoration of driver's license pursuant to § 46.1-421(c). Dismissed as party defendant.

Fertich v. Fertich and Hill. General District Court, City of Richmond. Petition for an order compelling issuance of a certificate of title. Petition granted.

Foreign Car City, Incorporated v. Hill and Carter. Circuit Court, City of Richmond. Motion for judgment for damages arising from sale of stolen vehicle. Pending.


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


In re Caudle. Circuit Court, City of Roanoke. Petition for restoration of driving privileges under § 46.1-421(c). Petition granted.


In re Eagle. Circuit Court, County of Campbell. Petition to establish ownership of Willys Jeep. Title awarded to Petitioner.

In re Gilmore. Circuit Court, County of Loudoun. Appeal of a driver's license suspension under § 46.1-514.11. Suspension order modified.

In re Hardy. Circuit Court, City of Norfolk. Appeal of the denial of a request for a panel hearing for a grievance under § 2.1-114.5:1. Pending.

In re restoration of driving privilege of Wilburn. Circuit Court, City of Roanoke. Motion to show cause why Commissioner should not be held in contempt for failure to reinstate driver's license. Withdrawn.

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

In re Tipton. Circuit Court, County of Washington. Appeal of the denial of a request for a panel hearing for a grievance under § 2.1-144.5:1. Pending.

In re Title to a 1966 Ford Galaxy 500. General District Court, County of Chesterfield. Notice to establish ownership of a 1966 Ford. Title awarded to Petitioner.
In the matter of Bailee's lien of Andy Mullins. General District Court, County of Fairfax. Petition to enforce lien under § 43-34. Petition granted.

Johnson v. Commissioner. Circuit Court, City of Virginia Beach. Petition for writ of mandamus to reinstate a revoked driver's license. Writ denied.

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

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


Knabe Motor Company v. Chrysler Corporation. Circuit Court, County of Henrico. Appeal of a hearing decision on the refusal to approve the sale of a dealership under § 46.1-547(c1). Pending.


Limampai v. Division of Motor Vehicles. Circuit Court, County of Fairfax. Petition to secure certificate of title for motor vehicle. Pending.


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

McGaha v. Division of Motor Vehicles. Circuit Court, County of Fairfax. Petition to compel Commissioner to assign vehicle identification number. Pending.

Meredith v. Commonwealth. General District Court, County of Pulaski. Petition pursuant to §§ 18.2-271(b1) and 46.1-421(c). Petition granted in part.
Miller v. Commissioner. Circuit Court, County of Fairfax. Petition for writ of mandamus to restore a driver's license revoked pursuant to § 46.1-421(b). Dismissed.

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

Montgomery v. Nielsen and Hill. Circuit Court, County of Augusta. Petition to establish ownership to 1946 Willys Jeep. Title awarded to Petitioner.

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.


Naval Air Norfolk Federal Credit Union v. Stephenson, individually and t/a Southern Body Works. Circuit Court, City of Norfolk. Petition to add Division of Motor Vehicles as a party defendant for refusal to issue title certificate. Title awarded.


Perry v. Hill. General District Court, City of Norfolk. Motion for judgment to establish ownership of a 1969 Ford van. Title awarded to Petitioner.


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

Richmond v. Hill. Circuit Court, County of Scott. Appeal of a driver's license suspension under § 46.1-167.4. Suspension withdrawn.


Sellers v. Division of Motor Vehicles. Circuit Court, County of Fairfax. Petition to establish ownership of a 1974 Kawasaki Motorcycle. Title awarded to Petitioner.


Shipp v. Hill. Circuit Court, City of Virginia Beach. Appeal of a driver's license suspension under § 46.1-430. Pending.


Troy v. Division of Motor Vehicles. Circuit Court, County of Fairfax. Petition for restoration of driving privileges under § 46.1-421(c). Petition granted.


Ware v. Hill. Circuit Court, City of Newport News. Petition for writ of mandamus to compel issuing of certificate of title. Writ denied.

Wilkins Chevrolet, Inc. v. McNamara, Virginia National Bank, Owens and Hill. Circuit Court, City of Norfolk. Bill of complaint to secure possession of and a title for a 1979 Chevrolet. Pending.


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

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

CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE IN WHICH THE TAX SECTION WAS INVOLVED

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


Bluefield Supply Company v. Department of Taxation. Circuit Court, City of Richmond, Division I. Application for correction of income tax assessment. Pending.


City of Richmond v. Ampey, et al. Circuit Court, City of Richmond, Division I. Suit to determine priority of claims. Decided, no outstanding liens in favor of Commonwealth.
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. Dismissed.


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 (Garland 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 H. A. Clopton) v. University of Richmond, et al. Circuit Court, City of Richmond, Division I. Suit to construe a will. Closed.

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. Closed.

First & Merchants National Bank v. Hospital Authority of the City of Petersburg, et al. Circuit Court, City of Petersburg. Suit to construe a will. Pending.

First & Merchants National Bank v. Petersburg Homes for Ladies, et al. Circuit Court, City of Richmond, Division I. Suit to construe a will. 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. Closed.

Fox v. Virginia 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.


Miller v. Faulconer. Circuit Court, County of Rappahannock. Suit to construe will. 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. Marshall Coleman. Circuit Court, City of Richmond. Bill of Complaint seeking court permission to liquidate portion of assets of charitable foundation and merge remaining assets into another charitable entity. Closed.


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


Slaughter v. Whiltshire, et al. Circuit Court, County of Culpeper. Suit to reform a will to comply with the 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.


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. Virginia Commonwealth University, et al. Circuit Court, City of Richmond, Division I. Suit to construe will. Pending.


Virginia Trust Company v. Virginia Commonwealth University, et al. Circuit Court, City of Richmond, Division I. Suit to construe will. Pending.


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

Circuit Court, City of Richmond, Division II. Reversed.

Adams, et al. v. Virginia Employment Commission and
Georgia-Pacific Corporation. Circuit Court, County of
Greensville. Pending.

Circuit Court, City of Radford. Pending.

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

American Furniture Co., Inc. v. Virginia Employment
Commission and Starling, et al. Circuit Court, City of
Martinsville. Pending.

Armbrister, et al. v. Virginia Employment Commission and
Lynchburg Foundry Company. Circuit Court, City of Lynchburg.
Pending.

Armistead-Morrison Company, Inc. v. Virginia Employment
Commission and Hailes. Circuit Court, City of Portsmouth.
Dismissed.

Art-Ray Corporation v. Virginia Employment Commission and
Smith. Circuit Court, City of Suffolk. Pending.

Atlee v. Virginia Employment Commission. Circuit Court,
County of Arlington. Pending.

Autotronic Systems, Inc. v. Virginia Employment Commission
and Autledge. Circuit Court, City of Newport News.
Pending.

Ball v. Virginia Employment Commission and Jewell Ridge Coal
Company. Circuit Court, County of Tazewell. Pending.

Barbour v. Virginia Employment Commission and Bank of
Virginia. Circuit Court, City of Richmond, Division I.
Affirmed.

Bartlett Co., Inc., t/a Northern Virginia Blueprint & Supply
Co. v. Virginia Employment Commission and Jimerson. Circuit
Court, County of Fairfax. Pending.

Beckner v. Virginia Employment Commission. Circuit Court,
County of Roanoke. Dismissed.

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


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

Bishop v. Virginia Employment Commission and McDowell Industries. Circuit Court, City of Richmond, Division II. Dismissed.

Broadway Baptist Church, Calvary Baptist Church and Grace Baptist Church v. Virginia Employment Commission. Circuit Court, City of Petersburg. Administrative decision concluded favoring petitioners.


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


Clatterbaugh Trucking Co. v. Virginia Employment Commission and Johnson. Circuit Court, County of Albemarle. Dis missed.


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


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


Dover v. City of Williamsburg. Circuit Court, City of Williamsburg. Pending.


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


Estrin v. Virginia Employment Commission and Fairfax County Public Schools. Circuit Court, County of Fairfax. Pending.


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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. Dismissed.


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


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


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Madison County School Board v. Virginia Employment Commission. Circuit Court, City of Richmond, Division II. Pending.


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


Martinsville Christian School v. Virginia Employment Commission. Circuit Court, City of Richmond, Division II. Pending.


Meadowood Christian School of the Meadowood Church of God v. Virginia Employment Commission. Circuit Court, City of Richmond, Division II. Pending.


Murphy Bros., 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. Dismissed.


Rideout v. Virginia Employment Commission and Franklin Concrete Products Corp. Circuit Court, County of Isle of Wight. Pending.


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


Tate v. Virginia Employment Commission. Circuit Court, City of Bristol. 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.


Victory Christian Day School of the Victory Tabernacle Baptist Church v. Virginia Employment Commission. Circuit Court, City of Richmond, Division II. Pending.


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


CASES DECIDED OR PENDING IN COURTS NOT OF RECORD OF THE STATE

Commonwealth v. Bolt. District Court, County of Montgomery. Judgment for damage to State vehicle granted.


Department of Highways and Transportation v. Jackson. General District Court, County of Carroll. Motion for judgment seeking damages for destruction of State property. Pending.


CASES BEFORE THE STATE CORPORATION COMMISSION


Appalachian Power Company (Case No. PUE 790015). Application to revise its tariffs. Interim increase granted.
Appalachian Power Company (Case No. PUE 790020). Application to conduct time-of-day and load management experiments. Granted.

Appalachian Power Company (Case No. PUE 800062). Investigation to determine fuel factor pursuant to § 56-249.6 for First Quarter 1980.

B-A-R-C Electric Cooperative (Case No. PUE 790007). Application to revise its tariffs. Rate reduction ordered.

CNG Transmission Company (Case No. 20015). Application for rate increase. Granted in part.

Chesapeake and Potomac Telephone Company (Case No. PUC 790001). Application for correction of long-distance intrastate charges. Granted.

Chesapeake and Potomac Telephone Company of Virginia (Case No. PUC 790002). Application for an increase in rates. Pending.

Chesapeake and Potomac Telephone Company of Virginia (Case No. PUC 800011). Application to revise its tariffs. Pending.

Clifton Forge-Waynesboro Telephone Company (Case No. PUC 790020). Application to revise its tariffs. Granted.


Commonwealth, ex rel. State Corporation Commission v. Blue Cross and Blue Shield (Case No. 19829). Summary judgment granted in favor of the Commonwealth.

Commonwealth Gas Pipeline Corporation (Case No. 20015). Application for an increase in rates. Granted in part.

Continental Telephone Company of Virginia (Case No. PUC 790014). Application to revise its tariffs. Denied.

Craig-Botetourt Electric Cooperative (Case No. PUE 790019). Application to revise its tariffs. Pending.

Delmarva Power and Light Company (Case No. PUE 800063). Investigation to determine fuel factor pursuant to § 56-249.6 for First Quarter 1980.

Determination Respecting the Automatic Adjustment Clause Standard Pursuant to § 113 of the Public Utility Regulatory Policies Act of 1978 (Case No. PUE 80025). Determination of standard for all electric and electric cooperative companies. Pending.

Determination Respecting the Information to Consumers Standard Pursuant to § 113 of the Public Utility Regulatory Policies Act of 1978 (Case No. PUE 800024). Determination of standard for all electric and electric cooperative companies. Pending.

Determination Respecting the Master Metering Standard Pursuant to § 113 of the Public Utility Regulatory Policies Act of 1978 (Case No. PUE 800026). Determination of standard for all electric and electric cooperative companies. Pending.

Determination Respecting the Termination of Service Standard Pursuant to §§ 113 and 303 of the Public Utility Regulatory Policies Act of 1978 (Case No. PUE 800027). Determination of standard for all natural gas, electric and electric cooperative companies. Pending.

Ex Parte: In the matter of adopting rules and regulations governing group self-insurers of workmen's compensation insurance (Case No. 20194). Regulations adopted.

General Telephone Company of the Southeast (Case No. PUC 790013). Application to revise its tariffs. Granted.

Holland Utilities Company (Case No. PUE 800014). Application for an increase in rates. Denied.

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.


Lakeville Estates Water Corporation (Case No. 20141). Application to revise its tariffs. Denied.

Northern Neck Electric Cooperative (Case No. PUE 790009). Application to revise its tariffs. Pending.

Old Dominion Power Company (Case No. 20106). Application for rate increase. Granted in part.
Old Dominion Power Company (Case No. PUE 800028). 
Application for an increase in rates. Pending.

Old Dominion Power Company (Case No. PUE 800064). 
Investigation to determine fuel factor pursuant to $56-249.6 for First Quarter 1980.

Portsmouth Gas Company (Case No. PUE 790006). Application to revise its tariffs. Granted.

Potomac Edison Company (Case No. PUE 800060). Application to revise its tariffs. Pending.

Potomac Edison Company (Case No. PUE 800065). Investigation to determine fuel factor pursuant to $56-249.6 for First Quarter 1980.


Potomac Electric Power Company (Case No. PUE 800058). Application for increase in rates. Pending.

Potomac Electric Power Company (Case No. PUE 800066). Investigation to determine fuel factor pursuant to $56-249.6 for First Quarter 1980.


Public Service Company of Virginia (Case No. PUE 800049). Application for an increase in rates. Granted in part.

Reston-Lake Anne Air Conditioning Corporation (Case No. PUE 800038). Application to revise its tariffs. Partial temporary increase granted.

Roanoke Gas Company (Case No. 20158). Application for an increase in rates. Granted.

Suffolk Gas Corporation (Case No. PUE 790008). Application to revise its tariffs. Granted in part.

United Inter-Mountain Telephone Company (Case No. PUC 790016). Application to revise its tariffs. Granted.

United Inter-Mountain Telephone Company (Case No. PUC 800003). Application for an emergency increase in rates. Denied.


Virginia Compensation Rating Bureau (Case No. INS 800047). Application for revision of workmen's compensation insurance rates and expense program. Pending.


Virginia Electric and Power Company (Case No. 20152). Application for increase in rates. Increase granted upon completion on North Anna Unit No. 2.


Virginia Electric and Power Company (Case No. PUE 790011). Application for increase in rates. Temporary rate increase granted.


Virginia Electric and Power Company (Case No. PUE 800056). Application for an increase in rates. Pending.

Virginia Electric and Power Company (Case No. PUE 800067). Investigation to determine fuel factor pursuant to § 56-249.6 for First Quarter 1980.

Virginia Electric and Power Company (Case No. PUE 800072; PUA 800008). Application for authority to participate in nuclear insurance plan. Pending.

Virginia Electric Cooperative (Case No. 20147). Application for revised rates for electric services. Pending.


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

Washington Gas Light Company (Case No. 20100). Application for permission to add new customers. Pending.

CASES BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA


Aycox v. HDMC. Decision on appeal of award to claimant. Pending.

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.


### EXTRADITION 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 3, 1979</td>
<td>Karl Michael Ross</td>
</tr>
<tr>
<td>July 17, 1979</td>
<td>Louise C. Weston</td>
</tr>
<tr>
<td>July 18, 1979</td>
<td>Ronnie L. Vickers, a/k/a Ronnie L. Foster Landron E. Gentry, a/k/a Landron E. Gentry, II</td>
</tr>
<tr>
<td>July 25, 1979</td>
<td>Rowena Riggs Powell-Spangler Roger Still Bonnie Jones, a/k/a/ Bonnie Fannon</td>
</tr>
<tr>
<td>September 4, 1979</td>
<td>Gary Keith Ball</td>
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<tr>
<td>September 7, 1979</td>
<td>Houston Talbert Dix Linwood Roosevelt White Richard Kern</td>
</tr>
<tr>
<td>September 11, 1979</td>
<td>Danny Wayne Clime, a/k/a Danny Wayne Cline</td>
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<tr>
<td>September 27, 1979</td>
<td>Linwood Brent Brown</td>
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<tr>
<td>October 4, 1979</td>
<td>James W. Lewis</td>
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<tr>
<td>October 16, 1979</td>
<td>Blake Bolin Bradley Kevin McKee Kenneth Britt Dennis Keith Cox Bruce William Callendar Joe Franklinn Coe Jack Robert Meece William Carl Slaughter Irene B. Hayes</td>
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<tr>
<td>October 22, 1979</td>
<td>Warren Harding Cooper, Jr.</td>
</tr>
<tr>
<td>October 30, 1979</td>
<td>Jerry L. Gurganus Ronald Douglas Kerns James Preston Smith</td>
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</tbody>
</table>
REPORT OF THE ATTORNEY GENERAL

November 15, 1979 William H. Hicks
November 26, 1979
Kenneth Watson
Bernard Meyers
Howard Lynwood Quintrell
Zeb Powell Bennett
George W. Washington

January 3, 1980 Jennings Blake Bolin
Howard Whitaker

January 8, 1980 Christopher S. Horton
Harry Lawrence Arnzen

January 11, 1980 Lonnie Kirk Reese

January 22, 1980 Terry Lawton
Jamahl Thomas Jefferson

January 24, 1980 Larry Hamby, a/k/a Larry Hugh Hamby

February 5, 1980 Verona Finnegan
Lonnie Edwin Hurlburt

February 6, 1980 Vivian Linda Davit

February 11, 1980 Michael Joseph Koliss
Debra J. Moody
Clifford Lee Raines
Patrick John Witcher
Ernest Allen Martin
Julius Thomas Evans, Jr.

February 12, 1980 William Curtis Steward

February 13, 1980 Perry N. Powell

February 14, 1980 Pat M. Bryant

February 18, 1980 Patrick W. Ambers
Merhl Victor Stull, III
Alvin Windley

February 26, 1980 James Allen "Rick" Marion

March 17, 1980 Larry Nelson Abner
James Bailey
Willie Eddie Penny

March 20, 1980 Larry Henson
Robert Patrick Lammens
Norman Calton

March 28, 1980 Linda A. Asbury
Jimmy Dell Carter
April 1, 1980  William David Troup
            Jimmy Hill
            Jerry Roger Harris

April 4, 1980  James Lawrence Dean
            James Fain

April 14, 1980  William Philip Taylor,
            a/k/a Philip William Taylor

May 5, 1980  Kerry Bruce Kopp

May 13, 1980  Charlis L. Hickman
            Curtis A. Hanson, Jr.
            Michael D. Rogers
            Richard McKinley Trivett
            Luther Johnson Gilbert, Jr.
            Robert Odarrio Moten
            Tom Davis Burgess
            Lavandus Swindell

May 15, 1980  Barbara Ann Reed
            Michael Keith Copeland
            Earnest D. Hicks

May 28, 1980  Jonathan George Goff
            Rory D. Martin, a/k/a Roy Dean Martin

June 6, 1980  Lori Collins, a/k/a Laura Collins
            Jerry M. Jenkins
            Jessie Ramos

June 12, 1980  James Charles Divers

June 16, 1980  Ronnie Johnson, a/k/a Sherwood West
            James F. Roberts

June 18, 1980  Rebecca Toro

June 19, 1980  Joseph Frank Posa
            Larry R. Burns

June 20, 1980  Robert Woodrow King
            Martha Wall
            Terry L. Spry
            Michael Ambrose

June 23, 1980  Melvin Leroy Davis

June 27, 1980  Robert Hendershot
CASES DECIDED OR PENDING IN THE UNITED STATES COURTS OF APPEAL


Almond v. Davis, No. 78-6273. Appeal from a dismissal of a civil rights action alleging that the inmate plaintiff was denied his constitutional rights by virtue of inadequate assistance of counsel and library facilities at the Mecklenburg Correctional Center. Pending.


Brown v. Mitchell. Appeal from denial of writ of habeas corpus in District Court. Identification; uncounseled lineup; timely objection. Pending.

Bush v. Muncy, et al. Appeal from dismissal of civil rights action alleging that inmate plaintiff was denied his constitutional rights in being transferred from Virginia to Maryland under the Interstate Agreement on Detainers.

CARE, et al. v. EPA, No. 80-1223 (Fourth Circuit). State Air Pollution Control Board has intervened in this challenge to support its original decision to issue a permit to Hampton Roads Energy Company and to support ERA approval of amendment to Virginia State Implementation Plan.

Coggens v. Richtmyer. Suit by State prisoner to enjoin his transfer to another institution and for monetary damages. Presently pending after briefing and oral argument.

Commonwealth, et al. v. Costle, No. 79-1104 and consolidated cases (D.C. Circuit). Consolidated challenges including that of Virginia State Air Pollution Control Board to national ambient air quality standard for ozone established by EPA. Argued in February 1980 and awaiting decision.


Crews v. Hall and Wooding. Civil rights complaint. District Court's decision affirmed.


Forest Hills Early Learning Center, et al. v. Lukhard. Appeal from the dismissal of a complaint challenging the constitutionality of § 63.1-196.3 which exempts day-care centers operated by religious institutions from some State regulation. Oral argument pending.


Goodwin v. Davis. Appeal from dismissal of civil rights action alleging that inmate plaintiff was denied adequate medical attention. Pending.

Grigsby v. Baskerville (Case No. 1). Prisoner's appeal from dismissal of habeas corpus petition without prejudice for failure to exhaust State remedies. Whether State remedies are exhausted by virtue of raising allegations of ineffective assistance of counsel in a petition for appeal to the Supreme Court of Virginia rather than on State habeas corpus. Pending.

Grigsby v. Baskerville (Case No. 2). Sufficiency of the evidence, whether conviction can be sustained on uncorroborated testimony of an accomplice with whom the Commonwealth had reached an agreement, denial of speedy trial, and exhaustion of State remedies. Pending.


Hudspeth v. Figgins. Prisoner suit to recover damages for cruel and unusual punishment as a result of a threat by a correctional officer. The Court reversed the District Court's holding in favor of the correctional officer and remanded for trial.

Hummer v. Hutto. Suit by State prisoner for damages as a result of a denial of access to the courts. The Court reversed a decision by the District Court in favor of the defendants.

In re Allied Towing Corporation. Appeal of District Court opinion that State recovery for damage to wildfowl by oil spill is not preempted by the 1977 amendments to the Federal Water Pollution Control Act.

In re Crawford. Petition for a writ of mandamus on behalf of State defendants directed to the United States District Judge to enforce a settlement. The petition was dismissed.
In the matter of the Complaint of Marine Navigation Sulfer Carriers, Inc. and Marine Transport Lines, Inc. as Owners of the S/T MARINE FLORIDIAN. Appeal from the U. S. District Court for exoneration and limitation of liability. District Court decision denying exoneration and limitation affirmed in favor of Commonwealth.

Inmates of the Richmond City Jail v. Davis, et al. Suit to enjoin overcrowded conditions at the Richmond City Jail and the Commonwealth to transfer various prisoners to the Virginia correctional system. Court of appeals affirmed the District Court's denial of relief.

Jones v. Blankenship. Appeal of Commonwealth from granting of writ 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. Reversed in favor of the Commonwealth.

Jones v. Purvis. Appeal from denial of habeas corpus. Whether twenty year sentence and $10,000 fine for possession of marijuana with intent to distribute constitutes cruel and unusual punishment. Pending.


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. Dismissed.

Kennedy v. Landon. Title VII sex discrimination employment case. Attorneys fees question pending.

Kibert v. Blankenship. District Court granted a petition for a writ of habeas corpus on the basis of an invalid guilty plea. The Court of Appeals reversed the District Court.

King v. Blankenship, et al. Appeal from dismissal of civil rights action alleging that inmate plaintiff was beaten by a corrections official in violation of his constitutional rights. Pending.

Lee v. Downs, No. 79-6641. Appeal from an awarded of damages in a civil rights action alleging that the inmate plaintiff was deprived of her constitutional rights by virtue of the fact that she was strip searched by correctional officers. Pending.


Moore v. Winston. Appeal from District Court in Richmond granting petitioners' petition for a writ of a habeas corpus. Double jeopardy.


Orpiano v. Hutto, et al. Appeal from award of $10,000 in damages in civil rights action alleging that inmate plaintiff was subjected to cruel and unusual punishment by excessive force used upon him by correctional officers. Pending.


Patterson v. Davis, et al. Appeal from dismissal of civil rights action alleging that inmate was denied adequate access to the courts. Pending.

Pittman v. Hutto. Suit to enjoin the Virginia Penitentiary's censorship of the inmate magazine. The Court affirmed dismissal of the suit.


REPORT OF THE ATTORNEY GENERAL

Renaissance Committee v. Hutto, et al. Appeal from dismissal of civil rights action alleging that inmate plaintiffs were illegally prohibited from meeting as an unrecognized inmate organization for the purpose of assisting one another in legal matters. Pending.


Scruggs v. Campbell. Suit challenging the school board's role in the due process procedure and suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitative Act. Briefed and orally argued. Pending.

Sheffey v. Hutto, et al. Appeal from award of attorneys fees in civil rights action in which all relief was denied. Plaintiff accepted attorneys fees. Attorneys fees in excess of $7,000 awarded. Affirmed in favor of inmate plaintiff.


Shrader v. Horton. Case challenging constitutionality of § 15.1-1261 authorizing counties and cities to adopt compulsory water and sewer hookup ordinances. Appealed from U.S. District Court, Western District of Virginia, Abingdon Division.


Simopoulos v. State Board of Medicine. On appeal from District Court. Motion for stay and interlocutory injunction denied.

Telvest, Inc., etc. v. Bradshaw. Appeal from District Court's issuance of preliminary injunction, restraining the State Corporation Commission from enforcing the provisions of the Take-Over-Bid-Disclosure Act. Court of Appeals reversed the District Court, and vacated the preliminary injunction. Decided.

Turner v. Muncy. Appeal from dismissal of civil rights action alleging that prison officials violated inmate plaintiff's rights in restricting the posting of pictures of nudes on the walls of a prison. Pending.
Turner v. Purvis. Prisoner's appeal from denial of habeas corpus. Whether the Commonwealth breached its plea agreement, and whether defense counsel was ineffective by failing to assist petitioner in fulfilling his obligations under the plea agreement. Affirmed.

Turner v. Young. Appeal from denial of habeas corpus. Whether bloody fingerprint on readily moveable object found at scene of a murder is sufficient to support conviction. Affirmed.

United States v. Department of State Police. Appeal and cross appeal from U.S. District Court orders on liability and relief in civil rights action for alleged discrimination in employment. Reversed and remanded.


Williams v. George Mason University. Appeal from District Court's judgment that defendants had not violated plaintiff's civil rights. Affirmed on appeal.

Williams v. Zahradnick. Whether the Commonwealth's attorney's reference to defendant's failure to make a statement in closing argument was a Doyle violation, and if so whether it was harmless. 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. Affirmed.


CASES DECIDED OR PENDING IN THE UNITED STATES DISTRICT COURTS


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


Brown v. Johnson. Suit by an inmate alleging guard brutality as a result of a riot at the Mecklenburg Corrections Center. Dismissed after trial.

Bukhari v. Hutto, et al. Civil rights action brought by female inmate alleging conditions of confinement constituted cruel and unusual punishment and alleging due process and equal protection of the law violations. Most of the case has been dismissed in defendants favor, but several issues are still pending.


Cagle, et al. v. Cox, et al. Suit brought as class action challenging the conditions of confinement at the Powhatan Correctional Center. Pending.

Calvin v. Hampton General District Court. Allegation that sex discriminatory reasons caused the termination from employment of a deputy clerk. Pending.


Carter v. Cox. Suit by an inmate alleging unconstitutional conditions at the Powhatan Correctional Center. Pending.


Chesapeake Bay Foundation v. United States of America. Suit to set aside issuance of NPDES permit. Pending.

Chisholm, et al. v. Lukhard, et al. Suit alleged that food stamps were issued late by the City of Richmond. Dismissed.


Commonwealth, ex rel., State Water Control Board and Kenley v. Goldschmidt. Suit for declaratory judgment to determine constitutionality of Water Control Board Regulation No. 5. Pending.


Cramer v. Virginia Commonwealth University, et al. Action instituted by a former "temporary" faculty member in the Department of Sociology who alleged that he had been the victim of "reverse discrimination" in that a lesser qualified female was selected for the "permanent" position for which he had applied. The original judgment of the District Court in favor of the plaintiff was reversed and remanded by the Court of Appeals. Trial on remand resulted in judgment in favor of defendants and dismissal of the case.

Crawford v. Loving. Suit for monetary damages on behalf of an ex-inmate of the Department of Corrections for personal injuries received as a result of self-mutilation. Pending trial.

Davis v. Mitchell. Suit on behalf of an inmate of the State Penitentiary alleging irregularities in his prison account and manipulation of his mails. Dismissed after trial.

Davis v. United States Air Force. Suit for injunction to abate sewage discharges into the Back River and James River. Pending.


Dewalt v. Burkholder. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act. Dismissed.


Dirosario v. Kline. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act. Pending.

"Doe" v. Richmond, et al. Suit by an inmate of the Richmond City Jail seeking damages under 42 U.S.C. § 1983 for violation of her constitutional right to be free from cruel and unusual punishment allegedly arising out of an assault by another inmate. Pending.


Donnovan v. Moon. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act. Settled.


Eastover Mining Co. v. Mine Safety and Health Administration. Western District of Virginia. Mine safety case, complaint filed against federal and State government; State has filed motion to dismiss.


Fareed v. MCV Hospital. Action instituted by inmate at Powhatan Correctional Center who alleges failure to render timely and appropriate remedial care, to wit: varicose vein surgery. Pending.

Farley v. Davis. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act. Settled.


Forest Hills Early Learning Center, Inc., et al. v. Lukhardt, etc. Challenge to the constitutionality of § 63.1-196.3 which in part exempts child care centers operated by religious institutions from regulation by the Department of Welfare. Defendant's motion to dismiss granted.
Forest Hills Early Learning Center, Inc., et al. v. Lukhard, etc. Same case refilled to overcome the District Court's dismissal of a prior complaint due to the plaintiff's failure to allege grounds upon which to grant relief. Dismissed.


Greer v. Alexander. Defendant's attempt to join Department of Highways and Transportation as an involuntary plaintiff was denied.


Hamm v. Yeatts. Suit seeking declaratory relief and monetary damages pursuant to the provisions of 42 U.S.C. § 1983 against the ABC Commissioners and a hearing officer based on their denial of an application for a beer off premises license. Dismissed.

Hanks v. Costle. Suit for relief from State Water Control Board's revision of its York River water quality management plan and issuance of NPDES permit to Hanover County. Pending.


Hinson v. Hutto, No. 79-0781-R. Civil rights action alleging a failure to protect the plaintiff from an assault by another inmate. Pending.


Hudspeth v. Figgins. Suit on behalf of an inmate of the Northern Virginia Correctional Unit #30 for damages as a result of a threat by a correctional officer. Settled.

Huff v. Bradford. Suit by an inmate of the penitentiary alleging guard brutality as a result of a fight. Dismissed after trial.

Huff v. Mitchell. Suit on behalf of an inmate of the penitentiary alleging a denial of his free practice of religion through a proper diet. Dismissed after trial.

Hummer v. Hutto. Suit by an inmate of Field Correctional Unit #17 alleging a denial of access to the courts. Judgment for the prisoner.

In re Allied Towing Corporation. Suit for cleanup costs, civil penalties, and damage to wildfowl for 1978 Chesapeake Bay oil spill. Settlement agreed to; pending.

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

In re Battle. Bankruptcy (No. 79-01116, Eastern District).
In re Bayside Hardware, Inc. Suit to determine priority of claims in bankruptcy. Commonwealth's claim paid in full.

In re Big 8 Construction. Bankruptcy. Pending.

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

In re Davis. Petition in bankruptcy. Motion seeking to discharge liquidated damages assessed for overweight vehicle violation was denied.


In re Permanent Surface Mining Regulations, Civil Action No. 79-1144 and Consolidated Cases (District of Columbia). Two decisions were issued by the District Court in February and May 1980 construing a large number of federal surface mining regulations challenged by industry and state petitioners, including Virginia.

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

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 Steuart Transportation Company. Suit for cleanup costs and damage to wildfowl for 1976 Chesapeake Bay oil spill. Proposed settlement awaiting approval.

In re Stokes. Bankruptcy (No. 79-00114(H), Western District).


In the matter of the Complaint of Tugboats, Inc., as owner of the Tug ANN K. and C&P Towing Co., Inc., as bareboat Charterer of the Tug ANN K., for exoneration from or limitation of liability. Admiralty action to recover $250,000 damages for injury to Eltham Bridge in West Point. Tugboat owner and operator seek exoneration from or limitation of liability. Third-party complaint filed by Tugboats, Inc., and C&P Towing Co., Inc., against Old Dominion Freight Lines for contribution. Pending.


Jones v. Chitwood. No. 79-0238(A). Civil rights action alleging inadequate medical treatment on the part of an emergency room physical amounting to cruel and unusual punishment on the part of correctional officials. Pending.

Jones v. Richmond. Suit by an inmate of the Richmond City Jail seeking damages under 42 U.S.C. § 1983 for violation of his constitutional right to be free from cruel and unusual punishment allegedly arising out of an assault by another inmate. Pending.


Lockard v. Commonwealth. Western District of Virginia. Suit brought on basis that Department of Labor and Industry had not fulfilled statutory duty under VOSH. 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. Out-of-court settlement reached.


Megginson v. Virginia Beach. Suit on behalf of an inmate who died in the Virginia Beach Jail as a result of an alleged head wound. Pending.


Miles v. Campbell, et al. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act. Settled.

Morris v. Hutto, No. 79-0402-R. Civil rights action alleging inadequate medical treatment with deliberate indifference toward plaintiff's medical needs on the part of prison officials. Pending.


NAHM v. Califano. Suit seeking attorneys' fees against the Commonwealth for successful action releasing various federal funds to the states. Pending.


Ollis v. Cox. Suit by an inmate at the Powhatan Correctional Center alleging that he was assaulted as a result of guard negligence. Pending.

Oslund v. Virginia Commonwealth University, et al. Action instituted by former faculty member in the Department of Urban Studies who alleged that she had been denied tenure on the basis of sex and because of the exercise of her First Amendment rights of free speech. Judgment entered in favor of defendants.

Oxendine v. Gathright. Suit by an inmate of the Staunton Correctional Center alleging discrimination in his custody status.


Pinkerton v. Move. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of Public Law 94-142 and § 504 of the Rehabilitation Act. Pending.

Pittman v. Brandenburg. Suit on behalf of an inmate of the penitentiary alleging that he was assaulted by guards. Dismissed after trial.


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 from Fourth Circuit Court of Appeals for evidence on constitutional claims arising out of relocations of utility facilities. Settled.

Preast v. Cox. Suit by fifteen inmates of the Powhatan Correctional Center alleging unsanitary dining conditions. Pending.

Ralls v. Rehabilitative School Authority. Civil rights suit based upon failure of R.S.A. to provide equal access to educational programs. Dismissed.


Roberson v. Hutto, No. 80-458-R. Civil rights action alleging constitutional deprivation through negligence on the part of prison officials in protecting a plaintiff from homosexual attacks. Pending.


Simopoulos v. State Board of Medicine. Temporary restraining order denied, motion to dismiss granted.


Smith v. Blankenship. Suit by an inmate of the Bland Correctional Center alleging that he was assaulted due to negligence of guards. Dismissed after trial.

"Smith" v. Richmond, et al. Suit by an inmate of the Richmond City Jail seeking damages under 42 U.S.C. § 1983 for violation of his constitutional right to be free from cruel and unusual punishment allegedly arising out of an assault by another inmate. Pending.

Smoot, et al v. Andrus, et al. No. 80-39-NN (Eastern District of Virginia, Newport News Division). Complaint for injunctive and declaratory relief against local, State and federal agencies based upon construction of Yorktown waterfront recreational project. Motions of State defendant (Commission of Outdoor Recreation) and others to dismiss are pending.


Stinnie v. Fidler. Petition for attorneys fees as a result of the culmination of a class action suit to enjoin all of the jails and lockups of the Commonwealth on each of the broad categories of prisoners' rights. Settled.

Summers v. Blankenship. Suit by an inmate of the Bland Correctional Center alleging that he was assaulted by another inmate through negligence of the guards. Dismissed after trial.

Taylor v. Cox. Suit by an inmate alleging confiscation of his personal property. Dismissed after trial.

Teaster v. Department of State Police. Suit by dismissed State Police officer under Fourteenth Amendment, seeking damages and reinstatement. Summary judgment for Department appeal to Fourth Circuit. Pending.


United States of America v. Commonwealth. Suit to determine whether AUI/NRAO is an institution of learning within the meaning of § 58-441.6(t). Pending.

United States of America v. Commonwealth, Department of State Police. Race and sex discrimination in employment suit. On remand to District Court after partial affirmance, partial reversal of District Court judgment. Pending.


REPORT OF THE ATTORNEY GENERAL


Vette v. Commonwealth. Consolidated suits by a prisoner challenging his medical treatment, classifications, and dietary deficiencies while confined in the Department of Corrections. Case dismissed after trial.

Virginia Surface Mining & Reclamation Assn., et al. v. Andrus, No. 78-0224-B (Western District of Virginia). District Court ruled in January 1980 that several sections of the 1977 Federal Surface Mining Control and Reclamation Act are unconstitutional and issued a permanent injunction. Cross-appeals are now pending before the United States Supreme Court (Nos. 79-1538, 79-1596) which has issued a stay pending appeal.


Wilson v. Hutto, et al. Civil rights action alleging cruel and unusual punishment in the failure of prison officials to offer appropriate protection to inmate plaintiff who was attacked and seriously injured by another inmate. Dismissed after trial.


Wright v. Downes. Suit by an inmate of the Correctional Center for Women alleging racial discrimination in the placement of inmates for study release. Pending.

Wright v. Ross. Suit by an inmate alleging that he was struck with a golf ball as a result of guard negligence. Dismissed after trial.

Wright v. Rucker & Richardson, Inc. Seeking to enjoin creditor of real estate firm from recovering from Real Estate Recovery Act. Pending.

REPORT OF THE ATTORNEY GENERAL


CASES BEFORE FEDERAL AGENCIES


In the Matter of the National Pollutant Discharge Elimination System Permit for Blue Plains Sewage Treatment Plant. Before the Environmental Protection Agency, adjudicatory hearing docket No. DC-AH-102. Hearing on the terms of the NPDES permit issued. Pending.

In the Matter of the Protest of Southern Stevedoring Corporation to the Section 15 Approval of Agreement No. T-3896. In the Federal Maritime Commission. Protest of negotiated renewal of port terminal lease between the Virginia Port Authority and Portsmouth Terminals, Inc. Pending.


Rhonda Lou Energy Co. v. Office of Surface Mining, IBSMA80-9, Docket No. CH 9-34-R. Division of Mined Land Reclamation intervened in this case to establish administrative discretion of State regulatory authority. Notices of violation were withdrawn by OSM and appeal dismissed.

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 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.

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.

The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
You have asked whether an individual who has continuously been engaged in real estate sales for the requisite period required by the Virginia Real Estate Commission (the "Commission") should qualify for a Virginia broker's license by reciprocity even though for a segment of that requisite period such individual was not employed by a broker as required by a policy of the Commission.

Specifically, you inquire whether the Commission may deny a broker's license by reciprocity to an individual possessing the following background: In February 1976 he is licensed in Virginia as a real estate salesman. In October 1976 he moves out of Virginia to Illinois where, because he qualifies for an exemption in that jurisdiction, he does not secure a license even though he is still engaged in the sale of real estate. The exemption is for persons employed to sell land by the owner of the land. Subsequently, he moves to Michigan where in December 1977 he secures a license, then he moves to Ohio in July 1978 where he does not obtain a license because of an exemption similar to that of Illinois. Finally, he moves to Maryland where he is employed as an associate broker and is licensed as such in May 1979. From the time of his licensure in Virginia until he is licensed in Maryland he is continuously engaged in the sale of real estate; however, he does not qualify for a Virginia broker's license by reciprocity because he has not been employed by or been associated with a broker for the period required by a written policy of the Commission, quoted below. You ask if this policy is a proper exercise of the Commission's powers.

Applicable Law

The Commission is a "regulatory board" as specifically enumerated in § 54-1.18(8) of the Code of Virginia (1950), as amended. As such, it has the power to establish qualifications for applicants for real estate licenses, "provided that all such qualifications shall be necessary to ensure either competence or integrity to engage..." in the real estate profession or occupation. See § 54-1.28(1). The Commission also has the power to "promulgate rules and regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer..." its regulatory system. See § 54-1.28(5).

Regulation 9.2 of the Virginia Real Estate Commission Regulations, adopted pursuant to the powers cited above, states:
"In its discretion the Commission may waive the examination provided for in these regulations and may issue a license as a real estate broker or real estate salesman to any person who is a holder of like license issued under the laws of any state or the District of Columbia, provided the requirements for such license in the State or the District of Columbia, in the opinion of the Commission, is [sic] equivalent to those required in these regulations."

Regulation 1.2 states in part that all those applying for an original broker's license, not by reciprocity:

"Shall have been actively engaged as a real estate salesman for a period of thirty-six (36) of the forty (40) months immediately preceding his or her application. 'Actively engaged' shall be deemed to mean full-time employment by or association with a broker in performing those activities defined in Virginia Code § 54-731 for an average of at least twenty hours per week...."

With reference to an out-of-state broker's application for a Virginia license by reciprocity, the Commission has adopted the following written policy:

"If the applicants did pass an examination prepared and graded by Educational Testing Service, they, at their expense, shall cause said Testing Service to send their grades to the Virginia Real Estate Commission. If the grade would have qualified them to pass the Virginia examination at the date of the examination and they have been licensed and actively engaged as a real estate broker and/or salesman combined for at least 36 of the 40 months immediately preceding their arrival in Virginia, the three full years of broker experience may be waived." Virginia Real Estate Commission, Waiver of the Written Examination Real Estate Broker #5.

The Commission has interpreted "actively engaged as a real estate broker and/or salesman" in the above policy to conform to the definition of that term in Regulation 1.2, i.e., full-time employment by or association with a broker for thirty-six of the preceding forty months. It is this policy requirement that the individual you describe does not meet.

Administrative Authority

The Commission's authority to adopt a policy such as that about which you inquire is governed by the Administrative Process Act (the "Act"), §§ 9-6.14:11 through 9-6.14:20 of the Code. Section 9-6.14:4(F) makes the Commission's policy a "regulation" for the purposes of the Act by stating: "'Regulation' means any statement of law, policy, right, requirement, or prohibition formulated and promulgated by an agency as a rule, standard, or guide for public or private observance or for the decision of cases..."
thereafter by the agency or by any other agency, authority, or court." By defining the policy as a regulation, the Act necessitates certain procedures for enactment of that policy unless it qualifies for exclusion from these procedures under § 9-6.14:6. These exclusions apply to the fixing of rates or prices; internal administrative procedures; semantic, interpretative or broad policy matters; emergencies; and non-discretionary conformance to basic state or federal laws. None of these exclusions is pertinent to the policy here in question. Therefore, the procedures generally required by the Act to adopt a regulation of a substantive nature must have been followed by the Commission to give effect to its policy. These procedures are detailed in §§ 9-6.14:7 and 9-6.14:8 of the Act and were not, I understand, implemented in adopting the policy here in question.

I therefore conclude that the Commission's enactment of the written policy in question is invalid, and that an application for a broker's license by reciprocity cannot be denied based upon it.

AGRICULTURE AND COMMERCE. BECAUSE COMMONWEALTH MAINTAINS SUBSTANTIAL CONTROL OVER THE ACTIVITIES OF CHIPPOKES PLANTATION FARM FOUNDATION AND IS SUPPORTED BY SPECIAL FUNDS, IT IS INSTRUMENTALITY OF COMMONWEALTH.

January 30, 1980

Mr. Stuart W. Connock, Director
Department of Planning and Budget

You have asked whether the Chippokes Plantation Farm Foundation may be regarded as a State agency for the purpose of granting loans from the Treasury pursuant to § 4-6.01 of the 1978 Appropriation Act.

This Office has on recent occasions had the opportunity to express its opinion on the differences between a political subdivision and an agency or instrumentality of the Commonwealth. The first of these Opinions was to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated September 21, 1977, and found in Report of the Attorney General (1977-1978) at 455, regarding the status of the Peninsula Transportation District Commission. The other Opinion was to Mr. John R. McCutcheon, Director, Department of Planning and Budget, dated July 13, 1978, and found in Report of the Attorney General (1978-1979) at 305, regarding the status of the Virginia Education Loan Authority. In the McCutcheon Opinion I stated that,

"A political subdivision...is a political division of the sovereignty of a state created by general law to aid in the administration of government. Such a subdivision is created by action of the legislature to exercise some portion of the sovereignty of the State in regard to one
or more specific governmental functions. Such functions may be general, such as municipal government; other functions assigned may be specific, such as the provision of water and sewer service, or the provision of public transportation. As the recipient of sovereignty, a political subdivision is independent from other governmental bodies, and may act, subject to applicable constitutional principles, within its discretion, to exercise those powers conferred by law without seeking the approval of a superior authority." Id., at 307.

An agency or instrumentality, on the other hand, "is a mere agency 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." See Diamonstein Opinion, supra, at 455.

I further note that agencies have two common characteristics which differentiate them from political subdivisions. The first is that agencies are dependent upon State appropriations and second, they are subject to prior administrative approval or post-administrative veto by higher authority of State government. See McCutcheon Opinion, supra, at 309.

I note also that independent political subdivisions employ their own consultants, attorneys, accountants, and other employees whose salaries are fixed by the political subdivisions, and are not subject to administrative control of the State. Secondly, political subdivisions often incur debts which are not debts of the Commonwealth, but debts of the political subdivision itself. Likewise, a political subdivision cannot pledge the full faith and credit of the Commonwealth in securing the debt.

Mrs. Victor Stewart gave the Chippokes Plantation to the Commonwealth of Virginia as a memorial to her husband. See The History of Chippokes, compiled by the Division of Parks, Department of Conservation and Economic Development, Richmond (1971). Chippokes has been a working plantation since 1626. See § 3.1-22.6 of the Code of Virginia (1950), as amended. The Stewarts desired that at least part of the plantation be maintained as a working farm to educate the public on the history and evolution of agriculture and rural living. The Chippokes Plantation Farm Foundation (the "Foundation") was the instrument the General Assembly chose to further this desire.

The Foundation has some of the characteristics of a political subdivision and some associated with an agency of the State. Section 3.1-22.7 states that the Foundation is a "body politic and corporate." Such terminology is normally used for an independent political subdivision. See § 3.1-22.10(A). In the 1978 Budget Bill there is no
estimation of revenues accruing to the Foundation nor any appropriation to it.

The Foundation has characteristics of an agency or instrumentality of the State. The board of trustees is appointed by the Governor and serves at his pleasure. See § 3.1-22.8. The executive secretary is the Commissioner of Agriculture and Consumer Services. See § 3.1-22.11. All administrative duties of the Foundation are carried out by him or his subordinates, all employees of the Commonwealth. The model farm is to be developed on a piece of property owned by the Commonwealth of Virginia through its agency, the Department of Conservation and Economic Development. Most important, the board maintains control over the property through a lease with the Foundation, and any sublease of the property must have the approval of the board. Finally, if the Foundation is unable to establish, maintain, or operate the property without expense to the Commonwealth, the board has the power to terminate the Foundation and dispose of the property in any manner it sees fit. See § 3.1-22.12.

I note further that the Foundation has operated to date in keeping with agency status. All monies received by the agency have been turned over to the State Treasury and expenses have been paid on warrants through the Comptroller. This Office has handled the Foundation's legal affairs, including its lease arrangements with the tenant on the property and has also secured a letter from the Internal Revenue Service which declares that the Foundation is an agency or instrumentality of State government. It is my opinion that the factors supporting the status of the agency are more substantial than the factors supporting its status as an independent political subdivision.

Deciding that the Foundation is an agency or instrumentality of State government does not dispose of your question. There is a distinction between agency and instrumentality status, even though these terms are often used interchangeably. For example, the Supreme Court of Virginia held that the Virginia State Milk Commission was not the "Commonwealth" but an "instrumentality" of the Commonwealth which was not entitled to the exemption for costs given to the Commonwealth in § 14-197. See Roller v. State Milk Commission, 204 Va. 536, 132 S.E.2d 427 (1963). The Virginia Supreme Court based its decision upon the fact that the State Milk Commission was not supported by general fund revenues, but by special assessments on producers and distributors. By comparison, the Department of Health was held to be "an arm of the State, the State's alter ego," having no powers distinct from the State. See Medicenters of America, Inc. v. Virginia, 373 F.Supp. 305, 306 (E.D. Va. 1974). (Emphasis added.) Because the Foundation will be entirely supported by specially raised funds, I hold that it is an instrumentality rather than an agency of the State.

"applicable equal to units of State Government, including 'department,' 'institution,' 'commission,' 'board,' 'council,' or other such body, however designated." Such agencies are the ones entitled to borrow against anticipated non-general fund revenue in accordance with § 4-6.01 of the [1978] Acts of Assembly, supra. It is my opinion that the term "state agency" here includes instrumentalities of the Commonwealth and is sufficiently broad to include the Foundation.

ALCOHOLIC BEVERAGE CONTROL LAWS. LOCALITIES CANNOT PRORATE LOCAL LICENSE TAX ON ALCOHOLIC BEVERAGES.

October 9, 1979

The Honorable William H. Logan, Jr.
Commonwealth's Attorney for Shenandoah County

You have asked whether an ordinance requiring an annual license tax on those selling alcoholic beverages is enforceable when it makes no provision for prorating the tax when a license is issued during a tax year. You advise that the ordinance was adopted pursuant to §§ 4-38 and 4-98.19 of the Code of Virginia (1950), as amended, and suggest that subsection (c) of § 4-38 and subsection (b) of § 4-98.19 would appear to make proration optional with the county adopting the ordinance.

Sections 4-38 and 4-98.19 provide the enabling authority for the requirement of local license taxes on alcoholic beverages and mixed beverages. These license taxes are in addition to the taxes on State licenses imposed by § 4-33 (alcoholic beverages) and § 4-98.18 (mixed beverages). State taxes on alcoholic beverage licenses are subject to proration in the amounts specified in § 4-33(b). Section 4-98.18(d) makes the provisions of § 4-33(b) dealing with proration of taxes applicable to State taxes on mixed beverage licenses.

In contrast, there is no express provision in § 4-38 or § 4-98.19 for proration of license taxes by a county, city or town. Section 4-38(c) states that the "governing body of a county, city or town may, in its discretion, classify [alcoholic beverage] licenses and graduate the license taxes therefor in such manner as it may deem proper." (Emphasis added.) With regard to mixed beverages, the local governing body "may, in its discretion, graduate the license taxes...as it may deem appropriate." (Emphasis added.) See § 4-98.19(b).

The power to graduate license taxes does not imply the power to prorate license taxes. "Graduated" means divided into steps or successive levels, usually proportional to size of tax base. See American Guaranty Corp. v. U.S., 401 F.2d 1004, 1006 (Ct. Cl. 1968). For example, § 58-293 requires payment of a graduated tax on commissions earned by commission merchants and brokers, twenty-five dollars on the
first two thousand dollars of earnings, plus fifty cents per
one hundred dollars on the next eight thousand dollars of
earnings, and one dollar per hundred dollars on all
commissions in excess of ten thousand dollars. "Proration"
of taxes, on the other hand, means payment of only that
portion that corresponds to the part of the tax period during
which the property or license was held. Salerno v. Buono,

I can find no other authority which would support an
implied power to prorate the taxes. In a case construing the
proration of real estate taxes between the State and a
municipality on the one hand (tax exempt entities) and the
prior owner on the other, pursuant to a statute authorizing
such proration, the court (quoting from the trial judge's
opinion) stated that "[t]he general rule is that such
proration is not allowed and when the assessment has been
made the then owner and the property become liable for a
whole year's taxes. This statute [now § 58-822] creates an
exception to the general rule...." Warwick County v. Newport
News, 153 Va. 789, 817, 151 S.E. 417 (1930). While that case
concerned real estate taxes, it stands for the proposition
that proration is not to be assumed unless it is specifically
provided for by statute. I therefore conclude that the local
government has no authority to prorate the taxes due.

You also ask about the enforceability of the ordinance
and implicitly question its legality on the ground that it
imposes a license tax greater than that imposed by the
Commonwealth. Counties, cities and towns may impose taxes up
to, but not in excess of, the limits specified in §§ 4-38 and
4-98.19. In some instances, these limits exceed rates that
may be imposed by the Commonwealth. A tax levied by a
locality within limits imposed by the constitution or a
statute is lawful. 84 C.J.S. Taxation § 56 (1954). Within
those limits, the amount or rate of the levy rests in the
discretion of the governing body vested with the power of
making the levy. See City of Roanoke v. Hill, 193 Va. 643,
70 S.E.2d 270 (1952).

In conclusion, I am of the opinion that the county may
not prorate license taxes and that the county's ordinance is
valid and enforceable.

ANNEXATION. REDUCED TAXATION ON ANNEXED LAND. NOT
RESTRICTED TO FIRST FIVE YEARS AFTER ANNEXATION.

April 28, 1980

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

You ask whether the authority of a governing body to
allow reduced taxation on annexed land, pursuant to
§ 15.1-1047.1 of the Code of Virginia (1950), as amended, is
restricted to the first five years after the effective date of annexation.

The first paragraph of § 15.1-1047.1 provides merely that the governing body may, by ordinance, allow a lower rate of taxation to be imposed for a period not to exceed five years. I find in the first paragraph no language limiting the exercise of the governing body's discretion to the first five years after annexation.

The second paragraph of § 15.1-1047.1 provides that the differences in the rate of taxation shall bear a reasonable relationship to differences in the provision of nonrevenue-producing, urban-type governmental services. The purpose then of § 15.1-1047.1 is to grant the governing body the authority to do equity during the transition after annexation, subject to certain limits.

The period after annexation is by its nature filled with change, and the application of equity within the statutory standard of differences in services poses difficult problems of legislative fact-finding and judgment. Grants of discretionary authority to deal with remedial and equitable matters are to be liberally construed.

Accordingly, based on the language of the statute, its purposes, and the applicable rules of construction, I find that the authority of the governing body to allow reduced taxation on annexed land, pursuant to § 15.1-1047.1, is not restricted to the first five years after the effective date of annexation. As long as the reduced taxes are for the purpose of aiding the transition after annexation, a period of up to five years occurring at any time after annexation would be appropriate.

APPROPRIATIONS. CONSTITUTIONAL LAW. FAILURE TO RETURN TAX REVENUES IN AMOUNT CORRESPONDING TO TAXES PAID NOT PROHIBITED.

March 27, 1980

The Honorable Warren E. Barry
Member, House of Delegates

You have asked two questions concerning the constitutionality of H.B. 631, which passed the 1980 Session of the General Assembly, and has been signed by the Governor. This statute imposes a sales tax on gasoline sold within the Northern Virginia Transportation District, the revenues from which will underwrite the operating deficit and debt service of the mass transit system therein.

You first ask whether the Bill is constitutionally defective because the tax revenues are disbursed to the Transportation Commission, rather than to some local government. That commission is a special purpose political
subdivision, and is comprised of both elected officials and private individuals.

The General Assembly, not the Transportation Commission, imposes the tax. The Virginia Constitution does not require that State tax revenues be disbursed to local governments; rather, it only requires that tax revenues be paid out of the State treasury pursuant to an appropriation. See Art. X, § 7 of the Constitution of Virginia (1971). The Appropriations Act for the 1981-1982 biennium appropriates the revenues generated by H.B. 631 to the commission. See Ch. __ [1980] Acts of Assembly __. Further, the Bill itself directs payments out of the special fund created in the treasury to the commission. Thus, the Bill complies with all constitutional requirements regarding disbursement of public funds.

You next ask whether the Bill would be unconstitutional if tax revenues raised from sales in each local government did not match that local government's mass transit system obligations.

The tax is not structured to match, dollar for dollar, the fuel tax paid by each political subdivision in the Transportation District, with its allocated share of the Metro deficit. There is no requirement under the Virginia Constitution that the tax be so structured, or that a political subdivision receive its proportionate share of revenues or benefits financed by tax revenues. It is within the discretion of the General Assembly to appropriate State revenues for the purposes and in the areas which it deems appropriate, without regard to the source of those revenues.

ARBITRATION. COUNTY CANNOT SUBMIT CONTRACT QUESTIONS TO BINDING ARBITRATION.

May 5, 1980

The Honorable George R. St. John
County Attorney for the County of Albemarle

This is in response to your request for my opinion as to "whether it is permissible under the Virginia Constitution and the laws of this State, for a local government--in this case Albemarle County--to enter into and execute what is known as the 'Special Section 13(c) Warranty'" in connection with Albemarle County's application for federal funds under § 18 of the Urban Mass Transportation Act of 1964 (as amended). You provided a copy of the warranty for my review.

I am informed that the Urban Mass Transportation Administration requires execution of this warranty in the "Section 18 program" to protect those employees in a transportation-related job of any employer providing transportation assisted by the grant and other employees in
transportation-related jobs in the service area of the project. The program assures that the conditions of these employees' employment will meet the requirements of § 13(c) of the Urban Mass Transportation Act of 1964 (as amended).

You first inquire whether it would violate the debt limitations of Art. VII, § 10(b) of the Virginia Constitution (1971) as a pledge of the taxing power of the county, if Albemarle County were to execute this warranty without a referendum.

There are several paragraphs in the warranty which are factually relevant to the question of whether the county is assuming responsibility for a debt under the warranty. First, the county, as the public body, agrees that the terms and conditions of the warranty shall apply for the protection of transportation-related employees. The county must agree that the project shall be carried out in such a manner and upon such terms and conditions as will not adversely affect employees of the recipient and of any other public transportation provider in the transportation service area of the project. The county assures that JAUNT agrees to be bound by the terms and conditions of a national (model) § 13(c) agreement which provides protections for employees who are laid off, terminated, or who suffer pay reductions or job transfers. Finally, the warranty provides that it shall be independently binding and enforceable by and upon the parties thereto, which would include the county, and by any covered employee or his representative. These provisions provide the basis for concluding that the county may be financially responsible for payments to employees allowed by the warranty. The only clause of the warranty which militates against this conclusion is found at § B(5) of the warranty, which provides that the recipient or other party designated by the public body will be financially responsible for the application of protective conditions for employees. The warranty is silent, however, with respect to what should happen in the event of default by JAUNT, and it is arguable that the county might be liable as a guarantor, a surety or even a principal.

The Virginia Supreme Court in Button v. Day, 205 Va. 629, 139 S.E.2d 91 (1964), held that the constitutional limitations on local debt are applicable to all "obligations...or liabilities, which may directly or indirectly require the obligator...to discharge by the payment of money." Id. at 642. In the case of the 13(c) warranty, it is arguable that the obligation of the county to uphold it is certain, and it is entirely possible that it may have to do so by the payment of money. A debt which is certain as to the liability, but uncertain as to the amount, is still an absolute rather than a contingent debt. Id. at 643. Although there may be general statutory provisions which allow a county to contract debts for projects, they must also provide for a referendum on the question of contracting the debt. I am informed no referendum has been
Accordingly, it is my opinion that execution of the warranty would be unconstitutional.

You have also inquired whether the provision of the warranty for final and binding arbitration of disputes under the warranty is permitted by Virginia law. Although it has been held that municipal corporations have the implied power to submit an issue to binding arbitration, there is no correlative implied power in counties. An Opinion of the Attorney General to the Honorable W. K. Cunningham, Jr., Director, Division of Corrections, dated July 29, 1971, found in Report of the Attorney General (1971-1972) at 368, held that a State agency did not have the authority to agree to submit disputes to arbitration because the General Assembly has prescribed certain methods by which the Commonwealth may be proceeded against in disputes arising from contracts or the actions of its agents. There are no general provisions in the law to allow submitting disputes to arbitration. Although the General Assembly has conferred the power to enter into final and binding arbitration arrangements upon transportation district commissions, it has not conferred this power upon counties. It is only by satisfying these statutory procedural and jurisdictional predicates that a county may be sued. Karara v. County of Tazewell, 450 F.Supp. 169 (W.D. Va. 1978); County of Chesterfield v. Town & Country Apartments & Townhouses, 214 Va. 587, 203 S.E.2d 117 (1974). Thus, it is my opinion that Albemarle County may not sign a warranty agreeing to submit disputes to binding arbitration.

Finally, I would point out to you two other questions that arise under the 13(c) warranty. First, it assumes the character of requiring the public body to hold the effected employees harmless. This Office has held in an Opinion to the Honorable W. E. Lavery, President, Virginia Polytechnic Institute and State University, dated October 27, 1976, and found in Report of the Attorney General (1976-1977) at 51, that such "hold harmless" provisions are void since they attempt to waive the sovereign immunity of the Commonwealth. I would add that because such agreements are open-ended, they are also to be condemned.

The second issue I bring to your attention is that it is arguable that the 13(c) warranty is in contravention of Art. X, § 10 of the Virginia Constitution. Among other things, this provision in the Constitution prohibits the use of county funds in support of private ventures. There are exceptions to this mandate if it can be found that the extension of credit is for a "public purpose." See Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261 (1972); II A. E. Howard Commentaries on the Constitution of Virginia 1128 (1974). Thus, the question is posed as to whether the 13(c) warranty requirements are for a public purpose. It is my opinion that such payments would not satisfy the public purpose text.

I trust that the foregoing answers your questions.
Article VII, § 10 provides that "[n]o debt shall be contracted by or on behalf of any county...except by authority conferred by the General Assembly by general law." Only in certain instances, not applicable here, may the General Assembly allow contracting such debt, "unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county...for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt...."

In the case at hand the recipient is Jefferson Area United Transportation, Inc. (hereinafter "JAUNT").

As you may be aware, one of my Deputies appeared before the United States Senate Subcommittee on Housing and Urban Affairs on behalf of Virginia and other states who have experienced problems with this particular warranty. He explained to the Committee the ambiguities and unnecessary restrictions and requirements that are inherent in the present form of the warranty. (A copy of the transcript of that hearing can be made available to you.) In accordance with the request of the Chairman of that Subcommittee, he is meeting with the Department of Labor in an attempt to eliminate certain of the ambiguities and other problems in order to render palatable the program for those large bodies of states that cannot or will not accept the present obligations.


ARREST. UNDER WARRANTS ORDERED DESTROYED PURSUANT TO § 19.2-76.1.

December 10, 1979

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

You have asked whether a "new" warrant may be issued for a felony or misdemeanor offense after the original warrant has been destroyed pursuant to § 19.2-76.1 of the Code of Virginia (1950), as amended.

Section 19.2-76.1 provides generally that the Commonwealth's attorney shall petition the circuit court for the destruction of felony and misdemeanor warrants which have remained unexecuted for fifteen and five years respectively. This section specifically provides that no arrest shall be made under authority of any warrant which has been ordered destroyed, and further that the section shall not be construed to relate to or affect the time within which a prosecution shall be commenced.
It appears that the legislature intended the destruction of unexecuted warrants to serve as a record keeping procedure, and is not intended to affect the prosecution of persons who, for a variety of reasons, have evaded arrest on the original warrant. The language of the section does not prohibit any arrest for the offense, but merely precludes an arrest upon the authority of a warrant which has been ordered destroyed. It is my opinion that should circumstances arise where execution becomes possible after the original warrant has been ordered destroyed, a new warrant may be issued and prosecution may proceed on the new warrant.¹

You also ask whether an arrest made on a previously unexecuted warrant that was more than fifteen or five years old, as the case may be, and which had not been destroyed pursuant to § 19.2-76.1 would be proper. The statute makes it clear that "[n]o arrest shall be made under the authority of any warrant which has been ordered destroyed pursuant to this section." The operative language is the word "ordered." In my opinion once the court has ordered a warrant destroyed, the warrant in effect becomes void² and provides no authority to support an arrest.

¹In cases where a statute of limitations is specified in § 19.2-8, the court's order of destruction should be introduced into evidence to establish that the proceedings had been commenced within the statutory limit.
²A similar circumstance is found in § 19.2-56 where a search warrant which has not been executed within fifteen days is to be returned to be voided.

ATTORNEYS. REAL ESTATE PRACTICES.

January 22, 1980

The Honorable N. Samuel Clifton, Executive Director
Virginia State Bar

You have requested my opinion, as required by the Rules of the Supreme Court of Virginia,¹ on the possible anticompetitive effects of several proposed rules defining the unauthorized practice of law.

The report of the Committee on the Unauthorized Practice of Law containing the proposed rules is published in the Virginia Bar News (December 1979), and citation will be to that publication. The text of the proposed rules will be quoted herein for convenience.

Applicable Principles of Law

The relevant legal principles under which each of the proposed rules must be evaluated have been set forth in my
Opinion of October 9, 1979, concerning UPL Advisory Opinions 1 through 5. These principles may be summarized briefly and concern primarily antitrust and First and Fourteenth Amendment considerations.

Antitrust considerations arise from the Sherman Act, which is intended to preserve free and unfettered competition and to protect consumer interests. While anticompetitive aspects are inherent in any determination that a commercial activity may be performed only by a licensed professional, the "State-action" exemption to the Sherman Act applies where the anticompetitive activity is compelled by State law. Goldfarb v. Virginia State Bar, 121 U.S. 773, 792 (1975). Since the proposed rules currently under consideration will be mandated by the Supreme Court, the State-action exemption would apply and the rules will not violate the Sherman Act. See Bates v. State Bar of Virginia, 433 U.S. 350 (1977).

Under the First Amendment, regulations which infringe the right of commercial speech must be shown to bear a reasonable relationship to the protection of the public. Such regulations may fall where a balancing of interests indicates the restriction of speech does not serve an appropriate public purpose. See Friedman v. Rogers, 99 S.Ct. 887 (1979); Bates v. State Bar of Arizona, supra; Virginia State Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976).

To withstand challenge under the Fourteenth Amendment, the rules must also bear a reasonable relationship to the public welfare. See Friedman v. Rogers, supra; Exxon Corporation v. Governor of Maryland, 95 S.Ct. 2207 (1978). Stated somewhat differently, the constitutional viability of a proposed rule hinges on whether there is a public purpose served by the rule and, if so, whether the rule is reasonably related to the interest sought to be protected.

Each of the proposed rules has been examined for its compliance with these standards and with the Supreme Court's definition of the practice of law.

UPR 6-101, 6-102, 6-103, 6-104, 6-105, 6-106, 6-107 Real Estate Practice

In Goldfarb the Supreme Court gave recognition to the "compelling interest" of the states to regulate professions to protect the public health, safety and welfare. See 421 U.S. at 792. After reviewing the committee proposals on real estate practice, I conclude that each bears a reasonable relationship to the legitimate purpose of the Commonwealth in regulating the practice of law. The proposals to a substantial degree follow language already approved in proposed UPL Advisory Opinions Nos. 1 through 5.

While questions of a restriction on commercial speech could be raised with regard to proposed UPR 6-101, I find a proper public purpose in closely regulating a non-lawyer's
right to advise others for compensation in matters involving the application of legal principles to the "ownership, use, disposition or encumbrance of real estate." As the committee has noted, "the purchase of a home is the most significant financial commitment many individuals make during their lifetime" and in the real estate area "we do not have the scarcity of expertise in the legal profession that currently exists in fields like taxation." See Virginia Bar News, supra, p. 20.

Accordingly, I am of the opinion that this proposal is consistent with the principles of law set forth above.

UPR 7-101 Title Insurance Practices

In proposing UPR 7-101, the committee has rejected the conclusions reached in 1974 in Former UPL Opinions Nos. 43 and 44 and recommends that the issuance of title insurance policies directly to non-lawyers be permitted. See Virginia Bar News, supra, pp. 20-26. In so doing, the committee has reacted to Surety Title and has moved to resolve the anticompetitive issues raised by that case.

In addition, the committee proposes prohibitions against an insurer giving legal advice or representing title insurance policies as legal opinions. These prohibitions as well as the prohibition in UPR 7-101(A) against expressing an opinion as to the status or marketability of title all involve clear application of legal principles to facts and are therefore properly within the Supreme Court's general definition of the practice of law.6

Accordingly, I am of the opinion that UPR 7-101 is consistent with the principles of law set forth above.

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3UPR 6-101. Giving Legal Advice, provides: "(A) A non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, except that, incident to his investigation of factual matters, he may give advice to his regular employer (other than in aid of his employer's unauthorized practice of law) or to a lawyer upon request by the lawyer therefor."
4UPR 6-102. Holding Out With Regard to Real Estate Services, provides: "(A) Except as specifically provided in UPR 6-101(A), a non-lawyer shall not hold himself out as authorized to furnish to another advice or service with respect to real estate transactions under circumstances which imply his possession of legal knowledge or skill in the
application of any law, federal, state, or local, to a specific set of facts for a particular person.

(B) A non-lawyer shall not be excused from any violation of these Rules by any disclaimer or other statement that his unauthorized advice or conduct should be reviewed by the customer's own lawyer."

UPR 6-103. Preparation of Legal Instruments, provides: "(A) A non-lawyer shall not, with or without compensation, prepare for another legal instruments of any character affecting the title to or use of real estate, except:

1. A non-lawyer may prepare a deed to or deed of trust secured by real estate owned by him.

2. A regular and bona fide employee may prepare legal instruments for use by his employer (other than in aid of his employer's unauthorized practice of law), for which no separate charge shall be made.

3. A real estate agent (or his regular and bona fide employee) involved in the negotiation of a transaction and incident to the regular course of conducting his licensed business may prepare a contract of sale, exchange, option or lease with respect to such transaction, for which no separate charge shall be made.

4. A lending institution may in the regular course of conducting its business prepare a deed of trust or mortgage on real estate securing the payment of its loan, for which no separate charge shall be made."

UPR 6-104. Real Estate Closings, provides: "(A) A non-lawyer shall not give legal advice or prepare or advise in the preparation of legal instruments in connection with a real estate closing.

1. Make abstracts of title (i.e., copy salient portions of what the public records show as distinguished from expressing an opinion on the legal consequences of what such records show).

2. Act as an agent or broker in connection with the issuance of title insurance commitments, binders and policies.

3. Provide such other services of a clerical nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property."

UPR 6-105. Attorney-Client Relationship, provides: "(A) A real estate agent, closing agent, lender or other party interested in a real estate transaction shall not:

1. Disrupt the relationship of confidence and trust which must exist between a lawyer and his client.

2. Prevent a lawyer from exercising independent judgment on behalf of his client by attempting to fix the lawyer's compensation, or sharing in a percentage of his compensation, or prescribing the terms of his employment, or attempting in any way to control or direct his actions.

3. Place himself between the lawyer and the owner or landlord in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and direct personal responsibility which ought to exist between a lawyer and his client."
REPORT OF THE ATTORNEY GENERAL

UPR 6-106. Referral of Business, provides: "(A) A real estate agent, closing agent, lender or other party interested in a real estate transaction may refer its customer to a lawyer subject to the following:

(1) The customer shall first have the opportunity to select a lawyer of his own choosing.

(2) If the customer does not so select a lawyer, the agent shall submit a list of lawyers from which the customer may make his selection and subsequently authorize the agent to refer his account to the lawyer so selected.

(3) The lawyer shall be free at all times to communicate directly with such customer, now his client; and, upon receipt of any subsequent business unacceptable to the lawyer on the basis of the prior fee arrangement, the lawyer shall communicate with his client for the purpose of establishing the fee arrangement, in which arrangement the agent shall not participate.

(B) A real estate agent, closing agent, lender or other party interested in a real estate transaction shall not exercise or attempt to exercise any control or imply that he has any right to control the actions of the lawyer in the handling of the transaction. All decisions are to be those of the lawyer acting on behalf of his client."

UPR 6-107. Representation Before Tribunals, provides:

"(A) With respect to the ownership, use, disposition or encumbrance of real estate, a non-lawyer shall not, with or without compensation, represent the interest of another before any tribunal, judicial, administrative or executive, established under the Constitution or laws of the Commonwealth other than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of briefs or pleadings."

4UPR 7-101. Title Insurance Practices, provides: "(A) A title insurance company shall not give legal advice or express an opinion to any person as to the status or marketability of title to real property in Virginia, or as to the legal effect of documents comprising the chain of title or matters revealed by a title search or examination.

(B) A title insurance commitment, binder or policy, or any of the provisions thereof, shall not be held out, directly or indirectly, by any person as constituting the equivalent of, or as tantamount to, a legal opinion based upon an examination of title.

(C) A title insurance company may in the regular course of conducting its business issue directly to an insured or prospective insured its title insurance commitments, binders and policies as otherwise permitted by law."


6The prohibition against expressing an opinion as to the status or marketability of title seems to be based on the
committee's premise in proposed UPC 7-2 that "interpretation of the meaning of documents comprising and affecting the chain of title, and the concepts attendant thereto require a knowledge of statutes, general law in the field, and judicial decisions not possessed by non-lawyers." Only if this premise is correct would my conclusion stand that this prohibition is consistent with the Supreme Court's general definition of the practice of law. While former Va. UPL Opinions Nos. 21 (1965) and 40 (1972) seem to lend some support to the premise, intervening decisions and the passage of time warrant reexamination of the factual basis of those opinions.

ATTORNEYS. REAL ESTATE PRACTICES.

June 3, 1980

The Honorable N. Samuel Clifton, Executive Director
Virginia State Bar

You have requested my opinion, as required by the Rules of the Supreme Court of Virginia, on the possible anti-competitive effects of several proposed rules defining the unauthorized practice of law ("UPL"). These rules, Nos. 6 and 7, deal with real estate practice and title insurance.

Initial proposals in this area were considered by the governing Council of the Virginia State Bar (the "Council") on February 8, 1980. My Opinion to you regarding those proposals was issued January 22, 1980. After considering the proposals, the Council voted to reject Rule 7 and a portion of Rule 6. The rules were then referred back to the UPL Committee (the "Committee") for redrafting. In its new proposals, the Committee has redrafted UPR 6-104 and UPR 7-101, along with each relevant Unauthorized Practice Consideration ("UPC"). The other sections of Rule 6 remain unchanged. These proposed revised rules are published in the Virginia Bar News (April 1980), but the text of the rules will be quoted herein for convenience. In addition to reviewing the general anticompetitive effects of these rules, they will also be examined for their compliance with relevant legal principles.

The economic effect of a rule, especially one promulgated by the Commonwealth, is of major concern because of this nation's commitment to an economic policy favoring competition. Unauthorized practice of law regulations are frequently anticompetitive in both purpose and effect because, by design, they preclude non-lawyers, and in some cases lawyers, from performing certain tasks thought to constitute the practice of law. To this extent, the number of competitors in a market, and thus competition itself, is reduced.
The proper objective of rules defining the unauthorized practice of law should be to protect the purchasers of legal services. When the goals of maximum competition and consumer protection conflict, any such rules should restrain trade or decrease competition only to the extent necessary to achieve the goal of protecting the public and, whenever possible, less restrictive alternatives should be considered.

Applicable Principles of Law

The relevant legal principles under which these revised proposed rules must be evaluated have been set forth in my Opinion of October 9, 1979, concerning UPL Advisory Opinions 1 through 5 and my Opinion of January 22, 1980, concerning the original UPL Advisory Opinions 6 and 7. These principles concern primarily antitrust and First and Fourteenth Amendment considerations. Briefly, regulations which appear to violate the Fourteenth Amendment or which seem to infringe upon the right of commercial speech must be shown to bear a reasonable relationship to the protection of the public or the public welfare.

Antitrust considerations arise since anticompetitive aspects are inherent in any determination that a commercial activity may be performed only by a licensed professional. Because such aspects are clearly present in UPL Rules 6 and 7, the rules would constitute illegal restraints of trade in violation of §§1 and 2 of the Sherman Act. The critical question, therefore, has been whether the rules are insulated by the "State-action" exemption to the Sherman Act, which applies where the anticompetitive activity is compelled by State law. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

Recently in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 48 U.S.L.W. 4238 (March 4, 1980), the U.S. Supreme Court in an unanimous opinion reviewed the past decisions and clarified the standards for antitrust immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 48 U.S.L.W. at 4240. Assuming that the Supreme Court of Virginia is wielding the power of the sovereign in defining the practice of law and will actively supervise these UPL rules, it is arguable that the State-action exemption would apply and the rules would not violate the Sherman Act simply because they have anticompetitive aspects. As I have previously indicated, however, there is some authority for the proposition that in order to utilize the State-action exemption, challenged rules must also be shown to have some public purpose beyond a restriction of competition. See Surety Title Insurance v. Virginia State Bar, 431 F.Supp. 298, 306 (E.D. Va. 1977), citing Bodicker v. Arizona Dental Ass'n, 549 F.2d 626 (9th Cir. 1977).
Each of the proposed revised rules have been examined for compliance with all of the above standards and with the Virginia Supreme Court's definition of the practice of law.\(^5\)

**UPR 6-104 Real Estate Practice**

In reconsidering UPL Rule 6, the Committee has redrafted UPR 6-104 and UPC 6-7 involving real estate closings.\(^6\) In all significant respects, UPL Rule 6 remains unchanged. My Opinion of January 22, 1980, approved Rule 6 as it was then written, and the present version is equally valid. I am unable to approve UPC 6-7 as it is modified. The effect of the present proposal is to require that an attorney conduct closings or that the inexperienced purchaser be represented by an attorney. While it is undoubtedly true that the parties would be best served by having counsel at the closing, I am of the opinion that no factual basis exists for denying to the parties the right to proceed without the presence of an attorney.

In general, the adoption of Rule 6 will affect competition in several ways. First, the rule prevents competition between lawyers in private practice and lawyers employed by real estate agents and lending institutions. Absent this rule, attorneys employed by lay agencies would likely engage in a full line of real estate services. Second, because the rule restricts these lay agencies, regardless of whether they have staff attorneys, competition between private attorneys and lay agencies, such as real estate and closing agents and lending institutions, is prevented.

In examining revised Rule 6 for compliance with appropriate legal principles, I will center on UPR 6-104 and UPC 6-7.

In the Committee's original proposals, UPC 6-7 indicated that a non-lawyer could conduct a real estate closing and provide services incidental thereto, "as long as such activity or service does not involve the giving of legal advice or the preparation of legal documents." The implication of that language was that in at least some situations the closing of a real estate transaction by a non-lawyer would be permissible and would not constitute the unauthorized practice of law. Indeed, in its report, the Committee acknowledged "the freedom of an individual to represent himself, and the prior precedents that extend this rule in the real estate transaction area to the activities of employees on behalf of their corporate employers." See Report of the UPL Committee, *Virginia Bar News* (December 1979) at 18.

In revised UPL Rule 6-104 and UPC 6-7, the Committee has sought to clarify when a non-lawyer providing settlement services to others is engaged in the unauthorized practice of law. In UPC 6-7, it appears that a non-lawyer is only prohibited from providing settlement documents and/or
services for a fee to persons not represented by counsel, when such persons are otherwise inexperienced in real estate transactions. The UPC goes on to presume that in such a situation the mere presentation of the documents and services is likely to imply the possession and use by the non-lawyer of legal knowledge or skill.

Accordingly, if the premise is correct that mere presentation of settlement documents and/or services for a fee to a person not represented by a lawyer is likely to imply the possession and use of legal knowledge and skill, then it can be argued that the proposed regulation is appropriate for assuring that legal problems of the public will be handled by those with adequate legal training. Only then would such restriction on non-lawyers be considered reasonable regulation in the public interest. See Friedman v. Rogers, supra.

However, when weighed against the manifest anticompetitive effects of the proposal, the premise will not withstand challenge. Several members of the Committee, for example, apparently are not convinced that the mere tendering of a deed at closing is an implied or express representation of legal knowledge or skill. See Report of the UPL Committee, Virginia Bar News (December 1979) at 18-19. As the original Report of the Committee observes "[t]his is still a caveat emptor world, and there are few today who are naive enough to believe that, if they do not wish their lawyer to be present at the time, they are entitled to full protection and to rely upon 'advice' given by a party with an adverse interest." Id. at 19. I am aware of no general belief on the part of purchasers that the person conducting the closing is there for the purpose of rendering legal advice to them.

UPR 7-101 Title Insurance Practices

In originally proposing UPR 7-101, the Committee rejected the conclusions reached in 1974 in Former UPL Opinions Nos. 43 and 44 and recommended that the issuance of title insurance directly to non-lawyers be permitted. See Virginia Bar News, supra, at 20-26. In rejecting that proposal, the Council expressed the desire to revive former UPL Opinion Nos. 43, 44 and 46, which basically hold that a title insurance commitment, binder or policy can only be issued through a lawyer or at the request of a lawyer licensed to practice in Virginia. In revised UPR 7-101, the Committee has essentially taken the position that the issuing of a title insurance binder is the same as the giving of legal advice. In contrast, UPR 7-101, as originally drafted, would have permitted a title insurance company to issue directly to members of the public its title insurance commitments, binders and policies as otherwise permitted by law.

If adopted, revised UPR 7-101 is likely to affect competition in several ways. First, and perhaps most
obviously, the revised rule prevents competition between lawyers in private practice and lawyers employed by title insurance companies for the home-buyer's business. Absent the revised rule, it is fair to say that attorneys employed by title insurance companies would engage in a wider range of legal services.

Second, because the rule restricts insurance companies regardless of whether they have staff attorneys, competition between title insurance companies and private attorneys is prevented. Private attorneys will in effect be given a submonopoly in this phase of the real estate transaction.

Finally, the economic impact of the revised rule will fall most directly on the consumer insured who is prevented from purchasing a title insurance policy unless he first purchases the services of a private attorney. In effect, the insured pays twice, once for the time the insurance company's attorney spends on supervising the title examination and once for his own attorney to certify title and request issuance of the policy.

In light of constitutional considerations and these potentially significant anticompetitive effects, revised UPR 7-101 must be carefully assessed to determine whether it bears a reasonable relationship to the public welfare. I have previously stated my opinion that "the proper test to be applied in judging the constitutional viability of the proposed rules is whether there is a public purpose served by a rule and, if so, whether the rule is reasonably related to the interest sought to be protected." See Opinion to the Honorable N. Samuel Clifton dated October 9, 1979. In addition, under Virginia law, it has long been found to be "unconstitutional discrimination" to exercise police power over occupational activities which do not pose a significant threat of harm to the public. See Chapel v. Commonwealth, 197 Va. 406, 408, 89 S.E.2d 337 (1955).

In revised UPR 7-101, the Committee purports to find an adequate public purpose for its proposal in the characterization of title insurance commitments, binders, and policies as technical legal instruments, necessarily implying the possession and use of legal knowledge or skill on the part of the title insurance company. As a result, the Committee now finds that issuance of a title insurance commitment, binder, or policy directly to a non-lawyer, unless requested by his lawyer, constitutes the practice of law under the Supreme Court's general definition. I cannot agree with these conclusions.

To the contrary, I embrace the Committee's original finding that "while legal knowledge and skill are generally used in the preparation of a title insurance policy, this fact does not convert a contract of indemnity into a legal opinion." See Report of the UPL Committee, Virginia Bar News (December 1979) at 21; McKillop, "Title Insurance," 8 U.Fla.L.Rev. 447, 457-458 (1955). Moreover, I am of the
opinion that readoption of Former UPL Opinions 43, 44 and 46 would be inconsistent with the logical reading of the "incident to" exception otherwise allowable under the Supreme Court's 1938 definition for "contracts [issued in] the regular course of conducting a licensed business." In reaching these conclusions, I am also persuaded by the fact that in a number of other states commercial title companies are permitted to perform all or at least many aspects of a real estate conveyance. In general, there is no indication that such activities have brought significant harm to the public. Finally, I am convinced that there is sufficient protection against possible abuses by title insurance companies through means of the State Corporation Commission and/or the General Assembly.

Accordingly, I am of the opinion that revised UPR 7-101 is not reasonably related to the public interest to be protected and I conclude that it is not consistent either with the Supreme Court's definition of the practice of law or the principles of law outlined above. As a result, I would recommend reconsideration and readoption of the Committee's original proposal. To the extent that issuance of title insurance by non-lawyers will impose unique threats to the public interest these problems may require additional regulations, but the activity is not one which can be banned in its entirety.

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3I note, however, that the General Assembly, in enacting § 54-48 of the Code of Virginia (1950), as amended, delegated to the Virginia Supreme Court the power to promulgate rules defining the practice of law. If, as a result, the General Assembly is viewed as wielding the power of the sovereign, the general delegation in § 54-48 may not be sufficient to meet the first test of Midcal.
REPORT OF THE ATTORNEY GENERAL

6UPR 6-104. Real Estate Closings, provides:
"(A) In connection with a real estate closing, a non-lawyer shall not give legal advice to another, or prepare for or advise another in the preparation of legal instruments, for compensation, direct or indirect. A non-lawyer may--

(1) Make abstracts of title (i.e., copy salient portions of what the public records show as distinguished from expressing an opinion on the legal consequence of what such records show).

(2) Act as an agent or broker in connection with the issuance of title insurance commitments, binders and policies.

(3) Provide such other services of a clerical nature as may assist the parties in the settlement of a contract, commitment or other agreement with respect to the sale or encumbrance of property."

UPC 6-7, provides: "A non-lawyer may not provide real estate 'closing' (or 'settlement') services, or other services incidental thereto, to another under circumstances which involve the giving of legal advice or the preparation of legal instruments or which imply such non-lawyer's possession or use of legal knowledge or skill. The terminology used in deeds, deeds of trust, deed of trust notes, title insurance commitments, binders and policies, and similar settlement documents is technical and intended to be of legally binding effect. The function ostensibly performed by the real estate settlement and the services provided in connection therewith is to resolve the legal rights and interests of the parties. The common understanding with which such services are customarily received, especially in the case of a person not represented by a lawyer, is that the mere furnishing of such documents and/or services constitutes advice or service involving the possession and use of legal knowledge or skill.

In order to determine whether a non-lawyer providing settlement services to others is engaged in the unauthorized practice of law, the circumstances under which such services are delivered must be examined closely. For example, the mere presentation of settlement documents to an individual represented by a lawyer is not the unauthorized practice of law because 'the presence of the attorney eliminates the evil against which the proscription is directed: reliance by laymen upon services which are implicitly offered to him as the product of legal knowledge or skill.'

The unauthorized practice of law is less likely to occur where all parties involved are knowledgeable in real estate matters. But where a non-lawyer provides settlement documents and/or services for a fee to a person not represented by a lawyer, the mere presentation of the documents and services is likely to imply that the documents are legally sufficient and appropriate to such person's purposes or desires and that the provider of these documents and services possesses certain legal knowledge or skill and either has used or will use such knowledge or skill on behalf of such person in the preparation and/or delivery of the documents or services.
For example, a non-lawyer acting for another may:

A. Order a survey, but not give an opinion as to the adequacy of such survey or with respect to matters reflected thereon.

B. Obtain copies of leases, easements, restrictions, building codes, zoning ordinances and the like, but not give an opinion as to the legal effects thereof or any party's legal obligation to comply therewith.

C. Order termite or other inspections, but not give an opinion as to whether the results thereof comply with the terms of the contract.

D. Ascertain the status of utility services and assist in their transfer, but not give advice as to a party's legal obligation with respect thereto, other than as specified in the contract.

E. Arrange for the issuance of casualty insurance coverage, as requested by a party in interest.

F. Provide lien payoff figures as asserted by the lienholder, but not give advice as to a party's legal obligation to pay the amount claimed.

G. Make mathematical computations involving the proration of taxes, insurance, rents, interest and the like in accordance with the terms of the contract or local custom.

H. Obtain lien waivers from mechanics or materialmen in form acceptable to the party in interest, but not prepare such waiver or give advice as to the legal sufficiency thereof.

I. Prepare settlement statements.

J. Receive and disburse settlement funds, and serve as escrow agent, to the extent licensed to do so.

K. Prepare receipts and certificates of release, but not deeds, deeds of trust or deeds of release." (Footnotes omitted.)

7UPR 7-101. Title Insurance Practices, provides:

"(A) A title insurance company, through its employees, agents or other representatives acting as such, shall not give legal advice or express an opinion to any person (other than, upon request, to a lawyer) as to the status or marketability of title to real property located in Virginia, or as to the legal effect of documents comprising the chain of title or matters revealed by a title search or examination.

(B) A title insurance commitment, binder or policy, or any of the provisions thereof, shall not be held out, directly or indirectly, by any person as constituting the equivalent of, or as tantamount to, a legal opinion based upon an examination of title.

(C) A title insurance company, through its employees, agents or other representatives acting as such, shall not issue directly to a non-lawyer its title insurance commitments, binders and policies, unless upon request of the lawyer representing such non-lawyer.

(D) A title insurance company, its employees, agents and other representatives are also subject to the Rules set forth in UPL Advisory Opinion No. 6."
As the Committee seems to have originally recognized, to interpret the "incident to" exception as done in Opinions 43 and 44 would raise serious questions as to the practices of "collection agencies, trust officers and perhaps even accountants who must review a myriad number of legal documents in rendering their opinion on a client's financial position." See Virginia Bar News (December 1979) at 22 n. 38. Such an interpretation would also seem to be inconsistent with decisions from other jurisdictions in which a wide range of activities of title insurance companies have been found to be incidental to their business. See, e.g., Bar Ass'n of Tennessee v. Union Planter Title Guar. Co., 46 Tenn. App. 100, 326 S.W. 2d 767 (1959); LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948). See, e.g., Bar Ass'n of Tennessee v. Union Planter Title Guar. Co., supra; Cooperman v. West Coast Title Co., 75 So. 2d 818 (Fla. 1959); LaBrum v. Commonwealth Title Co., supra; and People v. Title Guar. & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919).

My comments and limited concerns regarding that proposal are adequately stated in my Opinion of January 22, 1980. Should the Council elect to readopt the Committee's original proposal, appropriate changes will of course be required in UPC 6-7.

ATTORNEYS. REPRESENTATION BEFORE TRIBUNALS.

October 9, 1979

The Honorable N. Samuel Clifton, Executive Director
Virginia State Bar

You have requested my opinion, as required by the Rules of the Supreme Court of Virginia, on the possible anticompetitive effects of several proposed rules defining the unauthorized practice of law.

The report of the Committee on the Unauthorized Practice of Law containing the proposed rules is published in the Virginia Bar News (August 1979), and I will cite to that publication. The text of the proposed rules will be quoted herein for convenience.

Applicable Principles of Law

Certain principles of law are applicable to each of the proposed opinions.

That the legal aspects of professional regulation present complex legal issues is amply illustrated in the volume of litigation in our courts. The anticompetitive aspects inherent in the determination that a commercial
activity may be performed only by a licensed professional are a contributing factor in the uncertainty which exists as to the proper extent and method of regulation. Likewise, regulations which infringe rights such as the right of commercial speech, must be shown to bear a reasonable relationship to the protection of the public interest.


Under Virginia law, it is an "unconstitutional discrimination" to exercise the police power over occupational activities which do not pose a threat of harm to the public. Chapel v. Commonwealth, 197 Va. 406, 408, 89 S.E.2d 337 (1955).

The Supreme Court has recognized that states have a "compelling interest" in regulating the practice of professions to protect the public health, safety, and welfare. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Thus, there is no prohibition against confining the practice of law to licensed attorneys.

The definition of the practice of law set forth in the Rules of Court, 216 Va. 941, 1062 (1976), Part 6:I is:

"Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.

Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever--

1. One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.

2. One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

3. One undertakes, with or without compensation, to represent the interest of another before any tribunal,--judicial, administrative, or executive,--otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal
conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings."

In National Soc'y of Professional Engineers v. United States, 98 S.Ct. 1355 (1978), it was held that for a canon of professional ethics to comply with the Sherman Act, it had to satisfy the "Rule of Reason." The court repeated the lesson in Goldfarb that certain practices by a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context. Id. at 1362. However, where the anti-competitive activity is compelled by state law, the "State-action" exemption to the Sherman Act applies. Goldfarb, supra, at 421 U.S. 792. Persuasive authority indicates that in order to avail oneself of the State-action exemption, the challenged rule must have some public purpose beyond a restriction of competition. See Surety Title Insurance v. Virginia State Bar, 431 F.Supp. 298, 306 (E.D. Va. 1977), citing Bodicker v. Arizona Dental Ass'n, 549 F.2d 626 (9th Cir. 1977).

In this instance, since the proposed rules will be mandated by the Supreme Court, the State-action exemption would apply and the rules will not violate the Sherman Act merely because they may have anti-competitive aspects.

This does not end the inquiry however. Under applicable federal constitutional principles, the rules must bear a reasonable relationship to the public welfare. Failure to do this may run afoul of constitutional guarantees brought into play because of the restriction on the activities of those persons excluded from a particular activity. See Exxon Corporation v. Governor of Maryland, 98 S.Ct. 2207 (1978).

Accordingly, in my opinion the proper test to be applied in judging the constitutional viability of the proposed rules is whether there is a public purpose served by a rule and, if so, whether the rule is reasonably related to the interest sought to be protected.

Each of the proposed rules will be examined for its compliance with the foregoing standard and with the existing definition of the practice of law.

In addition, I note with pleasure that the report of the UPL Committee, Virginia Bar News, supra, pp. 4-5, adopted the standards the General Assembly has applied to other professional regulation. These standards are more strict than is necessary to satisfy constitutional requirements, but are certainly consistent with desirable public policy. You have not requested that I render an opinion whether the
proposed rules satisfy this standard, and I have not attempted to do so.

UPR 1-101,3 Representation Before Tribunals

In seeking to limit the representation of the interests of others before tribunals to licensed attorneys, the proposed rule seeks to prevent the evils resulting from inadequate representation of the individual. Bryce v. Gillespie, 160 Va. 137, 168 S.E. 653 (1933). As officers of the court, attorneys are best able to assist the court to proceed in an orderly and expeditious fashion. Norfolk and Portsmouth Bar Ass'n v. Drewry, 161 Va. 833, 836, 172 S.E. 282 (1934).

Such a purpose is clearly a proper purpose for professional regulation and, with the two exceptions noted below, justifies the monopoly extended to licensed attorneys.

I am of the opinion that the requirement that a corporation appear only by counsel may not withstand scrutiny in all cases. The list of public bodies deemed by the proposed rule to constitute tribunals is extensive. The nature of practice before some of the defined tribunals, such as zoning appeal boards, tax equalization boards, planning commissions, and departments of the executive branch, may as a matter of fact be proven not to require the assistance of a lawyer. These agencies are created to facilitate access of the people to government. Yet the proposed rules broaden the definition of tribunal by extending it to agencies of government other than courts. Corporations as well as individuals may be excluded from access to tribunals by the high cost of legal counsel. Although, corporations would always be best represented by competent counsel, as a matter of law it may well be that there is no rational basis for creating a blanket distinction between corporate entities and individuals. In addition, the distinction may be unwise as an application of public policy.

The authority cited by the Committee in its report properly notes the common law rule that corporations may not appear personally. Virginia Bar News (August 1979) at 43, n. 7. However, the authorities cited do not require that a corporation be represented only by an attorney when representing its own interest. In Richmond Ass'n of Credit Men, Inc. v. Bar Ass'n of the City of Richmond, 167 Va. 327, 189 S.E. 153 (1937), the court held that a corporation could not practice law by representing creditors. However, a corporation representing its own interest need not be defined as the practice of law.

One way of dealing with this diminished access to governmental agencies would be to allow corporations to represent their interests pro se. That would treat corporations and individuals equally in form, but an individual would be unable to utilize the services of a
non-lawyer before these agencies. In my opinion, a preferable way to solve the problem would be to narrow the definition of a tribunal to the traditional adjudicatory bodies, allowing other agencies to determine their own rules of practice.

A second defect of a technical nature should be corrected. By statute, non-lawyers may represent others before some tribunals which are not reflected in the exceptions set forth in UPR 1-101(A). Examples would be teacher dismissal hearing panels (§ 22-217.7) and the Employment Commission (§ 60.1-124). In addition, it may be assumed that other such statutes will be adopted from time to time. Accordingly, the rule as proposed will conflict with existing and possibly future statutes. I suggest curing this future defect by adding a sixth exception:

"(6) a non-lawyer may represent a party before a tribunal or administrative agency when authorized by statute."

Otherwise, I am of the opinion that UPR 1-101, when properly applied, is in accord with applicable principles of law.

UPR 2-101, 2-102, 2-103, Lay Adjusters

The original basis for this proposal was that corporations could not practice law except through attorneys. See UPL Opinion No. 16 (1942). Although as indicated above, I am of the opinion that corporations, in limited situations consistent with the public interest, should be able to represent their interests. I am of the opinion that lay adjusters representing claimants should not be able to give legal advice to the claimant. The adjuster's loyalty is to the employer, not the claimant. Accordingly, the restriction on the activities of lay adjusters is a reasonable regulation in the public interest. See Friedman v. Rogers, 99 S.Ct. 887 (1979).

UPR 3-101, 3-102, 3-103, Collection Agencies

These proposals are consistent with the principles of law set forth above and therefore in my opinion are lawful.

I am of the opinion that the determination of the fee to be charged by the attorney is not a matter which is so essential to the attorney-client relationship that the collection agency should be prevented from establishing some limits on the rates to be charged by attorneys it recommends. Accordingly, I recommend amendment of DR 3-102(A)(3) as follows:

"(3) The lawyer shall be free at all times to communicate directly with the creditor; and, upon receipt of the referral, the lawyer shall communicate with the creditor for the purpose of establishing the
fee arrangement, in which arrangement the agency shall net participate except that where counsel is selected from a list offered by the agency the agency may establish the customary fee to be charged."

The agency can provide the customary fee and the attorney may negotiate a higher fee, or rebate an excessively high fee, if circumstances depart from the usual.

The proposed DR 3-102(A)(3) would not be unlawful unless it was shown to result consistently in excessive fees, a fact which I do not know to be the case.

UPR 4-101, 4-102, 4-103, 4-104, Estate Planning

The Committee proposals reflect the general rule that estate planning constitutes the practice of law and in the public interest is best left to licensed attorneys. Grievance Committee of the Bar of Fairfield County v. Dacey, 222 A.2d 339 (Conn. 1966); Annot. 22 ALR3d 1112 (1968); appeal dismissed 386 U.S. 683 (1967). Except as noted below, the proposals satisfy applicable requirements of law. An attorney or lay employee of a financial institution may be skilled in the law of estate planning, but the conflict of interest created by the employment relationship provides insufficient guarantees that the needs of the individual will be properly considered.

Proposed UPR 4-101(A) prevents a non-lawyer from "specifically recommending" provisions for a will or trust, or "giving an opinion concerning the application, advisability or quality of any legal instrument...." In my opinion this would be protected "commercial speech" as that doctrine is set forth in Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) and Friedman v. Rogers, supra. Adequate protection for the public lies in having the attorney of one's choice actually render legal advice and prepare the papers. The financial institution is entitled to solicit patronage. Id., 99 S.Ct. at 895, n. 10.

In Fairfield County, supra, the defendant Dacey distributed literature recommending what he called a "Dacey Trust" and then provided the legal work to customers who accepted the offer. The court held that Dacey was giving more than "general information" in that he was giving "final or specific advice" and the "terms to be incorporated" in the trusts. See State Bar Ass'n v. Connecticut Bank and Trust Co., 140 A.2d 863 (1958); Annot. 69 ALR2d 394 (1958). By contrast, a different result was reached in New York County Lawyers Ass'n v. Dacey, 234 N.E.2d 459 (1967). In that case Dacey had published the book How to Avoid Probate. The Court of Appeals held that publication of text "which purports to say what the law is" may not be suppressed on grounds that the "mere fact that the principles or rules stated in the text may be accepted by a particular reader as a solution to his individual problem, does not affect the
matter." Ibid. In my opinion giving financial institutions the opportunity to recommend specific plans will provide valuable information to the consumer as well as, in some instances, to the attorney.

Accordingly, I recommend that UPR 4-101(A) be amended to read as follows:

"(A) A non-lawyer shall not advise another for compensation, direct or indirect, in any matter involving the application of legal principles to particular facts or purposes or desires, such as specifically recommending dispositive, inter-vivos or testamentary provisions for a will or trust; or giving an opinion concerning the application, advisability or quality of any legal instrument, document or form in connection with the disposition of property during lifetime or at death, except:

(1) A non-lawyer may collect information and analyze the facts and assets of a particular estate in relation to its economic or investment needs.

(2) A non-lawyer may, incident to the sale or transfer of a particular investment asset, give information about the laws affecting the holding or disposition of such asset, such as making projections of possible tax effects arising from a transfer of ownership of a life insurance policy, security or other investment.

(3) A non-lawyer may specifically recommend dispositive provisions for a will or trust, or express opinions concerning the application, advisability or quality of any legal instrument, document or form in connection with the disposition of property during lifetime or at death."

UPR 5-101, 5-102, Tax Practice

The Committee report notes that the rationale for the proposed rules is reflective of the fact that economic realities do not justify requiring preparation of tax returns only by lawyers. This has been the rule in Virginia. See UPL Opinion No. 20 (1944).

The prohibition in UPR 5-101(A) against implying legal knowledge or skill, is taken from the definition of the practice of law and imposes no new restrictions on lay tax preparation firms.

Accordingly, I am of the opinion that these proposals are in accord with applicable principles of law.
Section 54-1.17 of the Code of Virginia (1950), as amended, provides:

"The Virginia General Assembly finds that the right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it is clearly found that such abridgement is necessary for the preservation of the health, safety and welfare of the public.

It is hereby declared to be the policy of the Commonwealth of Virginia that no regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest when:

1. Their unregulated practice can harm or endanger the health, safety and welfare of the public and when the potential for such harm is recognizable and not remote or dependent upon tenuous treatment.

2. Their practice has inherent within its qualities peculiar to it that distinguish it from ordinary work and labor.

3. Their practice requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability.

4. The public is not effectively protected by other means.

Provided, however, no such regulation shall be imposed which is in conflict with the Constitution of the United States, the Constitution of Virginia, the laws of the United States, or the laws of the Commonwealth of Virginia, and periodically, but no less than annually, all existing regulations shall be reviewed by the agency imposing such regulations to ensure that no such conflict exists."

UPR 1-101 Representation Before Tribunals provides:

"(A) A non-lawyer, with or without compensation, may not represent the interest of another before a tribunal, judicial, administrative or executive, established under the Constitution or laws of the Commonwealth of Virginia, otherwise than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions, except:

(1) A non-lawyer qualified to do so under the rules of the agency may represent a party before an agency of the Commonwealth of Virginia for the informal presentation of factual data, argument or proof to the extent authorized by § 9-6.14:11 of the Code of Virginia.

(2) A non-lawyer may examine, cross examine, question and present evidence in behalf of a grievant or respondent before a grievance panel to the extent authorized by § 2.1-114.5:1D4 or § 15.1-7.1 of the Code of Virginia."
(3) A non-lawyer who is a regular and bona fide employee of an agency of the Commonwealth of Virginia may in the course of his employment represent the interests of his agency in administrative hearings before his own or any other such agency in the examination of witnesses relating to personnel matters and the adoption of agency standards, policies, rules and regulations.

(4) A non-lawyer who is a regular and bona fide employee of a legal aid society approved by the Virginia State Bar in accordance with its rules and regulations adopted under § 54-52.1 of the Code of Virginia may represent an indigent patron of such society before such a tribunal when authorized to do so by the governing body of such society and when such representation is permitted by the rules of practice of such tribunal.

(5) A law student may appear and represent others before such a tribunal in accordance with the third year student practice rule.

(B) An individual regularly and bona fide employed on a salary basis by a corporation (other than a duly registered law corporation) who appears in that capacity on behalf of another before a tribunal, judicial, administrative or executive, established under the Constitution or laws of the Commonwealth of Virginia, may not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings, or the presenting of legal conclusions except that, if such individual is a lawyer duly authorized or licensed to practice law in Virginia, he may, to the extent permitted by the Virginia Code of Professional Responsibility:

(1) Represent the interest of his employer before such tribunal.
(2) Represent the interest of a subsidiary or affiliated corporation when requested to do so by his employer.
(3) Represent the interest of his employer's insured when requested to do so by his employer.
(4) Represent the interest of a subscriber pursuant to a legal services plan licensed under Chapter 22 of Title 38.1 of the Code of Virginia."

"4UPR 2-101, Investigation, provides:
"(A) A non-lawyer acting as a lay adjuster, whether as an employee regularly and bona fide employed on a salary basis or as an independent expert, shall not for compensation, direct or indirect, advise another as to the law governing the facts as disclosed by his investigation, except:
(1) A lay adjuster may investigate the facts relative to a claim, and make a report thereon and an estimate of its monetary value to his principal.
(2) A lay adjuster may so advise his regular employer.
(3) A lay adjuster may so advise an insurance company or comparable entity as to its liability with respect to a claim investigated by him."

UPR 2-102, Negotiation of Settlement, provides:
"(A) A non-lawyer acting as a lay adjuster, whether as an employee regularly and bona fide employed on a salary basis or as an independent expert, shall not for
compensation, direct or indirect, negotiate or settle a claim of a person not represented by a lawyer except:

(1) A lay adjuster may secure and convey factual data and information, transmit settlement offers made by either party, determine and express his opinion on the extent of damage or injury and its monetary value, deliver releases or other documents, and assist the lawyer for his principal in the efficient performance of ministerial acts arising out of the settlement negotiations.

(2) A lay adjuster employed or retained by an insurer doing business in the Commonwealth of Virginia may, in the course of negotiating a settlement for such insurer, make statements to the claimant or others as to such insurer's liability or as to the law governing the facts to the extent consistent with the Rules Governing Unfair Claim Settlement Practices as from time to time promulgated by the State Corporation Commission of Virginia.

(3) A lay adjuster employed or retained by a self-insured person or entity doing business in the Commonwealth of Virginia may, in the course of negotiating a settlement for his principal, make statements to the claimant or others as to his principal's liability or as to the law governing the facts to the extent consistent with the principles enunciated in the Rules Governing Unfair Claim Settlement Practices as from time to time promulgated by the State Corporation Commission of Virginia, or in any case where it is clear that the claimant (a) recognizes the lay adjuster as an adversary and (b) is otherwise competent to manage his own affairs.

(B) A non-lawyer acting as a lay adjuster, whether as an employee regularly and bona fide employed on a salary basis or as an independent expert, shall not, with or without compensation, direct or indirect, conduct negotiations to settle a suit pending in court except with the approval of the lawyer for his principal."

UPR 2-103, Preparation of Documents, provides:

"(A) A non-lawyer acting as a lay adjuster, whether as an employee regularly and bona fide employed on a salary basis or as an independent expert, shall not, with or without compensation, direct or indirect, prepare or deliver legal instruments of any character other than a form of release or other document prepared or approved by his principal as to which he may fill in blanks supplying factual data."

UPR 3-101, Attorney-Client Relationship, provides:

"(A) An agency shall not disrupt the relationship of confidence and trust which must exist between a lawyer and his client.

(B) An agency shall not prevent a lawyer from exercising independent professional judgment on behalf of his client by attempting to fix the lawyer's compensation, or sharing in a percentage of his compensation, or prescribing the terms of his employment, or attempting in any way to control or direct his actions.

(C) An agency shall not place itself between the lawyer and the creditor in an attempt to act as the only conduit of information between the two, since this would prevent the establishment of the fundamental relationship of trust and
direct personal responsibility which ought to exist between a lawyer and his client."

UPR 3-102, Referral and Control of Claims, provides:
"(A) An agency may refer claims to a lawyer on behalf of the creditor subject to the following:
(1) The creditor shall first have the opportunity to select a lawyer of his own choosing.
(2) If the creditor does not so select a lawyer, the agency shall submit a list of lawyers from which the creditor may make his selection and subsequently authorize the agency to refer his account to the lawyer so selected by the creditor.
(3) The lawyer shall be free at all times to communicate directly with the creditor; and, upon receipt of the referral, the lawyer shall communicate with the creditor for the purpose of establishing the fee arrangement, in which arrangement the agency shall not participate.
(4) The agency may thereafter, if authorized by the creditor, continue correspondence of a routine nature with the lawyer on behalf of the creditor.
(B) An agency shall not exercise or attempt to exercise any control or imply that it has any right to control the actions of the lawyer in the handling of the creditor's claim. All decisions are to be those of the lawyer acting on behalf of his client, the creditor."

UPR 3-103, Preparation of Documents, provides:
"(A) An agency may prepare statements of accounts and affidavits of facts relating to accounts and may file the same with personal representatives and trustees in bankruptcy.
(B) An agency shall not prepare a proof of claim or file such a claim as agent for the creditor with the bankruptcy court except to the extent it is permitted to do so by the Bankruptcy Rules.
(C) An agency shall not prepare for others any document which requires legal training or the application of legal principles to factual situations except as authorized under these Rules.
(D) An agency shall not use any letters or forms which threaten the institution of legal proceedings or simulate judicial process or notice of judicial process."

UPR 4-101, Estate Planning Advice, provides:
"(A) A non-lawyer shall not advise another for compensation, direct or indirect, in any matter involving the application of legal principles to particular facts or purposes or desires, such as specifically recommending dispositive inter vivos or testamentary provisions for a will or trust, or giving an opinion concerning the application, advisability or quality of any legal instrument, document or form in connection with the disposition of property during lifetime or at death, except:
(1) A non-lawyer may collect information and analyze the facts and assets of a particular estate in relation to its economic or investment needs.
(2) A non-lawyer may, incident to the sale or transfer of a particular investment asset, give information about the laws affecting the holding or disposition of such asset, such
as making projections of possible tax effects arising from a transfer of ownership of a life insurance policy, security or other investment."

UPR 4-102, Holding Out with Regard to Estate Planning, provides:
"(A) Except to the extent estate planning advice is permitted under UPR 4-101, a non-lawyer shall not hold himself out as authorized to furnish another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, to a specific set of facts for a particular person.

(B) A non-lawyer shall not be excused from any violation of these Rules by any disclaimer or other statement that his unauthorized advice or conduct should be reviewed by his customer's own lawyer."

UPR 4-103, Preparation of Documents, provides:
"(A) A non-lawyer shall not, with or without compensation, prepare or draft, or cause his own lawyer to prepare or draft, for another legal instrument of any character, including the filling out of a form for any will or trust, except:

(1) A non-lawyer may prepare forms of wills or trusts of general application.

(2) A non-lawyer, as an incident to the regular course of conducting his business, may submit to his customer's lawyer specimen language for inclusion in a legal instrument to be prepared by such lawyer, subject to acceptance, modification or rejection by such lawyer.

(3) A non-lawyer, as an incident to the regular course of conducting his business, may furnish his customer with routine forms or contracts of generally accepted application which do not go beyond the legitimate interest of the non-lawyer and do not involve a selection by the customer as between alternatives with materially different legal results not generally understood in the community. For example, the offering by a savings institution of a joint account with right of survivorship, a simple revocable trust account or a custodial account under the Virginia Uniform Gifts to Minors Act would normally not constitute the unauthorized practice of law."

UPR 4-104, Settlement of Estates, provides:
"(A) A non-lawyer shall not give legal advice with respect to a person's domicile.

(B) A non-lawyer shall not prepare or draft instruments, or give legal advice, with respect to the disclaimer of all or part of a person's interest in property, or a person's right to renounce all or part of any interest due under the will of such person's spouse.

(C) A non-lawyer shall not undertake in the settlement of an estate or trust to represent the interest of another before any tribunal, judicial, administrative or executive, otherwise than in the presentation of facts, figures or factual conclusions, except:

(1) A non-lawyer may offer to the proper clerk of a court a will for probate or qualify as a fiduciary in any uncontested proceeding.
(2) A non-lawyer may prepare and file accountings and confer with the Commissioner of Accounts in any uncontested proceeding.

(3) With respect to tax matters, as set forth in UPL Advisory Opinion No. 5."

UPR 5-101, Holding Out as a Tax Expert, provides:
"(A) Except to the extent tax advice is permitted under UPR 5-102, a non-lawyer shall not hold himself out as authorized to furnish to another advice or service under circumstances which imply his possession of legal knowledge or skill in the application of any law, federal, state or local, dealing with taxes, except:

(1) A non-lawyer may hold himself out as an expert in the preparation of tax returns.

(2) A certified public accountant or a person duly enrolled may hold himself out as authorized to practice before the Internal Revenue Service, as those terms are defined by the then applicable federal regulations and to the extent permitted therein.

(3) A person admitted to practice before the United States Tax Court may hold himself out as such to the extent permitted by the rules of such Court."

UPR 5-102, Practicing Law in Tax Matters, provides:
"(A) A non-lawyer shall not furnish to another for compensation, direct or indirect, advice or service under circumstances which require his use of legal knowledge or skill in the application of any law, federal, state or local, dealing with taxes, except:

(1) A non-lawyer may prepare tax returns.

(2) A certified public accountant or a person duly enrolled may practice before the Internal Revenue Service, as those terms are defined by the then applicable federal regulations and to the extent permitted therein.

(3) A non-lawyer may render such advice or service in connection with his representation of his employer or others before a tribunal, judicial, administrative, or executive, (i) in the presentation of facts, figures or factual conclusions, (ii) as authorized before the Internal Revenue Service in (2) above, or (iii) as permitted by the rules of practice of the United States Tax Court.

(4) A non-lawyer may render such advice or service incident to an engagement to provide products or services which he is otherwise authorized to provide, where such advice or service arises out of the providing of such other products or services and was not the principal purpose of the engagement.

(5) A non-lawyer may render such advice or service to his regular employer other than in aid of such employer's unauthorized rendition of legal advice or services to another."

BAIL. PERSONS CHARGED WITH CLASS 3 OR 4 MISDEMEANORS MAY BE CONFINED IN JAIL FOR FAILURE TO MEET BAIL DESPITE FACT THAT THESE OFFENSES DO NOT PROVIDE FOR IMPRISONMENT.
You have asked whether it is proper for persons charged with Class 3 or 4 misdemeanors to be confined in jail owing to their inability to meet bail, even though such offenses do not provide for imprisonment in the event of conviction.¹

The Code of Virginia contains a number of provisions for bail in misdemeanor cases, regardless of classification. Section 19.2-120, for example, provides that an accused who is held in custody pending trial "for an offense...or otherwise shall be admitted to bail" unless a judicial officer has probable cause to believe that the defendant will not appear for trial or that his liberty will constitute an unreasonable danger to himself or the public.² (Emphasis added.) Under §19.2-121, if the accused is admitted to bail, the terms shall be set at such a level as reasonably to insure the appearance of the defendant, "having regard to (1) the nature and circumstances of the offense, (2) the weight of the evidence, (3) the financial ability to pay bail, and (4) the character of the accused...." Section 19.2-122 authorizes an officer arresting a person for a misdemeanor upon a presentment, indictment or information to admit him to bail if the officer takes a recognizance in the sum of not less than $200. Section 19.2-131 provides for bail for a person "charged with a misdemeanor or felony" who is held in a jurisdiction other than that where he is to be tried. None of these provisions differentiate between felonies and misdemeanors, or between various classes of misdemeanors.

The fixing of the amount of bail has been described as "peculiarly a matter of discretion with the trial court."³ A number of factors have been recognized as important in determining the proper bail, such as the financial status of the accused, the nature of the offense, the penalty for the offense, the strength of the evidence and especially the probability of the accused's appearing at trial.⁴ No one factor is determinative.⁵

With these general considerations in mind, courts have recognized that while bail normally should be set at a relatively low figure in misdemeanor cases, a higher amount may be justified where, for example, the accused has a past history of serious offenses or where there is a showing of his likely nonappearance at trial.⁶ Specifically, a number of courts have either upheld or recognized the right of a trial court to set bail for an accused even where no jail time may be imposed upon conviction.⁷

Accordingly, I am of the view that an individual charged with a Class 3 or 4 misdemeanor may be required to meet bail or else be imprisoned pending trial. Admittedly, this conclusion may seem anomalous. A person unable to meet bail could be confined to jail to await the disposition of a
charge for which the maximum penalty is a fine. My research, however, indicates that there is no prohibition as such against setting bail in a case in which little or no jail time is authorized, even if the accused is indigent.

I would add that while the Code and decisions from other jurisdictions support this conclusion, as a practical matter in order that bail not be deemed excessive, bail in a Class 3 or 4 misdemeanor case ordinarily should be of a minimal nature because of the relatively minor charge involved, the equally minor penalty upon conviction, and the likelihood that the accused would appear at the time of trial. Apart from this consideration, however, it is my opinion that a judicial officer is authorized to set bail in any Class 3 or 4 misdemeanor case, even in the event that the accused is indigent.

Section 18.2-11(c) of the Code of Virginia (1950), as amended, provides for a fine of up to $500 for the conviction of a Class 3 misdemeanor. Section 18.2-11(d) provides for a fine of no more than $100 upon conviction for a Class 4 misdemeanor.

1See, also, Rule 3A:29 of the Rules of the Supreme Court of Virginia.


In fact, several courts have rejected the argument that bail is excessive solely due to the defendant's inability to meet the amount. See United States v. Wright, 483 F.2d 1068 (4th Cir. 1973); Simon v. Woodson, 454 F.2d 161, 166 (5th Cir. 1972). See, also, Cook, Pretrial Rights of the Accused § 84 (1972).


4See, e.g., People v. Scott, 71 Misc.2d 266, 335 N.Y.S.2d 659 (1972) (bail of $300 upheld on charge of drunk driving where maximum fine was $250); Webber v. State, 239 P. 566 (Okla. 1925) (bail of $500 on charge of public drunkenness, while not ordinarily permissible, may be upheld upon showing of aggravating circumstances); Ex parte Farrell, 37 S.W. 328 (Crim.App.Tex. 1896) (bail of $750 on charge of fornication, punishable by fine of $50-$500, proper under ordinary circumstances). See, also, State v. McCoy, 4 Conn.Cir.Ct. 109, 226 A.2d 116 (1966).

8Section 19.2-124 allows a defendant to appeal the fixing of excessive bail to the next higher court.

BANKING AND FINANCE. BAD CHECK LAW. PROSECUTION OF PERSONS WHO ISSUE BAD CHECKS FOR "GOODS OR SERVICES."
October 4, 1979

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

You ask whether the 1978 amendment to § 18.2-181 of the Code of Virginia (1950), as amended, which prohibits the issuance of bad checks "as a present consideration for goods or services..." is intended to include the issuance of a bad check for the rental of real estate.\(^1\) (Emphasis added.) Since this amendment has yet to be construed by our courts it is necessary to interpret it by the use of the rules of statutory construction.

It is a basic postulate of statutory construction that penal statutes are to be construed strictly against the State. This rule of general application holds that such statutes are not to be extended by construction, but must be limited to cases clearly within the language used. Berry v. City of Chesapeake, 209 Va. 525, 165 S.E.2d 291 (1969); Johnson v. Commonwealth, 211 Va. 815, 180 S.E.2d 661 (1971); Price v. Commonwealth, 209 Va. 383, 164 S.E.2d 676 (1968). Furthermore, it is the duty of the courts to take the words the legislature has used and give them their usual and ordinary signification. Temple v. City of Petersburg, 182 Va. 418, 29 S.E.2d 357 (1944).

In general a "service" is not property, tangible or otherwise, but, rather is an act. Property exists while a service is rendered or performed. Indiana Dept. of State Revenue, Sales Tax Division v. Cable Brazil, Inc., Ind. App. 380 N.E.2d 555, 561 (1978). This definition of services is construed with other decisions that have held that renting property is not rendering a service per se.\(^2\) Therefore, it is my opinion that the courts cannot construe the word "services" to include the ordinary rental of real estate.\(^3\)

This interpretation of the 1978 amendment to § 18.2-181, however, does not preclude the prosecution of someone who, with the intent to defraud, has issued a bad check for the rental of real estate. The first paragraph of this section is sufficient authority for a larceny prosecution of the person who issued the bad check. The 1978 amendment to § 18.2-181 addresses itself to a narrowly drawn factual situation.\(^4\) It does not negate the language contained in the first paragraph of the section which allows the prosecution of any person who issues a bad check with the intent to defraud.

\(^1\)Chapter 791 [1978] Acts of Assembly 1359 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." (Emphasis added.)
In United States v. St. Paul's Union Depot, 118 F.Supp. 461, 463 (D. Minn. 1954) the court held that the rental of property alone is not a service. In the case of In re Schmidts Estate, 319 N.Y.S.2d 869, 873, 65 Misc.2d 1027 (1977), the court held that the term "services" within a statute authorizing fiduciary to retain 5 percent of the gross rents collected from real property if he renders management services means more than just the collection of rent but also active management.

If the rental of real estate were coupled with something more, e.g., management, repair services, etc., then such a rental could be deemed to be a service. See In re Schmidts Estate, fn. 2, supra.


BANKING AND FINANCE. DEFENSE OF USURY NOT AVAILABLE TO AVOID OR DEFEAT PAYMENT OF INTEREST ON CERTAIN BUSINESS LOANS MADE BY INDUSTRIAL LOAN ASSOCIATIONS.

May 1, 1980

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

You have asked whether borrowers can successfully plead usury to avoid or defeat the payment of interest on certain business loans made by industrial loan associations if the interest rate is greater than the maximum rate allowed under § 6.1-330.15 of the Code of Virginia (1950), as amended.

Section 6.1-330.15 limits the charges which an industrial loan association may make to eight per centum per annum rate of interest and either a service charge not exceeding two per centum of the amount of the loan or five dollars, whichever is greater.

Under § 6.1-330.44, if a loan is made for the acquisition or conduct of business or investment as sole proprietor, owner, joint venturers or owners, and the initial amount of the loan is five thousand dollars or more, the borrower may not avail himself of the provisions of Ch. 7.2, which includes § 6.1-330.15, to avoid or defeat the payment of interest.

Accordingly, a defense of usury could not be pled successfully to avoid or defeat the payment of interest on certain business loans made by an industrial loan association even if the charges made exceed those allowed under § 6.1-330.15.

However, I note that § 6.1-330.44, relating to the usury defense, does not necessarily preclude the State Corporation Commission from enforcing the statutory limit on interest
rates through its powers to supervise and regulate industrial loan associations. See §§ 6.1-237 and 6.1-228.

BANKING AND FINANCE. INDUSTRIAL LOAN ASSOCIATION NOT PERMITTED TO CHARGE INTEREST AS UNREGULATED LENDERS.

April 22, 1980

The Honorable Stanley C. Walker
Member, Senate of Virginia

You have asked whether the provisions of Ch. 724 [1980] Acts of Assembly can be extended to apply to industrial loan associations.

Those provisions amend § 6.1-330.16 of the Code of Virginia (1950), as amended, to provide that unregulated lenders may charge interest at sixteen percent per year, plus a two percent service charge, on a loan secured by a subordinate mortgage or deed of trust, which is for less than ten years. By its terms, § 6.1-330.16 excludes from its purview "lenders licensed by and under the supervision of the State Corporation Commission or the federal government or otherwise enumerated in §§ 6.1-330.25 and 6.1-330.48." Industrial loan associations are classed as banks and are licensed by and under the supervision of the State Corporation Commission by the provisions of § 6.1-228.

Accordingly, it is clear that by its very terms, § 6.1-330.16, as amended by Ch. 724 [1980] Acts of Assembly, cannot be extended so that the greater interest rates which it permits will apply to loans made by industrial loan companies. This conclusion is the same as that reached by this Office in an Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated June 4, 1973, and found in Report of the Attorney General (1972-1973) at 226.

BANKING AND FINANCE. ISSUER OF CREDIT CARDS MAY IMPOSE ANNUAL MEMBERSHIP FEE IN ADDITION TO SERVICE CHARGES.

May 22, 1980

The Honorable George P. Beard, Jr.
Member, House of Delegates

You have asked whether an issuer of a credit card, either bank or lender, may impose an annual membership fee as a condition of issuance of the card, which fee would be in addition to service charges permitted under § 6.1-330.19 or § 6.1-330.20 of the Code of Virginia (1950), as amended.

The answer to your question depends on whether a membership fee is a service charge. If it is, then an annual membership fee may not be imposed in addition to a service charge. If, however, the annual membership fee is not
included within the term "service charge," then the annual membership fee is not restricted by § 6.1-330.19 or § 6.1-330.20, and may be imposed in addition to a service charge.

I conclude that a membership fee is not a service charge and, therefore, it may be imposed in addition to the service charges permitted under §§ 6.1-330.19 and 6.1-330.20.3

Although "service charge" is not defined in the Code, its meaning can be gleaned from the Virginia Code Commission's report on the revision of Ch. 7 of Title 6. (Senate Document No. 38 (1975)). The Virginia Code Commission was appointed to rearrange and revise the money and interest sections of the Code for purposes of clarity rather than to make substantive changes. The Commission substituted the term "service charge" for the following terms which had been used throughout Ch. 6: "investigation and processing fee," "investigation fee," "supervision and processing and inspection fees" and "processing and investigation fees." The above terms describe costs that are incurred in connection with a loan. In a prior Opinion to the Honorable Adelard L. Brault, Member, Senate of Virginia, dated December 22, 1977, and found in Report of the Attorney General (1977-1978) at 192, the Opinion reads that "it appears that the Commission's concern with respect to the...service charge was to standardize the descriptions of the charge throughout Title 6." The Commission's decision to use the term "service charge" does not change the type of fee regulated by the statute. Therefore, "service charge" is used as an all inclusive word to describe only those costs that are incurred in connection with a loan.4 This description of "service charge" is further substantiated by the method used to compute the charge, namely, as a percentage of the loan.

The proposed annual membership fee is to be imposed as a condition of the issuance of a bank credit card and the amount of the fee is to be unrelated to the extent of the card's use. As the court in Illinois v. Continental Illinois National Bank and Trust Company of Chicago, 409 F.Supp. 1167, 1178 (N.D. Ill. 1975), aff'd in part and rev'd on other grounds, 536 F.2d 176 (7th Cir. 1976), cert. denied, 429 U.S. 871 (1976), recognized, "[m]any holders of bank credit cards never use them to obtain funds and, therefore, never make any loans with them although the line of credit is available." The annual membership fee is intended to be a charge for those benefits and privileges which accrue to a cardholder apart from obtaining a loan. A bank credit card may be used as a credit reference, particularly for cashing out-of-state checks, and as a convenience to avoid carrying large amounts of cash. A cardholder may use a bank credit card to make purchases by telephone. Credit cards, which are being accepted worldwide, offer the convenience of paying for all charges at once and provide the cardholder with a record of his purchases.
A cardholder may take advantage of these benefits even if he never uses the card for an extension of credit. That these benefits have a distinct value apart from the extension of credit is evident by the membership fee which is imposed by charge cards such as American Express. Charge cards offer benefits and privileges that are quite similar to those available to credit cardholders, but they do not offer a line of credit. A membership fee, therefore, is a charge for those benefits which accrue to a cardholder apart from the extension of credit while a service charge is a charge imposed in connection with receiving a loan. We have determined, therefore, that a membership fee is not a service charge and may be imposed in addition to the service charges permitted under §§ 6.1-330.19 and 6.1-330.20.

The Federal Reserve Board has come to a similar conclusion, finding that membership fees do not fall within the definition of "finance charge" since such fees are imposed as a qualification of membership in the plan and for the issuances of a credit card, and not as incident to or as a condition of any specific extension of credit." 12 C.F.R. § 226.407(b) (1979). Also, the Appeals Court of Massachusetts has recently held that a membership fee is not a finance charge. Northampton National Bank v. Attorney General, 397 N.E.2d 1149 (1979). Furthermore, the State of Arkansas has determined that a membership fee does not violate its usury law. Key v. Worthen Bank & Trust Company, N.A., 260 Ark. 725, 543 S.W.2d 496 (1976).

Although a membership fee is not a service charge, the fee must be commensurate with the privileges and benefits available to a cardholder. If the fee is unreasonably high, it may be inferred that the membership fee is being used as a cloak for what is in fact an increased service charge.

Finally, since a membership fee is not a service charge, this Opinion is not affected by H.B. 391, which was passed by the 1980 General Assembly, amending § 6.1-330.20 to allow sellers or lenders to charge and collect a minimum service charge on any balance greater than zero. Therefore, an annual membership fee may be imposed in addition to the service charges permitted under § 6.1-330.19 and under both the current and amended versions of § 6.1-330.20.

There is a distinction between a credit card and a charge card. Credit cards, offer cardholders a line of credit under which they may obtain a cash advance or purchase goods or services. Cardholders then have the option of paying in full within a specified period or deferring payment and incurring a service charge. Charge cards, on the other hand, do not extend credit to cardholders and, therefore, must be paid in full on the due date.

Section 6.1-330.19 provides that: "Any bank may charge a rate not exceeding one per centum per month on daily balances, or on maximum calendar or fiscal monthly balances,
under a written contract for revolving credit on any plan which permits an obligor to avail himself of the credit so established, and may also charge as a service fee a sum not exceeding twenty-five cents for each check, draft or other order on the credit so established. In addition to the charges permitted by the prior sentence a bank may impose a service charge not exceeding two per centum of the amount of the loan." (Emphasis added.) Cash advances obtained with credit cards may come under the regulation of this section.

3Section 6.1-330.20 regulates the most common credit card transactions. It provides that: "Any seller or lender engaged in the extension of credit under an open-end credit or similar plan under which a service charge is imposed upon the cardholder or consumer if the unpaid balance is not paid in full within a period of twenty-five days from billing date, may charge and collect a service charge at a rate not to exceed one and one-half per centum per month, computed at the option of the seller or lender on either (1) the average daily balance for the period ending on the billing date or (2) the balance existing on the billing date of the month, or (3) any other balance which does not result in the seller or lender charging and receiving any sum in excess of what would be charged and received in (1) or (2) above; provided that no service charge shall be charged unless the bill is mailed not later than eight days (excluding Saturdays, Sundays and holidays) after the billing date. For the purposes of this section the average daily balance for any period shall be that amount which is the sum of the actual amounts outstanding each day during the period, divided by the number of days in the period." (Emphasis added.)

4In § 6.1-330.20, the term "service charge" apparently includes an interest component, while in § 6.1-330.19 the interest component is stated separately.

5The Virginia Code Commission, in its report on Ch. 7 of Title 6, seemed to equate the term "finance charge" as used in the Federal Truth-in-Lending statute, 15 U.S.C. §§ 1601, et seq., (1976) with the term "service charge" as used in Title 6.

BANKING AND FINANCE. § 6.1-24 PROHIBITS ALL OFFICERS OR EMPLOYEES OF BANKS OR TRUST COMPANIES SELLING TRUST ASSETS FROM PURCHASING SUCH ASSETS AT PUBLIC SALE.

February 11, 1980

The Honorable Clinton Miller
Member, House of Delegates

You have asked whether it is a violation of § 6.1-24 of the Code of Virginia (1950), as amended, for an employee of a trust company, or a member of the immediate family of a trust company employee, to purchase trust property from that trust company at a public sale.

Section 6.1-24 provides in pertinent part:
"No trust company or bank doing a trust business or trust subsidiary shall buy any property for a trust from itself, or a department or branch thereof, or from an affiliate or subsidiary corporation, or from an officer or employee of such trust company, bank or trust subsidiary. Any such purchase shall be voidable at the election of any beneficiary or successor trustee.

A sale of any trust property by a trust company or bank doing a trust business or trust subsidiary to itself, or a department or branch of such trust company, bank or trust subsidiary, or to an affiliate or subsidiary corporation, or to an officer or employee of such trust company, bank or trust subsidiary shall be a breach of trust and voidable at the election of any beneficiary or successor trustee...."

The primary reason for this provision is to prevent a trust company or a bank doing trust business from using trust assets as a lever to increase the corporation's profits through interdepartmental sales and purchases. See "Conflict of Interest and the Duty of Loyalty in Fiduciary Administration in Virginia," 47 U.Va.L.Rev. 1105, 1108 (1961).

It is well settled that a trustee cannot properly purchase trust property for himself individually even though the sale is made at public auction, and the price is determined by competitive bidding. See Branch v. Buckley, 109 Va. 784, 791, 65 S.E. 652 (1909). This prohibition has been extended, without qualification, by § 6.1-24 not only to the corporate trustee, but also to "an officer or employee" of the corporate trustee. Therefore, it is my opinion that the prohibition extends to all employees of the corporate trustee, without limitation. The General Assembly may chose to clarify this provision at some time to provide that the mere fact that a prospective purchaser is an employee of the corporate trustee will not disqualify him where the employee has no real contact with the administration of the trust and is acting purely in an individual capacity. However, § 6.1-24 by its present terms contains no such qualification.

The statutory prohibition against the purchase of trust assets does not extend, by the terms of § 6.1-24, to relatives or spouses of officers or employees of a corporate trustee. Courts of equity will closely scrutinize the purchases of trust property by a spouse or relative of the trustee to assure that no loss or prejudice results to the trust estate. See Waddy v. Grimes, 154 Va. 615, 153 S.E. 807 (1930). The obligation is on the trustee not to take any position involving conflicting personal and fiduciary interests, and not to take any profit or benefit from trust transactions. Therefore, although § 6.1-24 does not explicitly prohibit the sale of trust property to the spouse or relative of an employee of a corporate trustee, it is my opinion that the relationship is an important factor which
may be raised in appropriate circumstances by the beneficiary to question the validity of the sale.

BINGO. JACKPOTS.

November 13, 1979

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

You have asked whether an organization authorized to conduct bingo games pursuant to § 18.2-340.1 of the Code of Virginia (1950), as amended, may award more than one jackpot prize of $1,000 per session of bingo.

The 1979 Session of the General Assembly revised the law concerning bingo games, and § 18.2-340.91 places limitations on the conduct of bingo games. This revision has not yet been judicially construed and its import concerning jackpots can be discerned only through principles of statutory construction.

The legislature has set forth jackpots as a separate and distinct category of prize from regular or special bingo. In making this distinction the legislature must have intended that each have a different meaning. The term "jackpot" is defined as a large pot formed by the accumulation of stakes from previous play; a large fund of money or other reward formed by the accumulation of prizes. See Webster's Seventh New Collegiate Dictionary (1965). A jackpot is also commonly thought of as being something which is rare and extraordinary.

In construing a statute the words used should be given their plain and ordinary meaning. See City of Richmond v. Grand Lodge of Virginia, 162 Va. 271, 174 S.E. 846 (1934). A proper construction of the term would necessarily limit "jackpot" to something which rarely occurs. Otherwise, a jackpot would become nothing more than a special bingo game. Therefore, it is my opinion that only one jackpot may be awarded per session of play, and its value may not exceed $1,000.

1"Prohibited practices.--In addition to those other practices prohibited by this article, the following acts or practices shall also be prohibited under the provisions of this article: ***

G. No organization shall award any prize money or any merchandise valued in excess of the following amounts: (i) no door prize shall exceed twenty-five dollars, (ii) no regular bingo or special bingo games shall exceed one hundred dollars, and (iii) no jackpot of any nature whatsoever shall exceed one thousand dollars...."
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BINGO. NOT AUTHORIZED TO TELECAST BINGO GAMES.

July 16, 1979

The Honorable Raymond C. Robertson
Commonwealth's Attorney for the City of Staunton.

You have asked whether it is permissible for bingo games to be broadcast over television and played by participants who are watching the telecast in their homes.

Sections 18.2-340.2 and 18.2-340.3 of the Code of Virginia (1950), as amended, require a qualified organization to obtain an annual permit for conducting bingo from the governing body of the city or county in which it has been in existence and met on a regular basis for a period of at least two years and such permit is valid only in the jurisdiction where the application is approved and at such locations as are designated in the permit application. Additionally, qualified organizations are prohibited from placing any signs advertising any bingo game within 100 yards of the exterior of the premises where such bingo game is to be played. See § 18.2-340.9(II).

In addition to these restrictions, § 18.2-340.9(B) prohibits a qualified organization from entering into a contract with or otherwise employing for compensation any person, firm, corporation, etc., for the purpose of organizing, managing or conducting bingo games. Further, § 18.2-340.9(E) prohibits any person, except a bona fide member of the qualified organization, from participating in the management, operation or conducting of any bingo game and no person shall receive any remuneration for participating in the management, operation or conducting of any bingo game.

In my opinion, a qualified organization would be prohibited by § 18.2-340.9(B) from contracting with any television station to manage or conduct bingo games, and § 18.2-340.9(E) would prohibit any personnel of the television station, who is not a bona fide member of the organization, from participating in any way with such a telecast. Further, § 18.2-340.3 would prohibit a telecast of bingo games outside the jurisdiction wherein the application has been approved.

I find nothing in the statutes which authorize the playing of bingo by telecast, and in view of the various restrictions placed on conducting bingo games, it is my opinion that the legislature intended that the participants in bingo games be physically located at the place where the game is being conducted. It is my opinion that the playing of bingo by television is prohibited by the statutes.

BINGO. "NUMERALS GAME" IS ILLEGAL ACTIVITY AND IS NOT AN AUTHORIZED FORM OF RAFFLE.
June 17, 1980

The Honorable John E. Kloch
Commonwealth's Attorney for the City of Alexandria

You have asked whether a game of chance called "Numerals Game," is legal in Virginia when operated by a qualified organization. As outlined in your letter, the game is played in the following manner:

Players purchase a ticket book containing five sealed tickets. Each ticket contains a number which is revealed only when the seal is broken. After purchasing a ticket book, the player breaks the seal to look at the numbers on each ticket. The player then compares his numbers with the various winning numbers listed on a separate chart. Regular winners know immediately if they have won and may collect their winnings in either money or more tickets without waiting for all the ticket books to be sold. When all the ticket books are sold, a grand prize number is revealed and the winner receives a pre-determined amount of money.

In the past the Attorney General has been asked to decide whether a certain activity constitutes illegal gambling, an illegal raffle or an illegal lottery. It has been the position of this Office that such illegal activities exist whenever the elements of chance, prize and consideration are present together, thereby being in violation of § 18.2-325(1) of the Code of Virginia (1950), as amended. However, §§ 18.2-334.2 and 18.2-340.1 through 18.2-340.12 provide that certain organizations under certain circumstances may conduct bingo games and raffles which would be otherwise prohibited. In the game in question, it is clear that the elements of chance, prize and consideration are present. Thus, unless the game fits one of the activities defined in § 18.2-340.1, it is my opinion that such an activity would be illegal, even if conducted by a qualified organization.

Of the three activities defined in § 18.2-340.1, it seems clear that the game in question does not fall under the definitions of "Bingo" or "Instant Bingo." The remaining permissible activity, "Raffle," is defined as follows: "a lottery in which the prize is won by a random drawing of the name or prearranged number of one or more persons purchasing chances." While lottery is a generic term and embraces all schemes for distribution of prizes by chance for consideration, a raffle has been said to be the simplest form of lottery. United States v. Baker, 364 F.2d 107, 111 (3rd Cir. 1966). As defined by the Code, a "raffle" is a form of lottery. It contemplates the purchase of chances by one or more persons for the opportunity to win a prize to be determined by a random drawing from some container in which have been placed all the chances purchased. While the game described above is a form of lottery, it is my opinion that it does not fall within the definition of "raffle" as found
Based on the foregoing, it is my opinion that the game of chance called "Numerals" as described in your letter would be illegal in Virginia.

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2 Section 18.2-325 provides in part: "(1) 'Illegal gambling'.--The making, placing or receipt, of any bet or wager in this State of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside, the limits of this State, shall constitute illegal gambling."
3 Section 18.2-340.1 includes the following definitions:
   "2. 'Bingo' means a specific game of chance played with individual cards having randomly numbered squares ranging from one to seventy-five, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random. Such cards shall have five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares.
   * * *
   4. '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 preprinted appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of such card."
4 Section 18.2-340.1(3).

BINGO. $1,000 CEILING PUT ON BINGO PRIZES NOT INTENDED TO APPLY TO RAFFLES.

November 5, 1979

The Honorable William G. Broaddus
County Attorney for Henrico County

You have asked whether § 18.2-340.9(G)(iii) of the Code of Virginia (1950), as amended, precludes the issuance of a prize in a raffle if the prize value exceeds $1,000, or whether this language is intended to apply only to bingo games.

When construing a statute the primary object is to ascertain and give effect to the legislative intent behind

One means of ascertaining the legislature's intent is to refer to the reports of the legislative committee which recommended the statutes, Adkins v. School Board of Newport News, 148 F.Supp. 430 (E.D. Va. 1957), by which a statute can be construed in light of the reasons which led to the passage of the act and the evils which it was intended to cure. Bunts Engineering and Equipment Co. v. Palmer, 169 Va. 206, 192 S.E. 789 (1937).

The Report of the Joint Subcommittee that dealt with the revisions of the Bingo Laws indicates that the legislative intent was to limit "the large amounts of money which exchange hands in connection with the conduct of bingo games." The Subcommittee's Report did not indicate that the legislature was concerned with the size of prizes awarded in raffles. This fact when coupled with the fact that § 18.2-340.9(G)(iii) does not specifically include raffles, leads me to the conclusion that the legislature did not intend to limit the amount of the prizes that are awarded in raffles. This conclusion is further supported by the fact that subsections A, B, C and E of § 18.2-340.9 specifically include raffles when dealing with other prohibited practices. Had the legislature intended § 18.2-340.9(G)(iii) to include raffles it surely would have specifically included the term raffles in the language of the section.

It is thus my opinion that the restrictions on the value of prizes set out in § 18.2-340.9(G)(iii) were intended to apply to bingo games only.

1The applicable provisions of this section are as follows: "G. No organization shall award any prize money or any merchandise valued in excess of the following amounts:...(iii) no jackpot of any nature whatsoever shall exceed one thousand dollars...."

April 4, 1980

The Honorable Robert E. Kowalsky, Jr.
Commonwealth's Attorney for the City of Chesapeake

You have asked whether a nonprofit, nonstock corporation operating a cooperative housing project may qualify pursuant to the provisions of §§ 18.2-340.1 and 18.2-340.2 of the Code of Virginia (1950), as amended, as an organization which may conduct a raffle.

Organizations as defined in § 18.2-340.1(b) include the following:

"An organization operated exclusively for religious, charitable, community or educational purposes; an association of war veterans or auxiliary units thereof organized in the United States, or a fraternal association operating under the lodge system."

(Emphasis added.)

A cooperative housing corporation is an organization normally formed for the mutual welfare and benefit of those in the corporation. This particular cooperative housing corporation was formed for the purpose of reducing housing costs for lower income families through periodic interest reduction payments made by the FHA to the corporation. It would appear that such corporation would not meet the requirement of being organized exclusively for community purposes. However, the ultimate decision as to whether a certain organization is a "qualified organization" under the provisions of § 18.2-340.2 will have to be made by the governing body of the city or county granting the permit required by statute.

Assuming arguendo that this is a "qualified organization," you further ask about the use of the proceeds from the raffle being used to pay off a financial obligation of the corporation. Section 18.2-340.9(E) provides that no person shall receive any remuneration for participating in the management, operation or conduct of any raffle. In a cooperative, the entire housing project is owned by the corporation. Each member, who is also a tenant, through their "monthly housing charges" pays their proportionate share of the expenses to finance and run the project. In this particular project, each member's "monthly housing charge" may be reduced by the interest reduction payment made by the FHA to the corporation. However, when an additional financial obligation is owed to HUD by the corporation, each member must pay their proportionate share. Thus, if the proceeds from this raffle go toward satisfying a financial obligation of the corporation to HUD, in essence, they have also reduced each member's "monthly housing charge." It is my opinion that each member has received remuneration for participating in the management, operation or conduct of the raffle. I therefore conclude that the use of proceeds from this raffle in such a manner would constitute an unlawful practice under § 18.2-340.9(E).
Section 18.2-340.9(E) provides in part that: "no person shall receive any remuneration for participating in the management, operation or conduct of any such game or raffle...."

BOARDS OF SUPERVISORS. MEETINGS. CONSTITUTION. MAY NOT CLOSE PUBLIC MEETINGS TO BROADCAST OR RECORDING, BUT MAY IMPOSE REASONABLE RULES.

June 13, 1980

The Honorable Frank M. Slayton
Member, House of Delegates

In separate communication you inquire whether a board of supervisors may close its public meetings to direct broadcast by radio, or to recording for later broadcast.

Section 15.1-539 of the Code of Virginia (1950), as amended, provides that boards of supervisors shall sit with open doors, and all persons conducting themselves in an orderly manner may attend meetings. Compare § 15.1-810 (rules and officers of council; open meetings). Further, § 2.1-343 (part of the Virginia Freedom of Information Act) provides generally that all meetings of public bodies are to be public meetings.

At the same time, § 2.1-343 creates no vested right to televise, photograph or record the transaction of public business at such meetings, and § 15.1-539 authorizes boards of supervisors to make such rules and take such measures as are necessary for the orderly transaction of public business. See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated April 23, 1974, found in Report of the Attorney General (1973-1974) at 457.

Nevertheless, any such rules and measures may have an impact upon constitutional rights, and must be justified as necessary for the maintenance of orderly proceedings. See Opinion to the Honorable Jose R. Davila, Jr., Commonwealth's Attorney for the City of Richmond, dated April 11, 1972, found in Report of the Attorney General (1971-1972) at 56. The constitutional protection for news gathering is limited to information generally available to the public, and is subject to such reasonable rules and restrictions as are imposed equally on the public. Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated October 16, 1978, found in Report of the Attorney General (1978-1979) at 224.

Accordingly, I find that a board of supervisors may not close its public meetings to direct broadcast by radio, or to recording for later broadcast, although the board of supervisors may impose reasonable rules and restrictions upon
the broadcast and recording activities, such as are imposed equally on the public.

BOARDS OF SUPERVISORS. MEETINGS. COUNTY WITH TRADITIONAL FORM OF GOVERNMENT. COMMISSIONER OF REVENUE NOT ENTITLED TO ATTEND CLOSED MEETINGS.

June 19, 1980

The Honorable Stanley R. Lewis
Commissioner of the Revenue for Middlesex County

You ask whether, in a county with the traditional form of government (with county administrator), the commissioner of the revenue (the "commissioner") is entitled to attend all meetings of the board of supervisors, including closed meetings.

Section 58-853 of the Code of Virginia (1950), as amended, provides that the commissioner, or a deputy, shall attend all regular meetings of the board of supervisors. Section 58-853 is worded as a duty, rather than an entitlement, and special meetings are not included. There is no mention of closed meetings. Section 58-853 does not provide an entitlement to attend all meetings of the board of supervisors.

As a matter of entitlement, however, the commissioner may attend all public meetings of the board of supervisors, whether regular or special, in his capacity as a citizen. See § 2.1-343 and Opinion to the Honorable Charles A. Reid, Treasurer for Greensville County, dated May 22, 1978, found in Report of the Attorney General (1977-1978) at 481. See also, § 15.1-539 (supervisors to sit with open doors--may require sheriff to attend meetings and preserve order).

Nevertheless, absent statute, I am aware of no rule that entitles the commissioner, either as commissioner or as a constitutional officer, to attend closed meetings of the board of supervisors, absent a request from the board. For certain forms of county government, there are indeed statutes expressly entitling specified officers to attend all meetings of the board. See, for example, § 15.1-601 (County Executive form), § 15.1-636 (County Manager form), § 15.1-737 (Urban County Executive form) and § 15.1-749 (Urban County Manager form). There is no language limiting these sections to regular or public meetings only, and the sections prescribe an entitlement of the officer, rather than a duty.

I have found no comparable statute applicable to the traditional form of county government (with or without a county administrator). Also, I have found no comparable statute applicable to commissioners of the revenue. See §§ 15.1-527 to 15.1-558 (counties generally - boards of supervisors) and § 15.1-40.1 (counties to elect certain officers; duties of officers).
Accordingly, I conclude that, in a county with the traditional form of government, the commissioner of the revenue is not entitled to attend closed meetings of the board of supervisors, even though the commissioner is entitled, as a citizen, to attend all public meetings of the board of supervisors.

1Compare, for example, § 15.1-532 (general duties of clerk), § 15.1-122 (dues of county clerk imposed on county administrator), § 15.1-117 (powers and duties of county administrator), § 15.1-119 (general powers of governing body in relation to county administrator), § 15.1-550 (procedure for allowance of claims), § 15.1-8.1 (duties of Commonwealth's attorneys and their assistants) and § 15.1-9.1:1 (office of county attorney appointment and duties). See, also, Opinion to the Honorable J. Madison Macon, Jr., Commonwealth's Attorney for Charles City County, dated January 22, 1973, found in Report of the Attorney General (1972-1973) at 91 (entitlement of Commonwealth's attorney to records and reports to determine legality of claims before board of supervisors under § 15.1-550).

BOARDS OF SUPERVISORS. REQUIREMENT TO MAKE SOCIAL SECURITY EMPLOYER CONTRIBUTIONS FOR CLERK OF CIRCUIT COURT.

January 18, 1980

Mrs. Bertha G. Abbott, Clerk
Circuit Court of the County of Lancaster

Your recent letter raises a question about your social security contributions. Your letter indicates that the board of supervisors has ruled that they will no longer match your social security payments on your salary based upon the fees received as clerk of the court. This has had the result of requiring you to file as a self-employed person for social security purposes. You do indicate that the board pays the employer portion of the social security contribution only on the $5,000 paid to you each year as clerk of the board.

Your first question is whether a board of supervisors may refuse to pay the employee's contribution on that portion of a clerk's salary which is derived from the fees paid to the clerk in the performance of his or her duties so as to require the clerk to file under social security as a self-employed person?

The position of clerk of the circuit court is a constitutional office established by Art. VII, § 4, of the Constitution of Virginia (1971). Such constitutional officers occupy a unique position in local government in that certain of their duties are prescribed by the Constitution and by State law and not solely by the governing body of the jurisdiction which they serve. Accordingly, as to their
constitutional functions, they are not subject to the jurisdiction and control of the local governing body. See Opinion to the Honorable Robert F. Ripley, Jr., Commonwealth's Attorney for York County, dated September 19, 1978, found in Report of the Attorney General (1978-1979) at 56.

However, for purposes of providing the benefits of the federal social security system to the clerks of courts (and other constitutional officers) they are classified as a "special employee" and regarded as an employee of the political subdivision which they serve.\(^1\) As a condition of providing social security coverage to its employees, the county or political subdivision is required by § 51-111.5 to enter into an agreement with the State agency\(^2\) to provide the benefits of Title II of the Social Security Act to its employees. This agreement or plan is required by law to provide that all services which are defined under Ch. 3.1 of Title 51 as constituting employment and are performed in the employ of the political subdivision must be covered by the social security plan or agreement which the subdivision enters into. See § 51-111.5(a)(2). Since clerks of the court are defined as "local employees" for purposes of Ch. 3.1 and further since by definition as employees their services are performed as employees in the employ of a political subdivision of the State, the work for which they receive fees upon which their salaries are based are services performed for such employer and therefore constitute employment within the meaning of the Chapter.\(^3\)

Accordingly, the county or subdivision is required by § 51-111.6(b) to pay the contributions for its local employees, which includes the clerk of the court, and its teachers as provided for in the plan or agreement. It is my opinion that you may not be treated as a private contractor and required to file as a self-employed person for social security purposes but that the board of supervisors must pay the employer's contribution on the salary you receive as clerk of the court up to the maximum percentage required by federal law.\(^4\)

You ask further as to your being a member of the retirement system. Section 51-111.31 specifically requires that where local political subdivisions, with the approval of the Board of Trustees of the Virginia Supplemental Retirement System, chooses to have its regular full-time salaried officers and employees participate in the retirement system that "clerks of the circuit court and deputies or employees of any such officer shall be included in the governing group." At the time that approval is granted by the board of trustees for participation by the political subdivision an option is available to current employees to choose membership in the system under § 51-111.32. No such option is available to the board of supervisors or other governing body of the political subdivision as to whether clerks of court will be included in the coverage group. Accordingly, if your county chooses to have its regular full-time salaried employees
eligible to participate in the Virginia Supplemental Retirement System, then the clerk of court, his or her other deputies and employees must also be included.

1Section 51-111.2(f) of the Code of Virginia (1950), as amended, reads: "The term 'local employee' means an employee of a political subdivision, and shall include a 'special employee' which means a county or city treasurer, commissioner of the revenue, Commonwealth's attorney, clerk of court, sheriff, sergeant or constable and a deputy or employee of any such officer."

2The State agency which administers the social security program for State and local political subdivision employees is the Board of Trustees of the Virginia Supplemental Retirement System. See § 51-111.2(g).

3Section 51-111.2(b) reads in part as follows: "The term 'employment' means any service performed by an employee in the employ of the State, or any political subdivision thereof, for such employer, whether it be regular or temporary, part-time or full-time, employment...."

4It should be noted that § 51-111.6(c) provides that in the case of a clerk of court that the State is required to reimburse the "employing political subdivision for the cost of the employer contribution...to the extent it shares or would share in the excess receipts from such office...." Since under § 14.1-140.1 the State shares one-third of the excess fees reported by the clerk of court under § 14.1-136, the State must reimburse the subdivision for one-third of the cost of the employer contributions paid on behalf of the clerk up to the maximum percentage.

BONDS. GENERAL OBLIGATION BONDS MUST BE SUBMITTED TO REFERENDUM.

July 20, 1979

The Honorable George R. St. John
County Attorney for Albemarle County

This is in response to your inquiry concerning the power of Charlottesville and Albemarle County and the joint Airport Board of the two jurisdictions to issue bonds without a referendum. Specifically, you have inquired as follows:

"The question is whether the Airport Board may issue one or more revenue bonds payable out of the rents from airlines and user fees, or, alternatively, whether the City and County themselves can jointly sell revenue bonds payable out of these sources, without the referendum called for by Code Section 5.1-42.

In other words, is the requirement of a referendum as set out in § 5-42 only applicable to 'full faith and
credit' bonds - i.e., general obligation bonds - or to revenue bonds, in case of an airport, as well?"

You also inquired whether the city, county or board may legally issue bonds for airport purposes.

Because local governments are creatures of the Commonwealth and thus subordinate thereto, their powers can be no greater than those conferred upon them by the General Assembly or the Constitution of Virginia. 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). For that reason, local governing bodies (or boards created by them) may take action of the type your inquiry concerns only if they have 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 localities. See I. J. Dillon Law of Municipal Corporations (1911).

Section 15.1-21 of the Code of Virginia (1950), as amended, provides that any power conferred on any political subdivision of the State may be exercised jointly with any other political subdivision, and the subdivisions may create a legal entity to which the powers of those subdivisions are delegated. Therefore, since Art. VII, § 10, of the Constitution of Virginia (1971) and §§ 15.1-175, 15.1-180, 15.1-185, 15.1-187 and 5.1-42 confer power on subdivisions individually to contract debts and to issue bonds, such power may be exercised by Charlottesville and Albemarle County jointly, acting through the Airport Board. This power, however, is subject to several requirements and limitations which are discussed below, including a limitation on the use of bond revenue.

Section 5.1-42 only authorizes localities to issue bonds to pay "[t]he purchase price or award for real property acquired for an airport or landing field..." and not for any other use. It is an accepted principle of statutory construction that the mention of one thing in a statute implies the exclusion of other things. Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938); Whitehead v. Cape Henry Syndicate, 105 Va. 463, 54 S.E. 306 (1906). See, also, 2A Sutherland, Statutory Construction, at 123-131. Where, as here, the statute expressly states for what purpose bonds may be issued, the statute must be strictly construed to bar the use of bond revenue for other purposes. The power of the city, the county and the Airport Board to use this bond revenue is not enlarged by the general statutory powers to contract indebtedness and to issue bond therefor which are found in §§ 15.1-175 and 15.1-185. Those statutes confer on cities and counties the general power "[t]o contract debts for any project, to borrow money for any project, and to issue...negotiable bonds to pay all or any part of the cost of acquiring, constructing, reconstructing, improving, extending, enlarging and equipping any project...." See § 15.1-175(b). While § 5.1-42 does not specifically state
that it is an exception to the general powers granted by §§ 15.1-175 and 15.1-185, it is a specific statutory provision enacted subsequent to the general statutory provisions of the latter statutes and is, therefore, controlling. When an earlier enacted general statutory provision is in conflict with a specific statutory provision, the specific by implication repeals the general to the extent necessary to abrogate the conflict. South Norfolk v. Norfolk, 190 Va. 591, 58 S.E.2d 32 (1950); Scott v. Lichford, 764 Va. 419, 180 S.E. 393 (1935). See, also, Reports of the Attorney General (1974-1975) at 72, and (1976-1977) at 102.

I am also persuaded by the fact that § 5.1-42 makes a distinction between "moneys available" and "proceeds from the sale of bonds." Either source may be used to pay the purchase price or award for real property; however, § 5.1-43 specifies that "[t]he expenses of such construction, improvement, equipment, maintenance and operation shall be paid...from available funds...." (Emphasis added.) Two statutes such as these which cover the same subject matter (funds for acquisition and operation of airports) are said to be in pari materia; they must be construed together reasonably to allow both to stand and to give force and effect to each. Kirkpatrick v. Board of Supervisors, 146 Va. 113, 136 S.E. 186 (1926). Construing these statutes together evidences that the legislature has distinguished between the two forms of funds and the uses to which each may be put.

For the foregoing reasons, I am of the opinion that bonds for airport purposes may be issued only pursuant to the authority of § 5.1-42. Furthermore, the revenue from bonds issued pursuant to this statute may be used only for the acquisition of real property for an airport or landing field and not for other expenses inherent in the expansion of the airport in question.

Assuming, for the sake of argument, that the revenue from the bonds will be used for the proper purpose, § 5.1-42 makes issuance of the bonds subject to approval by referendum "if such approval is a prerequisite to the issuance of bonds by any such political subdivision of the state for public purposes generally." The Public Finance Act (Title 15.1, Ch. 5) specifies the conditions under which bonds may be issued. General obligation bonds pledging the full faith and credit of the issuing jurisdiction, pursuant to Art. VII, § 10(a)(2), of the Virginia Constitution, must be submitted to referendum in both cities and counties before issuance. See §§ 15.1-180 and 15.1-185. Voter approval is not a prerequisite, however, for the issuance of revenue bonds in accordance with Art. VII, § 10(a)(3), where the principal and interest of same are payable exclusively from the revenues and receipts of a specific undertaking from which the jurisdiction derives revenue. See §§ 15.1-179 and 15.1-185. Since the Charlottesville-Albemarle Airport is an undertaking from which the two jurisdictions derive revenue, the city and county or the Airport Board may properly issue revenue bonds for the purposes specified in § 5.1-42 without submitting
such bond issue to a referendum, provided the principal and interest thereof are payable exclusively from the revenues and receipts of the airport operation, and are not general obligations of either jurisdiction or of the board.

BONDS. RECOGNIZANCES. EVERY RECOGNIZANCE MUST CONTAIN CONDITIONS AS SET FORTH IN § 19.2-135, BUT ONLY FORFEITURE PROVISION AFFECTING NON-CASH RECOGNIZANCE OCCURS WHEN PRINCIPAL FAILS TO APPEAR.

August 1, 1979

The Honorable J. R. Zepkin, Judge
General District Court

You have asked whether the procedure for forfeiting a recognizance under § 19.2-143 of the Code of Virginia (1950), as amended, applies only to the breach of the condition of appearance and if so, what would be the proper procedure against the surety for a breach of any of the other conditions of the bond, as required under § 19.2-135.

It is my opinion that when the General Assembly specifically added "of appearance" to § 19.2-143, it intended that the proceedings under this section should be limited to the violation of the condition of appearance only. Thus, this section does not prescribe a procedure for proceeding against the surety for a breach of any of the other conditions of the recognizance, as enumerated in § 19.2-135. In the special case of a cash recognizance, § 19.2-135 provides that the court may forfeit all or any part of such cash recognizance for a violation of any condition of the recognizance after notice and a hearing.

If there is a default in any of the conditions of § 19.2-135, this section still provides that the court may, in its discretion, remand the principal to jail until the case is finally disposed of. This appears to be the only available remedy for a breach of these conditions, other than the procedure to forfeit the recognizance for non-appearance. While every recognizance must contain the conditions as set forth in § 19.2-135, the only forfeiture provision affecting a non-cash recognizance occurs when the principal fails to appear.

CENTRAL CRIMINAL RECORDS EXCHANGE. REPORTABLE OFFENSES UNDER TITLE 18.2

January 29, 1980

The Honorable Francis M. Hoge, Judge
General District Court of Smyth County

You have asked whether a report and fingerprints must be forwarded to the Central Criminal Records Exchange ("CCRE")
as required under the provisions of § 19.2-390 of the Code of Virginia (1950), as amended, upon an arrest or after a conviction for a violation of either § 3.1-965(1) or a first offense of reckless driving under § 46.1-192.

Section 19.2-390(a)\(^1\) requires that a report be made to the CCRE by the arresting agency or officer of any arrest of any felony or of any offense punishable as a misdemeanor under Title 54, or Class 1 and 2 misdemeanors under Title 18.2, except an arrest for driving a motor vehicle while intoxicated\(^2\) or a violation for disorderly conduct in public places.\(^3\) (Emphasis added.) Section 19.2-390 also provides that such report shall not be required until after a disposition of guilt is entered by a competent judicial authority for persons arrested and released on summonses in accordance with § 19.2-74.

Both § 3.1-965(1)\(^4\) and the portion of § 46.1-192\(^5\) to which you refer include offenses contained in titles other than Title 18.2, but which are also classified as misdemeanors. Since no specific punishment is provided in such titles, the applicable punishment must be obtained from Title 18.2. See §§ 18.2-12 and 18.2-13. It is my opinion that this referral to Title 18.2 is only to determine the amount of punishment which may be imposed upon the defendant. Therefore, the offenses to which you refer are not punishable as misdemeanors under Title 18.2 and subsequently need not be reported to the CCRE. This is consistent with prior Opinions of the Office construing § 19.2-390 and its predecessor, § 19.1-19.3. See Opinion to the Honorable H. W. Burgess, Superintendent, Department of State Police, dated March 31, 1971, and found in Report of the Attorney General (1970-1971) at 43.

The hypothetical situation which you raise concerning whether both first and second offenses under § 46.1-192 are reportable to the CCRE is seemingly resolved since neither are required to be reported.

\(^1\)Section 19.2-390(a) provides in part: "Every State official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange, on forms provided by it of any arrest on a charge of treason or of any felony or of any offense punishable as a misdemeanor under Title 54, or Class 1 and 2 misdemeanors under Title 18.2, except an arrest for a violation of article 2, of chapter 7 of Title 18.2 (§ 18.2-266 et seq.) or for violation of article 2 of chapter 9 of Title 18.2 (§ 18.2-415), or any similar ordinance of any county, city or town. Such reports shall contain such information as shall be required by the Exchange and shall be accompanied by fingerprints of the individual arrested and information as to whether a
photograph of the individual is available. For persons arrested and released on summonses in accordance with § 19.2-74, such report shall not be required until after a disposition of guilt is entered by a competent judicial authority...."

2See Art. 2, Ch. 7, of Title 18.2 (§§ 18.2-266, et seq.).
3See Art. 2, Ch. 9, of Title 18.2 (§ 18.2-415).

Section 3.1-965 provides in part: "Any person who, by himself or by his servant or agent, or as the servant or agent of another person, performs any one of the acts enumerated in subparagraphs (1) through (9) of this section shall be guilty of a misdemeanor.

(1) Use or have in possession for the purpose of using for any commercial purpose, sell, offer, or expose for sale or hire, or have in possession for the purpose of selling or hiring; an incorrect weight or measure of any device or instrument used to or calculated to falsify any weight or measure."

4Section 46.1-192 provides in part: "Every person convicted of reckless driving under §§ 46.1-189, 46.1-190 or 46.1-191 shall for the first violation be punished as provided by § 18.1-9...."

CHARITABLE ORGANIZATIONS. CIVIC ORGANIZATIONS EXEMPT FROM SOLICITATION OF CONTRIBUTIONS ACT AS OF JULY 1, 1979, MAY NOT RECEIVE RETROACTIVE EXEMPTION TO JULY 1, 1978.

September 12, 1979

The Honorable Floyd C. Bagley
Member, House of Delegates

You have asked three questions about amendments to the Solicitation of Contributions Act (the "Act"), §§ 57-48 through 57-69 of the Code of Virginia (1950), as amended. I will answer these questions in the order in which you posed them.

The first question is whether a civic organization may be granted exempt status by the Commissioner of Agriculture under § 57-60, on or after July 1, 1979, which would operate retrospectively to July 1, 1978? It is my opinion that a civic organization may not be granted exempt status retrospective to 1978; however, it may be granted exempt status some time after July 1, 1979, retrospective to July 1, 1979. The reason for this conclusion is that by Ch. 598 [1979] Acts of Assembly 869, "civic organization" was added as a new category of organizations exempt from registration under the Act. A "civic organization" is defined as:

"Any local service club, veterans' post, fraternal society or association, volunteer fire or rescue groups, or civic league or association of ten or more persons not organized for profit but operated exclusively for educational or charitable purposes as defined herein, including the promotion of community welfare, and the
net earnings of which are devoted exclusively to charitable, educational, recreational or social welfare purposes." § 57-48(3a).

Prior to this amendment, the registration provisions of the Act applied to those civic organizations the solicitation activities of which brought them within the registration requirements of the Act. See Report of the Attorney General (1977-1978) at 50. There was no statement or emergency clause in Ch. 598 [1979] Acts of Assembly 868, which exempted civic organizations from registration, requiring that the exemption provisions operate immediately upon passage. Therefore, the effective date for the amendment exempting civic organizations was July 1, 1979. See § 1-12. Also, it is an established rule of statutory construction that unless a statutory provision clearly states the General Assembly's intention that it operate retrospectively, such an application cannot be made, and the statute will have only a prospective effect. Commonwealth v. United Cigarette Manufacturing Co., 120 Va. 835-845, 92 S.E. 901, 904 (1917). No such intention of retrospective application was expressed in Ch. 598. Accordingly, it is my opinion that a civic organization may not claim exemption retrospectively to July 1, 1978.

It should be noted, however, that § 57-60(c) was amended by the General Assembly to permit the Administrator of Consumer Affairs to extend, prospectively or retrospectively, the filing deadline, as distinct from the statutory status, for those organizations which could legally be exempted from the registration provisions of the statute. Therefore, if a civic organization, which could legally be exempt from registration by virtue of § 57-60(a)(6) did not file for such an exemption until late in 1979, but could show good cause to the administrator for altering its deadline for filing, the administrator could extend the filing deadline retrospectively to July 1, 1979.

The second question is whether any requirements or prohibitions of the Act apply to civic organizations which are exempted under § 57-60(a)(6). Although civic organizations may be exempted from the requirements of registering and record keeping, they may be subject to other provisions of the Act, if they solicit contributions from the public. The following provisions apply to organizations exempted as civic organizations under § 57-60(a)(6): § 57-54, which requires that contracts between organizations and professional fund-raising counsel be filed; § 57-55, which places limitations on the amount of payments to a professional solicitor for solicitation activities; § 57-57, which prohibits misrepresentations in connection with the solicitation of contributions, and § 57-59, which provides enforcement and penalties for violation of the Act. Further, if a civic organization itself becomes a professional fund-raiser or solicitor of charitable contributions for another organization, the provisions of § 57-61, which
require registration of professional fund-raisers and solicitors would apply.

The third question is whether an organization's lack of knowledge or understanding of the Act constitutes "good cause" under § 57-60(c) for the Administrator of Consumer Affairs to extend the filing deadline for an organization claiming exemption. The Act was passed in substantially its present form in 1974 and was to become effective on January 1, 1975. See Ch. 574 [1974] Acts of Assembly 1082. However, the effective date was postponed until July 1, 1978. See Ch. 401 [1977] Acts of Assembly 578. Therefore, organizations which solicit contributions from the public have had notice of the substance of the Act at least since its passage in 1974. I am advised that the Administrator of Consumer Affairs, who has been delegated by the Commissioner of Agriculture to oversee compliance with the provisions of the Act, has undertaken since July 1, 1978, an extensive public education campaign to explain the requirements of the Act to charitable organizations affected by its provisions. It is my opinion, therefore, that in order for an organization to exhibit that its lack of knowledge and understanding of the Act warrants an extension of an applicable filing date, it should show that its inability to file in a timely fashion stems from either excusable neglect or some course of events beyond its control. In exercising his administrative discretion on the application to extend the filing date, the administrator may then consider whether the prejudice to the organization if the extension were not granted, outweighs the prejudice to the public if the extension were granted. This determination must be made on the basis of the specific factual situation recited in each request for extension and this Office cannot make a determination at this time on the basis of a general or hypothetical situation.

CHARTERS. CONDITIONAL PROVISION FOR CITY TO REVERT TO TOWN. NOT VIOLATIVE OF CONSTITUTIONAL PROHIBITION AGAINST SPECIAL ACTS FOR CHANGE OF BOUNDARIES.

January 17, 1980

The Honorable T. A. Emerson
County Attorney for the County of Prince William

You ask whether § 5.10 of Ch. 722 [1976] Acts of Assembly, as amended, which conditionally provides for a particular city to revert to the status of a town, violates the prohibition in the Constitution of Virginia (1971), Art. VII, § 2, against special acts for the extension or contraction of the boundaries of any county, city or town.

The city was once a town, and became a city on June 1, 1975, pursuant to Ch. 22 of Title 15.1 of the Code of Virginia (1950), as amended. Chapter 22, as then in effect, provided for towns to become cities through judicial
proceedings. One collateral effect of the town becoming a city was an extension or contraction of the boundaries of the county in which the town had been located. Chapter 22, however, is a general law.

Chapter 722, and its amendment and re-enactment (Ch. 390 [1979] Acts of Assembly), are special acts. Chapter 722 grants the city a new charter, with the same boundaries that the city had as a town. See §§ 1.1 and 1.2. Chapter 722 also provides that by ordinance adopted not later than January 1, 1979, the city may revert to the status of a town. See § 5.10. Chapter 390 re-enacts Ch. 722, after amending § 5.10 to extend the adoption deadline for the reversion ordinance to not later than January 1, 1981.

Proceeding by general law is only one way of organizing a city. The Constitution of Virginia, supra, also authorizes the General Assembly to provide for the organization of cities by special act. See Bain, "A Body Corporate," City-County Separation in Virginia (Inst. of Gov't and Univ. Press of Va. 1967) at 69-71; Agner v. Commonwealth, 103 Va. 811, 48 S.E. 493 (1904) (community incorporated as city by special act, even though population below statutory minimum). Furthermore, any time the General Assembly provides for incorporation of a city by special act, there will necessarily be an extension or contraction of the boundaries of the county from which the city is created.

Special acts for the organization of cities are not special acts within the purview of the constitutional provision as to extension or contraction of boundaries. Compare Portsmouth v. Chesapeake, 205 Va. 259, 263-264, 136 S.E. 817, 821-822 (1964). The purpose of the provision is to exclude annexation as a legislative function. Prior to the adoption of the Virginia Constitution of 1902, the only method available for the enlargement of the boundaries of cities and towns was by recourse to the General Assembly. Annexation was then considered exclusively a legislative function. Henrico County v. City of Richmond, 106 Va. 282, 290-291, 55 S.E. 683, 686 (1906); Falls Church v. Board of Supervisors, 193 Va. 112, 114, 68 S.E. 2d 96, 98 (1957); Portsmouth v. Norfolk County, 198 Va. 247, 249, 93 S.E. 2d 296, 299 (1956); Howard, Commentaries on the Constitution of Virginia (Univ. Press of Virginia 1974) at 812-817.

The main type of legislation within the prohibition against special acts for the extension or contraction of boundaries is charter legislation in the nature of annexation or de-annexation. See, for example, Town of Narrows v. Giles County, 128 Va. 572, 105 S.E. 82 (1920); Wood v. Commonwealth, 146 Va. 296, 135 S.E. 895 (1926); compare Arey v. Lindsey, 103 Va. 250, 48 S.E. 889 (1904) (charter change enacted prior to Virginia Constitution of 1902, but not effective until after); Opinion to the Honorable Russell I. Townsend, Jr., Member, Senate of Virginia, dated June 29, 1976, found in Report of the Attorney General (1975-1976) at 330 (legislation to determine boundary lines
by waterways not unconstitutional); Opinion to the Honorable E. Eugene Gunter, County Attorney of Frederick County, dated March 25, 1971, found in Report of the Attorney General (1970-1971) at 84 (incorporation of county without boundary changes).

The present provision relates to the duration of city status, and is a necessary incident to the organization of the city in question. City charters today generally grant perpetual duration as a city to the body corporate, and § 1.1 of Ch. 722 [1976] Acts of Assembly indeed grants perpetual duration to the city in question. Section 5.10 provides, however, certain conditions under which duration as a city may not be perpetual. Any effect upon the boundaries of the county is collateral, and not in the nature of annexation or de-annexation. Compare Newport News v. Warwick County, 191 Va. 591, 597-598, 61 S.E.2d 871, 874 (1950) (general law for settling disputed boundary lines); and Opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated January 5, 1972, found in Report of the Attorney General (1971-1972) at 441 (county incorporating as city but excluding incorporated towns).

Accordingly, I find that § 5.10 of Ch. 722 [1976] Acts of Assembly, as amended and re-enacted, does not violate the prohibition in the Constitution of Virginia, supra, against special acts for the extension or contraction of the boundaries of any county, city or town.

CHARTERS. DISSOLUTION OR SURRENDER OF CHARTER. PROCEDURE FOR CONSOLIDATION OF CERTAIN COUNTIES, CITIES AND TOWNS.

April 10, 1980

The Honorable William T. Wilson
Member, House of Delegates

You ask by what procedure a city may give up its charter.

Your inquiry raises questions of some novelty and complexity. It appears no city in Virginia has given up its charter in this century. I believe, however, I can offer preliminary guidance.

Article VII, § 2 of the Virginia Constitution (1971) states that the General Assembly shall provide by general law for the organization, change of boundaries, consolidation and dissolution of counties, cities, towns and regional governments, but no special act shall be adopted which provides for the extension or contraction of any county, city or town.

I find at least one general law where the General Assembly has provided for the dissolution of towns. See § 15.1-972 of the Code of Virginia (1950), as amended
REPORT OF THE ATTORNEY GENERAL

petition for annulment of town charter granted by court). I do not find a general law where the General Assembly has provided for the dissolution of cities—at least, not where the process is called dissolution. But, compare, §§ 15.1-1059 to 15.1-1067 (contraction of corporate limits).

The statutory procedure that best covers the present situation is found at §§ 15.1-1130.1 to 15.1-1147 (consolidation of certain counties, cities and towns). Under §§ 15.1-1138 to 15.1-1140, the consolidation agreement or plan must be approved by referendum in all the political subdivisions involved. At the moment, I am not aware of a procedure that allows a city the unilateral option of consolidating with a county.

The alternative would be for the General Assembly to repeal the various acts which constitute the charter. Such action would not be a prohibited extension or contraction of the boundaries. Opinion to the Honorable T. A. Emerson, County Attorney for the County of Prince William, dated January 17, 1980, copy enclosed.

For background, you may be interested in the following Opinions issued by this Office, as follows: Opinion to the Honorable Richard W. Elliott, Member, House of Delegates, dated September 20, 1976, found in Report of the Attorney General (1976-1977) at 24 (only General Assembly can dissolve town charter); Opinion to the Honorable Robert B. Fox, Commonwealth’s Attorney for Westmoreland County, dated August 15, 1977, found in Report of the Attorney General (1977-1978) at 56 (procedure to annul town charter).

CHARTERS. PUBLIC OFFICERS. FILLING OF VACANCIES. OVERRIDING LANGUAGE IN § 24.1-76 DOES NOT AFFECT NECESSITY FOR SPECIAL ELECTIONS, MERELY TIMING WHEN REQUIRED.

February 29, 1980

The Honorable Floyd C. Bagley
Member, House of Delegates


When city or town offices are involved, § 24.1-76 calls for special elections to fill vacancies in office and states that the statutory scheme applies "Notwithstanding any provision of law...to the contrary...." It applies in two situations: (1) where an interim appointment is made by the circuit judges (per § 24.1-76), and (2) where an interim
appointment is made by the council (per charter). In either case, the special election is to be held only at the time of an ensuing general election.

Chapter 490 [1977] Acts of Assembly makes changes to § 24.1-76 to insure that the special election will not be held at a general election (1) immediately after the vacancy occurs, or (2) immediately before the term ends. To achieve this end, Ch. 490 uses language overriding contrary charter provisions as to the timing of the special elections.

In contrast to charters that are either silent on the filling of vacancies, or specifically call for a special election, the Manassas Park charter authorizes the council to fill any vacancy in the office of the mayor or membership of the council for the entire unexpired term. For § 24.1-76 to apply, as stated in its first sentence, there must not only be a vacancy, but there must also be no other provision made for filling the same. Under § 3.4 of the Manassas Park charter, there is no occasion for a special election (or an interim appointment). The overriding language in the 1977 amendment does not affect the necessity for special elections, merely their timing when required.

Furthermore, when a charter provision touches upon the appointment to and holding of public office, the charter provision is one for the organization and government of a city and prevails over general law. See Opinion to the Honorable C. W. Allison, Jr., Commonwealth's Attorney for the City of Covington and Alleghany County, dated October 2, 1975, found in Report of the Attorney General (1975-1976) at 52 (charter provision similar to § 3.4 of the Manassas Park charter, and § 24.1-76 found not to apply).

Since 1977, this Office has issued a number of Opinions consistent with this view, but it is important to note that the charter provisions involved were different from § 3.4 of the charter of Manassas Park. In one situation, the charter of the City of Chesapeake provided for an interim appointment by the council, followed by a vote to fill the vacancy at the next election for any purpose. See Opinion to the Honorable William T. Parker, Member, House of Delegates, dated March 31, 1977, found in Report of the Attorney General (1976-1977) at 66. In another case, the charter of the City of Alexandria contained no provisions regarding the manner of filling a vacancy in the office in question. See Opinion to the Honorable James M. Thomson, Member, House of Delegates, dated April 1, 1977, found in Report of the Attorney General (1976-1977) at 74.

In another situation, the charter for the City of Franklin did not provide for the filling of vacancies, and the Opinion noted that § 24.1-76 applied for that reason. See Opinion to the Honorable W. D. Johnson, Sr., Commissioner of the Revenue for the City of Franklin, dated July 25, 1977, found in Report of the Attorney General (1977-1978) at 72. In one last case, the charter of the City of Winchester
provided for an interim appointment by the council, followed by an election under specified circumstances. The time for election specified in the charter conflicted with the time specified in § 24.1-76, and § 24.1-76 controlled as a general law relating to the conduct of elections. See Opinion to the Honorable Alson H. Smith, Jr., Member, House of Delegates, dated March 1, 1978, found in Report of the Attorney General (1977-1978) at 137.

Section 3.4 of the charter of Manassas Park, however, is a special law for the organization and government of a city which prevails over general law, and further § 24.1-76, with its 1977 amendment, is not intended to reach situations where some other provision is made for filling a vacancy (as in § 3.4 of the charter). Compare Opinion to the Honorable H. Harrison Braxton, Jr., Commonwealth's Attorney for the City of Fredericksburg, dated January 23, 1979, found in Report of the Attorney General (1978-1979) at 35 (charter provision controls over later enacted general law unless such general law conflicts with charter and is intended to control conflicting charters).

Accordingly, I find that § 3.4 of the charter of the City of Manassas Park is not affected by the 1977 amendment to § 24.1-76.

CITIES. LOAN TO PRIVATE DEVELOPER OF FEDERAL GRANT FUNDS FOR ACQUISITION AND REHABILITATION OF NATIONALLY REGISTERED HISTORIC LANDMARK HOTEL NOT UNCONSTITUTIONAL.

June 13, 1980

The Honorable Franklin P. Hall
Member, House of Delegates

You have asked whether the participation by the City of Richmond (the "City") in a project funded by a federal grant from the Secretary of Housing and Urban Development would violate Art. X, § 10, of the Constitution of Virginia (1971). You have indicated that the project is funded as an Urban Development Action Grant ("UDAG") under § 119, Title I of the Housing and Community Development Act of 1974 (the "Act"), Pub.L. No. 93-383, as amended.

Project

The principal purpose of the grant is to enable the City to extend a construction and permanent loan of $4,170,000 to a developer, a private profit-making corporation, which, when combined with funds from other sources not including City revenues, will be utilized for the acquisition and rehabilitation of the Hotel Jefferson, an edifice which you have indicated is a nationally registered historic landmark. The grant will supplement the bulk of the project funds to be derived from the issuance and sale of industrial revenue bonds in the amount of $10,000,000 by the City of Richmond.
Industrial Development Authority. Loan repayments (including principal and interest) received by the City from the developer must be applied to economic and community development activities eligible for federal financial support under Title I of the Act, subject to the prior approval of the Department of Housing and Urban Development Richmond Area Office to which a full accounting shall be made. The City has represented that the project will result in new permanent nonconstruction jobs including at least 160 such jobs for low and moderate income persons. Upon completion of the project for occupancy and operation, the Hotel Jefferson will be operated by a private profit-making management company of recognized national reputation. The term of the loan shall not exceed 35 years, not including the construction.

The UDAG agreement provides rigorous controls on the disbursement, application and accounting of federal funds awarded under the grant. Disbursement of the funds is made through the terms of a letter of credit issued in the name of the City against which the City may draw funds on an as-needed-basis. Therefore, the federal funds remain in control of the federal government until immediately before the time they are to be applied to project expenses, thereby denying the opportunity to the City to take profit from the use or investment of the funds. Indeed, at no time does the UDAG agreement permit the City to exercise unconditional rights of ownership with respect to the expenditure or use of grant funds.

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...."1

Whether the participation of the City in the project violates the Virginia Constitution is determined by consideration of several factors: the nature of the funds involved; the nature of the entity from which the funds or credit are issued; the public nature of the underlying purpose and the nature of the relationship of the activity to normal governmental functions.

Nature of Funds Involved

It is abundantly clear that the granting of credit "in aid of any person, association or corporation" can only arise where the revenues owned and controlled by the City are pledged or issued. You have indicated that there exists no collateral obligation of the City to apply any of its revenues toward the completion of the project and that the City is, in effect, merely acting as a local agent of the
Secretary of Housing and Urban Development in the administration of project activities and grant funds. The so-called matching funds for this grant are derived exclusively from private sources. The presence of City revenues or a City guarantee among the resources pledged to the project is, in my opinion, an essential ingredient, indeed a precondition, to the pertinence of Art. X, § 10. Absent an affirmative response to this threshold question, the search need go no further. However, it is not intended to suggest that the noninvolvement of City revenues is essential to the holding of this opinion. See, e.g., Reports of the Attorney General (1978-1979) at 51 and 53; (1977-1978) at 181; (1975-1976) at 166; and (1971-1972) at 2.

The conclusion that the funds retain their "federal" character is conditioned upon the City meeting the requirements for "special funds" established by the General Assembly in § 15.1-29.7 of the Code of Virginia (1950), as amended, which provides in part:

"Any federal funds, or portion thereof, received by a county, city or town under a Title I program may be deposited in a special fund which shall be established separate and apart from any other funds, general or special; such funds shall be deemed to be federal funds and shall not be construed to be part of the revenues of such county, city or town."

This provision was added at the 1979 Session of the General Assembly. I interpret the purpose of this requirement to be to prevent the comingling of federal and local funds and resultant loss of identity as federal funds and not to declare that monies which were not federal funds to begin with may be "deemed to be federal funds" merely by establishing a special fund into which nonfederal funds could be deposited.

Nature of the Entities From Which Funds or Credit are Issued

As outlined above, the grant funds remain in the possession of the federal government until such time as their immediate application to the needs of the project is required. At that time, the grant funds pass through the hands of the City to the developer to reimburse project expenses. There is no intermediate authority through which the City carries out its role under the UDAG agreement. The Virginia Supreme Court held in the case of Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968), that not only could the Commonwealth not directly or indirectly aid a private purpose, it could not establish an authority to carry out such a purpose. The rule in that case was subsequently nullified by a constitutional amendment to § 10.

Conversely, if the purpose for which an authority is created is a public purpose, there would be no violation of Art. X, § 10, "even if such activities are directly performed
by a municipal corporation or county." See Report of the Attorney General (1977-1978) at 181. The question, therefore, is whether the project serves a public purpose.

Public Purpose and Governmental Function

The United States Congress has expressed it findings and declarations of purpose for the Act indicating its primary objective is:

"[The] development of viable urban communities by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives--

(7) The restoration and preservation of properties of special value for historic, architectural, or esthetic reasons...." 42 U.S.C. § 5301(c).

On the heels of this declaration of federal purpose and objectives, the General Assembly has ratified the purposes, objectives and authorized activities of the Act in § 15.1-29.7 of the Code which provides in part:

"Any county, city or town may participate in a program under Title I (Community Development) of the United States Housing and Community Development Act of 1974, as amended. Any such county, city or town may undertake the community development activities specified in Title I of that act unless such activities are prohibited by the Constitution of Virginia."

The General Assembly has also independently declared the public's interest in the preservation and perpetuation of historic landmarks. See § 10-145. Legislative declarations of public purpose are subject to judicial review. However, the standard of review is significantly deferential. The Virginia Supreme Court has circumscribed the limit to which courts may second-guess the legislature by acknowledging that they "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, 207 Va. 351, 357, 150 S.E.2d 87 (1966). It is my opinion that the project activities are not without reasonable relation to the public interest nor are they beyond the scope of legitimate government.
Conclusion

Thus, I conclude that the relationship of the City of Richmond to the project activities under the UDAG agreement does not violate the prohibitions of Art. X, § 10 on the alternative theories that (1) no local funds are involved and, therefore, no credit of the City can be granted in aid of any person, association or corporation, and (2) the acquisition and rehabilitation of a national historic landmark bears a reasonable relationship to the public interest and conforms to commonly accepted notions of legitimate governmental functions.

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1 The history of this provision is briefly summarized in a prior Opinion of this Office to the Honorable Jerry K. Emrich, County Attorney for Arlington County, dated December 21, 1978, and found in Report of the Attorney General (1978-1979) at 53. A more comprehensive analysis may be found in II A. E. Howard, Commentaries On The Constitution Of Virginia (1974). Howard notes the prohibitions of § 10 have, by judicial interpretation, "evolved in such a way as not to be a significant barrier to legislative response to modern problems, which, after all, bear little resemblance to the historical context that first gave rise to these constitutional prohibitions." Howard, supra, at 1130.

CITIES. USE OF PUBLIC FUNDS TO CAMPAIGN AGAINST CHARTER AMENDMENT REFERENDUM.

February 6, 1980

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

You ask whether the city council and the school board may use public funds and facilities, including sending materials home with students, to communicate the position of these agencies on a proposed referendum to request charter changes affecting taxes. You further ask whether "City facilities [can] be used to campaign against the referendum." You have not provided examples of proposed materials and I shall thus answer your inquiry by providing general rules of law for consideration by the city council and the school board.

City Council and School Board

The inquiry presents the common question whether public bodies may use public resources to inform the public of the position of these bodies as to an issue before the electorate.

The referendum proposes significant changes affecting the exercise of governmental powers. Reasonable people may
disagree on the need for the amendments or on the issue whether essential governmental functions will be affected adversely. However, just as the will of the people will be served by having the opportunity to speak at the polls, so will the views of the governing bodies be an essential element in the debate of the issue.

It would thus seem proper for the council and school board to make appropriate comment on the effects of a proposed charter amendment and the impact of an amendment on the operation of government. Accordingly, there would be no prohibition against sending properly drafted materials home with public school students.

The power of a governing body to expend funds is limited to those powers expressly granted, and those necessarily or fairly implied therein. See City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684, 101 S.E.2d 647 (1958). The Constitution of Virginia gives the school board broad discretion over the management of the schools which cannot be divested by the legislature. See School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978), Report of the Attorney General (1978-1979) at 224. The General Assembly has conferred upon the City of Richmond and the school board thereof broad governmental powers over the city and the school system from which can be implied the authority to comment on a referendum or similar issue.

Implied authority has been found in other states which have considered similar issues. In State v. Roach, 520 S.W.2d 69 (Mo. 1975), the power to operate a police department was held to permit advertising and community relations programs to foster cooperation with the police. In Kotlikoff v. Township of Pennsauken, 331 A.2d 42 (N.J. Super. 1974), it was held that advertising a city’s economic and cultural advantages was a proper expenditure from the administrative items of a city budget.

In Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills, 98 A.2d 673, 676-677 (N.J. 1953), the court held that a board of education has implied power to make reasonable expenditures to provide voters relevant facts to aid them in reaching an informed judgment on a school bond proposal. In the decision written by the present Justice of the United States Supreme Court, William J. Brennan, Jr., it was noted that

"The power so implicit plainly embraces the making of reasonable expenditures for the purpose of giving voters relevant facts to aid them in reaching an informed judgment when voting upon the proposal. In these days of high costs, projects of this type invariably run into very substantial outlays. This has tended to sharpen the interest of every taxpayer and family man in such projects. Adequate and proper school facilities are an imperative necessity, but the
large additional tax burden their cost often entails concerns taxpayers that they be obtained with the maximum economy of cost. At the same time the complexities of today's problems make more difficult the task of every citizen in reaching an intelligent judgment upon the accommodation of endurable financial cost with the acknowledged need for adequate education. The need for full disclosure of all relevant facts is obvious, and the board of education is well qualified to supply the facts. But a fair presentation of the facts will necessarily include all consequences, good and bad, of the proposal, not only the anticipated improvement in educational opportunities, but also the increased tax rate and such other less desirable consequences as may be foreseen. If the presentation is fair in that sense, the power to make reasonable expenditure for the purpose may fairly be implied as within the purview of the power, indeed duty, of the board of education to formulate the construction program in the first instance."

It is important to distinguish between providing information and evaluation, and conducting an intense or overly dramatic campaign about the issue. Although there is authority upholding the right of a government body to inform on such issues, there clearly are limits beyond which the use of public funds would be improper. Brennan goes on to say, in *Citizens,* that:

"The booklet under attack here, in 17 of its 18 pages, fairly presents the facts as to need and the advantages and disadvantages of the program, including the tax effect of its cost, and if it stopped there, none could fairly complain that the reasonable expenditure made for its preparation and distribution was without the scope of the implied power.

But the defendant board was not content simply to present the facts. The exhortation 'Vote Yes' is repeated on three pages, and the dire consequences of the failure so to do are over-dramatized on the page reproduced above. In that manner the board made use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side, and thus imperilled the propriety of the entire expenditure. The public funds entrusted to the board belong equally to the proponents and opponents of the proposition, and the use of the funds to finance not the presentation of facts merely but also arguments to persuade the voters that only one side has merit, gives the dissenters just cause for complaint." *Ibid.*

It is thus fair to conclude that public funds may be expended to educate and inform the electorate on issues, and to "get out the vote;" provided that the effort is not an
emotional and unreasoned presentation of a controversial issue.¹

City Facilities

The use of city facilities should be considered in two parts. The first is whether the council or school board can use the facilities to take a position on the referendum as discussed above. The same standards which apply to the use of public funds would also apply to the use of city facilities.

The second part of the question is whether groups or organizations could use city facilities to oppose the referendum. There is nothing to preclude a city from making its facilities available, so long as equal access is provided to all competing factions. Once a public forum is opened to one group, it must also be made available on the same terms to other groups.

¹Stanson v. Mott, 551 P.2d 1 (Calif. 1976); Porter v. Tiffany, 502 P.2d 1385 (Ore. 1972); Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978); Brennan v. Black, 1061 A.2d 790 (Del. 1954). See Report of the Attorney General (1974-1975) at 163. In Porter, the court held the expenditure of funds to be improper where the actions of the governing body had become overly partisan. In Stanson, the court noted that "Frequently, however, the line between unauthorized campaign expenditures and authorized informational activities is not so clear. Thus, while past cases indicate that public agencies may generally publish a 'fair presentation of facts' relevant to an election matter, in a number of instances publicly financed brochures or newspaper advertisements which have purported to contain only relevant factual information, and which have refrained from exhorting voters to 'Vote Yes,' have nevertheless been found to constitute improper campaign literature. In such cases, the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." 551 P.2d 12. (Citations omitted.)

CLERKS. ACCOMPANYING STATEMENT TO DEEDS. CLERK HAS NO AUTHORITY TO REQUIRE THAT ACCOMPANYING STATEMENT BE SIGNED AND ACKNOWLEDGED.

October 12, 1979

The Honorable Glenn B. McClanan
Member, House of Delegates

You have asked for an interpretation of the 1979 amendment to § 17-59 of the Code of Virginia (1950), as amended, which added the following language:
"but no deed shall be accepted for record by the clerk unless it be accompanied by a current business or residence address of the grantee or a designee; provided that if the deed is accepted for record and spread on the deed books, it shall be deemed to be validly recorded for all purposes."

Specifically, you ask whether this amendment requires that the accompanying information be provided on a form signed by the grantee and acknowledged before a notary public as is being required by the local circuit court clerk.

The language of § 17-59 is plain on its face and calls for a simple statement of a name and address; nowhere is there any requirement that the grantee sign the statement or that the statement be acknowledged. Section 17-60 lists those documents which may be recorded in the deed books and recognizes that such papers are required to be acknowledged or certified. However, the accompanying statement required by § 17-59 is not included in this list.

Section 55-106 begins with the proviso "[e]xcept when it is otherwise provided..." and requires the clerk to "admit to record any such writing as to any person whose name is signed thereto...when it shall have been acknowledged by him...." The question is whether § 55-106 imposes the acknowledged signature requirement on § 17-59 when § 17-59 is silent on that point.

In an opinion to the Honorable John Alexander, Commonwealth's Attorney for Fauquier County, dated December 5, 1968, and found in Report of the Attorney General (1968-1969) at 39, the inquiry concerned the recording of a subdivision ordinance pursuant to § 15.1-471. The opinion made specific reference to the "[e]xcept when it is otherwise provided" clause to support its determination that a § 15.1-471 recording was not subject to the acknowledged signature requirements of § 55-106. I am of the opinion that the same result obtains here, i.e., the accompanying statement required by § 17-59 does not have to be signed by the grantee and notarized.

Supporting this ruling is the proviso to the 1979 amendment which states that if a deed is recorded without the accompanying statement, "it shall be deemed to be validly recorded for all purposes." If a deed is recorded without being acknowledged, the consequences can be much more adverse to the parties. See Kiser v. Clinchfield Coal Corp., 200 Va. 517, 106 S.E.2d 601 (1959). The General Assembly did not intend that this statement, which merely aids the local treasurer in knowing where to send the tax bill, rise to the dignity of the deed itself or to the level of the other documents mentioned in § 17-60. Moreover, the clerk has no authority to add requirements for the recording of documents beyond those already required by statute. See Report of the Attorney General (1974-1975) at 24; see, also, § 58-65.
CLERKS. FEES. NO AUTHORITY TO CHARGE FOR RECORINATION AND INDEXATION OF MECHANIC'S LIEN OTHER THAN PER PAGE CHARGE AUTHORIZED UNDER § 14.1-112(2).

April 18, 1980

The Honorable James E. Hoofnagle, Clerk
Circuit Court of Fairfax County

You have asked whether the clerk of a circuit court may assess a fee in addition to the amount authorized by § 14.1-112(2) of the Code of Virginia (1950), as amended, for the recorination and indexing of a mechanic's lien if the indexing services performed (over 100 names) are far in excess of those normally rendered.

Section 14.1-112 generally provides that it "shall control the fees charged by the clerks of circuit courts for the services..." described in the section. The fee allowed for the recorination and indexing of a mechanic's lien is specifically and exclusively provided in § 14.1-112(2). This subsection allows a fee based upon the number of pages of the document involved. No reference is made to the number of names to be indexed.

Based upon the foregoing, it is my opinion that you may not charge an additional fee based upon the number of names to be indexed.

CLERKS. FEES. PROBATION HEARING FOR CONVICTED FELON DOES NOT WARRANT FEE.

June 23, 1980

The Honorable Richard F. George, Clerk
Circuit Court of Fluvanna County

You have asked whether a fee should be charged by a circuit court clerk when a previously convicted felon is brought before the court for violation of the terms of his probation. You state that the clerk drafts a show cause order, appears in court to swear in witnesses and take notes on the case, and prepares an order on the violation of probation. You ask whether you should consider this proceeding as another felony conviction and charge an additional fee (see § 14.1-112(15) of the Code of Virginia (1950), as amended), charge some other fee, or not be paid at all for your services.

First, the fact that the clerk cannot receive a fee for services performed does not relieve him from performing any duty imposed upon him by law. See § 14.1-126. The procedure by which a probationer is brought before the court for violation of his probation is a summary hearing. Such hearing is not a trial for the commission of a new offense. Slayton v. Commonwealth, 185 Va. 357, 38 S.E.2d 479 (1946).
There is no subsequent trial or second felony conviction. Therefore, § 14.1-112(15), which authorizes the fee a clerk shall charge for a conviction in a felony case, does not apply in such a proceeding.

Section 14.1-112(23) provides that "[f]or all services rendered by the clerk in any court proceeding for which no specific fee is provided by law, the clerk shall charge a fee of five dollars, to be paid by the party filing said papers at the time of filing...." However, the probationer is not the party filing the papers and § 14.1-87 prohibits charging the Commonwealth any fee "except when it is allowed by statute." This Office has held that such an allowance must be express. See Reports of the Attorney General (1978-1979) at 106; (1974-1975) at 72. No mention of the Commonwealth appears in § 14.1-112(23). Moreover, the use of the word "filing" in § 14.1-112(23) contemplates the institution of some type of court proceeding, rather than an extension of a proceeding in which fees have already been paid. See Report of the Attorney General (1976-1977) at 78(1). Therefore, I must conclude that no fee is allowed under these circumstances.

COLLEGES AND UNIVERSITIES. APPROPRIATIONS. FOR OPTIONAL RETIREMENT PLAN. INSTITUTIONS MAY MAKE PAYMENTS INTO OPTIONAL RETIREMENT PLAN OR ARRANGEMENT FROM GENERAL FUND APPROPRIATIONS.

October 10, 1979

The Honorable Charles B. Walker
Secretary of Administration and Finance

Your letter of August 8, 1979, raises three questions concerning optional retirement plans established by State institutions of higher education pursuant to § 51-111.28 of the Code of Virginia (1950), as amended. I will answer your questions seriatim.

You first ask whether a State institution of higher education that establishes such a plan and offers it as an option to its eligible employees may make contributions from general fund appropriations for the benefit of those who elect to be under it.

Section 51-111.28(a) provides in part as follows:

"Any institution of higher education which, at the time of the establishment of the retirement system, has established, or which may thereafter establish, a retirement plan or arrangement covering in whole or in part its employees engaged in the performance of teaching, administration or research duties, is hereby authorized to make contributions for the benefit of its employees who elect to continue or be under such plan or arrangement and elect to participate in such plan or
arrangement rather than in the retirement system established by this chapter." (Emphasis added.)

The intent of this section as manifested by the language cited is to enable State institutions of higher education to make payments or contributions into such "optional plan or arrangement" from funds appropriated by the General Assembly. A prohibition against the expenditure of appropriated funds for such purposes would largely frustrate the purpose of § 51-111.28. These payments or contributions by State institutions of appropriated funds, however, remain subject to the requirements of § 2.1-224\(^1\) that they be pursuant to lawful appropriations by the General Assembly and that quarterly estimates of amounts for each activity be submitted.

You next ask whether the contribution authorized to be made is limited to the rate at which the employer contributes on behalf of its other employees to the Virginia Supplemental Retirement System (hereinafter "VSRS"). I find no language in § 51-111.28 or any other sections of this chapter which would limit the amount that such institutions might contribute to their optional plans. The rate at which the institutions make contributions to the VSRS on behalf of its employees are not subject to an absolute ceiling but are determined ultimately by the rate and total amount of benefits paid to all VSRS members. Since the contributions made to both the VSRS and any optional plan must come out of appropriated funds, the ultimate limitation would be the appropriations made for those purposes by the General Assembly.

You last ask whether legislation would be required to allow employees presently members of VSRS but otherwise eligible to switch to the optional plan. The second sentence of § 51-111.28(a) reads as follows, "Any present or future employee of such institution shall have the option of electing to participate in either the retirement system established by this chapter or the plan or arrangement provided by the institution employing him." The term "present employees" as used in this section refers to those employees who are currently in the employ of the State institution of higher education at the time such institution establishes an optional retirement plan or arrangement. Therefore, under the present statutory language present employees of these institutions have the legal right and option to select to become members of such optional plan or arrangement or to remain members of VSRS. Accordingly, no legislation is required to allow such employees to switch to an optional plan.

\(^1\)Section 2.1-224 provides:

"No money shall be paid out of the State treasury except in pursuance of appropriations made by law."
No appropriation to any department, institution or other agency of the State government, except the General Assembly and the judiciary, shall become available for expenditure until the agency shall submit to the Director of the Division of Budget quarterly estimates of the amount required for each activity to be carried on, and such estimates shall have been approved by the Governor.

COLLEGES AND UNIVERSITIES. MARY WASHINGTON COLLEGE. MANAGEMENT AND CONTROL OF JAMES MONROE LAW OFFICE-MUSEUM AND MEMORIAL LIBRARY IS VESTED IN RECTOR AND VISITORS OF MARY WASHINGTON COLLEGE.

October 29, 1979

The Honorable Prince B. Woodard, President
Mary Washington College

You make several inquiries concerning the relationship between Mary Washington College ("College") and the James Monroe Memorial Foundation ("Foundation"). The principal holding of the Foundation, the James Monroe Law Office-Museum and Memorial Library ("Library"), was deeded to the Commonwealth of Virginia and the University of Virginia on January 21, 1964; the General Assembly accepted this gift April 1, 1964. Ch. 641 [1964] Acts of Assembly. When Mary Washington College was established as an entity separate from the University of Virginia, title to the Library was transferred to the College. See § 23-91.35 of the Code of Virginia (1950), as amended. With this background in mind, I will now answer your several questions.

"1. Is it correct that the ultimate responsibility and authority for the operation, management, supervision, care and preservation of the James Monroe Shrine rest with The Rector and Visitors of Mary Washington College?"

Section 23-91.35 transferred, as of July 1, 1972, the Library and all personal property associated therewith to the name and control of the rector and visitors of the College. The statute specifically states that "the term 'control' shall include, without limitation, 'management, control, operation and maintenance....'" Additionally, the deed of gift assigns to the rector and visitors the charge of the care and preservation of the Library. Thus, this question is answered in the affirmative.

"2. Is it correct that the Acts of Assembly designate The Rector and Visitors of Mary Washington College as the Agency which the Commonwealth of Virginia holds responsible for and communicates with concerning the supervision and management of the Shrine?"

Please see answer to No. 1 above.
"3. Are the actions of the Board of Regents subject to approval or veto of The Rector and Visitors of Mary Washington College?"

The deed of gift accepted by the General Assembly provides that the Library shall be managed and supervised by a board of regents. The board is to be composed of at least eighteen members: the rector and president of the College; the president and secretary of the Foundation; and at least fourteen others, appointed by the Governor and selected equally from lists submitted by the rector and the Foundation. This provision also states that the management and supervisory powers vested in the board of regents are subject to the approval of the rector and visitors of the College. As the power to approve necessarily embraces the power to disapprove, your inquiry is answered in the affirmative.

"4. Under the Acts of Assembly, what authority, if any, does the James Monroe Foundation have in regard to the programs, activities and operation of the Shrine, other than the endowed bookplate program in the Memorial Library?"

By the deed referred to above, the Library, together with all personal property, was removed from the purview of the Foundation.

Although retaining no direct authority over the Library, however, the Foundation remains viable in two respects. First, the president and secretary of the Foundation enjoy seats on the board of regents. In addition, the Foundation submits one of the two lists from which the Governor selects the remaining members of the board of regents. Second, the seventh clause of the deed specifically permits the Foundation to continue its endowment bookplate program. In this program, the Foundation solicits donations, using the funds to purchase and preserve volumes in the Library. All donors are remembered through bookplates affixed in the front of the volumes.

"5. If the role of the James Monroe Foundation in regard to the programs and operation of the Shrine is not limited to the bookplate program, is the role of the Foundation in regard to programs and activities of the Shrine subject to approval by the board of regents and/or The Rector and Visitors of Mary Washington College?"

As I noted above, the scope of the Foundation's activities is limited to serving on the board of regents and continuing the endowment bookplate program. The Foundation, having lost control over the Library, cannot exercise any greater authority over it than that already stated. However, should the Foundation desire a greater role in fundraising, programming, or other matters, the board of regents could grant to the Foundation such a larger role in the proper exercise of its supervisory function. Any extra participation granted to the Foundation would be subject to
the approval of the board of regents and ultimately, the approval of the rector and visitors of the College.

"6. Does the James Monroe Foundation have authority to bind or commit The Rector and Visitors of Mary Washington College, the James Monroe Board of Regents or the Commonwealth of Virginia in regard to any action or activity concerning the Shrine?"

Absent express authority granted to it by any of the bodies mentioned above, the Foundation may not and cannot bind or commit any entity other than itself. It does appear, however, that the pursuit of the bookplate endowment program is within the province of the Foundation alone, subject to no restrictions by either the board of regents or the rector and visitors of the College.

"7. What is the significance of the provision in the Act and what, if any, changes would accrue to the Board of Regents in regard to its role concerning the Shrine if it were to incorporate itself as permitted by provision of the 1964 Acts of Assembly?"

As defined in 4B M.J. Corporations § 3, the purposes of incorporation are: 1) immortality - although members of the corporation may change, the entity that is the corporation remains in existence; 2) individuality - the acts of the board of directors are the acts of the corporation; and 3) exemption - should the corporation fail, be sued or incur other liability, the directors are normally safe from personal liability. Thus, should the board of regents avail themselves of this provision, they would acquire the protections noted above. The relationship of the board of regents to the rector and visitors of Mary Washington College would be unchanged.

COMMISSIONERS OF ACCOUNTS. § 26.8 CONFERS NO JURISDICTION ON COMMISSIONER OF ACCOUNTS TO SETTLE FIDUCIARY ACCOUNTS BEYOND REQUIREMENTS IMPOSED UPON FIDUCIARIES IN CH. 2 OF TITLE 26. April 8, 1980

The Honorable Juanita E. Shields, Clerk
Circuit Court of the City of Lynchburg

You ask if (1) a substitute trustee of an inter vivos trust appointed under § 26-48 of the Code of Virginia (1950), as amended, who further qualifies as such by giving bond and taking oath that he will perform the duties of his office as provided in § 26-1.1, is required to file under §§ 26-13 and 26-17 with the commissioner of accounts an inventory and/or annual accounting or (2) whether the commissioner of accounts can require the filing of such inventory or settlement of accounts under the general authority conferred upon the commissioner under § 26-8.
The substitute trustee was appointed by the circuit court pursuant to § 26-48. You represent that although not required to do so by the court order of appointment or the trust instrument, the trustee nevertheless voluntarily gave bond and took oath before the clerk to perform the duties of trustee. In such circumstances, § 26-1.1(b) provides that "in every case where requested by any party in interest, the administration of the trust shall be in the same manner as if qualification had been required by the terms of the instrument creating it."

You advise that the commissioner of accounts maintains that the trustee must file an inventory (§ 26-12) and an annual accounting (§ 26-17) by virtue of: (1) the direct language of §§ 26-12 and 26-17 and/or (2) the commissioner of accounts can require the trustee to do so under § 26-8.

First, neither § 26-12 nor § 26-17 specifically requires the trustee of an inter vivos trust to file an inventory or an annual settlement of accounts.

Second, § 26-8 provides that the "commissioner[s] of accounts...shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts...." (Emphasis added.)

We shall assume, arguendo,¹ that the trustee in this instance is under the general supervision of the commissioner of accounts by virtue of having qualified "in such court or before the clerk" under § 26-1(b).

The tough question is whether the commissioner's right to "make ex parte settlements" of the accounts of qualified fiduciaries includes the right to require the filing of an inventory or accounting not otherwise explicitly required of the trustee of an inter vivos trust under § 26-12 or § 26-17.

In Cope v. Shedd-Carter, 175 Va. 273, 280, 7 S.E.2d 891, 894 (1940), a case which considered the predecessor to § 26-8 (§ 5401 of Ch. 221 of the Tax Code (1936)), the court held that the jurisdiction conferred upon the commissioner of accounts to settle the account of a trustee "is found in the...sections of that chapter [221]...."

Section 26-8, as well as §§ 26-12 and 26-17, are a part of Ch. 2 of Title 26. Applying the holding of Cope v. Shedd-Carter, the jurisdiction conferred upon the commissioner of accounts under § 26-8 to settle accounts can rise no higher than the duties conferred upon fiduciaries under the other sections of Ch. 2. Sections 26-12 and 26-17, on their face, do not require the trustee of an inter vivos trust to file either an inventory or an annual accounting. No other section of Ch. 2 of Title 26 require such inventory or accounting.
Based upon the foregoing, it is my opinion that the trustee of an inter vivos trust cannot be required by the commissioner of accounts to file an inventory or an annual accounting as otherwise provided in Ch. 2 of Title 26.

A fair reading of § 26-1.1(b), in conjunction with § 26-8, may lead to the conclusion that the powers conferred upon the commissioner of accounts under § 26-8 do not arise until an "interested party," within the meaning of § 26-1.1(b), requests that the trust be administered as if qualification had been required by the terms of the instrument creating it.

COMMONWEALTH'S ATTORNEYS. APPOINTMENT AS SPECIAL PROSECUTOR FOLLOWS COMMONWEALTH'S ATTORNEY TO WHATEVER JURISDICTION CASE TRIED IN.

September 25, 1979

The Honorable George F. Abbitt, Jr., Judge
Tenth Judicial Circuit

You have asked whether under the circumstances outlined below the Commonwealth's attorney for Prince Edward County is entitled to compensation from the State over and above his regular salary as Commonwealth's attorney for his services in prosecuting a case arising in Lunenburg County.

At the initial stage of the case the Lunenburg County Commonwealth's attorney disqualified himself from the prosecution and the Prince Edward County Commonwealth's attorney was appointed to prosecute the case in Lunenburg County. The preliminary hearing was waived, and after an indictment was returned a true bill, the defense moved for a change of venue. Venue was moved to Prince Edward County.

Section 19.2-155 of the Code of Virginia (1950), as amended, provides for the appointment of an "attorney-at-law" to "act in place of, and otherwise perform the duties and exercise the powers..." of a Commonwealth's attorney in a case in which the Commonwealth's attorney has disqualified himself, and provides for compensation for such attorney.¹

The attorney-at-law appointed under § 19.2-155 may be, and generally is, another prosecutor, and such other prosecutor is entitled to compensation pursuant to § 19.2-155, even if he is a full-time prosecutor in his own jurisdiction. See Report of the Attorney General (1976-1977) at 39-40.

In my opinion, a prosecutor's appointment as a special prosecutor follows him into whatever jurisdiction the case is tried, and the fact that in this particular case the prosecution was transferred to the special prosecutor's own jurisdiction would not have any effect upon the right to
compensation provided for in § 19.2-155. Therefore, it is my opinion that the Commonwealth's attorney for Prince Edward County is entitled to compensation pursuant to § 19.2-155 under the circumstances outlined above.

The attorney-at-law so appointed shall receive such compensation as the judge of the circuit court in which the case is tried or the service is rendered deems reasonable, in addition to his actual expenses for the time that he is actually engaged, such compensation and expenses to be paid by the State.\footnote{1}

COMMONWEALTH'S ATTORNEYS. DAY-TO-DAY LEGAL SERVICES FOR SCHOOL BOARD. COUNTIES HAVING POPULATION OF 15,000 OR LESS. TO BE PROVIDED WITHOUT SUPPLEMENTAL COMPENSATION.

April 22, 1980

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You ask whether a Commonwealth's attorney, in a county having a population of 15,000 or less, may be hired by the county school board as day-to-day counsel, and paid supplemental compensation from school board funds.

In the past, this Office has consistently ruled that the Commonwealth's attorney was to act, as part of his office, as day-to-day counsel for the school board, without additional compensation. See Opinion to the Honorable William S. Kerr, Commonwealth's Attorney for Appomattox County, dated March 7, 1973, found in Report of the Attorney General (1972-1973) at 87.

In 1973, however, § 22-56.1 of the Code of Virginia (1950), as amended, was amended by Ch. 299 [1973] Acts of Assembly, to provide that, notwithstanding any other provision of law, the attorney for the Commonwealth may be employed by a county school board to advise it concerning any legal matter, and further that all costs and expenses of such advice were to be a charge against the county treasury and paid out of funds provided by the governing body of the county. This language was recodified in substantially the same form by § 22.1-82, enacted by Ch. 559 [1980] Acts of Assembly.

The implication is that Ch. 299 [1973] Acts of Assembly was intended to authorize the hiring of, and payment of supplemental compensation to, the Commonwealth's attorney for advice concerning any legal matter, including day-to-day counsel. Compare Opinion to the Honorable Catesby Graham Jones, Jr., Commonwealth's Attorney for Gloucester County, dated June 19, 1972, found in Report of the Attorney General (1971-1972) at 341.
In 1977, however, the General Assembly enacted § 15.1-8.1 which clearly indicates that in counties having a population of 15,000 or less, the Commonwealth's attorney is still to act, as part of his office, as day-to-day counsel for school boards, without additional compensation. See Opinion to the Honorable Frederick C. Boucher, Member, Senate of Virginia, dated June 2, 1977, found in Report of the Attorney General (1976-1977) at 37.

Accordingly, I conclude that the Commonwealth's attorney in a county having a population of 15,000 or less is obligated to provide legal services to the school board without supplemental compensation.

COMMONWEALTH'S ATTORNEYS. DUTY TO PROVIDE LEGAL ADVICE IN CIVIL MATTERS TO COUNTY SCHOOL BOARD IN CERTAIN CASES.

April 22, 1980

The Honorable William N. Alexander, II
Commonwealth's Attorney for Franklin County

You ask if the Commonwealth's attorney must render general legal advice to county school boards in civil matters.

The Commonwealth's attorney has a general duty to represent the interest of the Commonwealth in his locality. As such, it has been the longstanding opinion of this Office that the Commonwealth's attorney must provide necessary legal advice in civil matters to all public agencies and officials of his county, absent a statutory prohibition to the contrary. See Reports of the Attorney General (1970-1971) at 64; (1971-1972) at 75 and 341; (1975-1976) at 58.

In 1977, the General Assembly enacted § 15.1-8.1(A) of the Code of Virginia (1950), as amended, which provides in pertinent part:

"Except in counties having a population of fifteen thousand or less, or in counties and cities having a joint criminal judicial system, wherein the combined population is less than fifteen thousand, no Commonwealth's attorney, or assistant Commonwealth's attorney, shall be required to carry out any duties as a part of his office in civil matters of advising the governing body and all boards, departments, agencies, officials and employees of his county or city, of drafting or preparing county or city ordinances, of defending or bringing actions in which the county or city, or any of its boards, departments or agencies, or officials and employees thereof, shall be a party, or in any other manner advising or representing the county or city, its boards, departments, agencies, officials and employees, except in matters involving the enforcement of the criminal law within the county or city."
Accordingly, I am of the opinion that if the population of the county exceeds the limits specified in § 15.1-8.1, the Commonwealth's attorney has no duty to advise the school board in civil matters; though he may elect to do so at the request of the governing board for additional compensation. See Report of the Attorney General (1976-1977) at 37. Your attention is also directed to § 15.1-9.1:1 which provides that the appointment of a county attorney, irrespective of the county population, will relieve the Commonwealth's attorney from any duty to advise the school board in civil matters.

COMMONWEALTH'S ATTORNEYS. PROHIBITION AGAINST PRIVATE PRACTICE OF LAW. LIMITED WIND-UP PERIOD, UNDER CERTAIN CONDITIONS.

January 2, 1980

The Honorable Daniel M. Chichester
Commonwealth's Attorney for Stafford County

You ask a number of questions regarding the requirement that certain Commonwealth's attorneys devote full time to their duties.

Transition Activities

Section 15.1-50.1 of the Code of Virginia (1950), as amended, provides that, as of January 1, 1980, Commonwealth's attorneys in certain counties are to devote full time to their duties, and not engage in the private practice of law. Compare § 15.1-821 (Commonwealth's attorney in certain cities). You ask first about what period of time, if any, is given to the Commonwealth's attorney to wind-up his private practice.

The statute does not allow any period of time for the Commonwealth's attorney to wind-up his private practice. A very limited wind-up period may be permissible if the amount of private practice is restricted to a de minimis level and is necessary and unavoidable. Otherwise, I find no basis for varying the plain meaning of the provision in § 15.1-50.1 that the Commonwealth's attorney shall not engage in the private practice of law.

Collateral Activities as Assistant Commissioner of Accounts, and Master Commissioner in Chancery

You also ask whether under § 15.1-50.1 the Commonwealth's attorney may act as (1) assistant commissioner of accounts, or (2) master commissioner in a chancery suit. Both of these activities are usually lawyer's work. See § 26-8 and Title 8.01, Ch. 23. Neither, however, is the private practice of law, even though private practitioners often do both. Compare Opinion to the Honorable Frederick P.

The operative limitation here is that the Commonwealth's attorney shall devote full time to his duties. Full time employment normally allows of a limited amount of collateral or personal business activity (for example, farming or investments) so long as the activity does not interfere with the individual's employment duties, and the individual's availability during normal working hours. Also, a Commonwealth's attorney subject to § 15.1-50.1 may with the county's consent serve as county attorney as well. See Opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated October 26, 1979.

Acting as assistant commissioner of accounts necessarily involves regular collateral activity during normal working hours. Acting as a master commissioner in a chancery suit involves questions not only of the total time involved, but also of priority.

Accordingly, I find Commonwealth's attorneys subject to § 15.1-50.1 may not normally serve as assistant commissioners of accounts or as master commissioners in chancery. But see the Aucamp and Harvey opinions cited above.

Collateral Activities as Trustee
Under Deed of Trust, and Personal Representative for Decedent's Estate

Your last questions are whether under § 15.1-50.1 the Commonwealth's attorney may act as trustee under a deed of trust, and as personal representative for a decedent's estate.

Again, lawyers frequently do both, but neither is the private practice of law. The operative limitation once again is that the Commonwealth's attorney shall devote full time to his duties.

If the Commonwealth's attorney acts only occasionally in either capacity, and does not allow either to become a regular collateral activity during normal working hours, then I am of the opinion that the Commonwealth's attorney may under § 15.1-50.1 act as trustee under a deed of trust, and as personal representative for a decedent's estate. The question is one of degree. The Commonwealth's attorney must use care that full value is given for his pay, and that the public's business is given regular attention and priority. See the Aucamp and Harvey Opinions, supra.

COMMONWEALTH'S ATTORNEYS. REQUIREMENT TO DEVOTE FULL TIME TO DUTIES AND NOT ENGAGE IN PRIVATE PRACTICE OF LAW. MAY REPRESENT CONSTITUTIONAL OFFICER PURSUANT TO § 15.1-66.4.
May 19, 1980

The Honorable William G. Petty
Commonwealth's Attorney for the City of Lynchburg

You ask whether a Commonwealth's attorney may represent a constitutional officer pursuant to § 15.1-66.4 of the Code of Virginia (1950), as amended, without violating the requirements of § 15.1-821 that certain Commonwealth's attorneys 1) devote full time to their duties, and 2) not engage in the private practice of law.

Appointment of a Commonwealth's attorney under § 15.1-66.4 involves 1) court appointment, 2) of one public officer by title, 3) to represent another public officer, 4) in connection with his official duties, 5) with compensation paid from public funds. Under these circumstances, representation of constitutional officers by a Commonwealth's attorney is not the private practice of law. Nor does such representation prevent a Commonwealth's attorney from devoting full time to his duties. See Opinion to the Honorable Frederick P. Aucamp, Judge, Juvenile and Domestic Relations District Court, dated March 15, 1977, found in Report of the Attorney General (1976-1977) at 38.

Accordingly, I find a Commonwealth's attorney may represent a constitutional officer pursuant to § 15.1-66.4, without violating the requirements of § 15.1-821 that certain Commonwealth's attorneys 1) devote full time to their duties, and 2) not engage in the private practice of law.

October 26, 1979

The Honorable E. Bruce Harvey
Commonwealth's Attorney for Campbell County

You ask whether a Commonwealth's attorney who is required to devote full time to his duties pursuant to § 15.1-50.1 may elect to serve as the county attorney as well.

Attendance to civil matters on behalf of the county is not inconsistent with devoting full time to the duties of Commonwealth's attorney. I find no statutory requirement that a county have a county attorney. Sections 15.1-9.1 and 15.1-9.1:1 authorize, but do not require, counties to create the office of county attorney. Absent creation of the office, the Commonwealth's attorney would represent the county in civil matters. See Opinion to the Honorable William G. Davis, Commonwealth's Attorney for Franklin County, dated July 8, 1974, found in Report of the Attorney General (1974-1975) at 86, and Opinion to the Honorable John

At the same time, § 15.1-8.1 provides that a Commonwealth's attorney shall not be required to attend to civil matters on behalf of the county. In an Opinion to the Honorable Frederick C. Boucher, Member, Senate of Virginia, dated June 2, 1977, found in Report of the Attorney General (1976-1977) at 37, it was ruled that a Commonwealth's attorney may serve concurrently as county attorney. Section 14.1-53 allows the county to supplement the salary of the Commonwealth's attorney from county funds for duties not required to be performed.

Accordingly, I am of the opinion that the Commonwealth's attorney may elect, with the concurrence of the governing body, to serve as county attorney for such additional compensation as the county may provide.

Section 15.1-50.1 of the Code of Virginia (1950), as amended, provides:

"In counties having a population of more than thirty-five thousand, Commonwealth's attorneys and all assistant attorneys for the Commonwealth shall devote full time to their duties, and shall not engage in the private practice of law."

COMPATIBILITY OF OFFICES. PUBLIC OFFICERS. CHARTERS. PROHIBITION OF SERVICE ON COUNCIL BY PUBLIC EMPLOYEES.

May 13, 1980

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You ask about the validity of a proposed city charter provision to prohibit service on city council by city and school board employees.

Article II, § 5 of the Virginia Constitution (1971) provides that the only qualification to hold any office of a governmental unit, elective by the people, shall be residence in the Commonwealth for one year, and qualification to vote for the office in question. Enactments which impose qualifications, other than those contemplated by the Constitution, are invalid. Opinion to the Honorable Eleanor W. Talley, Secretary, Fluvanna County Electoral Board, dated October 6, 1971, found in Report of the Attorney General (1971-1972) at 81.

Subsection (c) of Art. II, § 5, supra, does provide, however, that the General Assembly retains the power to prevent conflict of interests, dual officeholding and other
incompatible activities. This has been construed to mean that the General Assembly may prevent local employees from holding local office. See Opinion to the Honorable Ira M. Lechner, Member, House of Delegates, dated November 19, 1975, found in Report of the Attorney General (1975-1976) at 35.

In Pierce v. Dennis, 205 Va. 478, 138 S.E.2d 6 (1964), it was held that the General Assembly could by charter provide that federal employees could serve on a city council in spite of a general statute to the contrary. The court held that such a provision was a law for the government of a city and therefore was permissible special legislation under Art. VII, § 2 of the Constitution of Virginia.

COMPENSATION BOARD. COMMONWEALTH NOT OBLIGATED FOR AMOUNTS PREVIOUSLY PROVIDED BY LOCALITIES AS SUPPLEMENTS WHEN FULL COST OF OFFICE IS ASSUMED.

January 8, 1980

The Honorable Charles B. Walker
Secretary of Administration and Finance

You have asked whether the Commonwealth is obliged to assume the full costs of salaries, expenses and allowances, including supplements previously paid by local governing bodies, of attorneys for the Commonwealth and sheriffs, before Ch. 85 [1979] Acts of Assembly can become effective.

Under statutes now in effect, the Commonwealth pays a portion of the salaries, expenses and other allowances of attorneys for the Commonwealth, their employees, and of sheriffs, their full-time deputies, and part-time deputies. The balance of these salaries, expenses and allowances must be paid by the county or city for which those officers are elected or appointed. See §§ 14.1-64 and 14.1-79.1 The State Compensation Board has the authority and duty to establish these salaries, expenses and allowances (see §§ 14.1-50 and 14.1-51), and the total amount approved by that board is borne by the Commonwealth and the local governing body in accordance with the formulae specified by §§ 14.1-64 and 14.1-79, respectively. Though it is not required to do so, the local governing body has the authority to supplement the salaries of its constitutional officers, including the attorney for the Commonwealth and the sheriff, and their deputies and employees. The amount of any such supplement is in excess of that approved for payment by the State Compensation Board, and "shall be wholly payable from the funds of any such county or city." See § 14.1-11.4.

The 1979 Session of the General Assembly enacted a comprehensive bill dealing with the relations between counties and municipal corporations. See Ch. 85 [1979] Acts of Assembly 93. Section 4 thereof provides that its annexation immunity provisions shall not become effective unless "House Bill No. 599, introduced in the 1979 Regular
Session of the General Assembly, is enacted and funded in the 1980-1982 biennial budget in accordance with the provisions thereof." H.B. 599 was enacted. See Ch. 83 [1979] Acts of Assembly 85.

When it becomes effective on July 1, 1980, H.B. 599 will amend §§ 14.1-64 and 14.1-79 by deleting the requirement in each that the local governing body bear some proportion of the salaries, expenses and other allowances of attorneys for the Commonwealth and sheriffs. The issue you present is whether the General Assembly, by deleting those cost-sharing provisions, has thereby obliged the Commonwealth to pay all salaries, expenses and allowances, including supplements to salaries authorized by § 14.1-11.4. I conclude that it did not.

The General Assembly has made no change in §§ 14.1-50 and 14.1-51, which direct the Compensation Board to fix the salaries, expenses and other allowances of attorneys for the Commonwealth and sheriffs. Neither did it change § 14.1-11.4, which permits a local governing body to supplement the salaries of such officers or their employees. What the General Assembly has done, as it has done previously, is to alter the respective shares of the Commonwealth and the local governing body of salaries, expenses and allowances established by the Compensation Board. See Ch. 623 [1977] Acts of Assembly 1209. The amendments to those sections do no more than make the Commonwealth liable to pay all of the salaries, expenses and other allowances for the attorneys for the Commonwealth, sheriffs, and their employees, but only as those amounts are established by the Compensation Board. There is nothing in any statute relevant to your question that suggests a legislative intention to make the Commonwealth pay supplements provided by local governing bodies above the salaries established by the Compensation Board.

This conclusion is not negatived by the records and documents of the General Assembly's Commission on State Aid to Localities and the Joint Subcommittee on Annexation. These bodies reported to the Governor and the General Assembly on their deliberations. See [1978] House Document No. 26 and [1979] House Document No. 40, respectively. No mention appears anywhere in either of the documents that H.B. 599 was intended to require the Commonwealth to assume financial responsibility for any purely local supplements to salaries that had not been approved by the Compensation Board.

Further, I have made inquiry of members of the staffs of the Commission on State Aid to Localities and the Joint Subcommittee on Annexation, as well as the staff of the House Appropriations Subcommittee, regarding financial projections given to the General Assembly. I am advised that all financial projections presented for review were based solely upon the budgets for attorneys for the Commonwealth and sheriffs, as they had been approved by the Compensation Board.
Board, and without information on supplements paid by local governing bodies. From this, too, I conclude that the General Assembly based its funding decision upon salaries, expenses and other allowances approved by the Compensation Board, without regard to any supplements that may be paid by local governing bodies. Therefore, the Commonwealth is obliged only to pay the amounts approved by the Compensation Board. As I have pointed out above, the local governing bodies still have the discretion to supplement these amounts as they may deem appropriate.

Section 14.1-64 reads in part as follows: "Proportion borne by State and by localities.--The salaries, expenses and other allowances of attorneys for the Commonwealth in counties and cities shall be paid in the proportion of forty per centum by the respective counties and cities and sixty per centum by the Commonwealth after July one, nineteen hundred eighty...."

Section 14.1-79 reads in part as follows: "Division of salaries and expense allowances between State and localities.--The Commonwealth shall pay two thirds of the salaries and expense allowances of such sheriffs and their full-time deputies, and of the compensation and expense allowances of their part-time deputies, fixed as hereinbefore provided. The other one third of the salaries and expense allowances of such sheriffs and full-time deputies, and of the compensation and expense allowances of their part-time deputies, shall be paid by the respective counties or cities for which they are elected or appointed...."

Section 14.1-77 (now § 14.1-64) was amended in the same manner with respect to treasurers and commissioners of the revenue, altering the respective shares from two-thirds local and one-third State to one-half local and one-half State. See Ch. 652 [1954] Acts of Assembly 837.

COMPENSATION BOARD. COMMONWEALTH NOT REQUIRED TO PAY WORKMEN'S COMPENSATION AND UNEMPLOYMENT INSURANCE.
June 4, 1980

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

You have asked whether the Compensation Board is required by §§ 14.1-64 and 14.1-79 of the Code of Virginia (1950), as amended, to "pay all salaries, expenses and other allowances of certain elected officials." (Emphasis added.) You indicate that the Compensation Board "has declined to pay workmen's compensation and unemployment insurance..." and that it is your opinion that the Commonwealth should pay these items "since these items are required by law and since they are clearly an unavoidable expense of employment."

A review of the statutes you have cited does not reveal the use of the word "all" when referring to salaries and expense allowances. In fact, § 14.1-64, as amended by the 1980 General Assembly, refers to "salaries, expenses and other allowances...as fixed and determined by the Compensation Board." (Emphasis added.) Section 14.1-79 makes a similar reference to "the salaries and expense allowances...fixed as hereinbefore provided." (Emphasis added.) It is apparent from these limiting words that the General Assembly intends to extend to the Compensation Board the discretion to fix and determine those expenses of office which will be financially supported by the Commonwealth. You are correct in stating that the Compensation Board has historically refused to approve State funding of workmen's compensation and unemployment insurance. I am advised that past sessions of the General Assembly have refused to pass legislation which would have extended the State's financial participation to these expenses. From this fact, I can only conclude that the General Assembly has, by its refusal to pass enabling legislation, affirmed the denial of the Compensation Board of such costs.

I would agree that the words "salaries, expenses and other allowances" or "salaries and expense allowances" appear to embrace a wide variety of salary-related costs. However, it is also apparent that the authority granted by § 14.1-11.4 to local governing bodies to supplement the salaries of constitutional officers and their deputies or employees negates any inference which might otherwise be drawn that the quoted phrases are intended to encompass all salary and salary-related expenses. Therefore, I must conclude that the Code does not require the Compensation Board to authorize the expenditure of State funds in support of workmen's compensation and unemployment insurance.

COMPENSATION BOARD. POPULATION BRACKET DETERMINED BY LAST DECENTENNIAL CENSUS UNLESS INCREASED BY MORE RECENT FIGURES.
The Honorable Clifton A. Woodrum
Member, House of Delegates

You have asked what population figures the State Compensation Board must use for purposes of setting compensation of constitutional officers. You noted that the population of the City of Roanoke was approximately 105,000 in 1970, based upon the census of that year prepared by the U.S. Bureau of the Census (the "Bureau"). You note further that recent population estimates by the Tayloe/Murphy Institute (the "Institute") at the University of Virginia and/or the Bureau are less than 100,000. Your specific question is whether the Compensation Board is bound by the higher figure reported in the last decennial census.

I am advised that the population figures published by the Institute are the product of a cooperative program with the Bureau. The purpose is to develop population figures for use each year between decennial censuses. The current figures issued by the Institute are identical to the figures used by the Bureau.

The State Compensation Board is authorized, within its discretion, to use the population estimates published by the Institute to establish the population bracket within which a given city or county is placed. However, these more recent population estimates may be used only to place a county or city in a higher population bracket. Section 14.1-61 of the Code of Virginia (1950), as amended, provides, in part:

"For the purpose of this article, the population of each county and city shall be according to the last preceding United States census...provided, that whenever it is made to appear to the satisfaction of the Compensation Board that the population of any county or city has, since the last preceding United States census, increased so as to entitle such county or city to be placed in a higher bracket prescribing the minimum and maximum salaries, then such county or city shall be considered as being within such higher brackets in fixing the salaries provided by this article." (Emphasis added.)

From this statute, it is clear that the General Assembly intended that the Compensation Board use more current population figures only if the result would be to place the city or county in a higher population bracket. Pending publication of the next decennial census, the Compensation Board may not use the Institute's population estimates to place a city or county in a lower population bracket.

CONSTITUTION. ANTI-DISCRIMINATION CLAUSE. ART. I, § 11
LIMITS TYPES OF DISCRIMINATION TO WHICH IT APPLIES.
May 20, 1980

The Honorable Edward M. Holland
Member, Senate of Virginia

You ask whether a proposed change in the rules of the Virginia Housing Development Authority (the "Authority") to exclude one person households from the Virginia Housing Family Mortgage Program constitutes unlawful discrimination against single persons.

The latest change in question is to Rule 101(11) of the Rules and Regulations of the Virginia Housing Development Authority, as approved by the commissioners of the Authority on April 15, 1980. The effect of the resolution is to allocate to aged or handicapped singles a large portion of the funds available for single person housing.

The commissioners of the Authority have resolved that no more than an aggregate average of 17 percent of the housing units financed by the Authority pursuant to PSP I and PDS II commitments under its single family home loan program shall be financed for occupancy by one person households.

The purpose of this change, as expressed in the resolution itself, is to promote "the efficient use of the Authority's resources." While the rule change and amendment do not deny coverage to all one person households, they do restrict coverage of one person households in certain cases.

The question then comes down to whether this restricted financial coverage or assistance to one person households is unlawful.

Virginia Constitution

While the Virginia Constitution does protect against governmental discrimination, the anti-discrimination clause which is contained in Art. I, § 11 of the Constitution of Virginia (1971), limits the types of discrimination to which it applies. Singleness, in a marital or numerical sense, is not one of the categories protected.

Fourteenth Amendment to the U.S. Constitution

On the other hand, the equal protection clause of the Fourteenth Amendment to the federal constitution is more open-ended. It provides:

"[N]or shall any State...deny to any person within its jurisdiction the equal protection of the laws. Amendment XIV, Section 1, Constitution of the United States."

It is clear that the equal protection clause protects individual persons if they are denied equal protection of the law. The equal protection clause, however, does not prohibit
in all cases the placing of people in different categories. As stated in an Opinion to the Honorable Edward M. Holland, Member, Senate of Virginia, dated August 26, 1975, found in Report of the Attorney General (1975-1976) at 266, 267:

"Equal protection of the law is not violated when citizens are placed in different categories, provided the classification rests upon some ground of difference having a fair and substantial relation to the object of the rule. Kahn v. Shevin, 416 U.S. 351 (1974); Fredericksburg v. Sanitary Grocery Co., 168 Va. 57 (1937)...."

Classifications of Individuals Who Are Over 62 Years of Age, Disabled Or Handicapped

An argument can be made that the classifications of individuals who are over 62 years of age, disabled or handicapped are reasonably related to the purpose of the statute--to provide sanitary and safe housing to persons of low and moderate income. No findings to this effect are present in the proposed regulations. A state of facts, however, could exist to support the assumption that greater numbers of individuals in those classifications would be living on fixed income and/or of low or moderate income. A classification will not be set aside under the Fourteenth Amendment to the United States Constitution even if the classification is not made with nicety, if any state of facts reasonably may be conceived to justify it. Sheek v. City of Newport News, 214 Va. 288, 291, 199 S.E.2d 519 (1973). Since facts with regard to the income status of these people 62 years of age or over, or the handicapped or the disabled may exist to support these classifications, I conclude that these classifications do not violate the Equal Protection Clause of the Fourteenth Amendment.

Classification Based On Other Single Individuals

In allocating social welfare funds among competing groups, the State is not obligated to disburse funds equally. "If the classification has some 'reasonable basis' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some irregularity." Dandridge v. Williams, 397 U.S. 471, 485 (1970). In the present case, the 83%-17% division of available monies was selected to fairly represent the interests of the competing groups and that constitutes a reasonable basis for the classification. Accordingly, I am of the opinion that the regulation is a lawful exercise of the Authority's discretion.

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1The Rule provides as follows: "(11) 'Person', when used in the context of the financing of a housing unit to be owned by an occupant thereof under the Authority's single family home loan program, means (1) an individual who is 62 or more
years of age; (ii) an individual who is handicapped or disabled; or (iii) an individual who is neither handicapped nor disabled nor 62 or more years of age, provided that the Authority, from time to time, by Resolution may limit the number of housing units, and may fix the number of bedrooms contained in any housing units, that may be financed by the Authority for occupancy by such persons. 'Family' in such context, means a number of individuals related by blood, marriage or adoption, living together on the premises as a single non-profit housekeeping unit.

In all contexts other than the financing of housing units under the Authority's single family home loan program, 'person' or 'family' shall mean (i) two or more individuals living together in accordance with law; (ii) an individual who is handicapped or disabled; (iii) an individual who is 62 or more years of age; (iv) an individual who is neither handicapped nor disabled nor 62 or more years of age, provided that the Authority by Resolution may limit the percentage of dwelling units within a housing development that may be made available for occupancy by such persons."

(Emphasis supplied.)

2Resolution, Financing of Housing Units for One Person Households Under the Authority's Single Family Home Loan Program, Virginia Housing Development Authority, April 15, 1980.

3Article I, § 11 provides in part, "that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged...."

4Presumably such persons would have greater tendencies to be of low and moderate income than other residents not so classified.

CONSTITUTION. ART. XII, § 1. NO CONSTITUTIONAL BAR TO SIMULTANEOUS CONSIDERATION OF TWO AMENDMENTS TO SAME CONSTITUTIONAL PROVISION.

February 29, 1980

The Honorable W. Ward Teel
Member, House of Delegates

You have asked whether House Joint Resolution Nos. 34 and 43 are in proper order for consideration by the voters this Fall if the General Assembly passes them this Session. Specifically, you inquire whether some defect results because both resolutions concern amendment of the same section of the Constitution of Virginia (1971), Art. X, § 6.

Separate Resolutions May Propose Amendments to the Same Section of the Constitution

One of the two processes for amendment specified in the Virginia Constitution must be followed to effect a valid amendment. See Staples v. Gilmer, 183 Va. 613, 623, 33 S.E.2d 49, 53 (1945); Coleman v. Pross, 219 Va. 143, 152, 246...
S.E.2d 613, 619 (1978). Under Art. XII, § 1, the General Assembly may propose one or more amendments to the Constitution and place them before the voters for ratification. Certain procedures are required expressly, e.g., a general election of members of the House of Delegates must intervene between the sessions at which the amendment or amendments are adopted, and the required margins for adoption in each house and by the voters on the issue of ratification are specified. The courts have found other procedural requirements implied in the amendatory process, e.g., the language of the amendment or amendments adopted in each legislative session must be identical. See Coleman v. Pross, supra. The courts have also held, however, that the power of the people to amend the Constitution is limited only by the United States Constitution and the requirements of Art. XII.

I can find no language in Art. XII, § 1, or in any Virginia case, that would limit the power of the General Assembly to adopt at the same time more than one proposed amendment to the same section of the Constitution. Several states have limitations on the number of amendments that can be evidenced at the same time, but Virginia does not. See Ark. Const., Art. XIX, § 22; Ill. Const., Art. XIV, § 2; Kan. Const., Art. 14, § I; Ky. Const., § 256; Colo. Const., Art. XIX, § 2; II A. E. Howard Commentaries on the Constitution of Virginia 1173 (1974). I am not able to find any provision in any state constitution that would bar simultaneous consideration of two amendments to the same constitutional provision. I therefore conclude that there can be no defect in the resolutions in question in this respect.

Other Considerations

Two other matters require attention. First, it should be observed that the resolutions to which you referred, as they have been printed, are identical to the resolutions that were adopted by the 1979 Session. See Chs. 739 and 740 [1979] Acts of Assembly. I assume that the amendments, as entered on the journals of the House and Senate, are the same as the amendments reproduced in the Acts of Assembly. As has been stated above, the language of the amendments adopted by each session of the General Assembly must be the same.

You have also enclosed in your package H.B. Nos. 64 and 165. These Bills propose identical amendments to those proposed by the resolutions. If either of those Bills is adopted in the same form this Session, the proposed amendment will be in proper form for submission to the voters. The approval of the Governor to such Bills is not required because the legislature is not deemed to be exercising its ordinary legislative function when proposing amendments to the Constitution. 16 C.J.S. Constitutional Law § 9a, and cases cited therein.

In conclusion, it is my opinion that the resolutions and Bills are in proper form for adoption by the General Assembly
REPORT OF THE ATTORNEY GENERAL

and thereafter for submission to the voters for ratification.

1"Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates. If at such regular session or any subsequent special session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly. If a majority of those voting vote in favor of any amendment, it shall become part of the Constitution on the date prescribed by the General Assembly in submitting the amendment to the voters."

2The resolutions to which you refer present no question under the United States Constitution.

CONSTITUTION. WORKS OF INTERNAL IMPROVEMENT. EXPENDITURE OF CITY FUNDS FOR UTILITY JUNCTION BOXES DOES NOT VIOLATE ART. X, § 10 OF VIRGINIA CONSTITUTION.

February 5, 1980

The Honorable Thomas W. Athey
County Attorney for York County

You have asked several questions arising from a proposal before the City of Williamsburg for an ordinance providing for the underground placement of utility lines. You state that it will be necessary to install a new junction box on the property of each individual premises served by the utility. The city would like to enact an ordinance allowing it either to perform such installation for the owner of the premises at the city's expense, or, in the alternative, to provide for reimbursement of the reasonable costs incurred by the owner for doing it himself.

Works of Internal Improvement

You first ask whether such an ordinance would violate the provision of Art. X, § 10 of the Constitution of Virginia (1971) that forbids local governments from becoming a party to or interested in any work of internal improvement. That provision was inserted in the basic law to remedy the same evil as the "credit" and "stock and obligations" clauses,
namely, the use of governmental funds and credit to foster and encourage construction and operation of private enterprises. Almond v. Day, 197 Va. 782, 91 S.E.2d 660 (1956).

Although the owners of private premises may incidentally benefit from the expenditure of city funds for such installation, that fact does not destroy its public purpose. See Board of Supervisors of Fairfax County v. Massey, County Executive of Fairfax County, 210 Va. 253, 169 S.E.2d 556 (1969). Accordingly, it is my opinion that enactment of an ordinance such as the one in question would not constitute a violation of Art. X, § 10.

Denial of Equal Protection

You ask whether the fact that one class of citizens will benefit incidentally by the city's action constitutes a violation of the equal protection clause of the United States Constitution and the Virginia Constitution.

If a law operates alike on all persons and property similarly situated, it is not subject to the objection of special or class legislation and does not violate the equal protection clause. See State ex rel. Heck's, Inc. v. Gates, 149 W. Va. 421, 141 S.E.2d 369 (1965). The ordinance that you describe would operate alike on all owners of private property within the city. Accordingly, it is my opinion that the ordinance would not constitute a violation of the equal protection clause of the United States Constitution.

You have not sought my opinion whether in the absence of any express statutory authorization any aspects of the ordinance are beyond the authority which may be implied necessarily from powers expressly granted. See Kirkpatrick v. Board of Supervisors of Arlington County, 746 Va. 173, 136 S.E. 186 (1926); I. J. Dillon Law of Municipal Corporations (1911); Reports of the Attorney General (1978-1979) at 196; (1977-1978) at 189. No facts are presented by your inquiry to establish the enabling authorities or lack thereof for the proposed ordinance.

CONSTITUTIONAL LAW. PUBLIC FUNDS MAY BE EXPENDED FOR REFORM OF YOUTHFUL CRIMINALS; ONLY CERTAIN JUVENILES QUALIFY AS SUCH.

September 19, 1979

The Honorable Vincent F. Callahan, Jr.  
Member, House of Delegates

You ask whether the Division of Justice and Crime Prevention ("DJCP") may make a grant of money to Volunteer Emergency Foster Care of Virginia ("VEFC"), a private organization providing certain services to juveniles. At
issue is whether in aiding "children in need of services" VEFC is providing aid to youthful criminals as authorized by Art. IV, § 16, of the Constitution of Virginia (1971).

In information supplied by you, the organization was described as follows:

"The purpose of VEFC is to provide sheltered care to troubled children as an alternative to jail or detention facilities. Most, if not all of the children who enter this program will be under the jurisdiction of the Juvenile and Domestic Relations District Court, and will be serviced by local Social Services Units or the Juvenile Court Services Unit in their area. They will have been taken into custody either under a detention order or a warrant...."

You note that in most instances the youths will not have committed a "delinquent act" but will rather be in the category of "children in need of services."

Your inquiry does not require resolution of the question whether VEFC is sectarian. Nor do you ask whether VEFC can qualify for a grant under DJCP's guidelines for making grants to private organizations.

Article IV, § 16 of the Virginia Constitution has remained unchanged since the Constitution of 1902 was adopted. Before that language was adopted, however, language was offered which would have allowed appropriations to institutions where youths of the State were to be "reformed from criminal tendencies." This language, however, for reasons which are not clear, was changed to the language referring to the "reform of youthful criminals."

The difference between the language offered and that ultimately adopted is obvious. Even if the present language of § 16 is to be broadly construed in favor of appropriations to nonsectarian institutions, it is impossible to conclude that the purpose of reform of youthful criminals is the same as the prevention of juvenile delinquency. Particularly this is true in view of the legislative history of the section.

The language of § 16, "youthful criminals," clearly contemplates acts committed in violation of the law. Children classified as those "in need of services" as defined in § 16.1-228(F) of the Code of Virginia (1950), as amended, generally have not committed acts in violation of law. The same is true with respect to "abused or neglected" children, as defined in § 16.1-228(A). Delinquent children, as defined in § 16.1-228(I), however, clearly are within the scope of the constitutional section. In my opinion, therefore, VEFC may be a recipient of funds from the Division of Justice and Crime Prevention only insofar as the funds are allocated for the purpose of reforming youths who have been subject to the jurisdiction of a juvenile and domestic relations district court as delinquent children.
I would note, however, that this Opinion would not foreclose VEFC from formulating grant requests to finance services to delinquent juveniles. VEFC could then use any other of its own resources for children in need of services, allocating grant monies only to those children who would fall within the Constitution’s definition of "youthful criminals."

1Art. IV, § 16, relating to the General Assembly's powers to appropriate funds, provides, in part, as follows: "The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals...." (Emphasis supplied.)

CONSTITUTIONAL LAW. RELIGION, AID TO, ON ESTABLISHMENT OF CHURCH-CONTROLLED, HOUSING-REHABILITATION PROJECT. PERMISSIBLE FOR POLITICAL SUBDIVISION TO ADVANCE FEDERAL GRAND FUNDS, PURSUANT TO NON-SECTARIAN RESTRICTIONS, TO FURTHER LOCAL COMMUNITY DEVELOPMENT PLAN.

July 30, 1979

The Honorable Jerry K. Emrich
County Attorney for Arlington County

You ask whether Arlington County may advance certain funds received under the Community Development ("C.D.") program of the U.S. Department of Housing and Urban Development ("HUD") to Wesley Housing Development Corporation ("Wesley"), to acquire and rehabilitate apartment units for rental to low and moderate income persons in conformity with the county's HUD-approved housing assistance plan. Wesley is a nonprofit Virginia nonstock corporation controlled by a church or sectarian society as contemplated by Art. IV, § 16, of the Virginia Constitution (1971).

Wesley, the county and HUD have a common interest in the apartment units, although each has its own special purposes and constraints. HUD requires compliance with a HUD-approved county housing assistance plan as a condition of advancing C.D. funds. Wesley will be obligated to follow nonsectarian policies and practices, and comply with the county's HUD-approved plan. The purpose and primary effect will be to combine Wesley ownership and management with HUD funds to carry out the county's HUD-approved plan on a nonsectarian basis.
The purpose and primary effect of the arrangement is to enable Wesley to carry out part of the county's HUD-approved housing assistance plan. The county has identified a need for the apartment units to aid in the prevention or elimination of slums or community blight. Wesley's activities will allow the county to discharge its duties to HUD under the county's HUD-approved plans.

The State constitutional requirements are twofold.

Article IV, § 16, prohibits appropriation of public funds to associations or institutions controlled by any church or sectarian society. However, you state that the county and the State have not contributed to the C.D. funds, and have no interest in their remainder or residue.

Article I, § 16, among other things, prohibits the county from conferring peculiar privileges or advantages on any sect or denomination. Compliance with Art. I, § 16, is judged on essentially the same criteria as are applied under the Establishment Clause of the First Amendment to the federal Constitution—purpose, primary effect and degree of entanglement. See Miller v. Ayres, 213 Va. 251, 191 S.E.2d 261 (1972), and a connected case, Miller v. Ayres, 214 Va. 171, 198 S.E.2d 634 (1973).

The activities of Wesley under the HUD-approved plan will be for a secular purpose, with a primary effect that neither advances nor inhibits religion, and the degree of any entanglement will be slight. The county does need, however, independent assurances from Wesley that (1) Wesley will follow nonsectarian policies and practices in connection with the apartment units and (2) Wesley will not divert to sectarian purposes (upon dissolution or otherwise) any equity in the apartment units that represents HUD funds rather than surplus earned or contributed by Wesley. The reason for the first requirement is to assure that the arrangement is facially valid. The second requirement is to prevent the county from being an agency to favor sectarian interests with grants of other than Virginia public funds. See Opinion to the Honorable William G. Broaddus, County Attorney for Henrico County, dated April 18, 1974, and found in Report of the Attorney General (1973-1974) at 180.

If the county can meet the nonsectarian requirements just stated, I find that the proposed arrangement will violate neither Art. I, § 16, nor Art. IV, § 16, of the Virginia Constitution, nor the First Amendment to the Constitution of the United States.

1HUD will place conditions upon both the county and Wesley to prevent violation of the federal restraints against establishment of religion, as judged by HUD. The State has authorized the county (and its other local governments) to establish and carry out HUD-approved C.D. programs, unless
prohibited by the Constitution of Virginia. See § 15.1-29.7 of the Code of Virginia (1950), as amended. HUD's conditions may in fact offer compliance with State requirements, but HUD's conditions may change, and the county has an independent obligation to see that its actions meet both federal and State constitutional standards. In the present case, compliance with the State Constitution affords compliance with the federal Constitution.

CONSTITUTIONAL LAW. SEPARATION OF POWERS. MAGISTRATES. § 19.2-34 AUTHORIZED BY ART. VI, § 8, NOT INCONSISTENT WITH ART. III, § 1.

February 6, 1980

The Honorable Joseph P. Crouch
Member, House of Delegates


Article III, § 1, supra, provides that the legislative, executive, and judicial departments shall be separate and distinct, so that none shall exercise the powers properly belonging to the others. Section 19.2-34 directs the Committee on District Courts, established under § 16.1-69.33, to determine for each judicial district the number of magistrates necessary for the effective administration of justice. However, Art. VI, § 8, supra, states that the General Assembly may provide for additional judicial personnel such as magistrates, and may prescribe their jurisdiction and provide the manner in which they shall be selected and the terms for which they shall serve.

The separation of powers doctrine is not an absolute. See Winchester & Strasburg Ry. Co. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906) (State Corporation Commission created by 1902 Constitution of Virginia not invalid because invested with combination of legislative, executive and judicial powers); I., A.E. Howard, Commentaries on the Constitution of Virginia (1974) at 442. The entire Constitution must be read as a whole, and provisions with the same subject matter are to be construed together. See Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952). Most of the constitutional provisions that bear directly on how much separation of powers there will be in Virginia are not reflected in the language of Art. III itself, but are elsewhere in the Constitution. Howard, supra, at 436.

Article VI, § 8, supra, states explicitly that the General Assembly may provide for additional judicial personnel such as magistrates. I find that § 19.2-34 is authorized pursuant to Art. VI, § 8, supra, and accordingly,
I find § 19.2-34 is not inconsistent with Art. III, § 1 of the Virginia Constitution.

CONTRACTS. "EXTRA COMPENSATION." STATE AGENCY MAY NOT INCREASE PRICE OF EXISTING CONTRACT.

July 20, 1979

The Honorable J. Robert Bray, Executive Director
Virginia Port Authority

This is in reply to your recent inquiry concerning renegotiation of a contract of lease between the Virginia Port Authority ("VPA") and Nacirema Operating Company. Pursuant to that contract, Nacirema operates, as lessee, the Newport News Marine Terminal in the City of Newport News, a port facility owned by VPA. You advise that the contract was let after competitive bidding, and that Nacirema submitted the most favorable bid, based on the amount of rent payable to VPA and the anticipated ability of Nacirema to operate successfully the terminal throughout the term of its lease. Nacirema has advised VPA that it is now experiencing financial losses, and has requested VPA to reduce the rental fee to an amount comparable to that charged at other ports. Your inquiry is whether VPA may accede to Nacirema's request to amend the contract on which it bid.

When VPA advertised for bids for operation of the Newport News Marine Terminal in 1976, each bidder was furnished a copy of the proposed contract and was requested to submit its bid in the form of guaranteed percentages of income, above certain established minimums, to be paid annually to VPA as rent. The lease provides for an initial term of seven years, divided into two and five years, commencing January 1, 1977, with the option to renew the lease for an additional term of five years beginning July 1, 1984. Art. X of the lease, which sets forth the renewal option, permits the lessee to renegotiate its guaranteed rental payments for the additional term of five years; however, no provision of the lease permits renegotiation of the amount of such payments as bid for the initial seven year term.

The proposal submitted by Nacirema indicated that it was experienced in the management of marine terminals and well qualified to operate the facility at Newport News. Nacirema's bid offered an annual rental payment of $776,000 for years one and two and $1,346,000 for years three through seven, which exceeded the next highest rent bid by $8,000 for the first period and $7,500 for the second period of the lease. Public contracts in excess of $2,500 may be let by a State agency only after advertising for bids pursuant to § 11-17 of the Code of Virginia (1950), as amended, and § 11-20 requires that such contracts be let to the lowest
responsible bidder. Such was the case when VPA accepted the bid of Nacirema which, although stated as the highest sum bid, represents the lowest cost to the Commonwealth in obtaining a qualified port operator. Once executed, the contract between VPA and Nacirema obligated the lessee to operate the Newport News Marine Terminal for the full term of its lease at the rent agreed upon. Material to Nacirema's duties under the lease it its representation, when it bid on the contract, that it was capable of operating the port efficiently. Therefore, it must be presumed that the guaranteed rent bid reflected the compensation required by Nacirema to operate the port as promised.

As I have indicated, the lease to Nacirema makes no provision for reduction of the rental fee during the initial seven year term. Further, Nacirema's request is not supported by a promise to perform any service not anticipated in its proposal and the lease. Accordingly, there is no consideration upon which to found a new agreement justifying additional compensation.

With the foregoing in mind, it is relevant to consider the provisions of Art. IV, § 14, of the Constitution of Virginia (1971). Therein, it is provided:

"The General Assembly shall not enact any local, special, or private law in the following cases:

(8) Remitting, releasing, postponing, or diminishing any obligation or liability of any person, corporation, or association to the Commonwealth or to any political subdivision thereof. * * *

(10) Granting from the treasury of the Commonwealth, or granting or authorizing to be granted from the treasury of any political subdivision thereof, any extra compensation to any public officer, servant, agent, or contractor." (Emphasis added.)

I am of the opinion that reduction of the rent payable by Nacirema, which would entitle it to receive additional funds for operation of the terminal, would diminish its obligation to the Commonwealth and constitute the payment of "extra compensation," prohibited by the Constitution. See Opinion to the Honorable Philip R. Brooks, Director, Department of Purchases and Supply, dated August 26, 1974, and found in Report of the Attorney General (1974-1975) at 101. Accordingly, I answer your inquiry in the negative.

CONTRACTS. INSURANCE. FUNDAMENTAL PRINCIPAL OF VIRGINIA INSURANCE LAW IS THAT PROVISIONS OF POLICY ARE CONSTRUED AS IN OTHER CONTRACTS, SUBJECT ONLY TO LAWS AFFECTING INSURANCE CONTRACTS.
The Honorable Edward E. Willey
Member, Senate of Virginia

You have asked whether an insurance company, which writes health and sickness insurance policies in the Commonwealth, may legally deny payment for an outpatient hospital’s "facility-component" of the charge for rendering medical care at that facility. I am advised that the policy of insurance is a group policy and that the policy’s definition of "hospital" excludes outpatient facilities. This latter fact has the effect of excluding any reimbursement for the use of the facility, i.e., the "facility-component" of the charge, during the rendering of care to an insured patient even though reimbursement is available for other components of the charge, such as physicians’ fees.

A fundamental principal of Virginia insurance law is that terms and provisions of a policy of insurance are to be construed as in other contracts, subject only to the laws affecting insurance contracts. See, e.g., Carter v. Carter, 202 Va. 892, 121 S.E.2d 482 (1961). Accordingly, words and phrases of a policy should be given their ordinary meaning. London Guarantee & Acc. Co. v. C.B. White & Bros., 188 Va. 195, 49 S.E.2d 254 (1948). If the language of the policy is clear and unambiguous, the courts may not resort to rules of construction to make the contract different from what it is. Provident Life and Acc. Ins. Co. v. Kegley, 199 Va. 273, 99 S.E.2d 601 (1957).

Remembering these principals, it is clear that a Virginia outpatient hospital does not qualify as a "hospital" as defined by the policy of insurance. Thus, if the policy authorizes payment for the facility-component of a "hospital" charge, then the insurance company may properly deny payment to an outpatient facility for its facility-component of its charges for medical care. While one may question the wisdom of any policy of insurance which encourages insured parties to seek more expensive inpatient treatment, the facility-component of which is covered, when the same treatment is available at a less expensive outpatient facility, I am unaware of any provision of the law which prohibits an insurance company from writing such a policy. I conclude, therefore, that the insurance company may deny payment for the facility-component of the charge for the medical care rendered at an outpatient facility, even though that facility is a "hospital" for licensure purposes. See § 32.1-123.

1To qualify as a "hospital" under this group policy a facility must satisfy the following criteria:
1. it is primarily engaged in providing, for compensation from its patients and on an inpatient basis, diagnostic
and therapeutic facilities for the surgical and medical diagnosis, treatment and care of injured and sick persons by or under the supervision of a staff of physicians;
2. it continuously provides twenty-four hour a day nursing services by registered nurses; and
3. it is not, other than incidentally, a place for rest, a place for the aged, a place for alcoholics or a nursing home.

21 I note that a group policy of insurance is exempt from certain requirements of State law to which individual policies are subject. See § 38.1-360(1) of the Code of Virginia (1950), as amended. One of the requirements of State law for individual policies is that any provision of a policy which conflicts with a State statute is amended by operation of law to conform with that State statute. See § 38.1-350(9). Arguably, then, § 32.1-123's definition of "hospital," which does include outpatient facilities, replaces the definition of "hospital" in individual policies.

CONTRACTS. PUBLIC. WATER OR SEWER LINES, ROADS OR SIMILAR SITE CONSTRUCTION AS IMPROVEMENTS TO REAL PROPERTY UNDER § 11-23.5.

August 13, 1979

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

You ask whether a contract for the installation of water lines, sewer lines, subdivision roads or other similar site improvements or any combination thereof would be considered a "contract for the improvement of real property" in accordance with § 11-23.5 of the Code of Virginia (1950), as amended. This section allows the owner to retain up to five percent of the contract proceeds until completion of the project.

Improvement of real property involves such permanent addition to or alteration of the land, its structures and appurtenances as will substantially enhance the useful or intrinsic value of the property. Pritchard v. Williams, 106 S.E. 144 (N.C. 1921); cf. Wiggins v. Procter & Schwartz, Inc, 330 F.Supp. 350, 352 (E.D. Va. 1971). The activities which you describe are regarded as permanent improvements. City of Pasadena v. Los Angeles County, 182 Cal. 171, 187 P. 418 (1920); Williams, Belser & Co. v. Rowell, 145 Cal. 259, 78 P. 725 (1904).

Accordingly, I am of the opinion that the installation of water lines or sewer lines or the grading and paving of subdivision roads or other similar site improvements whether done singly or in any combination would constitute improvements to real property as contemplated by the Act.

CONTRACTS. TO CONSTRUE CONTRACT, LAW EFFECTIVE WHEN CONTRACT MADE GOVERNS.
October 4, 1979

William R. Hill, M.D., President
State Board of Health

This is in reply to your inquiry concerning the legality of permitting a recipient of a State medical scholarship to repay the Commonwealth by working as an employee of a private hospital which assigns this physician to a family practice residency program which is conducted in a local health department.¹

Pursuant to the State medical scholarship law,² a recipient contracts to engage in the practice of family medicine in an "area of need" within the Commonwealth for a period of time equal to the number of years for which he or she was the beneficiary of scholarship awards. If the physician declines to do so, then the statute permits him or her to become an employee of one of certain designated State agencies or to repay the money received from the Commonwealth.

In this instance, you inform me that the physician is not engaged in practice in an area of need and that he desires to satisfy his contract by working in the family practice residency program which is physically based in a local health department. The question, therefore, is whether the physician's employment with a private hospital, which assigns him to work in the residency program, is legally equivalent to State employment with the State Health Department. I conclude that it is not.

To construe the contract in question, it is well established that the law effective when a contract is made governs. Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974). When this recipient entered into his scholarship contracts, § 23-35.3(d) specified that "appointment and service in the public health service of the Commonwealth..." [for the requisite number of years] would discharge his contractual obligations. Remembering that words in a statute should be given their plain and ordinary meaning unless it is apparent that legislative intent is otherwise, see, e.g., Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206 (1972), cert. denied, 407 U.S. 922, 92 S.Ct. 2469 (1972), I interpret "appointment and service" to mean that the physician must be formally employed by the Commonwealth.

While it could be argued that this recipient's service at a local health department, but not employed by it, satisfies the intent of the General Assembly, I am not persuaded by those arguments. In particular, I note that the physician does not attend only those indigent patients who go to a local health department clinic for medical care. He also renders care and treatment to persons who can afford treatment by a private physician. Secondly, I am advised that the physician must devote part of his time to the training of the interns and residents in the program as well
as deal with the administrative duties of the program. These are responsibilities which benefit the private hospital which conducts the residency program, not the Commonwealth. In other words, the physician is not controlled and directed by officials of the State Health Department, and control is, in my opinion, contemplated by the statute. Arguably, the statute's current usage of the language "employee of the Virginia Department of Health..." rather than "appointment and service in the public health service of the Commonwealth..." reveals or clarifies an intent of the General Assembly that a formal appointment is not necessary so long as the physician performs work for the Health Department. This interpretation would require a broad generic view of the word "employee." Forgetting for a moment the rule of statutory construction referred to above in Lovisi v. Commonwealth, supra, this argument must also fail. The Supreme Court of Virginia has frequently construed statutes using the word "employee," "employer," and "employment." The court has consistently identified the power of control as the key element in determining whether the definition of any of those words is met. See, e.g., Tidewater Corp. v. McCormick, 189 Va. 158, 166, 52 S.E. 2d 141 (1949) (and the cases cited therein).

As I indicated above, it appears that this physician is not under the control of the State Health Department; rather, he is under the control of the private hospital. The mere location of his day-to-day work place does not establish the Health Department's control. Accordingly, it is my opinion that the physician in question cannot properly discharge his contractual obligations to the Commonwealth while working in the employ of a private hospital, even though some of his work may benefit patients of the Health Department's local clinic.

1In the Commonwealth, localities are given the option of establishing their own health department or of entering into a cooperative arrangement with the Commonwealth whereby the locality contributes money to the State Health Department which, in return, operates and staffs the local department. See §§ 32-40.1 and 32-40.2 of the Code of Virginia (1950), as amended. The situation at hand involves a local department operated by the State Health Department pursuant to the cooperative arrangement.

2See §§ 23-35.1 to 23-35.8.
You have asked a number of questions regarding the constitutionality of portions of the Subdivided Land Sales Act of 1978 (the "Act"), §§ 55-336 through 55-350 of the Code of Virginia (1950), as amended.¹

1. Your first question is whether, when applied to contracts in existence on the effective date of the Act, § 55-344(A)(3)² effects a taking of private property for a private purpose without just compensation in violation of Art. I, § 11 of the Virginia Constitution (1971) and the Fifth and Fourteenth Amendments of the United States Constitution.

Under § 55-344(A)(3), a land developer must transfer legal title and control of common facilities and amenities in the subdivision to a property owners' association.

The Fifth and Fourteenth Amendments of the United States Constitution and Art. I, § 11 of the Virginia Constitution prohibit the taking of private property for public use without just compensation. Although the Act does not state whether compensation of land developers for the required transfer is contemplated, even so, §§ 55-343 and 55-344.A. of the Act are constitutional only if the property is taken for a public purpose. "Although not forbidden by the Constitution of this State, the legislature cannot authorize the taking of private property for private use, as it is contrary to the fundamental principles of republican government." See Boyd v. C.C. Ritter Lumber Co. Inc., 119 Va. 348, 353, 370, 89 S.E. 273, 274, 279 (1916); Fallsburg & Co. v. Alexander, 101 Va. 98, 43 S.E. 194 (1903). In Boyd the court held that to qualify as a public use, a use must be fixed and definite; it must be substantially beneficial to the public and its absence should create great loss or inconvenience to the public; and its necessity must be obvious. See 119 Va. at 369.

Under the Boyd criteria enumerated above, it seems clear that the use of common facilities and amenities by residents in a subdivision does not constitute a public use and therefore the transfer of these facilities and amenities required by § 55-344(A) of the Act is in violation of Art. I, § 11 of the Virginia Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

2. Your second question is whether §§ 55-343³ and 55-344(D)⁴ impair contracts existing prior to July 1, 1978, and thus violate Art. I, § 11 of the Virginia Constitution and Art. I, § 10 of the United States Constitution. This question must be answered in the affirmative for "legislation must be considered as addressed to the future, not to the past...[and] a retrospective operation will not be given to a statute which interferes with antecedent rights...unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.'" Greene v. United States, 376 U.S. 149, 160 (1964) quoting Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 191 (1913);
Kennedy Coal Corp. v. Buckhorn Coal Corp., 140 Va. 37, 56, 124 S.E. 482, 488 (1924). Although there is no express prohibition against retrospective laws, such a law is invalid if it impairs vested rights. See 16 Am.Jur.2d Constitutional Law § 420 (1964). Impairment of vested rights would be the clear effect of retroactive application of §§ 55-343 and 56-344(D).

Under the law existing prior to July 1, 1978, a developer could obtain outright title in common facilities for which owners were assessed on a regular or special basis. If the Act were applied to developers who completed all sales before July 1, 1978, the impairment of this property right would result. Such an application of the Act would violate the rule that vested interests and manner and for the welfare of the public, it expands automatically to protect the public against an improper use of private property to the injury of the public interest. Gorieb v. Fox, 145 Va. 554, 134 S.E. 914 (1926), aff'd 274 U.S. 603 (1927).

3. You next ask whether §§ 55-343, 55-344(A)(3) and 55-344(D) may be effective if applied to subdivisions in existence on the effective date of the Act if sales have been made since the effective date of the Act.

The purpose of the Act is to protect the public from the possibility of fraud on the part of developers. Since this is an appropriate use of the police power, it is no objection that the performance of existing contracts (made between developers and homeowners prior to July 1, 1978) may be frustrated by the prohibition of injurious practices. See Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934); Rast v. Van Demar & Lewis Co., 240 U.S. 342 (1916). Thus, the Act is valid with respect to sales made by developers after July 1, 1978.

If a developer continues to make sales after July 1, 1978, he subjects himself to the provisions of the Act and thus must transfer title to a property owners' association if the development is covered by the Act. Previous sales can be examined to determine whether or not the subdivision is covered or is exempted. See Huffman v. Commonwealth, 210 Va. 530, 172 S.E.2d 788 (1970), where the Virginia Supreme Court held that motor vehicle violations which occurred before the passage of the habitual offender provisions of the Code could be the basis of a license revocation, so long as one of the three required offenses occurred after the effective date of the provision. In Huffman, the court ruled that the license revocation did not violate the prohibition against ex post facto laws, since the legislation was civil in nature and was enacted to protect the public, not to punish the habitual offender. See, also, Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965), where the court held that a statute authorizing divorces a vinculo matrimoni on the grounds that the couple had lived separate and apart without any cohabitation and without any interruption for three years applied to instances of separation existing at the time of its enactment.
The statute will not be regarded as operating retroactively because of the mere fact that it relates to antecedent events, or draws upon antecedent facts for its operation. United States v. Village Corp., 298 F.2d 816 (4th Cir. 1962); Smith v. Moore, 225 F.Supp. 434 (E.D. Va. 1963), modified on other grounds 343 F.2d 594 (4th Cir. 1965).

The authority of the General Assembly to pass such legislation is based on the police power, and applying the statute to sales made after July 1, 1978, does not impair existing contracts in violation of the Virginia Constitution or the United States Constitution.

4. Your final question is whether the Act as a whole discriminates against land developers who sell by installment sales contract, thus violating the Fourteenth Amendment of the United States Constitution. In Dandridge v. Williams, 397 U.S. 471, 485 (1970), the Supreme Court held that a statutory discrimination will not be set aside if any state of facts may reasonably justify it. In Dandridge the court held that "the equal protection clause does not require that a state choose between attacking every aspect of a problem or not attacking the problem at all." 397 U.S. at 486-487. In its passage of the Act, the General Assembly was keenly aware of factual differences between sales by installment sales contracts and other methods, particularly the abuse of land sales installment contracts. See Report on Recreational Land Development, H. Doc. No. 5 (1978).

Accordingly, I am of the opinion that the statute is consistent on its face with the equal protection clause of the Fourteenth Amendment.

1Section 55-337(5) of the Act defines a subdivision as "any subdivision of land into one hundred or more lots, whether contiguous or not, where any lots therein are, from July one, nineteen hundred seventy-eight, sold or disposed of, or, prior to July one, nineteen hundred seventy-eight, a substantial number have been sold or disposed of, by land sales installment contracts, and pursuant to a common promotional plan, where lot purchasers within said subdivision have use of and access to the facilities and amenities within such subdivision for which the said lot owners are assessed on a regular or special basis for the use and enjoyment thereof...."

2Section 55-344(A)(3) provides: "The transfer of title and control and maintenance responsibilities of common areas and common facilities to the association, which transfer is to take place no later than at such time as the developer transfers legal or equitable ownership of at least seventy-five percent of the lots within the subdivision to purchasers of such lots or when all of the amenities and facilities are completed, whichever shall first occur, but in no event any sooner than two years from the date the developer sells his first lot within the subdivision should
the developer elect to retain title to said common areas and common facilities for such period. The transfer herein required of the developer shall not exonerate him from the responsibility of completion of the common areas and facilities once the transfer takes place:"

3Section 55-343 provides: "It shall be unlawful to restrain the owner of a lot in a subdivision from offering that lot for sale or lease, provided leasing of the lot is not specifically prohibited by recorded convenant, or from selling or leasing such lot. Any deed restriction or recorded convenant which creates a right of first refusal in excess of thirty days or creates a sales restraint which denies lot owners the right to post for-sale signs of reasonable size, shall be null and void."

4Section 55-344(D) makes general provision for the recording, enforcement, and disclosure of liens for past due assessments by property owners' associations. These provisions may conflict with other agreements entered into prior to the effective date of the Act.

COSTS. AMOUNT ALLOWABLE UNDER UNIFORM FINE SCHEDULE.

September 27, 1979

The Honorable Robert M. Galumbeck
County Attorney for Tazewell County

You have asked whether the clerk of a district court may properly collect from a magistrate court costs in a public intoxication prosecution which exceed the schedule promulgated by the Supreme Court of Virginia for such costs.

Section 16.1-69.40:2 of the Code of Virginia (1950), as amended, empowers the Supreme Court to designate by rule nontraffic offenses for which a pretrial waiver of appearance, plea of guilty and fine payment may be accepted. An accused may appear in person before a magistrate, prior to any fixed date of trial, enter a waiver of trial and plea of guilty, and pay the fine established for the particular offense, with costs.1 These prepayable offenses and fines are established under schedules promulgated by the Supreme Court, which must be uniform in their application throughout the Commonwealth.2 The statute further provides that fines and costs "shall be paid in accordance with the provisions of this Code or any rules or regulations promulgated thereunder."3

Pursuant to § 16.1-69.40:2, the Supreme Court in 1978 promulgated Part 3C of the Rules of the Supreme Court of Virginia. Rule 3C:2 includes § 18.7-388, which in part proscribes public intoxication,4 among those nontraffic offenses which are prepayable. Rule 3C:2 specifically states that this schedule "is applied uniformly throughout the Commonwealth, and a clerk or magistrate may not impose a fine and cost different from the amounts [set forth in the
schedule." In the case of a prepayable guilty plea under §18.2-388, unless otherwise provided by statute, the schedule imposes court costs of $13.

My review of the Code discloses no such contrary statutory provision. Under these circumstances, I think it is clear that a district court clerk lacks any authority to collect any court costs over $13 from a magistrate who has accepted a guilty plea for violation of §18.2-388. Rule 3C:2 unambiguously states that its schedule shall be applied uniformly throughout Virginia, and that a clerk or magistrate may not impose fines or costs different from the amounts set forth in said schedule. It is my view that this Rule is clear on its face, and thus prohibits any action by a court clerk which would compel a magistrate to collect court costs at variance with the uniform schedule in Rule 3C:2.

1§16.1-69.40:2(B).
2§16.1-69.40:2(A) and 16.1-69.40:2(C).
3§16.1-69.40:2(C).
4§18.2-388 states in part: "If any person profanely curse or swear or be drunk in public he shall be deemed guilty of a Class 4 misdemeanor."

COSTS. JUROR IS ENTITLED TO COMPENSATION FOR EACH DAY HE ATTENDS TERM OF COURT, RATHER THAN ONLY THOSE DAYS WHERE SELECTED AS PART OF JURY PANEL.

July 16, 1979

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

You have asked whether a juror is entitled to compensation for each day he attends a term of court, or whether such compensation is limited only to those days where he is in fact selected as part of the jury panel.

Section 14.1-195.1 of the Code of Virginia (1950), as amended, provides 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."

In an Opinion to the Honorable Charles E. King, Clerk, Circuit Court of Gloucester County, dated November 9, 1978 (a copy of which is enclosed), I concluded that a convicted defendant is liable for the compensation of all persons summoned to appear in court for jury duty in his case, regardless of whether they ultimately are excluded from the
jury or jury panel. I pointed out that § 14.1-195.1 provides compensation for "[e]very person summoned as a juror in a... criminal case...." (Emphasis added.) The Opinion then stated:

"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." 1

This Opinion demonstrates that a citizen is entitled to compensation for each day he attends the term of court, irrespective of whether he is chosen as part of the jury or jury panel. Furthermore, my review of the Code discloses no statute which bases the amount of compensation on the extent of a summoned juror's services or the amount of time he spends in court prior to being released. Accordingly, I believe that a juror attending a term of court should be fully compensated for each day he reports to the circuit court, to the extent provided for under § 14.1-195.1.

I take note of the fact that this conclusion is in accord with the general rule, which states that a juror is entitled to his per diem allowance for all the time he is necessarily in attendance on the court, whether or not during such time he is actually serving as a juror. 2

Finally, as you suggest, just as a juror is entitled to compensation for each day he attends the term of court, so is he entitled to expenses incurred in travelling "to and from court by the most direct route...." 3 Again, the Code does not decrease a juror's travel expenses merely because on a given day he ultimately is not chosen for jury duty.

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1See, also, Report of the Attorney General (1963-1964) at 60 (Code of Virginia does not differentiate between pay of juror whether he serves as such or simply attends in obedience to lawful summons).
3Section 14.1-195.1.
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COUNTIES. BOARDS OF SUPERVISORS. COUNTY BOARD OF SUPERVISORS LACKS AUTHORITY TO RESCIND PREVIOUS APPROPRIATION OF FUNDS TO SCHOOL BOARDS FOR SCHOOL PURPOSES WITHOUT CONSENT OF COUNTY SCHOOL BOARD.

February 15, 1980

The Honorable W. Edward Meeks, III
Commonwealth's Attorney for Amherst County

You ask if the county board of supervisors may rescind a prior appropriation of funds to the local school board.

School boards are governmental entities separate and distinct from the local governing body. All funds set aside for county school purposes automatically vest, by operation of law, in the county school board. Such school funds include local funds appropriated to the school board by the governing body of the county. And, such funds must be expended on the order of the school board consistent with the terms of the appropriation. See §§ 22-63, 22-116, 22-127, 22-147 of the Code of Virginia (1950), as amended.

Accordingly, once the appropriation is made, the funds automatically vest within the exclusive dominion of the school board, and the county would have no authority to otherwise divert such funds for any other purpose without the consent of the county school board. See Report of the Attorney General (1977-1978) at 350; Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 28 S.E.2d 698 (1944); County School Board of Fluvanna County v. Farrar, 199 Va. 427, 100 S.E.2d 26 (1957). Your question is, therefore, answered in the negative.

COUNTIES. COUNTY ADMINISTRATOR FORM OF GOVERNMENT. CENTRALIZED PURCHASING FOR ALL DEPARTMENTS BY COUNTY ADMINISTRATOR. PERMISSIVE.

May 22, 1980

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You ask two questions. First, whether a local department of social services, in a county which operates under a county administrator form of government, and which is excluded from central purchasing for the county, must obtain professional services, such as insurance and architectural services, only by the letting of bids. You also ask whether an insurance company can raise the workmen's compensation insurance rate during the policy period as the result of issuance of an experience modification by the Virginia Compensation Rating Bureau.
Competitive Bidding

The local board of the department of social services has an implied power to contract for those goods and services required to administer their programs. Opinion to the Honorable Robert M. Galumbeck, County Attorney for Tazewell County, dated October 31, 1978, found in Report of the Attorney General (1978-1979) at 240. That opinion did not reach the question as to whether this contracting for goods and services must be done via competitive bidding.

Competitive bidding is provided for by statute for counties utilizing a county administrator in the form of centralized purchasing for all departments by the county administrator. See § 15.1-127. This statutory provision is permissive. The county administrator is only authorized to establish centralized purchasing for all departments, including the department of social services. There is no provision in this chapter requiring or authorizing individual departments to utilize competitive bidding. This fact, plus the fact that competitive bidding is also permissive under § 15.1-117(12), indicate no overall intent by the legislature that competitive bidding is required for all or certain purchases by any or all departments in a county. Thus, I must conclude that a local department of social services is not required to let bids when contracting for professional services.3

Insurance Rate Modification

You next ask whether the department of social services, if it enters into a contract for workmen's compensation insurance, after letting bids thereon and acceptance of the lowest bid, must pay a raise in premium sought by the insurance agency during the contract term, where the premium increase is based on an experience modification by the Virginia Compensation Rating Bureau.

The facts presented indicate that the Board of the Department of Social Services solicited bids by letter of April 24, 1979, from various insurance agencies to provide workmen's compensation insurance. The letter to the agencies indicated that the Department of Social Services "rebids insurance every 36 months." The letter did not mention that bids were to include endorsements or audits. On May 23, 1979, the insurance agency that eventually won the bid, submitted its bid offering separate quotes for each type of coverage at a per annum figure. The bid did not contain any express reservations. The letter from the insurance agency submitting its bid did not qualify its bid or reserve the right to add endorsements or change premiums because of experience modifications. The Board of the Department of Social Services approved the award of the insurance contract to the agency in question at its meeting on June 6, 1979, and the agency was so notified.
On June 18, 1979, the Department of Social Services received a letter from the president of the insurance agency indicating only that they expected to be able to deliver the policies on the coverages awarded in a few weeks. There was no mention in this letter of any endorsements. I am informed that the Virginia Compensation Rating Bureau forwarded the revised experience rating to the former carrier and not to the present carrier prior to issuance of the policy. In February 1980, the insurance agency sought an increase in premium with respect to the workers compensation insurance for June 30, 1979, through June 30, 1980, because of an experience modification by the Virginia Compensation Rating Bureau.

The above facts contain all the elements of a contract at the originally bid price—an offer, acceptance and mutual consideration. These transactions thus appear to satisfy the definition of a contract: a promise enforceable at law. However, in all probability the policy issued was a form approved by the Industrial Commission pursuant to § 65.1-113 and provides that premiums will be in accord with the Virginia Corporation Rating Bureau's schedule. Thus, whether the premiums may be changed during the policy period depends on the facts of the case.

Section 63.1-38 of the Code of Virginia (1950), as amended, provides that there shall be a local board of public welfare in each county of the State. The governing body of each county may designate its department of public welfare as the department of social services. See § 63.1-38.1.

The board of social services, in a traditional county form of government, may exercise power to contract for goods and services if the board of supervisors of the county has excluded the board of social services from central purchasing. Opinion to the Honorable Robert M. Galumbeck, County Attorney for Tazewell County, dated October 31, 1978, and found in Report of the Attorney General (1978-1979) at 240.

This conclusion is not disturbed by the requirement of § 15.1-108 that all purchases be based on competitive bids whenever feasible. This provision only applies when a county has employed a purchasing agent or designee; its provisions do not apply to any county until the board of supervisors employs such a county purchasing agent or designee. See § 15.1-113. Since the given facts indicate that the county in question employs a county administrator and not a purchasing agent, § 15.1-108 is not applicable.

While it has been held that it is an elementary rule of construction of insurance contracts or policies that statutory provisions are as much a part of the policy as if incorporated therein, these cases are distinguishable. See State Farm Mutual Automobile Insurance Co. v. Duncan, 203 Va. 440, 125 S.E.2d 194 (1962). Here no statute mandates that premium increases incorporated pre-existing contracts.
March 25, 1980

The Honorable Vincent F. Callahan, Jr.
Member, House of Delegates

You indicate that the Board of Supervisors of Fairfax County adopted a resolution on January 28, 1980, which prohibits the county from awarding any contract to any contractor who, within the last three years, has been cited for a willful or repeated violation of the federal Occupational Safety and Health Act of 1970 (hereinafter "OSHA") or has been cited for a serious construction safety violation of that Act after having received a warning from a county inspector.

Your letter then raises the following inquiries. First, in light of the corollary of Dillon's Rule, which limits the powers of boards of supervisors to those conferred expressly or by necessary implication, does the board of supervisors have the authority to impose the above referenced requirements on contractors bidding on county contracts? Secondly, in light of the federal preemption of the field of occupational health and safety regulation by the adoption of OSHA, and the approval of Virginia's State Plan under OSHA with Virginia's accompanying enforcement responsibilities, is Fairfax County precluded from making compliance with the applicable safety standards a condition of the contract?

Requirements For Public Contractors

The policy in this State of awarding contracts for public improvements to the lowest responsible bidder is firmly established and of longstanding duration. See Opinion to the Honorable Nathan H. Miller, Member, House of Delegates, dated August 6, 1975, found in Report of the Attorney General (1975-1976) at 72; Ch. 9 [1840-1841] Acts of Assembly 35; Ch. III [1811-1812] Acts of Assembly 5. Such a policy is designed to serve several considerations, including lowest price obtainable in the market for the work performed, best quality of construction consistent with plans and specifications, avoidance of fraud or favoritism, and prompt completion of the project.

The expressed objective of the Fairfax resolution of January 28, 1980, is to assure that contractors who are awarded county contracts practice good construction safety techniques as revealed by their prior safety records. Such records may reasonably be considered as one of the facts bearing upon the determination of a responsible bidder.

But is a policy which excludes from consideration for its contracts all those contractors which have suffered specified OSHA violations a necessary or implied component of
its power to award contracts to the lowest responsible bidder? The implementation of such a policy raises the real possibility that a significant number of contractors would be excluded from the bidding process who might otherwise contribute significantly to a determination of the lowest contract price or the swiftest completion of the contract. Such a circumstance would appear to effect drastically the possibility of obtaining the "lowest responsible bidder."

There may well be in particular instances no direct relationship between the assessment of an OSHA citation upon a contractor within the past three years and such contractor's skill and experience, his ability to carry out the contract and the quality of his work under previous contracts. Therefore, to exclude one or a number of such contractors whose bids may well play a significant role in determining the lowest bid would largely frustrate the purposes of the competitive bidding requirements. When significant competing public interests are involved, and where means less drastic than a flat prohibition against a certain broad category of bidders would appear to be available to assure that parties to county contractors are responsible, such a prohibition cannot be held to be reasonably implied from any expressly granted power of the board of supervisors.

Accordingly, I am of the opinion that the county is without the authority to adopt a blanket rule excluding any contractor with OSHA violations from bidding on public projects. However, this would not preclude the county from considering the circumstances of a citation in determining the responsibility of individual bidders.

Since the county has the implied authority to consider various factors in determining the lowest responsible bidder, it may make a determination whether prior violations have a material bearing upon the contractor's ability to carry out the contract upon which he is bidding. The procedure set forth in the January 28, 1980, resolution, appears to create an irrebuttable presumption that a contractor who has received a citation within the past three years is not responsible. Although, as indicated above, this is not permissible, the board may establish procedures to determine contractor responsibility on a case by case basis.

Preemption Of Local Regulations By OSHA

With regard to your second question, I am of the opinion that the county is not preempted from making compliance with applicable safety standards a term of the contract.

When federal regulation is adopted in an area involving the protection of the health and safety of its citizens which traditionally has been occupied by the states and its subdivisions "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of
Since OSHA specifically recognizes the jurisdiction or authority of states and localities over issues involving health and safety which are not covered by standards under OSHA, 29 U.S.C. § 667(a), the state or local enactments must give way only when they are so inconsistent with federal law so as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Jones, supra, 430 U.S. at 526.

Therefore, with regard to the provisions contained in the resolution in question, the county does not appear to be preempted. If in fact the county were to impose requirements upon contracts additional to those imposed by OSHA, a different question would be presented.

Footnote:
1 For a discussion of those factors which the contracting agency may consider in determining the "lowest responsible bidder," see Opinion to the Honorable Edgar F. Shannon, Jr., President of the University of Virginia, dated January 4, 1973, found in Report of the Attorney General (1972-1973) at 107.

COUNTIES, CITIES AND TOWNS. EMPLOYER CONTRIBUTIONS FOR VSRS BENEFITS. NO NEED FOR FURTHER ACTION BY GOVERNING BODY TO APPROVE ACTUAL PAYMENTS TO VSRS ONCE APPROPRIATIONS FOR EMPLOYEE COMPENSATION MADE.

April 22, 1980

Mr. Glen D. Pond, Director
Virginia Supplemental Retirement System

Your recent letter states that some 420 political subdivisions in the Commonwealth participate in the Virginia Supplemental Retirement System ("VSRS") for purposes of employee benefits for retirement, group life insurance and federal Social Security programs. As you note, part of the subdivision’s responsibilities thereunder are to forward payments constituting both employee and employer contributions and to maintain and forward appropriate records to the VSRS.

Your question is whether these subdivisions as employers are authorized to withhold the forwarding of their payments to the VSRS until their respective governing bodies have met and approved each payment, or whether the employee and employer contributions are benefit costs which are fixed by law and therefore do not need approval by such governing body on a monthly basis prior to forwarding to the VSRS.
The payment or contribution made by any subdivision as an employer for purposes of funding retirement benefits through the VSRS is determined in accordance with § 51-111.47 of the Code of Virginia (1950), as amended. The expressed statutory purpose as reinforced by the scheme of this section is to establish, under normal circumstances, a relatively steady or level rate of contribution by the employer. Each of the constituent elements of the employer's contribution is determined in accordance with a statutorily defined ratio. Once these rates are determined based upon the valuation of the normal annual cost of the benefits, they "remain in effect until a new valuation is made." These rates are required to be certified by the Board of Trustees of the VSRS to each contributing employer or subdivision and in addition "any changes made therein from time to time." Section 51-111.47(i). Therefore, until a new valuation results in a change of the rates or unless the exceptional circumstance of an insufficiency of contributions to pay expected benefits during a year arises, under § 51-111.47(j), the rate used in determining contributions by each subdivision remains constant.

Payments of employer's contribution for social security benefits are controlled explicitly by statute. Section 51-111.5(c)(1) now provides that a political subdivision whose employees are to be covered for such benefits shall pay the contributions prescribed by law within fifteen days after the end of each quarter. For delinquency in payment of these contributions, the subdivision is subject to interest charges at the rate of 8 percent per annum. Section 51-111.5(d). No exception is made from these requirements.

Finally with regard to group life insurance, the employer's contribution required by § 51-111.67:9 is a percentage of the premiums or charges not paid for or covered by the employee contributions. Once the premium rate is established, the employee's share of the cost is established by the VSRS Board of Trustees as a percentage of each employee's annual compensation in accordance with § 51-111.67:5. The balance of the premium is the employer's percentage of charge or their contribution for group life insurance. Therefore, there appears no necessity for the local subdivisions to take any action other than the appropriation which they make on an annual or other legally permitted basis to cover all wage costs for their employees.

Contributions by local political subdivisions for retirement, social security and group life insurance benefits are legally mandated components of the total cost borne by such subdivisions for compensation of their employees. These employer contributions are calculated based upon the rate of compensation of each employee.

The budget which must be prepared and approved by the governing bodies of every county, city or town for purposes of information and fiscal planning would of necessity contain the amounts which the governing body expects to pay out.
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within the fiscal year for these employer contributions if it is to be a "complete itemized and classified plan of all contemplated expenditures...." Section 15.1-160. Although the funds budgeted for employer contributions cannot in fact be paid until appropriated by the said governing body pursuant to § 15.1-152, the employer contributions would logically be part of the appropriation of funds made for the actual compensation of its employees. Therefore, so long as its employees have been paid, I see no reason why these subdivisions are authorized to withhold the forwarding of these contribution payments to the VSRS pending any further action by the governing bodies to approve these contributions once the amounts to pay the employees have been appropriated.

Section 51-111.47(a) provides, in part, as follows: "The objective with respect to employer contributions under the retirement system shall be that in the absence of amendments to the system the total annual contribution for each employer, expressed as a percentage of the annual membership payroll, will remain relatively level from year to year."

For the requirements for determining the "normal contribution," the "accrued liability contribution," if any, and the "supplementary contribution," if any, see, respectively, subsections (c), (e) and (h) of § 51-111.47.

Chapter 620 [1977] Acts of Assembly inserted the explicit fifteen day deadline in place of language requiring payment "at such time or times as the State agency may by regulation prescribe," which language is also reflected in the "Plan of Agreement" used by VSRS with local political subdivisions for purposes of extending the benefits of Title 11 of the Social Security Act to political subdivisions under Ch. 3.1 of Title 51 of the Code of Virginia.

This Office has been advised by the VSRS and their group life insurance carrier that the premium for Group Life Insurance under VSRS was established in 1960 and has remained constant since that time.

COUNTIES, CITIES AND TOWNS. INSURANCE. POLITICAL SUBDIVISIONS COMBINING TO PROVIDE SELF-INSURANCE PURSUANT TO § 15.1-506.1. MAY PARTICIPATE IN RECIPROCAL INSURER UNDER CH. 16 OF TITLE 38.1.

September 20, 1979

The Honorable Jerry K. Emrich
County Attorney for the County of Arlington

You ask about the authority of political subdivisions in Virginia to combine pursuant to § 15.1-21 of the Code of Virginia (1950), as amended, to provide the self-insurance authorized pursuant to § 15.1-506.1 through a reciprocal insurer under Ch. 16, Title 38.1.
Pursuant to § 15.1-21, any power or authority capable of exercise by any political subdivision of this State may be exercised jointly with any other political subdivision of this State, and the political subdivisions may enter into agreements with one another for joint or cooperative action pursuant to the provisions of that section. Pursuant to § 15.1-506.1, political subdivisions may provide the "self-insurance" described therein. Chapter 16 of Title 38.1 authorizes and regulates the organization and operation of "reciprocal insurers" which are unincorporated aggregations of persons designated as subscribers which under a common name engage in interinsurance or in exchanging contracts of insurance on the reciprocal plan through an attorney-in-fact having authority to obligate the subscribers personally on contracts of insurance made with any subscriber as a policyholder. See § 38.1-689(2).

Ordinarily one does not expect political subdivisions to obligate themselves as insurers on contracts of insurance, but "self-insurance" and "reciprocal insurers" both involve special concepts, and there seems no question about the general authority of political subdivisions in some fashion jointly or cooperatively to self-insure. The answer to your inquiry depends on whether participation in a reciprocal insurer is consistent with the general authority jointly or cooperatively to self-insure. In particular, the answer depends upon the authority of political subdivisions to obligate themselves as insurers on the contracts of insurance called for under a reciprocal insurance arrangement.

Self-insurance is not defined in § 15.1-506.1. Self-insurance is not insurance in the ordinary sense, particularly because of the absence of an insurance contract. Yellow Cab Co. v. Adinolfi, 204 Va. 815, 818, 134 S.E.2d 308 (1964). At the same time, I find no definition of self-insurance in the Code of Virginia, even though it is basic to a number of statutory provisions besides § 15.1-506.1. See Ch. 8 of Title 65.1 (Workmen's Compensation-Insurance and Self-Insurance), especially § 65.1-104.2, relating to "group self-insurance associations;" § 46.1-395 (certain self-insurers exempt from Motor Vehicle Safety Responsibility Act); and most closely in point, § 2.1-425.1 (Self-insurance of State motor vehicles), added by Ch. 231 [1979] Acts of Assembly.

From a review of these statutes, it appears the General Assembly uses the term "self-insurance" to describe arrangements to indemnify an identifiable class of persons independently connected with the self-insurer (for example, its employees) against loss or liability arising out of the independent connection (for example, the course of the employment). The arrangements also usually involve some sort of security, bond, reserve or trust fund (often with periodic supplements like premiums) to secure the payments due to the indemnified class. So viewed, self-insurance has most of the elements of ordinary insurance: a responsibility or undertaking to indemnify an identifiable class with respect

Except for absence of the insurance contract, self-insurance is much like ordinary insurance. Self-insurance allows of group self-insurance associations. See § 65.1-104.2. The contracts of insurance contemplated by § 38.1-689(2) are merely a vehicle to provide group self-insurance. There is no requirement under Ch. 16 of Title 38.1 that subscribers be insurance companies, even though the subscribers issue insurance contracts to one another. In fact, pursuant to § 38.1-692, all individuals, partnerships and corporations of this State are specifically authorized to enter into reciprocal or interinsurance contracts with each other, even though they may not otherwise enjoy insurance powers. Pursuant to § 15.1-506 the political subdivisions of this State enjoy certain self-insurance powers or authority, and pursuant to § 15.1-21 the political subdivisions may enter into agreements with one another for joint or cooperative action to provide self-insurance, and accordingly, I find that political subdivisions are authorized to enter into reciprocal or interinsurance contracts pursuant to Ch. 16 of Title 38.1 to carry out their authority pursuant to §§ 15.1-21 and 15.1-506.

I also find no necessary inconsistency between the reciprocal insurer contemplated by Ch. 16 of Title 38.1 and the separate entity, administration or joint board contemplated by § 15.1-21. I have also considered, but I offer no opinion at this time as to the financing arrangements you contemplate, except to suggest that ordinarily political subdivisions may not be in a position to commit as subscribers of the reciprocal insurer for more than one year at a time.

COUNTIES, CITIES AND TOWNS. NO AUTHORITY TO REGULATE OPERATION OF MOTOR VEHICLES ON PRIVATE PROPERTY.

October 11, 1979

The Honorable F. Paul Blanock
Commonwealth's Attorney for Mathew County

This is in response to your inquiry concerning the power of the Board of Supervisors of Mathews County to enact an
ordinance prohibiting the operation of four wheel drive vehicles over and across private beaches in the county. For the reasons given below, I concur in your opinion that the board does not have statutory authority to enact such an ordinance.

Counties possess only such powers as are expressly conferred by constitution or statute, together with those powers necessarily implied thereby; powers not conferred or so implied are prohibited. Section 46.1-180 of the Code of Virginia (1950), as amended, permits a jurisdiction to adopt ordinances to regulate the operation of motor vehicles on the highways of such jurisdiction, provided such ordinances are not in conflict with the provisions of Title 46.1. However, neither this statute nor any other confers power on a locality to regulate traffic on private property. A highway, as defined by § 46.1-1(10), must be a way open to the use of the public for purposes of vehicular traffic. The term does not apply to private property such as the beaches concerned in your inquiry. See Prillaman v. Commonwealth, 199 Va. 401, 100 S.E.2d 4 (1957). Therefore, I am of the opinion that a county has no authority to regulate the operation of motor vehicles on private lands.

As you mentioned in your inquiry, the City of Virginia Beach has enacted an ordinance prohibiting the operation of vehicles of any kind upon public beaches or sand dunes. This ordinance, by its terms, does not apply to privately-owned beaches.

It is possible, however, that the desired result might be achieved by the enforcement of § 18.2-119. This criminal statute prohibits any person, without authority of law, to enter upon or remain upon the lands of another or any part thereof after having been forbidden to do so by the owner, lessee or custodian thereof. Such prohibition may be given orally, in writing or by signs posted on the property. This statute is applicable to any person who intrudes on the private property of another without permission, whether or not in a vehicle.

See Opinion to the Honorable Thomas B. Inge, Jr., Commonwealth's Attorney for Lunenburg County, found in Report of the Attorney General (1974-1975) at 303; Opinion to the Honorable Norman Sisisky, Member, House of Delegates, supra, at 131.
You ask whether a drug analysis report may be provided to school authorities by the clerk of the juvenile court, the Commonwealth's attorney's office, or any law-enforcement agency.

Sections 16.1-301 and 16.1-305 of the Code of Virginia (1950), as amended, restrict the dissemination of law enforcement and court records of juveniles to the general public. Drug analysis reports become law enforcement records when they are received by your office or by any law-enforcement agency. Once a drug analysis report is filed or introduced as evidence in the juvenile court, this document constitutes part of the court record.

Under §§ 16.1-301(B)(3) and 16.1-305(A)(4), the juvenile court judge has the discretion to issue a court order, permitting other persons to examine the law enforcement or court records of the juveniles if they have a legitimate interest in the case, in the work of the law-enforcement agency, or in the work of the court. I am of the opinion that school authorities meet this requirement, because the report will aid them in controlling the possession and distribution of illegal drugs on the school grounds and among the student population. If a court order authorizes it, a copy of the drug analysis report can be furnished to appropriate school authorities by the clerk of the juvenile court, Commonwealth's attorney's office or the law-enforcement agency.

CRIMES. ABDUCTION OF CHILD BY PARENT. MAY CONSTITUTE FELONY OR MISDEMEANOR DEPENDING ON WHETHER PROCEEDING IS STILL PENDING.

January 7, 1980

The Honorable Donald W. Devine
Commonwealth's Attorney for the County of Loudoun

You have asked whether, and under what circumstances, a parent may be guilty of a felony when he has abducted his own child, assuming that all the elements of the offense would otherwise warrant the conviction of a felony.

Section 18.2-47 of the Code of Virginia (1950), as amended, defines the crime of abduction. Section 18.2-47 was amended in the 1979 Session of the General Assembly by deleting the word "not" preceding "punishment" near the middle of the proviso at the end of the second paragraph and by adding the phrase "in addition to being punishable as contempt of court" at the end of that proviso.
In construing § 18.2-47 before it was amended in 1979, this Office concluded that abduction, including abduction of a child by his parent, was punishable as a felony, provided such abduction was "not punishable as contempt of court in any proceeding then pending." (Emphasis added.) In only that particular instance, abduction was punishable as a misdemeanor. In my opinion, the amendments to § 18.2-47 enacted in 1979 change this interpretation. Now, while abduction is still punishable as a felony, the proviso states that a parent shall be guilty of a misdemeanor rather than a felony if the abduction was punishable as contempt of court in any proceeding then pending.

The term "proceeding" is defined in the general sense as "the form and manner of conducting judicial business before a court or judicial officer; regular or orderly progress in form of law; including all possible steps in an action from its commencement to the execution of judgment...." Black's Law Dictionary 1368 (Rev. 4th ed. 1968). The Virginia Supreme Court has held that "proceeding" is broad enough to cover any act, measure, step or all steps in a court taken in conducting litigation, civil or criminal. See Sigmon v. Commonwealth, 200 Va. 258, 267, 105 S.E.2d 171 (1958).

The term "pending" is defined as "[b]egun, but not yet completed; during...undetermined; in the process of settlement...Thus, an action or suit is pending from its inception until the rendition of final judgment." Black's Law Dictionary, supra, at 1291. See, also, 1 C.J.S. Actions § 142 (1936).

Given these legal definitions, I am of the opinion that § 18.2-47 provides that a parent who has been divested of the custody of his child by a final order of a court of competent jurisdiction and who abducts that child is guilty of a felony. However, if the abducting parent has not been divested of custody by a final order of the court and the final disposition is still "pending" before the court, then the parent is guilty only of a misdemeanor.

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1Section 18.2-47 provides that: "Any person, who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes the person of another, with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of abduction'; but the provisions of this section shall not apply to any law-enforcement officer in the performance of his duty. The terms 'abduction' and 'kidnapping' shall be synonymous in this Code.

Abduction for which no punishment is otherwise prescribed shall be punished as a Class 5 felony; provided, however, that such offense, if committed by the parent of the person abducted and punishable as contempt of court in any
proceeding then pending, shall be a Class 1 misdemeanor in addition to being punishable as contempt of court."


CRIMES. USE OF CREDIT CARD IN EXCESS OF CREDIT LIMIT TO PURCHASE GOODS IS NOT VIOLATION OF § 18.2-195.

October 24, 1979

The Honorable Richard W. Davis, Judge
Radford General District Court

You have asked whether it is a crime under § 18.2-195 of the Code of Virginia (1950), as amended, for a cardholder to make purchases of goods with his credit card in excess of his credit limit. You pose the situation of a cardholder, whose authorized credit is $500, purchasing merchandise totalling $2,500, and you indicate that each purchase is less than an amount requiring the retailer to contact the card issuer.

Section 18.2-195 provides in part that a person is guilty of credit card fraud when, with the intent to defraud the issuer, a cardholder "obtains money" from an unmanned device of the issuer or through someone other than the issuer by using the card when he knows that "such advance" will exceed his available credit. There is no similar provision of § 18.2-195 applying to obtaining goods in this manner. Consequently, I am of the opinion that the situation you pose does not constitute credit card fraud under § 18.2-195.

CRIMINAL LAW. INTENT TO PERMANENTLY DEPRIVE OWNER OF HIS PROPERTY NEED NOT BE PROVEN IN PROSECUTION FOR EMBEZZLEMENT.

July 17, 1979

The Honorable Donald W. Devine
Commonwealth's Attorney for Loudoun County

You have asked whether in the prosecution of a commission merchant for embezzlement, one element of proof is the defendant's intent to deprive the owner permanently of his possession of the embezzled funds.

In defining the statutory crime of embezzlement, the Supreme Court of Virginia typically has failed to state that the intent to deprive must be permanent. For example, in Revell v. Commonwealth the court said: "To constitute the statutory crime of embezzlement it is necessary to prove that an accused wrongfully appropriated to his own use or benefit, with the intent to deprive the owner thereof, the property of
another which has been entrusted to him by reason of his employment or office.\(^2\)

By contrast, the court has explicitly stated that the intent to deprive must be permanent for a conviction of larceny.\(^3\) The court has held that restitution cannot serve to excuse a prior act of embezzlement.\(^4\) Moreover, in Shinn v. Commonwealth,\(^5\) the court affirmed the conviction for embezzlement of an association's secretary, who was alleged to have retained a check which he had received in the course of his employment, and which was properly the property of the association. In so doing, the court noted that the jury had interrupted its deliberation to inquire whether it should acquit the defendant in the event it concluded that he had kept the check with the intent of returning its proceeds to the association at some future date. The court then stated, "Very properly the court answered the question in the negative."\(^6\)

The majority view among the states is that embezzlement has been committed even if the offender takes the property with the intent to return it at a subsequent time or to make restitution.\(^7\) While language in at least one Virginia decision arguably supports the proposition that a permanent deprivation must have been intended,\(^8\) the Supreme Court has certainly not directly rejected what is the strong majority view. Accordingly, in the absence of such authority, I believe that Virginia's rule on this issue is in accord with the general one - that an intent to permanently deprive is not an element of proof of embezzlement.

It is my view that this conclusion is applicable with respect to commission merchants. Under § 3.1-715 of the Code of Virginia (1950), as amended, a commission merchant is in part required to deliver to the consignor all moneys, less the agreed commissions and other charges, received by him in connection with the sale of farm products originally consigned to him. If these moneys are not delivered to the consignor within the requisite ten-day period after their receipt by the commission merchant, it would not be a defense to a charge of embezzlement that the commission merchant was not proven to have kept the proceeds with an intent to deprive the consignor permanently.

\(^{1215}\) Va. 708, 213 S.E.2d 756 (1975).


\(^{4}\) Robinson v. Commonwealth, 104 Va. 888, 894, 52 S.E. 690 (1906).
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573 Va. (32 Gratt.) 899 (1879).
6Id. at 911. Cf. Stegall v. Commonwealth, 208 Va. 719, 160 S.E.2d 566 (1968) (failure to return rented automobile within agreed upon period of time may constitute embezzlement).
8See Lee v. Commonwealth, 200 Va. 233, 105 S.E.2d 152 (1958). (The warrant of arrest charged "with the intent of permanently depriving," and the court held under the facts in this case this phrase was material.)

CRIMINAL LAW. § 18.2-144 PROHIBITS MAIMING OR DISFIGURING OF DOG.

February 1, 1980

The Honorable J. Samuel Johnston, Jr., Judge
Campbell County General District Court

You ask for a construction of the meaning and constitutionality of § 18.2-144 of the Code of Virginia (1950), as amended.

Section 18.2-144 makes it a Class 5 felony for any person to commit certain acts with respect to enumerated animals with the intent to maim, disfigure, disable or kill such animals. The section also prohibits the doing of such acts by an individual to any of his own animals where there is an intent to defraud any insurer. This statute also makes it a Class 1 misdemeanor to commit any of the proscribed acts with respect to any fowl or any companion animal.

The General Assembly in 1978 amended § 18.2-144 to substitute the term "companion animal" for "dog." In view of this change, you inquire whether dogs are excluded from the protection of § 18.2-144, and also whether the term "companion animal" is so vague as to render § 18.2-144 unconstitutional.

My research of Title 18.2 discloses no provision which in any way defines "companion animal." However, § 3.1-796.41(H) of the Animal Welfare Act (the "Act") of 1977 defines the term for purposes of the Act to mean "dogs both domestic and feral, cats both domestic and feral, monkeys and all members of the monkey family, guinea pigs, hamsters, rabbits, exotic animals and exotic native birds. Game species shall not be considered companion animals for the purposes of this chapter."

For several reasons, it is my opinion that "companion animal" is used in § 18.2-144 in the same way as defined in § 3.1-796.41(H). First, statutes such as § 18.2-144 and § 3.1-796.41(H), which relate to the same subject matter, are
in pari materia and therefore should be construed together. 4 This is particularly true with respect to statutes passed at the same session of the legislature. It is presumed "that such acts are imbued with the same spirit and actuated by the same policy...They should be construed, if possible, so as to harmonize, and force and effect should be given to the provisions of each." 5

It is important to note that when the General Assembly enacted the Animal Welfare Act of 1977, in the same bill the legislature amended § 18.2-144. 6 Again, in 1978 when the legislature amended § 18.2-144 to refer to "companion animal," the amendment was part of a bill which also changed certain provisions in the Animal Welfare Act. 7 Under these circumstances, I believe that the General Assembly has demonstrated a clear intent to link § 18.1-144 with the Act. Thus, it is my further view that § 3.1-796.41(H)'s definition of "companion animal" should be used to define the phrase as set forth in § 18.2-144. That being the case, then § 18.2-144 continues to make it a Class I misdemeanor for a person to commit any of the proscribed acts against a dog.

I further believe that § 18.2-144 is constitutional. A statute is unconstitutionally vague only if a person could not reasonably be expected to understand what acts it proscribes. 8 It is my view that whatever may be the limits of § 18.2-144, clearly its reference to "companion animal" would include dogs. An individual committing any of the acts prohibited in § 18.2-144 against a dog would lack the standing to challenge its constitutionality since "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." 9 In addition, I believe that § 3.1-796.41(H) can be used to define the term "companion animal" as used in § 18.2-144. This would be consistent with familiar rules of statutory construction and with the United States Supreme Court's reliance upon state courts narrowing constructions to uphold what otherwise might be viewed as overly vague provisions. 10 Under these conditions, § 18.2-144, read in conjunction with § 3.1-796.41(H), describes a "companion animal" with enough specificity to put an individual on notice as to what kinds of acts it disallows.

Finally, you pose the question of the effect of § 18.2-392 upon § 18.2-144. I believe that § 18.2-392 is not meant to remove dogs from the terms of § 18.2-144. Section 18.2-392 makes it a Class I misdemeanor for any person to make "any animal" suffer any of certain specified acts of cruelty. 11 Certainly, it is conceivable that the same act might violate both §§ 18.2-144 and 18.2-392. However, the enumerated acts prohibited under § 18.2-144 are not the same as those in § 18.2-392. Further, § 18.2-144 requires a specific intent "to maim, disfigure, disable or kill," which is not a prerequisite for a conviction under § 18.2-392. Remembering that statutes apparently in conflict should be harmonized and read together if possible, 12 I believe that §§ 18.2-144 and 18.2-392 apply to different situations and
further that § 18.2-392 does not have the effect of excluding dogs from the terms of § 18.2-144.

1Section 18.2-144 reads as follows:
"Except as otherwise provided for by law, if any person maliciously shoot, stab, wound or otherwise cause bodily injury to, or administer poison to or expose poison with intent that it be taken by, any horse, mule, pony, cattle, swine or other livestock of another, with intent to maim, disfigure, disable or kill the same, or if he do any of the foregoing acts to any animal of his own with intent to defraud any insurer thereof, he shall be guilty of a Class 5 felony. And if any person do any of the foregoing acts to any fowl or to any companion animal with any of the aforesaid intents, he shall be guilty of a Class 1 misdemeanor."

3See §§ 3.1-796.39, et seq.
4See, e.g., Soble v. Herman, 175 Va. 489, 9 S.E.2d 459 (1940).
5City of Richmond v. Drewry-Hughes Co., 122 Va. 178, 190, 94 S.E. 989, 991 (1918). See, also, Lillard v. Fairfax County Airport Authority, 208 Va. 8, 155 S.E.2d 338 (1967).
11Section 18.2-392 provides in pertinent part:
"Any person who (1) overrides, overdrives, overload, tortures, ill-treats, abandons, willfully inflicts inhumane injury or pain not connected with bona fide scientific or medical experimentation to, or cruelly or unnecessarily beats, maims, mutilates, or kills any animal, whether belonging to himself or another, or deprives any animal of necessary sustenance, food, drink or shelter, or causes any of the above things, or being the owner of such animal permits such acts to be done by another, or (2) willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal...shall be guilty of a Class 1 misdemeanor."
The Honorable William F. Watkins, Jr.
Commonwealth's Attorney for Prince Edward County

You ask what costs, if any, are imposable against a defendant in a criminal proceeding in which a Commonwealth's attorney prosecutes the case in another jurisdiction pursuant to § 19.2-155 of the Code of Virginia (1950), as amended.

Section 19.2-155 provides for the appointment of an attorney-at-law to perform the duties of a Commonwealth's attorney who is disqualified or temporarily unable to act in a certain case or cases. Typically, said appointee is a Commonwealth's attorney from a second jurisdiction. Section 19.2-155 further states that the appointee shall receive that compensation deemed reasonable by the judge of the circuit court in which the case is tried or the service is rendered and also shall receive his actual expenses for the time he actually spends, "such compensation and expenses to be paid by the State."

You also refer, however, to § 14.1-121, which establishes the fees for Commonwealth's attorneys in all criminal cases resulting in a conviction and sentence not overturned on appeal, and for expenditures made in the discharge of their duties. This statute provides for fees ranging from twenty dollars to five dollars depending upon the seriousness of the offense and the nature of the proceeding.

As to the fees set out in § 14.1-121, the Supreme Court of Virginia has held that the fees for various public officers, including Commonwealth's attorneys, are costs rather than general expenses incurred in the administration of justice. In accord with this holding, I believe that the fees established in § 14.1-121 are payable as costs by a criminal defendant.

A more difficult question arises, however, in the case of compensation and expenses paid to a Commonwealth's attorney pursuant to § 19.2-155. Such payments could quite conceivably represent figures far in excess of the fee schedule set forth in § 14.1-121. These payments are distinguishable from fees in that they are not fixed amounts or amounts determined in accordance with fixed schedules. Further, payments under § 19.2-155 fully reimburse a Commonwealth's attorney for his services and thus differ from fees, which represent a legislative attempt to partially defray costs incurred by the State in criminal prosecutions and which may not approximate at all the actual costs involved in a particular case.

Under these circumstances, I believe that a defendant convicted in a criminal prosecution may be made to pay as costs the fees in § 14.1-121 but not the compensation and expenses under § 19.2-155. In this regard, I would point out
that the disqualification or disability of a Commonwealth's attorney and the subsequent appointment of a second prosecutor are essentially fortuitous events not the direct and immediate result of a defendant's committing an offense. In my view, to hold that the payments authorized under § 19.2-155, which may involve amounts far above the normal costs of prosecution, are chargeable costs against a defendant is not the intent of the General Assembly. This is particularly true in light of the fact that constitutional issues might be raised if a defendant could be made to pay the compensation allowed under § 19.2-155. It has been held that a defendant's right to seek and receive a fair trial is violated when a statute is applied to impose upon him the costs of prosecution which are "not the immediate and direct result of his actions in committing the crime, but rather of defending himself." 


2Section 19.2-155 states in part: "The attorney-at-law so appointed shall receive such compensation as the judge of the circuit court in which the case is tried or the service is rendered deems reasonable, in addition to his actual expenses for the time that he is actually engaged, such compensation and expenses to be paid by the State."

3Section 14.1-121 states: "The fees of attorneys for the Commonwealth in all felony and misdemeanor cases in which there is a conviction and sentence not set aside on appeal or a judgment for costs against the prosecutor, and for expenditures made in the discharge of his duties shall be as follows:

For each trial of a felony case in his circuit court, in which only one person is tried at a time, if the punishment prescribed may be death, twenty dollars; if the punishment prescribed is less than death, ten dollars; but where two or more persons are jointly indicted and jointly tried for a felony, in addition to the fees above provided, ten dollars for each person more than one so jointly tried. For each person prosecuted by him at a preliminary hearing upon a charge of felony before any court or judge of his county or city, five dollars.

For each person tried for a misdemeanor in his circuit court, five dollars, and for each person prosecuted by him before such court of his county or city for a misdemeanor, which he is required by law to prosecute, or upon an indictment found by a grand jury, five dollars, and in every misdemeanor case so prosecuted the court or judge shall tax in the costs and enter judgment for such misdemeanor fee.

No attorney for the Commonwealth shall receive a fee for appearing in misdemeanor cases before a district court notwithstanding any provision of law to the contrary."

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825, 159 S.E. 74 (1931); Commonwealth v. Sprinkles, 31 Va. (4 Leigh) 702 (1833).

See Carter, supra, at 878.


CRIMINAL PROCEDURE. FINES. MAY NOT BE REQUIRED TO SERVE TIME IN JAIL IN LIEU OF PAYMENT IF UNABLE TO PAY.

December 3, 1979

The Honorable Joseph Whitehead, Jr.
Substitute Judge
Pittsylvania General District Court

You have asked whether an individual could be incarcerated for failure to pay a fine after having been convicted of assault and battery and sentenced to 30 days in jail and a $100 fine. In Latex v. Short, 401 U.S. 395 (1971), the court held that it was the denial of the Equal Protection Clause of the Fourteenth Amendment for a state to impose a fine as a sentence and then automatically convert it into a jail term solely because a defendant was indigent and could not afford to pay the fine. The court, however, stated:

"We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant’s reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case." 401 U.S. at 400-401.

The General Assembly subsequently enacted §§ 19.2-354, et seq., of the Code of Virginia (1950), as amended. These statutory sections provide for a means of paying a fine in installments and for enforcement thereof in cases where the defendant is unable to show that his default is not attributable to an intentional refusal to pay or to a failure on his part to make a good faith effort to obtain the necessary funds for payment.

In my opinion, therefore, an individual who has been sentenced to pay a fine may not automatically be required to serve time in jail because of inability to pay the fine. He may, however, be required to pay the fine in installments and if he fails to do so may be held in contempt if he
intentionally refuses to obey the sentence or fails to make a
good faith effort to obtain the necessary funds for payment.

CRIMINAL PROCEDURE. § 18.2-46 DOES NOT DIVEST JUVENILE COURT
OF JURISDICTION IN APPROPRIATE CASES.

March 27, 1980

The Honorable Von L. Piersall, Jr., Judge
Juvenile and Domestic Relations District Court

You ask whether the language in § 18.2-46 of the Code of
Virginia (1950), as amended, conflicts with the

Section 18.2-46 places jurisdiction for all prosecutions
of crimes by mobs in the circuit court of the county or city
wherein such actions occurred, whereas § 16.1-241(A)(1) gives
juvenile and domestic relations district courts the exclusive
original jurisdiction over all matters and proceedings
involving a child alleged to have committed delinquent acts. While there appears to be a conflict between these two
statutes, it is a basic rule of statutory construction that
all of the provisions of the Code of Virginia which deal with
the same subject matter should be construed together and
reconciled whenever possible. See Marymount College v.
Harris, 205 Va. 712, 139 S.E.2d 43 (1964). Viewing these two
statutes in this light, I am of the opinion that they can be
reconciled to allow the legislative intent to be fully
served.

The grant of jurisdiction to the circuit court in
§ 18.2-46 would include prosecutions for misdemeanors as well
as felonies. It is clear, therefore, that the General
Assembly intended § 18.2-46 to change the general procedures
used in criminal prosecutions of crimes by mobs. I do not
believe that this exception to the general rules of criminal
procedure was intended to affect the grant of jurisdiction to
juvenile courts in appropriate cases. I base this belief on
the fact that, taken as a whole, the Virginia cases compel
strict compliance with the requirements of those juvenile
statutes which are not merely procedural. See Matthews v.
Commonwealth, 216 Va. 358, 218 S.E.2d 538 (1975); Hailey v.
Dorsey, 580 F.2d 112 (4th Cir. 1978). Moreover, the General
Assembly's stated purpose and intent with regard to the
juvenile code places persons falling within its purview in a
special position, and I find no language in § 18.2-46
indicating a contrary approach.

I am of the opinion, therefore, that § 18.2-46 does not
displace the exclusive original jurisdiction given to
juvenile courts under § 16.1-241. Because of this
conclusion, it is not necessary to reach the other questions
propounded in your request.
A "delinquent act" is defined in § 16.1-228(H) as an act designated a crime under the law of this State, and would clearly include those offenses to which § 18.2-46 refers.

Section 18.2-42 which is covered by the jurisdictional restrictions of § 18.2-46 deals with a misdemeanor.

Sections 16.1-123 and 16.1-124 generally give courts not of record the exclusive original jurisdiction over misdemeanor cases.

DEED OF TRUST. ADVERTISING FORECLOSURE SALE. FIVE-DAY METHOD NOT REQUIRED.

November 5, 1979

The Honorable Alan A. Diamonstein
Member, House of Delegates

You ask whether a trustee, advertising prior to a foreclosure sale, has the option of advertising once a week for four successive weeks when the property or some portion thereof is located in a city, or in a county adjacent to a city of the first class.

The question is governed by § 55-59.2(A)(2) of the Code of Virginia (1950), as amended, which provides, in part:

"[T]he trustee shall advertise once a week for four successive weeks; provided, however, that if the property or some portion thereof is located in a city or in a county immediately contiguous to a city of the first class, publication of the advertisement five different times shall be deemed adequate."

The statute does not say that "only" the five-day method shall be deemed adequate, nor does it provide that the five-day method shall be "mandatory." Consequently, it is my opinion that the five-day method of advertisement does not replace the generally applicable four-week method, but becomes available in the indicated circumstances as a second, alternative procedure by which the trustee may satisfy the requirements of § 55-59.2(A)(2).

DEFINITIONS. "UPON ANNEXATION" MEANS WITHIN REASONABLE TIME AFTER ANNEXATION, AS USED IN § 56-265.4:2.

September 10, 1979

The Honorable George P. Beard, Jr.
Member, House of Delegates

You have asked whether § 56-265.4:2 of the Code of Virginia (1950), as amended, which was enacted by the General Assembly in the 1978 Session, permits the Town of
Culpeper to acquire electric distribution facilities in an area which was annexed prior to the enactment of that statute. It is my opinion that it does not.

Section 56-265.4:2 was enacted in response to the decision of the Virginia Supreme Court in Culpeper v. VEPCO, 215 Va. 189, 207 S.E.2d 864 (1974). In that case, the court considered whether the Town of Culpeper could, after annexation of an area in 1966, acquire the electrical distribution facilities within that area and nullify the certificate of public convenience and necessity previously issued by the State Corporation Commission. The court held that Culpeper could not acquire the facilities and noted:

"We find no provision in the Constitution or in any statute that permits us to hold that a certificate of public convenience and necessity, such as was granted by the Commission in this case, can be nullified by an annexation proceeding over which neither the Commission nor the utilities have any control. And no procedure exists in Virginia under which annexing towns and cities can acquire by eminent domain the facilities of a franchised utility serving an area which is annexed by such municipalities." Id. at 193.

The statute is a remedial one, intended by the General Assembly to permit the type of eminent domain procedure which the court found not previously permitted by any statute.

It is an established rule of statutory construction in Virginia 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). To construe statutes as retroactive, they must be "so clear, strong, and imperative that no other meaning can be annexed to them..." Ferguson v. Ferguson, 169 Va. 77, 85, 192 S.E. 774 (1937). This is particularly true where retrospective application of a statute would destroy or impair vested rights. Duffy v. Hartsock, 187 Va. 406, 416, 46 S.E.2d 570, 574 (1948).

The Virginia Supreme Court has recognized that utility companies' vested rights in particular service areas may be impaired if their distribution facilities are acquired upon annexation. In Culpeper v. VEPCO, the court noted:

"We observe that utilities not only have a right to provide services to the area covered by their franchises, but are charged by law with a duty to furnish such services...To deny the appellees [utilities] the use of their facilities within the newly annexed area of the Town of Culpeper, and the right to service those customers within that area who desire to be serviced by appellees, would destroy a vested and valuable right they possess and cause the companies to sustain a non-compensable loss." Supra, at 196.
Presumably, the General Assembly was cognizant of this ruling prior to the enactment of § 56-265.4:2. Had its intention been to nullify the court's ruling by making § 56-265.4:2 applicable to areas annexed prior to the effective date of the statute, it explicitly would have expressed that intention.

Accordingly, it is my opinion that the purpose of the words "upon annexation of additional territory" which appear in the first paragraph of the section refer to territory annexed after the effective date of the Act, July 1, 1979.

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1Section 56-265.4:2 provides:
"Any city or town in the Commonwealth which provides electric utility service for the use of its residents may, upon annexation of additional territory to such city or town, acquire the distribution system facilities of the electric utility serving the annexed area in the manner provided by Title 25 of the Code of Virginia. As used in this section the term 'distribution system facilities' shall be deemed to include all facilities necessary to distribute electric utility service to any annexed area but shall not include substations of the public utility whose facilities are being acquired.
Upon completion of the eminent domain proceedings or upon the negotiation of a settlement between the city or town and the electric utility, the State Corporation Commission shall amend the certificate of convenience and necessity of the public utility whose distribution system facilities have been acquired to reflect the change in its territory."

2A conclusion that § 56-265.4:2 is retroactive in effect would mean that all utility facilities described in the statute which are within territory annexed by cities could be condemned by the city without regard to when the annexation proceeding was completed. Under such an interpretation, many cities and much of the utilities' property in those cities would be subject to condemnation, even where annexation took place many years ago. I can attribute no intent to the General Assembly to create such pervasive retroactive effect.

DENTISTS. SCOPE OF PRACTICE INCLUDES DIAGNOSIS OF PATIENT'S GENERAL HEALTH CONDITION FOR DENTAL PURPOSES.

December 3, 1979

Mr. Robert W. Minnich, Executive Director
Virginia Board of Dentistry

You have asked whether a licensed dentist who takes a health history and makes a physical examination of his patient on admission to a hospital for dental surgery is engaged in the unlicensed practice of medicine in violation of § 54-274 of the Code of Virginia (1950), as amended.
The practice of dentistry falls within the scope of the definition of the "practice of medicine." A person holding a valid license issued by the Board of Dentistry under § 54-175, however, is licensed to do those acts which fall within the "practice of dentistry," as defined in § 54-146, and such acts would not violate § 54-274. The question, therefore, is whether taking a health history and making a physical examination under the described circumstances are beyond the scope of the lawful practice of dentistry.

Section 54-146 defines the "practice of dentistry" to include the diagnosis, as well as the treatment, of diseases of the oral cavity. In my opinion, this would include any diagnosis of a patient's general health condition which is necessary to the proper and complete diagnosis of dental disease, or which is necessary to determine the safety or advisability of a proposed dental treatment. Health histories taken and physical examinations made as part of such a diagnosis would therefore fall within the definition of the "practice of dentistry" under § 54-146.

Section 54-146 defines the practice of dentistry to include "any practice included in the curricula of recognized dental colleges...." If the diagnostic skills discussed above are regularly taught to dental students as an accepted part of the curricula of recognized dental colleges, they also fall within the definition of the "practice of dentistry," and would not constitute the unlicensed practice of medicine.

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Section 54-273(3) provides: "'Practice of medicine or osteopathy' means the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method."

Section 54-146 provides, in part: "Any person shall be deemed to be practicing dentistry...who shall diagnose, profess to diagnose, or treat or profess to treat any of the diseases or lesions of the oral cavity, its contents or contiguous structures...or repair artificial teeth as substitutes for natural teeth, or shall place in the mouth and adjust such substitutes, or do any practice included in the curricula of recognized dental colleges, or administer or prescribe such remedies, medicinal or otherwise, as shall be needed in the treatment of dental or oral diseases, or shall use an X-ray or administer local or general anesthetic agents for dental treatment or dental diagnostic purposes...."

DISTRICT COURTS. DEFAULT ON MOTION FOR JUDGMENT. NOT GOVERNED BY TWENTY-ONE DAY REQUIREMENT CONTAINED IN RULES OF COURT.

January 7, 1980

The Honorable Brian J. Donato, Judge
General District Court of the County of Albemarle
You ask whether the Virginia Rules of Court take precedence over the procedure ordinarily used for determining default judgments in general district court, when the plaintiff has commenced his action by a motion for judgment rather than by civil warrant.

Section 16.1-81 of the Code of Virginia (1950), as amended, provides authority to bring a civil action in a court not of record by motion for judgment. Section 16.1-82 provides that "[e]xcept as otherwise provided herein, procedure upon such motion for judgment shall conform as nearly as practicable to the procedure in motions for judgment prescribed by Rules of Court for civil actions in courts of record." These rules include Rule 3:5, which provides that "[a] defendant may within twenty-one days after service on him of the notice of motion for judgment file in the clerk's office his pleadings in response, and if he fails to file a pleading he is in default...."

It is important to note that this rule does not require the defendant to file a written answer within twenty-one days after receiving the motion for judgment, but requires him to file such an answer after receiving the notice of motion for judgment. Under Rule 3:3, this notice is a specific legal document, issued by the clerk of court with whom the motion for judgment has been filed and attached to such motion for service upon the defendant. The purpose of the notice is to inform the defendant of the requirement that he file a written response with the twenty-one day deadline.

Where the case is brought in general district court, there is no requirement to file with the clerk prior to service of the motion for judgment. Instead, the plaintiff delivers the motion directly "to the officer or other person" serving it. See § 16.1-82. Consequently, no notice is used, nor is there any other provision for informing the defendant of any requirement that he respond in writing and within twenty-one days.

The law does provide, however, that a motion used to commence an action in general district court must "notify the defendant or defendants of the day on which such motion shall be made...." See § 16.1-81. By advising the defendant of the date on which he must appear in court, this information takes the place of the notice of motion for judgment in that it implicitly warns the defendant when he must act in order to avoid default. It would certainly constitute unfair surprise for the defendant to be told by the process served upon him that he must appear in court on a certain date, only to discover upon making his appearance that a rule which was never brought to his attention required him to file a writing at some earlier time.

It is my opinion, therefore, that the procedure for determining default judgments in general district court is not governed by Rule 3:5. The statutory procedures for notifying the defendant of the court date and serving process
upon him without a notice of motion for judgment make the default procedure one of the exceptions to the Rules of Court contemplated by § 16.1-82.

DISTRICT COURTS. RULES OF PROCEDURE. RULE 1:1 GENERALLY NOT APPLICABLE, BUT EXCEPTION NOTED.

January 24, 1980

The Honorable J. R. Zepkin, Judge
General District Court

You ask whether Rule 1:1 of the Virginia Rules of Court applies to general district courts.

As amended September 1, 1976, this rule is found within Part One of the Rules of Court beneath the heading "General Rules Applicable to All Proceedings" and provides that:

"All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error." 216 Va. 941, 949 (1976).

It would certainly appear that a rule applicable to "all final judgments" and contained within a section applicable to "all proceedings" would be broad enough in its scope as to include general district courts as well as circuit courts. I am of the opinion, however, that such an easy analysis must give way to a contrary interpretation based upon the history of the rule and the general district court system.

The rule was included, in substantially its present form, in the last general revision of the Rules of Court, adopted on November 22, 1971, and effective on March 1, 1972. See 212 Va. 305, 311 (1972). At that time, there were no general district courts in Virginia and it is highly questionable whether the rule could have been intended to govern a system of courts that had not yet been created.

The issue might be resolved in favor of the applicability of the rule if the county and municipal courts which were the forerunners of the general district courts had been governed by its terms; but this does not appear to have been the case. As originally promulgated, Rule 1:1 appeared within Part One under the narrower heading "General Provisions Applicable to All Proceedings in Trial Courts." 212 Va., supra. (Emphasis added.) The phrase "trial
courts," which is also found within the text of the rule itself, appears to have been commonly used at the time not only to distinguish the several courts of record in which trials were then held (i.e., circuit, corporation and hustings) from appellate courts, but also to distinguish them from courts not of record and justices of the peace. Consequently, it would appear that Rule 1:1 was not originally intended to apply to county and municipal courts, and by implication not to their successors, the general district courts.

This view is strengthened by the fact that, under Art. VI, § 5, of the Virginia Constitution (1971), any rule adopted by the Supreme Court would be subordinate to statutes of the General Assembly. Section 16.1-97 of the Code of Virginia (1950), as amended, was in effect at the time of the adoption of the rules and allowed up to thirty days after any judgment for a court not of record to vacate such judgment and order a new trial. Similarly, § 16.1-133.1 allowed a court not of record to reopen a non-felonious criminal case up to thirty days after conviction, upon application of the defendant and for good cause shown. Although these two statutes may leave interstices for which there is no explicit limit upon the period in which a court not of record may exercise its jurisdiction, it is my opinion that the broad language of Rule 1:1 was not directed at resolving any such questions but was intended to operate solely upon the jurisdiction of courts of record conducting trials.

It is true that the heading of Part One and the text of the rule have been slightly amended and republished since the general district courts were created; but these actions do not, in my opinion, signal an intention to bring general district courts within the scope of the rule for whatever questions of jurisdiction may be left unresolved by §§ 16.1-97 and 16.1-133.1. Absent some explicit statement by the court to the contrary, it can be fairly presumed that there has been no enlargement of the category of courts to which the rule is intended to apply.

In summary, therefore, it is my opinion that Rule 1:1 of the Virginia Rules of Court has no application to the general district courts.

2The 1975 amendment increased the time to sixty days.
3The amendment reported at 217 Va. 155, 159 (1976) simply changed the first sentence of the rule to add authority for the trial court to suspend, by order entered within twenty-one days, a final judgment pending disposition of a motion for a new trial; and added the material following the semicolon in the second sentence in order to eliminate
misunderstanding concerning the effect of postponement of execution of sentence in a criminal case.

DOG LAWS. ISSUANCE OF RABIES CERTIFICATES TO DOGS IN KENNELS.

February 18, 1980

The Honorable Daniel M. Stuck
County Attorney for New Kent County

You ask whether a kennel license may be required in addition to individual dog licenses, and how the county should proceed to issue rabies certificates to dogs in kennels.

Kennel License

That a kennel license will be issued is provided in § 29-213.10 of the Code of Virginia (1950), as amended, as asked. The term "kennel license" is not defined in the Code. In such a case, the words are given their customary meaning. See 17 M.J. Statutes § 61 (1979). Customarily, a kennel license is one issued for a prescribed number of dogs in lieu of individual licenses for each dog. See Report of the Attorney General (1969-1970) at 107.

Rabies Certificates

You next ask whether counties may require that the number of matching individual tags issued with a kennel license match the number of rabies certificates produced at the time the kennel license is applied for.

This question arises since § 29-213.20 provides that no dog shall be licensed without a rabies inoculation certificate; there is no other specific requirement that a dog be vaccinated against rabies, and, § 29-213.20 requires a rabies vaccination for each tag issued.

In construing ambiguous statutes, it is necessary to reconcile them to give as much effect to each as is possible. Accordingly, I am of the opinion that when the kennel license is issued, the only way to assume that each dog licensed has been vaccinated is to issue tags only for the number of dogs for which valid vaccination certificates are presented.

Since § 29-213.9 prevents owning an unlicensed dog over six months old, this means that once a kennel license is issued, new dogs added to the kennel must be licensed individually. This result may not accord with current practice in some jurisdictions, but it is a necessary result in view of the wording of the current statutes.
Prior to the repeal of the former § 29-183(d), a kennel was defined only as an enclosure for confining dogs. Thus, there has never been a statutory definition of a kennel license.

DRUGS. SINGLE PRESCRIPTION FORM MAY BE USED TO PRESCRIBE TWO OR MORE DRUGS, FROM SAME SCHEDULE ONLY.

October 17, 1979

The Honorable Edward E. Willey
Member, Senate of Virginia

You have asked whether a health practitioner may prescribe two or more drugs on a single prescription form, and whether the alternative signature lines required by the Virginia Voluntary Formulary are required for each drug on such a "polyscript".

Section 54-524.65 of the Code of Virginia (1950), as amended, authorizes practitioners to issue prescriptions. By providing that no prescription shall include two or more drugs from different schedules, that section clearly implies that a prescription may contain two or more drugs from the same schedule. In my opinion, therefore, several drugs from the same schedule may be included on a single prescription form.

Section 54-524.109:17(A) requires printed prescription forms to provide a choice of two lines for the prescriber's signature. By selecting the appropriate signature line, the prescriber indicates his dispensing instruction to the pharmacist. In my opinion, § 54-524.109:17(A) requires the alternative signature lines to be placed only on each printed prescription form, and does not require two such signature lines for each drug prescribed. Unless otherwise specifically indicated by the practitioner, his signature on the appropriate line would constitute his dispensing instruction for each drug prescribed thereon.

Section 54-524.65 provides, in part, "A practitioner...may prescribe, on a written prescription or on oral prescription as authorized by § 54-524.67...drugs and devices...No prescription shall include two or more drugs which appear in a different schedule...Such a prescription shall be written, dated and signed by the person prescribing on the day when issued, and shall bear the full name and address of the patient for whom the drug is prescribed, and the full name, address and registry number under the federal laws of the person prescribing...."

Section 32.1-87(A) provides, in part: "A prescriber may indicate his permission for the dispensing of a drug product..."
included in the Voluntary Formulary when in his prescription, in his own handwriting he writes 'Voluntary Formulary,' or 'V.F.' On and after January one, nineteen hundred seventy-nine, prescriptions written on printed prescription forms shall provide a choice of two lines for the prescriber's signature. Alongside the first line (positioned on the left side of the prescription blank) shall be printed the words 'Voluntary Formulary permitted.' Alongside the second signature line (positioned on the right side of the prescription blank) shall be clearly printed the words 'Dispense as Written.' By signing on the appropriate signature line the prescriber will indicate his dispensing instruction to the pharmacist."

ELECTIONS. CONSTITUTION. REMOVAL OF VOTING DISABILITIES. STATUTE OF ANOTHER STATE CONSTITUTES OTHER APPROPRIATE AUTHORITY.

June 27, 1980

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You ask about the voting status in Virginia of persons convicted of felonies in other states where the civil rights of those persons may have been restored under the law of those states.

Statute of Another State as Other Appropriate Authority for Removal of Voting Disabilities

Some states provide by statute for so-called "automatic" restoration of civil rights in certain events, usually upon expiration of the person's sentence, or upon the person's earlier release from parole. Article II, § 1 of the Constitution of Virginia (1971) provides that no person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. See, also, § 24.1-42 of the Code of Virginia (1950), as amended. You ask whether such a statute constitutes "other appropriate authority" within the meaning of Art. II.

"Other appropriate authority" has been construed to mean the President, other Governors, and pardoning boards which have such authority. See Opinion to the Honorable Pat Perkinson, Secretary of the Commonwealth, dated July 8, 1974, found in Report of the Attorney General (1974-1975) at 197. See, also, I A. E. Howard, Commentaries on the Constitution of Virginia (University Press of Virginia 1974) at 344-347.

The so-called automatic restoration of rights is automatic on a comparative basis only. The statutes do constitute a determination, however, by the sovereign power of the states in question that the civil rights of certain persons are to be restored.
Heretofore, as a condition to restoration of rights, these states presumably required an independent determination that each individual met certain standards, usually including standards of rehabilitation or fitness. That at least has been the pattern in many states.

Under the new statutes, the states in question have determined that the civil rights of a certain classification of persons are to be restored more or less routinely, without the necessity for individual determinations as to rehabilitation, fitness, etc.

Under the old system which required individual determinations, the responsibility was delegated to various officials, such as the Governor or a pardoning board. When these officials made the required determination, they regularly issued a certificate attesting to the individual's restoration of rights.

Restoration of civil rights by statutory classification is no different in principle from restoration of civil rights by duly authorized officials acting on an individual case basis. Each constitutes a determination by the sovereign power of the state that the civil rights of certain persons are restored.

Accordingly, I find that statutes from other states restoring civil rights to a statutory classification of persons constitute other appropriate authority for purposes of Art. II, § 1 of the Virginia Constitution.

Proof That An Individual Falls Within Benefited Statutory Classification

You next ask what constitutes satisfactory proof that a particular individual falls within the classification of persons to whom the statutes of the other state "automatically" restore civil rights.

The statutes in question are comparatively new. Like all statutes, they are subject to change and interpretation. They can also vary in important respects from state to state. And, as pointed out earlier, they are not fully automatic, because there can be questions whether an individual's sentence has expired, or whether the individual has been earlier released from parole.

Whether an individual falls within a benefited classification under the statutes of another state is not a question of Virginia law. Under normal circumstances, your office should not make determinations involving the law of another state. Instead, your office should ask for certification from the other state that the rights have been restored. Situations from states that do not have a certification procedure will have to be dealt with on the facts of individual cases.
Conditional Pardons and Conditional Restoration of Civil Rights

Your third question concerns the situation where the individual has received a conditional pardon from some appropriate authority in the other state, but has not yet satisfied the conditions, or the conditions are open-ended. You ask whether such a pardon constitutes a sufficient restoration of civil rights under Art. II, § 1.

As you know a pardon does not always carry with it a restoration of civil rights. For present purposes, it is assumed that the conditional pardons in question carry with them a conditional restoration of civil rights.

The requirement in Art. II, § 1 for restoration of civil rights is unqualified. A conditional restoration of rights therefore does not meet the constitutional requirement.

Accordingly, I find that the individuals receiving the conditional pardons you describe are not entitled to vote under Art. II, § 1 of the Virginia Constitution.

ELECTIONS. DETERMINATION OF VOTE PURSUANT TO § 24.1-222. REPRESENTATIVES PRESENT PURSUANT TO § 24.1-137 MAY "WITNESS" BUT NOT "EXAMINE."

October 17, 1979

The Honorable Steven F. Gibson
Commonwealth's Attorney for Buchanan County

You ask two questions about certain statutes applicable to the conduct of elections.

Authority of Representatives Pursuant to § 24.1-222

Your first question is whether at the determination of vote pursuant to § 24.1-222 of the Code of Virginia (1950), as amended, the representatives present pursuant to § 24.1-137, may examine the voting machine counters and printed return sheets, and the statement of results prepared by the officers of elections.

Section 24.1-222 speaks only of opening the counter compartment in the presence of all persons who may be lawfully present, giving full view of the counters, and determining and announcing the results as shown by the counters. Section 24.1-137 speaks of the ballots being taken from the box in the presence of specified representatives, and the representatives being entitled to be present and witness the count of ballots and the making up of returns. Section 24.1-137 provides rules applicable to elections generally, and also rules specially applicable with printed paper ballots. See § 24.1-225. Section 24.1-222 provides
rules specially applicable with voting machines. Compare § 24.1-142.

None of these sections speak of the representatives examining anything. Instead, the sections provide that certain things are to be announced and done by the officers of election in the presence of, and witnessed by, the representatives. Title 24.1 uses the idea of presence and witnessing in a number of sections, such as §§ 24.1-115 (printing of ballots), 24.1-117 (placing seal on ballots), 24.1-119 (packaging ballots for precincts), 24.1-121 (opening and counting ballot packages), 24.1-124 (emptying ballot boxes prior to voting), 24.1-129 (marking of ballot by disabled persons), and 24.1-229 and 24.1-232 (marking of absentee ballot).

By way of contrast, the word "examine" is used in a number of other sections in Title 24.1, particularly in connection with the duties of officers of election. See §§ 24.1-138 (detection of double ballots), 24.1-154 (review of certified abstracts by State Board of Elections), 24.1-204 (approval of machines by State Board of Elections), 24.1-216 (seal of envelope for voting machine keys, registration of counters prior to election), 24.1-224 (re-opening of machines after sealing). The word "inspect" is also used in a number of sections of Title 24.1, particularly in connection with the duties of officers of election. See §§ 24.1-131 (deposit of unopened ballot in box), 24.1-144 (re-opening of voted ballots after sealing), 24.1-208 (sample ballots displayed at polling place), 24.1-215 (check of face of machine after each voter).

The word "examine," for purposes of Title 24.1, means something different from "witness" and "in the presence of." According to § 24.1-210, representatives may "examine" whether the machines are in proper condition prior to the election, but the sealing of serviceable machines is to be done merely "in their presence." See, also, § 24.1-216 (examination by representatives on election day prior to voting). Section 24.1-222 does not speak of the representatives examining anything after the voting. Accordingly, I find that the representatives are entitled only to witness the totals shown on the voting machine counters, and to witness the entry of the totals on the printed return sheets and the statement of results prepared by the officers of election.

Authority of Electoral Board Pursuant to § 24.1-146

Your second question is whether, when ascertaining the result pursuant to § 24.1-146, the electoral board may consult any printed return sheets enclosed with the returns of the officers of elections.

Section 24.1-222 requires printed return sheets, where used, to be placed with the pollbooks and sealed and returned.
to the clerk of the court of record as required by § 24.1-143. Section 24.1-146 requires the electoral board to meet at the clerk's office and proceed to open the several returns which have been made at that office. The board is then to ascertain from the returns the persons who have received the greatest number of votes.

Under § 24.1-222, the printed return sheets, where used, are part of the returns made by the officers of election, and under § 24.1-146 the electoral board is to ascertain the persons receiving the greatest number of votes from the returns. Accordingly, I find the electoral board may consult the printed return sheets pursuant to § 24.1-146. The curing of any irregularities or informalities occurring in the returns must be done in conformity with § 24.1-147.

ELECTIONS. ELECTION OFFENSES. DUTIES OF ELECTORAL BOARD. DUTIES OF COMMONWEALTH'S ATTORNEY.

December 19, 1979

The Honorable Thomas M. Moncure, Jr., Chairman Stafford County Electoral Board

You ask two questions about the Virginia Election Laws, Title 24.1 of the Code of Virginia (1950), as amended.

Alleged Violations of § 24.1-277

You first inquire as to the electoral board's responsibility to initiate enforcement action in the event of alleged violations of § 24.1-277, which requires campaign literature to identify the author. Violation of this section, by its terms, does not require or result in the voiding of any election. See § 24.1-277(4). Violation is a misdemeanor, however, and it is the responsibility of the Commonwealth's attorney to prosecute violations of the Commonwealth's criminal laws. See § 15.1-8.1, and Opinion to the Honorable Ray L. Garland, Member, House of Delegates, dated December 18, 1978, found in Report of the Attorney General (1978-1979) at 95.

The obligation of the electoral board is to report alleged violations of § 24.1-277 to the Commonwealth's attorney, and to cooperate in the investigation and prosecution of the violations. See § 19.2-201 (officers to promptly give information of the violation of any penal law to the attorney for the Commonwealth).

Non-Party Members as Officers of Election

Your next question is whether officers of election may be "independents" rather than members of a political party.

Section 24.1-105 requires that officers of election be competent citizens and qualified voters. Whenever
practicable, the officer designated as the assistant for a precinct shall not represent the same political party as the chief officer for the precinct. Pursuant to § 24.1-106, whenever it is possible to do so, the officers appointed may be chosen from a list of competent persons of good moral character which may be submitted by the political parties described therein.

Neither section mentions party membership, although there is mention of party representation. At any given time, a political party may wish to place the name of independent voters on the list it submits under § 24.1-106, and I find that this is permissible. Under certain circumstances, an electoral board may wish to appoint, as officer of election, an independent voter not listed by a party pursuant to § 24.1-106, and I find that this may also be permissible. Sections 24.1-105 and 24.1-106 do not require party membership for officers of election.

ELECTIONS. METHOD OF STAGGERING TERMS.

March 20, 1980

The Honorable William F. Watkins, Jr.
Commonwealth's Attorney for Prince Edward County

You ask whether it is lawful to draw lots after an election to determine which terms of newly elected members of a board of supervisors will be for four years and which will be for two years. The argument is that the individual candidates were elected to office for four-year terms and may not have their terms diminished after their election.

This issue arises out of the attempt by the county to stagger the terms of the board of supervisors so that half the membership is elected every two years to a four-year term. Section 24.1-88 of the Code of Virginia (1950), as amended, authorizes staggered terms for members of the board. The determination is made either by resolution of the board or petition of the voters. Initially, it is necessary that half the terms will be for four years and half for two; thereafter, all terms are for four years.

Section 24.1-88 provides two methods of determining which of the terms will be for two years. Under one method, where the terms are to be staggered by election district the seats to be for two years are determined by lot in advance of the election. Under the other method, where the terms are assigned as individuals rather than by election district, the two year terms may be selected after the election by lot. You state that because Prince Edward has a multi-member district, the staggered terms could not be selected by election district. Accordingly, the first method could not be employed. So lots were drawn after the election in the alternate method specified in § 24.1-88.
The board's resolution to stagger the terms was passed prior to the election. The point of contention is that the failure to determine prior to the election which terms would be for two years renders invalid the post-election drawing.

In the absence of express constitutional limitations, a legislative body may modify the terms of an office even though the effect may be to curtail an incumbent's unexpired term. Michaels v. City of Long Beach, 360 N.Y.S.2d 473 (App. Div. 1979). The legislature in creating an office may fix the term thereof. See 67 C.J.S. Officers § 67 (1978). Similarly, the legislature may change the term of an office during the term of an incumbent. See 15 M.J. Public Officers § 26 (1979). In the absence of express constitutional limitations, a legislative body may modify the terms of an office even though the effect may be to curtail an incumbent's unexpired term. Michaels v. City of Long Beach, supra.

It has been recognized that since the only way in which a change to biennial election may be effected is to change the existing terms of office, the incumbent derives no right to a particular term. Lovell v. Democratic Central Committee of Pulaski County, 327 S.W.2d 387 (Ark. 1959).

In this case when the election was held the public and the candidates were on notice that half would be assigned (by lot) a two-year term. The term of office fixed prior to the election was four years unless diminished by lot as provided in § 24.1-88. Therefore, no candidate had a vested right to a four-year term. The Supreme Court of Virginia has approved a statutory grant of authority to an appointing board to determine at its discretion which appointees to a school board would serve one, two, three, or four year terms. Prince William County v. Wood, 213 Va. 545, 193 S.E.2d 671 (1973). When the conditions upon which an election is held are spelled out by statute, these conditions are known to the voters, and they must be presumed to have acted with knowledge of those conditions. See also, Miller v. Ayres, 211 Va. 69, 175 S.E.2d 253 (1970).

Accordingly, I am of the opinion that the procedure followed in designating which terms will be for two years is lawful.

1Section 24.1-88 reads in pertinent part: "Assignment of the individual terms of members shall be determined by lot by the electoral board of the county at the meeting of the board as required by § 24.1-146 on the second day following the election and immediately upon certification of the results of the election. Provided, however, the assignment of such individual terms of members may be determined by election district by a drawing held by the electoral board at a meeting held prior to the last day for a person to qualify as a candidate if the governing body of the county so directs by
a resolution adopted at least thirty days prior to the last day for such qualification and members are elected by district...."

ELECTIONS. PRIMARY TO NOMINATE CANDIDATES TO FILL VACANCIES. NOT AUTHORIZED WHERE NO REGULAR PRIMARY SCHEDULED.

April 14, 1980

The Honorable Virgil Haywood, Secretary
Chesapeake Electoral Board

You ask whether the political party of a city may require a direct primary election, pursuant to § 24.1-171 of the Code of Virginia (1950), as amended, to nominate candidates to fill vacancies, where no regular primary has been set, pursuant to § 24.1-174, to nominate candidates for the ensuing general election.

Under § 24.1-1(5)(c), elections to fill vacancies are special elections, even though such an election may be held on a regular general election day. See Opinion to the Honorable Elmon T. Gray, Member, Senate of Virginia, dated March 17, 1975, found in Report of the Attorney General (1974-1975) at 156. Section 24.1-174 provides dates for primaries for nomination of candidates for ensuing general elections. Section 24.1-174 makes no provision, however, for primaries to nominate candidates for ensuing special elections.

Section 24.1-171 states that the article on primary elections (Art. 5, Ch. 7 of Title 24.1) shall not apply to nominations of candidates to fill vacancies, unless such candidates are to be voted for on the date set by Ch. 7 for regular primaries (that is, primaries for general elections).

The political party wishes to nominate candidates to fill vacancies to be voted on at a special election to be held on a regular general election day, but no regular primary is scheduled, pursuant to § 24.1-174, for the regular primary day preceding the general election.

Inasmuch as the candidates for nomination to fill vacancies cannot be voted for on the date set for regular primaries, unless a regular primary has been set, no primary may be held for the nomination of candidates to fill vacancies. See Opinion to the Honorable Joan S. Mahan, Secretary, State Board of Elections, dated June 29, 1971, found in Report of the Attorney General (1970-1971) at 182.

Accordingly, I find that the political party of a city may not require a direct primary to nominate candidates to fill vacancies where no regular primary has been set to nominate candidates for the ensuing general election.
You ask three questions about the redistricting of a county, and the effect of the redistricting upon the county's school board.

Status of the Redistricting

Your first question is whether the redistricting conforms to § 24.1-40.3(B) of the Code of Virginia (1950), as amended.

That section provides that no election district shall be changed from July 1, 1976, through May 31, 1981, unless (among other possibilities) the change is required as a result of an order entered by a court of competent jurisdiction in an annexation suit.

A part of the county's population and area was lost four years ago pursuant to an order of annexation which (after appeal) became effective at midnight December 31, 1975. Section 15.1-571.1 requires that whenever the boundaries of a county have been altered, the governing body shall, as may be necessary, increase or diminish the number of magisterial or election districts.

Under § 15.1-571.1, as it existed when the order of annexation became effective, redistricting was not required prior to election of the members of the governing body that took office for four-year terms commencing January 1, 1976. The next general election for members of the governing body was in November 1979, and by ordinance adopted March 8, 1979, the governing body ordained the redistricting of the county into eight election districts. The election held in November 1979 was on the basis of eight election districts, and the terms of the members of the governing body then elected commenced January 1, 1980.

Accordingly, I find that the redistricting ordained by the governing body of the county on March 8, 1979, was a redistricting required as a result of an order entered in an annexation suit, in compliance with § 24.1-40.3(B).

Effect of Redistricting on School Board Membership

Your next question is about the effect of redistricting upon membership of the school board, particularly in view of § 15.1-37.9.
The county has the "traditional" form of county government in which members of the school board are elected by a school trustee electoral board pursuant to § 22-60. Under § 22-61, the school board has the same number of members from each district as there are members of the governing body from each district. In addition to members selected by districts, under certain circumstances there may be up to two members from the county at large. See § 22-61.

Prior to redistricting, the school board had seven members: one member at large, one for a town in a special district, and five representing each of the five districts that made up the balance of the county. The redistricting changes the five districts into six, with the boundaries of each of the five districts changing. The boundaries for the town's special district do not change, and one member is still to be elected at-large.

As a general rule, when new election districts become effective for purposes of representation, the comparable positions on the school board are vacated by force of law. See Opinion to the Honorable Robert E. Brown, Commonwealth's Attorney for King George County, dated June 3, 1971, found in Report of the Attorney General (1970-1971) at 87. In appointing persons to the new positions, the school trustee electoral board must select a member from each new election district in the county, and may reappoint a previous member, but it is not required to reappoint a previous member. See also, Opinion to the Honorable Curtis A. Sumpter, Commonwealth's Attorney for Floyd County, dated June 8, 1971, found in Report of the Attorney General (1970-1971) at 88. For similar Opinions to the same effect, see Reports of the Attorney General (1970-1971) at 323 and 326, and (1971-1972) at 338, 339 and 340.

As noted in Brown, these Opinions deal with the 1971 reapportionment of counties, cities and towns directed by enactment (with emergency provision) of §§ 15.1-37.4 to 15.1-37.8 at the General Assembly's 1971 Special Session. At least in part, the reapportionment was required by the terms of the new Constitution of Virginia (1971). See Va. Const., Art. VII, § 5.


The Ruck Opinion, citing Brown, among others, stated that where by statute an election district is represented on the county school board by a resident of that district, and
the district ceases to exist due to redistricting, the offices of the school board members representing those districts are vacated by force of law. Where the school board member, however, represents an area undisturbed by the redistricting, as with an at-large member representing the entire county, the term of office of such member is undisturbed by the redistricting.

Section 15.1-37.9, which was enacted in 1976, provides in part that upon reapportionment with or without a change in district boundaries, members of school boards and planning commissions may continue to serve for the remainder of their terms, regardless of loss of residency within a particular district due to reapportionment. The section further provides that appointment of and ensuing service of any such member since March 16, 1971, is declared to be valid. March 16, 1971, was the effective date of the enactment (with emergency provision) of §§ 15.1-37.4 to 15.1-37.8, directing reapportionment of counties, cities and towns. See Ch. 199 [1971] Acts of Assembly.

Section 15.1-37.9 is permissive, curative, and not self-executing, and therefore not applicable in the present situation. Accordingly, I find that the term of office of the at-large member and the member representing the town's special district are undisturbed by the redistricting, but I also find that as of the effective date of the redistricting (midnight December 31, 1979), the offices of the five other school board members are vacated by force of law. Note, however, the de facto officer doctrine mentioned in the Ruck Opinion.

Possible Enlargement of School Trustee Electoral Board

Your third question is about the possible enlargement of the school trustee electoral board pursuant to § 22-60, and whether the six school board vacancies must be filled by the old electoral board, rather than by the new electoral board (when appointed and possibly enlarged).

The idea of an enlarged electoral board is tied in part to the redistricting, which is not effective until midnight December 31, 1979. At the same time, § 22-64 as interpreted in the Brown Opinion, provides that filling of the six vacancies is to be done within sixty days prior to December 31, 1979. In other words, the filling of the vacancies is originally within the jurisdiction of the old electoral board.

Generally, a statutory specification of time within which a public official is to perform an act is merely directory, and not mandatory, unless the nature of the act or the language of the statute shows the time designation was intended as a limitation of power. See Huffman v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956) (late appointment of electoral board valid under § 22-60) and Owen v. Reynolds,
172 Va. 304, 308-309, 1 S.E.2d 316 (1939) (appointment of school board member by electoral board "holding over" valid).

The old electoral board is not organized by district, so its membership is undisturbed by the redistricting. Therefore, as indicated by the Owen case, the old electoral board may fill the six vacancies at any time after midnight December 31, 1979, and prior to qualification of a new electoral board (whether enlarged or not). If the old electoral board does not fill the six vacancies prior to qualification of a new electoral board, then the new electoral board has the duty and jurisdiction to fill the six vacancies. The failure to fill the vacancies within sixty days prior to midnight on December 31, 1979, does not oust either board from jurisdiction to fill the vacancies. See Huffman, supra. The old electoral board will be ousted from jurisdiction, however, by qualification of a new electoral board (whether enlarged or not).

ELECTIONS. RESIDENCE. REGISTRATION BY ABSENTEE APPLICATION. REGULAR STUDY ABROAD CONSTITUTES OVERSEAS RESIDENCE CAUSED BY EMPLOYMENT.

May 19, 1980

The Honorable Floyd C. Bagley
Member, House of Delegates

You ask whether a student residing temporarily outside the United States, but otherwise qualified to vote, is entitled to register by absentee application, pursuant to § 24.1-48 of the Code of Virginia (1950), as amended.

Section 24.1-48 provides that persons otherwise qualified to vote who reside temporarily outside the United States by virtue of their employment, and are normally absent from Virginia due to such employment, shall be allowed to register by absentee application. Students are clearly entitled to register by absentee application, if their temporary residence and absence is by virtue of, or due to, employment.

The meaning of employment is not restricted to activity for immediate economic gain, such as employment for wages or a salary, or self-employment. In the broadest sense, employment means purposeful activity—in the present context, activity that causes temporary residence abroad (not mere activity while temporarily abroad). See Webster's New Collegiate Dictionary (G. & C. Merriam Co. 1979) at 370; compare Pocahontas Fuel Co. v. Godbey, 192 Va. 845, 66 S.E.2d 859 (1951) ("employment" not used to describe relationship between employer and employee, but instead to refer to work or process in which a person is engaged).

The federal act, however, applies only to federal elections. The Virginia requirement is for overseas residence caused by employment in the sense of purposeful activity. Students enrolled abroad in an organized course of university study, as for a degree, will normally have a temporary residence caused by employment. Retired persons residing abroad and taking university courses on a casual basis will normally not have a temporary residence caused by employment.

Assuming then that regular study abroad is the cause of the temporary residence outside the United States, I find that persons engaged in such study are entitled, under § 24.1-48, to register by absentee application.
It is the responsibility of the Commonwealth's attorney to prosecute violations of the Commonwealth's criminal laws. See § 15.1-8.1 and Opinion to the Honorable Ray L. Garland, Member, House of Delegates, dated December 18, 1978, found in Report of the Attorney General (1978-1979) at 95. Therefore, under §§ 24.1-262 and 24.1-263, it is the obligation of the electoral board to report alleged violations to the Commonwealth's attorney and to cooperate in the investigation and prosecution of the violations. See § 19.2-201 (officers to promptly give information of the violation of any penal law to the attorney for the Commonwealth), and Opinion to the Honorable Thomas M. Moncure, Jr., Chairman, Stafford County Electoral Board, dated December 19, 1979.

Bars to Investigation and Prosecution

You next ask whether § 52-8.2 is a bar to investigation or prosecution of the alleged violations of the Act.

Section 52-8.2 provides that no investigation of an elected official of any political subdivision under the provisions of § 52-8.1 shall be initiated or undertaken except upon the request of certain officers or a grand jury. Section 52-8.1 provides generally for investigations by the Division of Investigation in the Department of State Police. Section 52-8.2 is, therefore, not a bar to investigation of the alleged violations, although it is a bar to an investigation by the State Police's Division of Investigation, absent compliance with the conditions stated in the statute.

There is, however, a bar to prosecution of the alleged violations, in that the violations are misdemeanors, and § 19.2-8 provides that in ordinary cases a prosecution for a misdemeanor shall be commenced within one year next after there was cause therefor. Accordingly, absent facts which would toll the running of the statute of limitations, prosecution of the alleged violations is barred by the statute of limitations.

EMINENT DOMAIN. GENERAL RECEIVER'S FEE CANNOT BE CHARGED TO COMMONWEALTH IN HIGHWAY CONDEMNATION CASES.

April 3, 1980

The Honorable Harold C. King, Commissioner
Department of Highways and Transportation

You have inquired whether the fees of a general receiver for a circuit court may properly be charged against the Department of Highways and Transportation, as an agency of the Commonwealth, in condemnation cases. In addition, you have asked whether a circuit court judge has authority to order the Commonwealth to pay funds directly to landowners or other distributees in condemnation cases, and not to pay such funds into court for distribution by the clerk. For the
The appointment, powers and fees of a general receiver are set out in Art. 1, Ch. 22 of Title 8.01 of the Code of Virginia (1950), as amended. Pursuant to § 8.01-582, every circuit court is required to appoint a general receiver to receive and handle all moneys paid into the court and to pay out or dispose of same as the court may direct. The amount of a general receiver's compensation is left to the discretion of the court, under § 8.01-589. However, that statute expressly provides that the compensation is "to be apportioned among the funds under [the receiver's] control...." There is no statute requiring or allowing such compensation to be separately assessed to or to be paid by the Commonwealth or any other party to a case. Furthermore, to require the Department to pay that fee over and above the amount of compensation awarded in a condemnation case would amount to a judgment for costs against the Commonwealth; such judgments are prohibited by § 14.1-201 unless a statute specially provides otherwise.

I note that § 25-46.32 provides that "all costs of the proceeding in the trial court which are fixed by statute shall be taxed against the petitioner...." (Emphasis added.) The general receiver's fee, being discretionary with the court and not fixed by statute, does not qualify as a fee properly chargeable to the petitioner under this statute. The Virginia Supreme Court, in construing even more liberal language found in former § 33-65, has held that "[c]osts therein contemplated should be confined to statutory fees to which officers, witnesses, jurors, commissioners and others are entitled to for their services. They should not be extended to every conceivable cost and expense incurred by a party engaged in litigation." Ryan v. Davis, 201 Va. 79, 109 S.E.2d 409 (1959). (Emphasis added.) Note, also, that § 14.1-87 prohibits payments from the State treasury to officers for services rendered in cases of the Commonwealth unless a statute provides otherwise. See Report of the Attorney General (1978-1979) at 100. A general receiver appointed by the court pursuant to § 8.01-582 is clearly an "officer" within the meaning of this statute, and is, therefore, barred from receiving a fee for services in cases to which the Commonwealth is a party.

Concerning your second question, I am of the opinion that a court is without authority to order the Commonwealth to pay money directly to landowners in condemnation cases, because provisions of Art. 7, Ch. 1 of Title 33.1 expressly require money in those cases to be paid into court. Section 33.1-120 requires the commissioner to "pay into court, or to the clerk thereof, such sum as he shall estimate to be the fair value of the land taken, or interest therein sought, and damage done..." before entering on or taking property in eminent domain. Section 33.1-121 permits the filing with the court of a certificate stating that a designated sum will be paid, instead of depositing money, but this statute provides...
that the filing of such certificate "shall be deemed and held for the purpose of this article to be payment into the custody of such court...." (Emphasis added.) Section 33.1-124 establishes the procedure by which landowners may withdraw funds deposited into court or may withdraw the money represented by the certificate. This statute imposes upon the commissioner the mandatory duty to deposit such funds with the court within 21 days of the order for distribution of the money. Finally, § 33.1-128 specifies that the award in a condemnation proceeding, if greater than that deposited by virtue of a certificate, "shall be paid into court" for the persons entitled to the money. The use of the word "shall" in these statutes shows a mandatory intent of the legislature that funds in highway condemnation cases pass through the control of the court, and not be paid directly to landowners or others. See Opinion to the Honorable Robert M. Hurst, Chief Judge, Nineteenth Judicial District, dated January 11, 1978, found in Report of the Attorney General (1977-1978) at 117.

I recognize that § 25-46.24 provides in part that the sum ascertained by the court as compensation and damages "may be paid into court," which, if viewed in isolation, would indicate that some other procedure could be used, including direct payments to landowners. See 6B M.J. Eminent Domain § 55 (1976). That statute, however, and the other provisions of Ch. 1.1 of Title 25, control condemnation proceedings only "[u]nless otherwise specifically provided by law...." See § 25-46.2. Since the statutes in Title 33.1 previously cited specifically provide a mandatory procedure for depositing money in highway condemnation cases, they are controlling.

1Section 14.1-201. "In no case, civil or criminal, except when otherwise specially provided, shall there be a judgment for costs against the Commonwealth."

2Section 33-65. "All costs of the proceedings in the trial court under this article shall be borne by the petitioner." Note: This section was recodified in 1970 to § 33.1-110 and then repealed by Ch. 765 [1972] Acts of Assembly 1123.

3Section 14.1-87. "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."

EVIDENCE. BURDEN OF PROOF. IN ADMINISTRATIVE PROCEEDING WHERE LICENSE MAY BE REVOKED CLEAR, CONVINCING EVIDENCE MUST BE SHOWN.

December 10, 1979

Mrs. Ruth J. Herrink, Director
Department of Commerce
You pose the question as to the standard of proof necessary to impose disciplinary sanctions upon a licensee of one of the regulatory boards of the Department of Commerce. I believe that when the board can and may revoke the license as a result of the hearing, the appropriate standard of proof is "clear and convincing" evidence.

General authorities indicate that the burden of proof is not the same in all administrative proceedings:

"In most instances, agency decisions are based on preponderance of the evidence and the standard is applicable even though the act under agency scrutiny would constitute a crime. However, cases do arise in which the standard of clear, unequivocal and convincing evidence is applicable..." B. Mezines, J. Stein and J. Gruff, 4 Administrative Law § 24.03. Accord, C. McCormick, Evidence 798 (2d ed. 1972).

Case law indicating when the greater burden of proof is applicable is quite scarce. In most federal cases, the burden of proof has been the preponderance of the evidence. These cases deal with valuable interests but with something less than an occupational license. See, e.g., Alsbury v. United States Postal Service, 530 F.2d 852 (9th Cir. 1976) (federal employment); Kephart v. Richardson, 505 F.2d 1085 (3d Cir. 1974) (social security benefits); Breeden v. Weinberger, 493 F.2d 1002 (4th Cir. 1974) (social security benefits); Polcover v. Secretary of the Treasury, 477 F.2d 1223 (D.C. Cir. 1973) (federal employment); Kent v. Harden, 425 F.2d 1346 (5th Cir. 1970) (loss of trading privileges on future market); Williams v. Ribicoff, 323 F.2d 231 (5th Cir. 1963) (social security benefits). However, in dealing with professional licensure, the Court of Appeals for the District of Columbia stated:

"In the present case we have an administrative agency with a charter for protection of the public, and the function of evaluating with sophisticated sensitivity the conduct of those operating in a regulated industry. Two elements appear relevant to the standard we should impose here: (1) the type of case (fraud); (2) the heavy sanction (deprivation of livelihood). Given those elements...it appears to us that the 'clear and convincing evidence' standard is the proper standard here...." Collins, Security Corp. v. Securities and Exchange Commission, 362 F.2d 824 (D.C. Cir. 1977).

This analysis appears to be most closely analogous to the hearing held by the various boards in the Department of Commerce. Although fraud is not always involved, the potential loss of a professional license is a very heavy sanction, much greater than those involved in the above cited cases that applied the burden of preponderance of the evidence.
Those Virginia cases addressing the issue of administrative burden of proof appear all to deal with actions against lawyers. See, e.g., Tenth District Committee of the Virginia State Bar v. Baum, 213 Va. 523, 193 S.E.2d 698 (1973); Seventh District Committee of the Virginia State Bar v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971); Tucker v. Seventh District Committee of the Virginia State Bar, 202 Va. 840, 120 S.E.2d 366 (1961); Maddy v. First District Committee of the Virginia State Bar, 205 Va. 652, 139 S.E.2d 56 (1964); Campbell v. Third District Committee of the Virginia State Bar, 179 Va. 244, 18 S.E.2d 883 (1942); Norfolk and Portsmouth Bar Association v. Drewry, 161 Va. 833, 172 S.E. 282 (1934). These cases are unanimous in their conclusion that such hearings are civil in nature and that the criminal burden of proof, "beyond a reasonable doubt," need not be met. However, the decisions do not discuss whether the applicable civil burden is "preponderance" or "clear and convincing." The court in Gunter states that "clear proof" must be established which seems to imply that the greater burden is applicable. Additionally, in barring a lawyer from practicing before the federal courts, the District Court for the Eastern District of Virginia required clear and convincing evidence. In re Ryder, 263 F.Supp. 360 (E.D. Va. 1967) aff'd 381 F.2d 713 (4th Cir. 1967).

Based on the above authorities, I conclude that where the licensee may lose the right to practice his profession and thereby his livelihood, the board should bear the greater burden of proving its case by clear and convincing evidence.

FEES. CLERKS. NOT CHARGEABLE AGAINST UNIVERSITY OF VIRGINIA EXCEPT WHEN ALLOWED BY STATUTE.

November 13, 1979

The Honorable Frank L. Hereford, Jr., President
University of Virginia

You ask whether the University of Virginia (the "University") is exempt from paying clerk's fees, sheriff's fees and fees to the Secretary of the Commonwealth for services rendered by these officers in cases involving the University.

Section 14.1-87 of the Code of Virginia (1950), as amended, provides 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."

It has been noted in previous opinions of this Office that this statute exempts State agencies from the payment of fees generally required by Title 14.1. These Opinions have held that State agencies are required to pay a particular fee
only when the statute states that the fee is applicable to the Commonwealth. See Opinion to the Honorable Frederick T. Gray, Jr., Secretary of the Commonwealth, dated April 10, 1979, a copy of which is enclosed; and Opinion to the Honorable Keary R. Williams, Commonwealth's Attorney for Buchanan County, found in Report of the Attorney General (1974-1975) at 72.

There can be no doubt about the fact that the University is a "public bod[y]" and a "governmental instrumentali[t]y for the dissemination of education." See § 23-14. It is also clear that the University is "at all times subject to the control of the General Assembly." See § 23-69. These characteristics are not, however, by themselves sufficient to equate the University with "the Commonwealth" for the specific purposes of § 14.1-87.

In Roller v. Milk Commission, 204 Va. 536, 132 S.E.2d 427 (1963), the court construed a similar statute, § 14.1-201 (then § 14-178), which exempts the Commonwealth from judgments for court costs. Even though the Milk Commission had been declared an "instrumentality of the Commonwealth," the court held that it was not to be equated with "the Commonwealth" for purposes of the exemption statute, since "[t]he operations of the Commission are not supported by general taxation...." Roller at 542. In my opinion, however, the partial support which the University receives from general taxation is sufficient to remove it from the rationale of the Roller decision.

Consequently, I am of the opinion that the University of Virginia is entitled to the exemption afforded the Commonwealth by § 14.1-87. This conclusion is consistent with a previous Opinion of this Office holding that the University is "an agency of the state" for purposes of the common law principle that the sovereign is immune from statutes which are not, by affirmative terms, made applicable to the sovereign. See Opinion to the Honorable Edgar F. Shannon, Jr., found in Report of the Attorney General (1971-1972) at 106.

Neither the clerk's fee (§ 14.1-112) nor the sheriff's fee (§ 14.1-105) nor the fee of the Secretary of the Commonwealth (§ 14.1-103) are made applicable to the Commonwealth in civil cases (excluding condemnation). Since the Commonwealth is exempt, so is the University.

FIREMEN. APPOINTMENT OF CHIEF. CHIEF MAY BE MEMBER OF VOLUNTEER COMPANY, OR REGULAR EMPLOYEE OF DEPARTMENT.

December 18, 1979.

The Honorable Adelard L. Brault
Member, Senate of Virginia
You ask whether, under § 27-6.1 of the Code of Virginia (1950), as amended, a governing body may appoint as the chief of the fire department a member of a volunteer fire company operating within that political subdivision, rather than a regular employee of the fire department.

Section 27-6.1 provides that the governing body may establish the fire department as a department of government. The head of the department shall be known "the chief." The section then provides that the department may employ as many other officers and employees as the governing body may approve. Section 27-9 then provides for the establishment of volunteer fire departments, the heads of which shall be "the chief," to function in the manner specified by local ordinance. In that manner a locality may provide for fire services to be provided by both professional and volunteer personnel.

Section 27-6.1 was added by Ch. 187 [1970] Acts of Assembly, to replace § 27-6, which provided that the principal engineer (now, the chief), fire wardens, and commanders of fire companies constituted the fire department of the localities in question. Employment and appointment were not mentioned in § 27-6. Pursuant to § 27-13, as in effect prior to enactment of Ch. 187 [1970] Acts of Assembly, there were to be appointed, in such manner as the governing body might prescribe, a principal engineer (now, the chief) and as many fire wardens as the governing body might direct.

The Report of the Code Commission on Revision of Title 27 of the Code of Virginia (House Document No. 18 [1970] at 2) indicates § 27-6.1 replaced § 27-6 to permit governing bodies to establish fire departments, rather than having them "constituted" under the repealed § 27-6. The same Report indicates § 27-13 was amended to broaden the authority of localities with respect to the appointment of fire company and department officers. See, also, Opinion to the Honorable Bonnie L. Paul, Member, House of Delegates, dated October 31, 1977, found in Report of the Attorney General (1977-1978) at 452; and Opinion to the Honorable William W. Bennett, Jr., Commonwealth's Attorney for Halifax County, dated March 10, 1978, supra, at 453.

The present § 27-13 provides there shall be appointed, in such manner as the governing body may prescribe, a chief and as many other officers as such governing body may direct. There is no requirement that the chief be appointed from the membership of the city fire department, just as there is no requirement that the chief of the volunteer department be appointed. Either alternative is within the discretion of the governing body.

I find nothing helpful in Title 15.1 about appointment of the heads of departments for local governments. See, for example, § 15.1-794 (election or appointment of certain officers of cities and towns); 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 (establishment of fire department under county executive form of government). Accordingly, I find that § 27-6.1 does not restrict the discretion of a governing body when appointing a fire chief pursuant to § 27-13, and such governing body may appoint either a member of a volunteer fire company or a regular employee of the fire department.

FIREWORKS. DEFINITIONS. "PURPLE SMOKE BOMB," "MOON TRAVELIERS BOTTLE ROCKET," "SNOW AND RED PLUM BOTTLE ROCKET," "SHOWER FOUNTAIN."

December 14, 1979

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

You have asked whether certain items known as "purple smoke bomb," "moon traveliers bottle rocket," "snow and red plum bottle rocket," and "shower fountain" labeled "Happiness" are fireworks and prohibited by § 59.1-142 of the Code of Virginia (1950), as amended.

In determining whether an object is a firework, § 59.1-142 sets forth two criteria: chemical composition of the substance and whether the object is "intended, or commonly known, as fireworks." The items about which you inquire meet the chemical composition aspect because the chemical analysis report indicates that each item contains one or more ingredient defined in the statute. Whether the items about which you inquire are "intended, or commonly known, as fireworks" is a matter of proof. Therefore, I am of the opinion that whether the items are in fact fireworks would depend on whether the items are intended as fireworks or commonly known as fireworks.

You have also asked what standard is to be applied in determining whether an object is prohibited under § 59.1-142 or exempt under § 59.1-147.2 Section 59.1-142 prohibits all items, whatever forms or construction, containing the prescribed chemical compounds and intended or commonly known as fireworks except as otherwise provided in the chapter. By this language, all fireworks are prohibited unless exempt under some other Code section.

Section 59.1-147 enumerates several forms of fireworks which when used on private property with the consent of the owner are exempt from the prohibition of § 59.1-142. In order to determine whether fireworks are exempt under § 59.1-147, I am of the opinion that reference must be had to the definitions of those items found in § 59.1-147 and compared to the item in question.3 This is a factual determination to be made when a full definition of the item in question is known.
REPORT OF THE ATTORNEY GENERAL

Section 59.1-142 reads as follows:
"Except as otherwise provided in this chapter, it shall be unlawful for any person, firm or corporation to transport, manufacture, store, sell, offer for sale, expose for sale, or to buy, use, ignite or explode any firecracker, torpedo, skyrocket, or other substance or thing, of whatever form or construction, containing nitrates, chlorates, oxalates, sulphides of lead, barium, antimony, nitroglycerine, phosphorus or any other explosive or inflammable compound or substance, and intended, or commonly known, as fireworks."

Section 59.1-147 reads as follows:
"(a) This chapter shall not apply to the use or the sale of sparklers, fountains, Pharaoh's serpents, caps for pistols, or to pinwheels commonly known as whirligigs or spinning jennies;
(b) Provided, however, the fireworks listed in paragraph (a) may only be used, ignited or exploded on private property with the consent of the owner of such property."


GAME AND INLAND FISHERIES. LICENSE. REVOCATION FOR TWO CONVICTIONS. DEFENDANT LIABLE FOR REVOCATION ANYTIME DURING TWELVE MONTHS SUCCEEDING SECOND CONVICTION.

September 19, 1979

The Honorable William Roscoe Reynolds
Commonwealth's Attorney for Henry County

You ask whether a General District Court which has convicted a person for violating game laws or regulations may subsequently suspend the hunting and fishing license of such person upon a discovery by the court that the person had been previously convicted in a different jurisdiction of a similar offense within two years preceding the recent conviction.

You state that the prior conviction was discovered more than twenty-one days after final judgment was entered upon the conviction for the second offense. Accordingly, the discovery came too late to permit reopening the latter judgment under Rule 1:1 of the Rules of Court, which provides that "all final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer...."

The Supreme Court of Virginia has noted that "'[a] final order is one which disposes of the whole subject...and leaves nothing to be done in the cause save to superintend ministerially the execution of the order.'" See Daniels v. Truck Corp., 205 Va. 579, 585, 139 S.E.2d 37, 35 (1964) (Emphasis supplied.) Thus, the issue you raise is essentially whether the defendant's liability for a
revocation of his license was implicitly a part of the subject or cause of which the court disposed or whether it forms a distinct subject and cause not yet brought before the court.

The authority of the court to revoke hunting and fishing licenses for multiple convictions of certain offenses is found in § 29-77 of the Code of Virginia (1950), as amended, which provides as follows:

"If any person be found guilty of violating any of the provisions of the hunting, trapping, and/or inland fish laws, and/or...regulations adopted by the Commission pursuant thereto, a second time within two years of a previous conviction of violating any such law or regulation...the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction."

In my opinion, such a revocation is similar to the revocation of an operator's license by the Commissioner of the Division of Motor Vehicles upon receipt of records of multiple convictions under the Motor Vehicle Code. See Opinion to the Honorable Chester F. Phelps, dated April 26, 1963, and found in Report of the Attorney General (1962-1963) at 97. In Prichard v. Battle, 178 Va. 455, 462, 17 S.E.2d 393, 395 (1941), it was held that the revocation of an operator's license is not an added punishment for the offense committed and is civil rather than criminal in nature. Comparing the revocation of an operator's license to the revocation of a liquor license, the court cited the case of State v. Harris, 50 Minn. 128, 52 N.W. 387, 388, for the principle that "[t]here is a plain distinction between such a withdrawal of a special privilege which has been abused, the termination of a mere license, and the penalty which the law imposes as a punishment for crime." 178 Va. at 463. Consequently, it is my opinion that the revocation of a hunting and fishing license forms no part of the criminal proceedings or punishment but constitutes an independent, civil finding that the licensee is no longer entitled to hold and enjoy a privilege which the Commonwealth had heretofore granted him under its police power.

Since the defendant's liability for such a revocation is civil in nature, it constitutes a different cause than the issue of his criminal liability. Furthermore, since his prior conviction was not discovered until the twenty-one days had elapsed, the issue of defendant's civil liability was never brought before the court and could not have formed a part of the subject or cause of which the court disposed. Consequently, the termination of the court's jurisdiction in the criminal matter would not prevent the court from later exercising jurisdiction to dispose of the civil issue.

I am of the opinion, therefore, that the Henry County General District Court continues to have the authority to
revoking the defendant's hunting and fishing license for the
twelve month period following the date of his second
conviction; and that it would be proper to subpoena the
defendant before the court to show cause why his license
should not be so revoked.

GARNISHMENTS. COMMISSIONS FOR COLLECTIONS.

August 30, 1979

The Honorable Constantine A. Spanoulis, Chief Judge
General District Court of the City of Virginia Beach

You ask three questions dealing with the collection of commissions by officers serving process in garnishment proceedings:

A. Does § 14.1-109 of the Code of Virginia (1950), as amended, contemplate the delivery of garnishment proceeds to the serving officer?

B. If so, is the officer entitled to the commissions mentioned in § 14.1-109?

C. If he is so entitled, is he further authorized to calculate and deduct his commission before remitting the proceeds to the issuing clerk of court?

In addition to § 14.1-109, there are two other sections of the Code which bear directly upon the questions you raise. These are §§ 8.01-499 and 8.01-520. The answers to your questions depend, in part, upon the particular point in any garnishment proceeding at which the officer receives payment from the garnishee.

Delivery of Proceeds

At the beginning of any garnishment proceeding, when the officer serves the summons in garnishment, the garnishee "may, before the return day of the summons, deliver and pay to the officer serving it, what he is liable for; and the officer shall give a receipt for, and make return of, what is so paid and delivered...." See § 8.01-520.

Of course, if no such payment is made prior to the return date by the garnishee, then a judgment would be rendered against him. If the garnishee then fails or refuses to pay the amount of the judgment, an execution may be issued against him and collection would thereafter be made by the officer under such judgment.

In each of these two cases, the law contemplates the receipt of money by the officer. In each case, he is entitled to a commission; but the amount of commission to which he is entitled is not the same in both cases. In the
first case, the commission is prescribed by § 8.01-499. In the second case, it is prescribed by § 14.1-109.

Computation of Commission

As noted in previous opinions of this Office, these two sections appear to be in conflict since they provide different formulas for calculating the commission. In resolving the conflict, it should first be noted that both sections have been reenacted by the General Assembly since the conflict appeared in the Code, thereby signifying an apparent intention that the two provisions be read together, rather than that one be held totally to supplant the other. It should also be noted that § 8.01-499 is the more general provision, and § 14.1-109 the more specific. Section 8.01-499 pertains to money received by an officer under Ch. 18, Title 8.01 (the chapter providing, inter alia, for garnishments), while § 14.1-109 pertains to payments received "under an execution or other process."

Money received by an officer under § 8.01-520 is, of course, not a payment received "under an execution" since no execution would have yet been issued against the garnishee. Similarly, such money does not constitute a payment received "under...process" since the garnishment summons neither creates a lien nor compels any payment, but merely requires the garnishee to appear in court and to withhold certain payments owed the judgment debtor. When the garnishee takes advantage of the convenience allowed him by § 8.01-520, he does not, in my opinion, pay the money "under" the summons, but rather pays it in lieu of compliance with its requirement that he appear.

Under the rules of statutory construction, the more general provision must give way to the more specific to the extent they are in conflict. Consequently, where an execution has been issued, the formula set forth in § 14.1-109 would be applicable; and where no execution has been issued the formula set forth in § 8.01-499 would apply. Thus, § 8.01-499 applies to the first case described above and § 14.1-109 to the second.

This resolution of the conflicting formulas is in accord with previous Opinions issued by this Office, including an Opinion to the Honorable Rhea F. Moore, Jr., Clerk, Circuit Court of Tazewell County, dated March 21, 1969, and found in Report of the Attorney General (1968-1969) at 105.

Deduction of Commission

Your final question was whether the serving officer is entitled to calculate and deduct his commission before remitting the proceeds to the clerk of court. Where the commission is determined by § 8.01-499, it is clear from the face of the statute that he is entitled to deduct his commission as well as his necessary expenses and costs before paying the net proceeds over to the clerk. When the
commission is computed under § 14.1-109, it is my opinion that the officer is also entitled to calculate and deduct the commission before payment to the clerk.

As suggested above, § 8.01-499 sets forth the general framework for handling commissions on money received in garnishment proceedings, while § 14.1-109 simply amends the amount of commission to which an officer is entitled, in cases involving an execution. This interpretation is in accord with the previous Opinion of this Office issued to the Honorable T. F. Tucker, Clerk of Corporation Court of Danville, dated December 5, 1963, and found in Report of the Attorney General (1963-1964) at 137.

1Section 8.01-499 reads in part as follows: "An officer receiving money under this chapter shall make return thereof forthwith to the court or the clerk's office of the court in which the judgment is entered...After deducting from such money a commission of five per centum and his necessary expenses and costs, including reasonable fees to sheriff's counsel, he shall pay the net proceeds...."

2Section 14.1-109 reads in part as follows: "An officer receiving payment under an execution or other process in money, or selling goods, shall receive the like commission of ten per centum of the first one hundred dollars of the money paid of proceeds from sale, five per centum on the next four hundred dollars, and two per centum on the residue...."

GENERAL ASSEMBLY. AUTHORITY OF LIEUTENANT GOVERNOR TO VOTE ON RESOLUTION RATIFYING CONSTITUTIONAL AMENDMENT.

February 8, 1980

The Honorable Clive L. DuVal, 2d
Member, Senate of Virginia

You have asked whether the Lieutenant Governor may cast the deciding vote on Senate Joint Resolution 27 ratifying an amendment to the Constitution of the United States.

Constitutional Authority

The United States Constitution provides that amendments shall be valid "when ratified by the Legislatures of three fourths of the several states...." Article V. States may select their respective methods of procedure, Hawke v. Smith, 253 U.S. 221 (1919), and ratification is not an act of legislation but "the expression of the assent of the state to a proposed amendment." Id., at 229.

Article V, § 14, of the Constitution of Virginia (1971) provides that the Lieutenant Governor shall be President of the Senate but shall have no vote except in the case of an equal division. The Virginia Constitution also establishes
the requisite number of votes necessary for many actions, e.g., passing ordinary bills (Art. IV, § 11), discharging a committee (Art. IV, § 11), amending the Constitution (Art. XII, § 1). It does not, however, address the issue of ratification of a proposed amendment to the United States Constitution.

Thus, I am of the opinion that the Lieutenant Governor is not precluded by constitutional law from voting on this resolution if the Senate is equally divided with twenty Senators on each side. Whether he can so vote, however, turns on the rules of each house.

Senate Is Judge Of Its Own Rules

The Rules of the Senate provide that the votes required to adopt a resolution amending the United States Constitution must be "a majority of the members elected, not less than 21." Rules of the Senate Appendix 3(d). This rule is not in conflict with any constitutional provision.3

The Virginia Constitution provides that each house shall "settle its rules." Article IV, § 7; Wise v. Bigger, 79 Va. 269, 282 (1884). While it is appropriate for the Attorney General to render opinions on constitutional language and case law impacting on the General Assembly,4 the interpretation of its own rules must be made by the Senate itself.5

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1This question arose in Kansas over ratification of the Child Labor Amendment and reached the Supreme Court of the United States. The court did not rule, but left it to the upper house of the state legislature to decide whether the Lieutenant Governor could cast a tie breaking vote. Coleman v. Miller, 307 U.S. 433 (1939). The court ruled that voting procedures and the efficacy of ratification are political in nature to be determined by the legislatures and not by the courts.

2"Since Article V is silent on the matter, the states have set their own policies concerning what percentage of the membership in each legislative chamber is necessary to approve a proposed resolution." Martin, "State Legislative Ratification of Federal Constitutional Amendments: An Overview," 9 U.Rich. L.Rev. 271, 292 (1975).

3Judicial determinations in other states on the Lieutenant Governor's power to cast a deciding vote generally involve reconciling differences between various state constitutional provisions and determining the constitutionality of legislative rules. See State ex rel. Senatead v. Freed, 251 N.W.2d 898 (N.D. 1977), and cases therein cited at 903-905. See, also, Advisory Opinion on Constitutionality of 1978 PA 426, 272 N.W.2d (1978). See Morris, "Virginia's Lieutenant Governors: The Office and the Person" (Charlottesville, Va., 1970), at 21-23, for a discussion of the tie breaking function.
GRIEVANCE PROCEDURE. AUTHORITY OF REDEVELOPMENT AND HOUSING AUTHORITY TO ADOPT EMPLOYEE GRIEVANCE PROCEDURE.

February 6, 1980

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

You ask whether the Alexandria Redevelopment and Housing Authority (the "Authority") is subject to the employee grievance procedure adopted by the City of Alexandria. If not, you inquire whether the Authority is then subject to the State procedure or may adopt its own procedure.

Applicability of City's Procedure

Counties, cities and towns are obligated by § 15.1-7.1 of the Code of Virginia (1950), as amended, to promulgate a grievance procedure approved by the State Director of the Department of Personnel and Training. In a previous Opinion, I have ruled that an authority is a separate political subdivision and therefore not a part of a county, city or town. Accordingly, there is no basis for applying the grievance procedure of a county, city or town to a housing development authority. See Opinion to the Honorable Robert M. Galumbeck, County Attorney for Tazewell County, dated November 3, 1978, and found in Report of the Attorney General (1978-1979) at 116.

Applicability of State Procedure

Section 15.1-7.1 also provides that if a county, city or town fails to adopt a grievance procedure, the State procedure required by § 2.1-114.5:1 becomes applicable. But since an authority is not subject to the procedure of a locality, this provision does not make the State procedure applicable to an authority either. Additional coverage of the State procedure is set forth in § 2.1-114.5:1(C) and does not include employees of authorities. Accordingly, there is no provision of law which requires authorities either to promulgate a grievance procedure or to comply with the State procedure.

Effect of Adoption of Procedure by Authority

Inasmuch as the Authority voluntarily has adopted a grievance procedure and no State or local procedure applies, the only reason the Authority's plan would be inapplicable in the present circumstances would be if the procedure were
invalid. Your request presents no information to suggest that the Authority's procedure is invalid.

Section 36-13 allows the Authority to select its employees and determine their duties. By virtue of § 36-15, the Authority may delegate its functions to one or more of its agents or employees. Section 36-19 gives authorities the power to sue and to contract.

Arbitration provisions adopted by governmental entities have been sustained in Virginia as a function of their power to contract and to sue. See Chapline v. Overseers of the Poor, 34 Va. (7 Leigh) 231 (1836); McKennie v. Charlottesville and Albemarle Railroad, 110 Va. 70, 65 S.E. 482 (1909). In a prior Opinion of this Office, it was ruled that a school board could adopt a grievance procedure. See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated May 11, 1978, and found in Report of the Attorney General (1977-1978) at 174.

Accordingly, I am of the opinion that a housing and redevelopment authority may adopt a procedure for arbitrating employee grievances. The procedure adopted by the Alexandria Redevelopment and Housing Authority would then be applicable in the situation you present.

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1Section 2.1-114.5:1(C) reads in part as follows:

"Coverage of personnel. -- All permanent State government personnel, excluding probationary employees, are eligible to file grievances except for: (i) those appointees of elected groups or individuals; (ii) agency heads or chief executive officers of government operations, and institutions of higher education appointed by boards and commissions; (iii) law-enforcement officers as defined in chapter 10.1 (§ 2.1-116.1 et seq.) of Title 2.1 whose grievance is subject to the provisions of chapter 10.1 of Title 2.1 and who have elected to proceed pursuant to chapter 10.1 of Title 2.1 in the resolution of their grievance or any other employee electing to proceed pursuant to any other existing procedure in the resolution of their grievance; and (iv) managerial employees who are engaged in agency-wide policy determinations, or directors of major State facilities or geographic units as defined by regulation, except that such managerial employees below the agency head level may file grievances regarding disciplinary actions limited to dismissals. Employees of local welfare departments and local welfare boards shall be included within the coverage of the State grievance procedure; provided, however, that these employees may be accepted in a local governing body's grievance procedure at the discretion of the governing body of the county, city or town but shall be excluded from such a locality's personnel system. Notwithstanding the provisions of § 2.1-116 (1), constitutional officers' employees shall have access to the State grievance procedure if such officer employs fifteen or more persons...."
In an Opinion to the Honorable Vernon D. Hitchings, Jr., Judge, Norfolk General District Court, dated January 13, 1978, and found in Report of the Attorney General (1977-1978) at 171, it was ruled that the Committee on District Courts lacked the authority to promulgate a grievance procedure. But that Opinion was based on statutory language which conferred the power to make employment policy on the judge rather than the committee.

GRIEVANCE PROCEDURE. NO AUTHORIZATION FOR STATE TO BEAR ANY COST FOR NON-STATE EMPLOYEE PANEL MEMBERS EVEN WHEN SUCH PERSONS HAVE BEEN APPOINTED BY CHIEF JUDGE OF CIRCUIT COURT.

April 23, 1980

The Honorable Arthur L. Lane, Jr., DPA
Commissioner
Virginia Employment Commission

You have asked a question concerning compensation of any persons appointed by the chief judge of a circuit court as a third grievance panel member pursuant to § 2.1-114.5:1(D)(4) of the Code of Virginia (1950), as amended. Specifically, you ask if it would be permissible for a State agency to provide such a panel member with out-of-pocket expenses and a reasonable honorarium which the agency would ask the court to designate.

Section 2.1-114.5:1 is silent regarding compensation of panel members, as is the State grievance procedure promulgated pursuant to that section. I have recently stated my opinion, however, that while State employees serving on grievance panels may receive appropriate travel expenses and should not suffer a loss in pay, there is no authorization for the Commonwealth to bear any cost for non-State employee panel members. See Opinion to the Honorable Frederick C. Boucher, Member, Senate of Virginia, dated January 24, 1980 (copy enclosed). Where a law is expressed in unambiguous terms, the legislature must be presumed to mean what it has plainly stated and new words cannot properly be read into the law. See Porter v. Virginia Electric & Power Co., 183 Va. 108, 31 S.E.2d 337 (1944); Town of South Hill v. Allen, 177 Va. 154, 12 S.E.2d 770 (1941). Had the General Assembly intended to authorize State agencies to compensate possible non-State employee panel members, it would have been a simple matter to provide explicitly for such payment. For example, such authorization appears in a similar statute prescribing a grievance procedure for teachers. See §§ 22-217.7:1(J) and 22-217.7:1(K).

Accordingly, I am of the opinion that it would not be appropriate for State agencies to compensate non-State employee panel members, even when such persons have been appointed by the chief judge of a circuit court.
Section 2.1-114.5:1(D)(4) provides in pertinent part: "Qualifying grievances shall advance to the final step which shall provide for a hearing before an impartial panel, such panel to consist of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select such third panel member. Such panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel...."

GRIEVANCE PROCEDURE. PANEL REPRESENTATIVE. HAD NO DIRECT INVOLVEMENT WITH GRIEVANCE BEING HEARD AND, THEREFORE, HIS SELECTION WAS NOT IMPROPER.

September 10, 1979

The Honorable M. D. Aldridge, Jr.
Commonwealth's Attorney for the City of Hopewell

You ask whether there is a violation of due process standards for a city manager to designate the assistant city manager as the city's representative on a panel selected to hear grievances at the fourth step of the grievance procedure.

The city's grievance procedure was adopted pursuant to § 15.1-7.1 of the Code of Virginia (1950), as amended. In establishing a panel selection method for the last step of the procedure, the city has followed the method set forth in the State grievance procedure. Your question, therefore, really relates to the propriety of the State's panel selection method.

Section 2.1-114.5:1 sets forth the requirement for and basic provisions of the State grievance procedure. Section 2.1-114.5:1(D) specifically requires a hearing at the final step of the procedure "before an impartial panel, such panel to consist of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two." That section further provides that such panel "shall not be composed of any persons having direct involvement with the grievance being heard by the panel." After reciting these provisions the State grievance procedure states that "[p]anels chosen in compliance with these requirements shall be deemed to be impartial." Such panels would in fact be impartial in the sense that both parties to a grievance would be equally represented on the panel with neither side having any unfair advantage in selecting a representative.
On the basis of the facts which you have provided concerning the assistant city manager, it would not appear that his selection as the city's representative was improper or inconsistent with the established procedure. Specifically, you have indicated that he was apparently in no way involved with the grievance at issue and had only "hearsay" knowledge of its nature. Under such circumstances, neither the State nor the City of Hopewell grievance procedure restricts such a person from serving as a panel representative. Nor would due process standards require such a restriction, even assuming they are applicable. Cf. Withrow v. Larkin, 421 U.S. 35 (1975).

The basic principle of procedural due process is fairness and, in light of the above, I cannot conclude that there is anything inherently unfair about the panel selection method set forth in § 2.1-114.5:1(D) and the State grievance procedure. Accordingly, I find no violation of due process standards in this matter.

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1See State Grievance Procedure established by the Virginia Department of Personnel and Training pursuant to § 2.1-114.5:1.

GRIEVANCE PROCEDURE. STATE AGENCY MAY APPOINT ONE OF ITS EMPLOYEES AS ITS PANEL MEMBER.

January 24, 1980

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You ask several questions concerning the appointment and compensation of persons serving as members of grievance panels pursuant to § 2.1-114.5:1(D)(4) of the Code of Virginia (1950), as amended. That section specifies that the final step of the State grievance procedure shall provide for a hearing before an impartial panel consisting of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two.1

Appointment of Panel Members

You first ask whether an agency may appoint one of its employees as its panel member.

Section 2.1-114.5:1(D)(4) places only one restriction on who may be appointed to serve on a grievance panel. That restriction simply prohibits the selection of "any persons having direct involvement with the grievance being heard by the panel." Accordingly, it would appear to be proper for an agency to choose one of its employees as its panel member, so long as such employee has had no direct involvement with the grievance being heard.
Compensation of Panel Members

You next ask whether an agency may compensate one of its employees selected to serve as its representative on a panel and similarly may a grievant pay reasonable fees and expenses to his designated panel member for the time expended in service on the grievance panel.

Section 2.1-114.5:1 is silent regarding compensation of panel members, as is the State grievance procedure developed in compliance with that section.

I am of the opinion that State employees serving on grievance panels may receive appropriate travel expenses and will not suffer a loss in pay, regardless of who selected them. There is no authorization for the Commonwealth to bear any cost for non-State employee panel members. This approach is consistent with the fact that the grievance procedure is an internal mechanism intended for use by State employees to resolve their grievances. While persons from outside State government may be selected to sit on panels, such persons serve voluntarily and have no basis for expecting payment of compensation or expenses. Despite this fact, there is no specific prohibition against a grievant making payment to a non-State employee panel member he has selected. Any payment greater than out-of-pocket expenses, however, would raise serious questions concerning possible improper bias on the part of the panel member. It has long been held that those with significant pecuniary interest in administrative or legal proceedings cannot properly sit in judgment. See Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Tumey v. Ohio, 273 U.S. 510 (1927).

You also ask whether it would be permissible for an agency and a grievant to enter into an agreement for payment of reasonable fees and expenses of the third panel member, and whether an agency could assume payment of reasonable fees and expenses for all three panel members.

Since the State is to bear no cost regarding non-State employee panel members, I answer each of these questions in the negative. Moreover, to permit an agency to pay reasonable fees and expenses to all panel members would call into question the impartiality of the panel.

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1Section 2.1-114.5:1(D)(4) provides in pertinent part: "Qualifying grievances shall advance to the final step which shall provide for a hearing before an impartial panel, such panel to consist of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select such third panel member. Such
panel shall not be composed of any persons having direct
involvement with the grievance heard by the panel...."


HEALTH. INSURANCE. EMPLOYERS WITH GROUP HEALTH CARE
POLICIES MUST OFFER TERMINATING EMPLOYEES CHOICE EITHER OF
CONVERTING TO NON-GROUP POLICY OR REMAINING COVERED FOR
PERIOD OF 90 DAYS UNDER EMPLOYER'S GROUP POLICY.

March 7, 1980

Mr. Kenneth B. Yancey, Director
Department of Personnel and Training

You ask about the proper interpretation of § 38.1-348.11
of the Code of Virginia (1950), as amended, which took effect
on January 1, 1980.1 That section assures that any
terminating employee previously covered by a group health
care policy may continue health care coverage either by
converting to a non-group policy or by remaining covered for
a period of ninety days under the employer's group policy.
You indicate that presently the State program provides only
for conversion to a non-group policy because to allow a
terminating employee to extend coverage for three months
would overburden the present administrative procedures. You
ask whether this offering of only one of the listed
alternatives of § 38.1-348.11 is permissible.

Section 38.1-348.11 provides that upon termination of
eligibility for coverage the insured "shall be entitled" to
conversion to a non-group policy or to have his or her
existing coverage continued for a period of ninety days. The
section is couched in terms of an option for the insured and
there is no specific mention of any discretion in the
policyholder to elect to offer only one of these
alternatives. The only limitation on the alternatives
concerns continuation of coverage and prescribes that it
"shall only be available to an employee or member who has
been continuously insured under the group policy during the
entire three months' period immediately preceding termination
of eligibility." The clear implication of this language is
that continuation of coverage is available to an employee so
long as the three month requirement is met.

Accordingly, I am of the opinion that § 38.1-348.11 was
intended to require policyholders to offer terminating
employees the option of selecting either of the listed
alternatives for continuing health insurance coverage.

1Section 38.1-348.11 provides: "Every group hospital
policy or group medical and surgical policy or group major
medical policy of accident and sickness insurance, hereafter
issued for delivery in this Commonwealth or renewed, reissued
or extended if already issued, shall contain language
providing that if the insurance on a person covered under such a policy or contract ceases because of the termination of such person's eligibility for coverage other than due to termination of the group policy, prior to his or her becoming eligible for Medicare or Medicaid benefits, then such person shall be entitled (a) to have issued to him or her by the insurer, without evidence of insurability, a nongroup policy of accident and sickness insurance, either individual or family, whichever is appropriate, in the event that the insurer offers such policy, provided that application for such a policy shall be made, and the first premium paid to the insurer within thirty-one days after such termination and provided further that:

1. the premium on the policy shall be at the insurer's then customary rate applicable (i) to such policies, (ii) to the class of risk to which such person then belongs, and (iii) to his or her age attained on the effective date of the policy;

2. the policy of accident and sickness insurance will not result in over-insurance on the basis of the company's underwriting standards at the time of issue;

3. the benefits under the policy of accident and sickness insurance shall not duplicate any benefits paid for the same injury or same sickness under the prior policy;

4. the provisions of subsection (a) of this section shall be effectuated in such a way as to result in continuous coverage during the thirty-one day period for such insured; or (b) to have his or her present coverage under such policy or contract continued for a period of ninety days immediately following the date of the termination of such person's eligibility, without evidence of insurability, provided that application for such extended coverage shall be made to the group policyholder and the total premium for the ninety-day period paid to the group policyholder prior to such termination and provided, further that the premium for continuing the group coverage shall be at the insurer's then present rate applicable to such group policy. Continuation shall only be available to an employee or member who has been continuously insured under the group policy during the entire three months' period immediately preceding termination of eligibility."

HIGHWAYS. PROJECTS UTILIZING NO STATE OR FEDERAL FUNDS NEED NOT COMPLY WITH REAL PROPERTY ACQUISITION ACT.

June 24, 1980

The Honorable Owen B. Pickett
Member, House of Delegates

You have requested my opinion as to whether Ch. 6, Title 25 of the Code of Virginia (1950), as amended, "applies to the City of Virginia Beach with respect to a road project being undertaken by the city which is 100% financed with city funds, and in which no federal or state funds are involved."
Section 25-238 defines a State agency to be, among other things, any municipal corporation or local government unit or any department agency or instrumentality of a municipal corporation or local government unit. Section 25-237 provides that the purpose of Ch. 6 of Title 25 is to "establish a uniform policy for the fair and equitable treatment of persons displaced as a result of programs or projects involving the acquisition of real property by any State agency as defined in § 25-238." If these two sections of the Code alone are read together, it would appear that the City of Virginia Beach would have to comply with Ch. 6 if it desired to construct the road project in question. These two sections do not stand alone, however, and are qualified by § 25-236. That section provides that "the provisions of this chapter shall be applicable to the acquisition of real property by any State agency as hereinafter defined for use in projects or programs in which federal or State funds are used...." By providing that the State agency must apply Ch. 6 in those projects or programs in which federal or State funds are used, it is my opinion that such a delimitation excludes applicability of the chapter in those acquisitions where a State agency uses neither federal nor State funds. Blue Cross v. Commonwealth, 211 Va. 180, 194, 176 S.E.2d 439 (1970); 2A Sutherland Statutory Construction § 47.23 (4th ed.).

In light of the above it is my opinion that Ch. 6, Title 25 does not apply to the road project Virginia Beach intends to undertake using only city funds.

HIGHWAYS. SECONDARY SYSTEM. INCLUSION OF CERTAIN ROADS LEADING TO COUNTY SCHOOLS.

October 23, 1979

The Honorable Steven F. Gibson
Commonwealth's Attorney for Buchanan County

You have asked whether § 33.1-68 of the Code of Virginia (1950), as amended, "automatically includes within the secondary system of State Highways 'all roads leading from the State Highways, either primary or secondary, to public schools in the counties of the Commonwealth to which school buses are operated....'" See § 33.1-68.1 With certain important qualifications hereafter discussed, my answer is in the affirmative.

To determine the present scope and application of § 33.1-68, it is necessary first to consider its predecessors.

As originally enacted, the statute made all roads leading from State highways to public schools in the counties to which school buses were operated a part of the secondary system of State highways, provided the following two express criteria were met:
i. the school served by the road had to have one or more buildings containing in the aggregate five or more separate classrooms.

ii. such service road could not exceed one-quarter mile in length.

In 1950 the statute was again amended (codified as § 33-45 of the former Code) to delete the words "on and after the date upon which this section takes effect, be and," while inserting in their place the words "continue to." (Additionally, the word "alone" was added to the end of the last sentence of the statute to make clear that a road outside the ambit of this statute could nonetheless be admitted into the secondary system by virtue of other, more all-inclusive statutory provisions.)

The question first arises as to whether the 1950 Session of the General Assembly intended only to include such otherwise covered roads as were in existence at the time the statute was originally enacted. It is my opinion that the statute was intended to admit continually into the secondary system such roads as meet the statutory criteria on or at any time after the statute's initial enactment. As noted, the language of the original statute had provided that the covered roads would be portions of the secondary system "on and after the date upon which this act takes effect...." Ch. 74 [1940] Acts of Assembly. (Emphasis added.) The retention by the legislature in later amended forms of the statute of the future-oriented proviso, "provided, however, that if any such road leading to a school exceeds one-quarter of a mile in length, it shall not become a part of the secondary system by virtue of the provisions of this section..." (emphasis supplied), evinces a legislative intent that the statute continue to embrace covered roads within the secondary system even after its enactment date.

Further, it is only when the statute is viewed as prospective in its operation that one can render congruous a 1952 amendment of the statute. This amendment changed the criteria for roads covered for inclusion within the secondary system by deleting the former requirement that such roads not exceed one-quarter mile in length and substituting in lieu thereof the requirement that such roads be included "[only] in so far as these roads are on school property...." Ch. 505 [1952] Acts of Assembly 802. Inasmuch as the presumption is against the retroactive amendment of a statute, again it must be presumed that the statute was intended to effectuate inclusion of such otherwise covered roads as continued to come into existence subsequent to the effective date of the original statute.

It is, of course, the latest and still effective, 1964 amendment which is of primary concern. See § 33.1-68 (formerly § 33-45 Code of Virginia (1950), as amended). Here the General Assembly deleted from the requirements for a covered road that the school so serviced had to have one or
more buildings containing five or more classrooms. And, more importantly for purposes of this opinion, the legislature deleted the language "in so far as these roads are on school property" while substituting in lieu thereof the words "insofar as these roads lead to or are on school property." (Emphasis added.) See § 33.1-68. As your letter notes, the words "insofar as these roads lead to or are on school property..." demand statutory construction.

In the example you cite, Slate Creek Bridge Road, you state that this road "does have school buses operating on it, is in a county of the Commonwealth, and leads from a secondary road to a public school." You go on to note that "[t]he road does, however, also service several private homes as well..." but conclude that "since Code Section 33.1-68 does not appear to be limited to school access roads which service only the school itself, this fact should not prevent it from falling within the purview of the statute."

I share your view generally. As noted, supra, the General Assembly in drafting the statute's prior forms was quite explicit in stating the limitations on the statute's application. Therefore, the absence of such explicit limitations from the statute's present form must be given significance in its interpretation. I am thus of the opinion that to the extent a road leading from either a primary or secondary school also leads to a public school to which school buses are operated, it is automatically included, in a pro tanto fashion, within the secondary system. The presence of private dwellings or other privately-owned buildings along such a road, and between the aforementioned primary or secondary road from which the road leads and the school in question, does not operate to prevent such automatic inclusion. However, to the extent such a road may continue beyond the school, the words "insofar as these roads lead to or are on school property" would prevent such additional portion of the road from being automatically included within the secondary system. (Emphasis added.) Id.

In your letter you mention that the Department has refused to take Slate Creek Bridge Road into its secondary system because its "policy is that school access roads must be constructed and improved to certain standards before they will be considered for admission to the secondary system of State highways." I am in general agreement with your observation that unless § 33.1-68 were intended as an exception to the general statutory standards under which roads are admitted to the secondary system, its enactment was "entirely superfluous." You correctly note, that this conclusion should not be lightly reached and you cite Raven Red Ash Coal Corp. v. Absher, 153 Va. 332, 335, 149 S.E. 541, 542 (1929). The interpretation adopted here is consistent with the rule 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. In this way, and no other, can the two
Correspondence included with your inquiry, however, indicates that a "bridge across Slate Creek is privately owned." If true, this statement raises the question of whether the road itself is privately owned—a question I do not presume to decide. If the road is indeed privately owned, I am of the opinion that the statute does not operate to automatically include it within the secondary system. A contrary construction would run afoul of the requirements of Art. I, § 11 of the Constitution of Virginia (1971) which prohibits the taking of private property without due process.

1 Section 33.1-68 provides:
"All roads leading from the State highways, either primary or secondary, to public schools in the counties of the Commonwealth to which school buses are operated shall continue to constitute portions of the secondary system of State highways insofar as these roads lead to or are on school property and as such shall be improved and maintained."

2 Its first enactment was in 1940:
"All roads leading from State highways, either primary or secondary, to public schools in the counties of the Commonwealth to which school buses are operated, and which have one or more buildings containing five or more separate class rooms, shall, on and after the date upon which this act takes effect, be and constitute portions of the secondary system of State highways, and as such be improved and maintained; provided, however, that if any such road leading to a school exceeds one-quarter of a mile in length, it shall not become a part of the said secondary system under the provisions of this act." Ch. 74 [1940] Acts of Assembly.
This is in response to your recent inquiry concerning the validity of a prosecution under § 18.2-140 of the Code of Virginia (1950), as amended, for cutting or trimming trees within the bounds of a State highway without permission of the Virginia Department of Highways and Transportation. While I concur in your opinion that a prosecution under that statute would be improper, prosecution under either of two other provisions of the Code would be proper.

Section 18.2-140 prohibits, among other things, the cutting or trimming of "any tree...found, growing or being upon the land of another, or upon any land reserved, set aside or maintained by the State as a public park, or as a refuge or sanctuary for wild animals, birds or fish...." Violation of this statute constitutes a Class 3 misdemeanor. Since it is a penal statute, it must be strictly construed against the Commonwealth. See Commonwealth v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953).

Had the statute prohibited certain acts "on the land of another" without further qualification, it could be reasonably inferred that State-owned land, such as a highway right-of-way, fell within its provisions. However, a distinction is made in the statute between "the land of another" and "land reserved, set aside or maintained by the State" for certain enumerated purposes, thereby indicating that State property is not to be considered as "land of another" for the purposes of the statute. To read it otherwise would be to treat the second clause of the statute as surplus and of no effect. It is an accepted principle of statutory construction that each part of a statute should be given effect if possible. Burnette v. Commonwealth, 194 Va. 785, 788-789, 75 S.E.2d 482, 484-485 (1953). Furthermore, since the mention of one thing implies the exclusion of another, the reference to prosecution for certain acts within the bounds of specific State lands impliedly excludes the prosecution for such acts on other State land. Accordingly, no prosecution can be maintained for cutting or trimming trees within the bounds of a State highway, since it falls outside the enumerated lands protected by the statute.

The proper course would be to prosecute offenders for violating § 18.2-137, which provides, in pertinent part, that "[i]f any person, unlawfully, but not feloniously, take and carry away, or destroy, deface or injure any property, real or personal, not his own...he shall be guilty of a Class 1 misdemeanor." The cutting of trees within the bounds of a State highway is also a violation of § 10 of the Rules and Regulations of the State Highway and Transportation Commission, which prohibits injury or destruction of any property growing or placed upon a highway right-of-way, without the consent of the Commissioner. These rules were adopted pursuant to authority granted by § 33.1-12, and in conformity with the Administrative Process Act and the Virginia Register Act. Pursuant to § 33.1-19, they have the force and effect of law and violation thereof is a misdemeanor. A copy of these rules is enclosed.
November 7, 1979

The Honorable Maurice B. Rowe
Secretary of Commerce and Resources

This is in response to your request for my opinion as to whether §§ 33.1-185 through 33.1-192 of the Code of Virginia (1950), as amended, require the bonding of subcontractors performing work or supplying materials to contractors doing work for the State Highway and Transportation Commission (hereinafter the "Commission") under highway construction contracts. You also inquired as to whether §§ 11-17, 11-18, 11-20 and 11-23 are applicable to highway construction contracts. With regard to the latter inquiry, you further ask whether the requirement of 50 percent surety bonds contained in subsection (b) of § 11-23 is applicable to subcontractors on the Commission's highway construction contracts. I will answer these inquiries seriatim.

Section 33.1-185 requires, among other things, that all construction projects undertaken by the Commission, reasonably estimated to cost in excess of $200,000 or more, be let to contract after public advertising. It further provides that where such projects are reasonably estimated to cost between $25,000 and $200,000, that the Commission may let them to contract and that if it so chooses, except in cases of emergency, it shall do so only after public advertising.

Section 33.1-186 requires that each bidder to such a contract tender with his bid a certified check "for a reasonable sum to be fixed by the Commission..." as a guarantee that in the event the contract is awarded to him he will thereafter enter into the contract with the Commission. In the alternative, the bidder may file a bond with a solvent guaranty company as surety for a sum that is twenty-five percent (25%) in excess of the amount that would otherwise be tendered by such certified check.

Section 33.1-187 then provides that the contract shall be let to the lowest responsible bidder who shall be required to enter into a bond "which bond must be approved by the State Highway Commissioner and conditioned upon the faithful performance of the work in strict conformity with the plans and specifications of the same." It is with respect to this requirement that your first inquiry is concerned.
There is nothing in the terms of the foregoing statutes which requires that a subcontractor give bond to either the Commission’s contractor or to the Commission for the faithful performance of his subcontract. However, the Supreme Court of Virginia has held that by virtue of the Commission’s incidental powers, it may require of its contractor a bond more broadly conditioned than the one mandated by § 33.1-187, provided such further conditions are properly related to the contract work. Aetna Cas. & Sur. Co. v. Earle-Lansdell Co., 142 Va. 435, 444, 129 S.E. 263, 265 (1925). I am informed that it has been the policy of the Commission to require of its highway construction contractor that he obtain from his subcontractor a payment bond equal to 100 percent of the amount of the subcontract. Such requirement is properly related to the contract work. Hence, it is within the incidental powers of the Commission to demand inclusion of this requirement as a provision of the contractor’s bond. Cf., Aetna Cas. Co., supra, at 444.

In response to your second inquiry, I am of the opinion that §§ 11-17, et seq., are generally applicable to contracts relating to highway construction undertaken by the Commission, though with certain qualifications which are noted here. Section 11-17 provides in part, "[n]otwithstanding the provisions of this section and of the sections following, all bids for work on the highways shall be governed by §§ 33.1-185 through 33.1-192 whenever any provision of these sections is applicable." Thus, to the extent §§ 33.1-185 through 33.1-192 contain provisions either not found in §§ 11-17, et seq., or ones that are in conflict with those that are found therein, the former sections of the Code govern highway construction undertaken by the Commission. Moreover, as you have apparently noted, § 11-20.2 expressly excludes from its terms "any bid for a contract to which the Virginia Department of Highways is a party...." Id.

Lastly, and with regard to your more particular inquiry, I have concluded that the provisions of § 11-23, generally, and hence those of its subsection (b), as well, are not applicable to the Commission’s highway construction. This section of the Code applies only to those contracts to which "any authority, county, city, town, school board, or any agency thereof, is a party...." Manifestly, with the exception of such public bodies as are embraced within the term "authority," the statute’s application is limited to the enumerated governmental subdivisions and their agencies.

I have further concluded that the Commission is not an "authority" as that term is employed in this statute. The term "authority" refers to a relatively autonomous governmental body; it embraces "a large class of corporations created by government to undertake public enterprises in which public interests are involved to such an extent as to justify conferring upon such corporations important governmental privileges and powers, such as eminent domain, but which are not created for political purposes and which
are not instruments of the government created for its own uses or subject to its direct control." Housing Authority for the City of Woonsocket v. Fetzik, 289 A.2d 658, 662 (R.I. 1972). This term, then, does not embrace the Commission which is the governing body of an agency of the Commonwealth, i.e., the Virginia Department of Highways and Transportation. ²

¹No opinion is expressed as to whether the Commission could, pursuant to its incidental powers, impose a requirement to that contained in § 11-23(b) regarding a 50 percent surety bond of subcontractors.
²When the General Assembly has sought to generally embrace the agencies of the Commonwealth, as distinguished from its authorities, it has employed a different, and more appropriate, language for that purpose: "A bidder for a contract with the State or any department, institution or agency thereof, or with any county, city, town, school board, or any agency thereof...." Section 11-20.2, supra. (Emphasis added.)

HOUSING AUTHORITIES. ACQUISITION OF BLIGHTED COMMERCIAL STRUCTURES OUTSIDE AREA OF OPERATION.

February 18, 1980

The Honorable Bernard S. Cohen
Member, House of Delegates

You ask whether a housing authority may acquire through eminent domain proceedings commercial buildings located outside its area of operation when such structures are deemed to be blighting influences on the surrounding area.

Exercise of the power of eminent domain is conferred upon housing authorities by § 36-27 of the Code of Virginia (1950), as amended, for the "purposes of such authority." The only "purpose" of a housing authority which could be interpreted to allow condemnation of blighted commercial structures is § 36-19(b). That section limits a housing authority to actions "within its area of operation."

Accordingly, I am of the opinion that a housing authority may not exercise the power of eminent domain outside its area of operation.

HOUSING AUTHORITIES. RESIDENCE REQUIREMENTS. COMMISSIONER OF REGIONAL AUTHORITY MAY RESIDE IN TOWN WITHIN OUTER LIMITS OF AREA OF OPERATION.
March 10, 1980

The Honorable William F. Green
Member, House of Delegates

You ask two questions about regional housing authorities established under Art. 6 of the Housing Authorities Law (Ch. 1 of Title 36 of the Code of Virginia (1950), as amended).

Residence Requirements for Commissioners of Regional Housing Authorities

Your first question is whether a resident of a town within the outer boundaries of the area of operation of a regional housing authority is eligible to serve as a commissioner, particularly in view of § 36-18 which provides that nothing contained within the Housing Authorities Law shall be construed to prevent appointment of a commissioner who resides within the "perimeter boundaries" of the authority's area of operation.

Under § 36-3(f), the area of operation for county authorities excludes the towns located within the counties. Towns have their own housing authorities. See Opinion to the Honorable Clive L. DuVal, 2d, Member, House of Delegates, dated April 29, 1971, found in Report of the Attorney General (1970-1971) at 207; Opinion to the Honorable John N. Dalton, Member, House of Delegates, dated August 18, 1972, found in Report of the Attorney General (1972-1973) at 223. As a result, the area of operation for county authorities can contain voids representing towns that are otherwise part of the county. See Opinion to the Honorable George H. Hill, Member, House of Delegates, dated May 17, 1955, found in Report of the Attorney General (1954-1955) at 133.

Regional housing authorities are political subdivisions. See § 36-4 and Opinion to the Honorable George H. Hill, Member, House of Delegates, dated May 11, 1955, found in Report of the Attorney General (1954-1955) at 132. The commissioners of housing authorities are public officers. Under the Virginia Constitution (1902) § 32, both elective and appointed officers were required to be residents of the areas they represented. Accordingly, commissioners of housing authorities had to be residents of the area represented. See Opinion to the Honorable William B. Spong, Jr., Member, Senate of Virginia, dated October 17, 1960, found in Report of the Attorney General (1960-1961) at 165; Opinion to the Honorable Joseph P. Johnson, Jr., Member, House of Delegates, dated October 12, 1967, found in Report of the Attorney General (1967-1968) at 123.

In the Virginia Constitution (1971), the residence requirement held over from the Constitution of 1902, § 32, was narrowed to elective officers, and the constitutional requirement as to the residence of appointed officers was dropped. See Art. II, § 5 of the Virginia Constitution
Accordingly, any continuing prohibition would be found in the statutes. See, for example, § 15.1-51 (residence of district and county officers) and, Opinion to the Honorable Charles L. McCormick, III, Commonwealth's Attorney for Halifax County, dated March 18, 1971, found in Report of the Attorney General (1970-1971) at 208 (director of industrial development authority required to comply with § 15.1-51 as officer of political subdivision).

However, § 36-9 provides that insofar as the provisions of the Housing Authorities Law are inconsistent with any other law, the provisions of the Housing Authorities Law are controlling. Section 36-18 impliedly authorizes the appointment of commissioners resident within the perimeter boundaries of an authority's area of operation. A perimeter can mean either a simple boundary or an outer limit. See, for example, Webster's New Collegiate Dictionary (G. & C. Merriam Co. 1977). A perimeter boundary, to avoid a redundancy, necessarily means an outer boundary.

Accordingly, I find that a resident of a town within the outer boundaries of a regional housing authority's area of operation is eligible to serve as a commissioner of the authority.

Location Of Headquarters Or Principal Office of Regional Housing Authority

Your second question is whether a regional housing authority may establish its headquarters or principal office in a town situated within the outer boundaries of its area of operation, particularly in view of § 36-18 which provides that nothing contained within the Housing Authorities Law shall be construed to prevent meetings of commissioners anywhere within the perimeter boundaries of an authority's area of operation.

I find no provision in the Housing Authorities Law about establishment of a headquarters, a principal place of business, a registered office or any other office for housing authorities. Likewise, in Title 15.1, I find no general provision on establishment of offices for political subdivisions, other than § 15.1-257 (courthouse, clerk's office, jail, and facilities for Commonwealth's attorney), and § 15.1-258 (providing offices for various officers, judges, etc.). The Virginia Freedom of Information Act speaks merely of entry to meetings of public bodies, and access to records in the custody of public officials (§ 2.1-340.1), during regular office hours of the custodian of such records. See Section 2.1-342(a). The office hours referred to are those of the custodian, not necessarily at any established office of the public body.
By way of comparison, I find a number of local authorities are required to designate a principal office, but are still empowered to have an office at such place or places the authority may designate. See, for example, § 15.1-1230(B)(a) and § 15.1-1232(d) (park authorities); § 15.1-1242(a) and § 15.1-1250(d) (water and sewer authorities).

In the absence of any provision or rule of law to the contrary, I am of the opinion that establishment of a principal office by a regional housing authority is within the discretion of the commissioners, and the location of that principal office in a town located within the outer boundaries of the regional housing authority's area of operation is also within the discretion of the commissioners, and certainly consistent with § 36-18, even though locations for a principal office and for meetings of the commissioners are not necessarily the same thing.

INDUSTRIAL DEVELOPMENT. AUTHORITIES. MAY ISSUE BONDS TO FACILITATE PURCHASE OF EXISTING HOSPITALS AND HOMES FOR RESIDENCE AND CARE OF AGED.

November 27, 1979

The Honorable Madison E. Marye
Member, Senate of Virginia

You ask whether an industrial development authority may issue bonds to facilitate the purchase of existing nursing homes, homes for adults or hospitals if there is no new construction involved in the project purchase.

Section 15.1-1378 of the Code of Virginia (1950), as amended, sets forth the powers of an industrial development authority. Section 15.1-1378(d) empowers the authority to "acquire, whether by purchase, exchange, gift, lease or otherwise...one or more authority facilities...." Section 15.1374(d) defines "authority facilities" as including medical facilities and facilities for the residence or care of the aged, "now existing or hereafter acquired, constructed or installed by...the authority...." The section makes no mention of "homes for adults."

Section 15.1-1378(g) empowers an authority to issue its bonds for the purpose of carrying out any of its powers. Accordingly, it is my opinion that an industrial development authority may issue its bonds to facilitate the purchase of existing hospitals, which are plainly medical facilities, and facilities for the residence and care of the aged, but that it may not issue bonds to facilitate the purchase of homes for adults, existing or otherwise, unless those homes also function as medical facilities.
INDUSTRIAL DEVELOPMENT. AUTHORITIES. MAY OWN BUT NOT OPERATE WAREHOUSE.

January 3, 1980

The Honorable Ford C. Quillen
Member, House of Delegates

You ask whether an industrial development authority operating under the provisions of Ch. 33 of Title 15.1 of the Code of Virginia (1950), as amended, can construct, own and operate a bonded warehouse within an industrial park to serve the needs of the park tenants and other businesses and industry within close proximity to the park.

Section 15.1-1375 sets forth the intent of the legislature that industrial development authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises to locate in or remain in Virginia. It is expressly provided in § 15.1-1375, however, that "[i]t is not intended hereby that any such authority shall itself be authorized to operate any such manufacturing, industrial or commercial enterprise or any facility of an institution of higher education." The term "enterprise" is defined in § 15.1-1374(j) as including "any industry for...warehousing...any products of agriculture, mining, or industry...." Accordingly, it is my opinion that such an authority may construct and own a warehouse but that it may not engage in the business of warehousing.

INDUSTRIAL DEVELOPMENT. § 15.1-1377 PROHIBITS COUNTY COORDINATOR OF EMERGENCY SERVICES FROM SERVING AS DIRECTOR.

October 26, 1979

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

You ask whether a county coordinator of emergency services activities and an executive director of a county water and sewer authority are officers or employees of the county within the meaning of § 15.1-1377 of the Code of Virginia (1950), as amended, which prohibits officers and employees of a county from serving as directors of a county industrial development authority.

Coordinator of Emergency Services Activities

Pursuant to § 44-146.19(b)(2), the county coordinator of emergency services activities is appointed by the county director of emergency services with the consent of the local governing body. By the same statute, the county director is either a member of the board of supervisors selected by the
board, or the chief administrative officer for the county. I am advised that the coordinator is paid out of county funds, although the county is reimbursed by the State for a portion of these funds. Accordingly, I find that the coordinator is a county officer for purposes of § 15.1-1377, and may not serve at the same time as director of the industrial development authority. See Opinion to the Honorable Harold Hawkins, Commonwealth’s Attorney for Clarke County, found in Report of the Attorney General (1973-1974) at 272.

Executive Director of Water and Sewer Authority

I do not find a statute establishing or describing the post of executive director for water and sewer authorities. The executive director is therefore an employee hired by the authority pursuant to its general powers, as stated in §§ 15.1-1250 and 15.1-1270. An employee of a water and sewer authority is not an employee of the county (or counties) participating in the authority. See Opinion to the Honorable Robert M. Galumbeck, County Attorney for Tazewell County, dated November 3, 1978 (copy enclosed). Accordingly, I find that the executive director of the water and sewer authority may serve at the same time, under § 15.1-1377, as director of the industrial development authority.

INTEREST. USURY DEFENSE WHERE LOAN EXTENDED FOR BOTH BUSINESS AND PERSONAL USES.

July 30, 1979

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

You have asked several questions concerning § 6.1-330.20 of the Code of Virginia (1950), as amended. I believe that the first two questions you posed can be consolidated into one basic question.

Question 1

Is it permissible under § 6.1-330.20 of the Code for a lender to take a deed of trust on a borrower’s real estate to secure open-end loans made under that section?

It is my opinion that it is permissible under § 6.1-330.20 for a lender to take a deed of trust to secure an open-end loan, provided that the notice and rescission requirements of the federal Truth-in-Lending laws are met. Section 6.1-330.20 provides:

"Any seller or lender engaged in the extension of credit under an open-end credit or similar plan under which a service charge is imposed upon the cardholder or consumer if the unpaid balance is not paid in full within a period of twenty-five days from billing date,
may charge and collect a service charge at a rate not to exceed one and one-half per centum per month, computed at the option of the seller or lender on either (1) the average daily balance for the period ending on the billing date or (2) the balance existing on the billing date of the month, or (3) any other balance which does not result in the seller or lender charging and receiving any sum in excess of what would be charged and received in (1) or (2) above; provided that no service charge shall be charged unless the bill is mailed not later than eight days (excluding Saturdays, Sundays and holidays) after the billing date. For the purposes of this section the average daily balance for any period shall be that amount which is the sum of the actual amounts outstanding each day during the period, divided by the number of days in the period."

This provision, in itself contains nothing which either allows or forbids the securing of an open-end loan by a deed of trust. Nor do any other state statutory provisions directly allow or forbid the taking of a security interest to secure an open-end loan. In practice, it can be advantageous to both a borrower, who may not have other forms of available collateral, and a lender, to be able to use the borrower's real estate as collateral. In the absence of any legislative prohibition of the practice, it is my opinion that the securing of an open-end loan with a deed of trust on real estate is permissible.

Where a deed of trust is taken on real property to secure an open-end loan, the requirements of the federal Truth-in-Lending laws must be met. This means that disclosure of the type, nature and extent of the security interest taken in the real estate must be made before the first transaction on the loan. See 15 U.S.C. § 1637(a)(7). Additionally, in certain circumstances, it also means that the borrower has certain rescission rights, and that the lender is required to provide notice to the borrower of those rights. See 15 U.S.C. § 1635.

Question 2

If a deed of trust may be taken by a lender to secure an open-end loan made pursuant to § 6.1-330.20, what rates of interest and charges are permissible for such a loan?

Section 6.1-330.20 permits an effective annual rate under open-end loans of eighteen percent. However, in the case of loans secured by a deed of trust which is subordinate to an existing deed of trust a specific limitation on interest and charges is provided in §§ 6.1-330.16 and 6.1-330.24.

Section 6.1-330.16 provides for an interest rate of twelve percent, plus service charges of two percent, in
certain circumstances. In addition, § 6.1-330.24 provides in part:

"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 title examination, title insurance, recording fees, surveys, attorney's fees, and appraisal fees...."

It is a settled rule of statutory construction that specific provisions govern in preference to general provisions relating to the same subject. See 17 M.J. Statutes § 43. Therefore, on the question of what rates and charges apply to open-end loans secured by deeds of trust, the specific provisions of §§ 6.1-330.16 and 6.1-330.24 governing interest and charges for subordinate mortgages apply, rather than the general provisions of § 6.1-330.20 which relate to open-end loans. Accord, Schmidt v. Beneficial Finance of Frederick, 400 A.2d 1124 (Md. 1979).

Of course, where the subordinate mortgage issue does not arise, the general provisions of § 6.1-330.20 will control.

Section 6.1-330.16(A) provides in pertinent part:

"The lender may also impose a service charge not exceeding two per centum of the amount of the loan provided that such service charge shall not be made more often than once each eighteen months except to the extent that new money is advanced within such eighteen-month period by a renewal or additional loan...."

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. APPEALS FROM REVOCATION OF PROBATION. UPON APPEAL ORIGINAL SENTENCE CANNOT BE REVIEWED.

June 19, 1980

The Honorable Cynthia D. Kinser
Commonwealth's Attorney for Lee County

You have asked whether the revocation of probation of an adult defendant in juvenile and domestic relations district court is a final appealable order within § 16.1-296 of the Code of Virginia (1950), as amended, and if so, whether the circuit court has the authority to reduce the original sentence even though the cases were tried several months before and were not appealed at that time.

Section 16.1-296 provides that where an appeal is taken by an adult on a finding of guilty of an offense by the juvenile and domestic relations district court, the appeal shall be dealt with in all respects as if it were an appeal from a general district court adjudication pursuant to §§ 16.1-132 through 16.1-137. Section 16.1-132 provides that
a person convicted in a court not of record shall have the right to appeal to the circuit court within ten days. It further provides, "[t]here shall also be an appeal of right from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence."

It is my opinion that §§ 16.1-296 and 16.1-132 specifically provide that the decision of the juvenile and domestic relations district court revoking probation and imposing the original sentence is a final appealable order.

An appeal from the original conviction and sentence is likewise provided under §§ 16.1-296 and 16.1-132. Upon an appeal the defendant would be entitled to a jury trial. See § 16.1-136. But if the appeal is not taken within the statutory period it becomes final and the happening of an event which brings into operation the right of revocation does not alter the finality of the judgment previously entered. Fuller v. Commonwealth, 189 Va. 327, 53 S.E.2d 26 (1949).

It is significant that § 16.1-136 provides different procedures for the trial of an appeal from a conviction and trial of an appeal from a revocation of probation. The imposition of a sentence upon an adult defendant by a juvenile and domestic relations district court is a final order appealable under § 16.1-296. If it is not appealed within the ten day statutory period it becomes final and cannot be reviewed at a subsequent time.

It is my opinion, when a revocation of probation under § 16.1-296 is appealed to the circuit court, the court is limited to considering the propriety of the revocation and cannot inquire into the propriety of the original underlying sentence.

**JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. DESTRUCTION OF ADULT RECORDS.** ALL ADULT CRIMINAL RECORDS FINALLY DISPOSED OF MAY BE DESTROYED BY JUVENILE COURT AFTER PERIOD OF TEN YEARS HAS PASSED.

September 21, 1979

The Honorable A. L. Larkum, Judge
Juvenile and Domestic Relations District Court

You have asked whether § 16.1-304 of the Code of Virginia (1950), as amended, is qualified by § 16.1-138 to the extent that all adult criminal records finally disposed of may be destroyed by the juvenile and domestic relations district court after a period of ten years has elapsed.

Section 16.1-304 requires that all papers involved with any proceeding in a juvenile and domestic relations district court, except papers in proceedings appealed or required to
be returned to the circuit court, shall be properly indexed, filed and kept in such court. Section 16.1-138, on the other hand, allows the destruction of all papers in criminal proceedings which are not required to be returned to the circuit court after such papers have been properly indexed, filed and preserved in the trial court as public records for a period of ten years.

It is a basic tenet of statutory construction that different sections of the Code should be regarded as simultaneous expressions of the legislative will, and all of its provisions which deal with the same subject matter should be construed together and reconciled whenever possible. Since both §§ 16.1-304 and 16.1-138 deal with the same subject matter, the disposition of papers connected with proceedings in a juvenile and domestic relations district court, it is my opinion that the requirements of these sections can be reconciled by construing § 16.1-138 to be a specific exception to the general requirements of § 16.1-304 so that all adult criminal records finally disposed of may be destroyed by the juvenile court after a period of ten years has passed.

1Marymount College v. Harris, 205 Va. 712, 717, 139 S.E.2d 43 (1964).
2While § 16.1-138 is not part of the Juvenile and Domestic Relations District Court Law, it does deal with the procedures to be followed by courts not of record which includes juvenile and domestic relations district courts. See § 16.1-69.5(a).

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. DESTRUCTION OF RECORDS. DOCKET OF JUVENILE AND DOMESTIC RELATIONS COURT IS RECORD WITHIN CONTEXT OF § 16.1-306.

August 21, 1979

The Honorable F. Thompson Wheeler, II, Chief Judge
Juvenile and Domestic Relations District Court

You have asked what should be done with a juvenile and domestic relations district court docket under § 16.1-306 of the Code of Virginia (1950), as amended, when a juvenile is found not guilty and requests that the records concerning him be destroyed.

Section 16.1-306(C1) authorizes a child who has been the subject of a delinquency petition which does not allege an offense which would be a felony if committed by an adult and has been found innocent of such charge or such petition was dismissed for some other reason, to file a motion requesting that all of the "records" dealing with said charge be destroyed. An analysis of the Juvenile and Domestic Relations District Court Law reveals that the court's docket
is a "record"; in fact, § 16.1-305 specifically includes the docket in its enumeration of court records. ²

Section 16.1-306(I), however, sets forth the specific requirement that "[a]ll docket sheets shall be destroyed in the sixth year after the last hearing date recorded on the docket sheet." Since § 16.1-306(I) implicitly requires that docket sheets be kept for this six-year period, it stands in apparent contradiction to subsection C1 of § 16.1-306.

It is a basic tenet of statutory construction that different sections of the Code should be regarded as simultaneous expressions of the legislative will, and all of its provisions which deal with the same subject matter should be construed together and reconciled whenever possible. It is my opinion, therefore, that the requirements of § 16.1-306(C1) and § 16.1-306(I) can be reconciled to give full effect to both by simply deleting the name of the juvenile in question from the docket sheets. This would remove all reference to the juvenile involved from the docket, while at the same time allowing these records to be kept for the full six-year period.

1Section 16.1-306(C1), a recent amendment to this statute, provides as follows:
"A person who has been the subject of a delinquency petition which does not allege an offense which would be a felony if committed by an adult and (i) has been found innocent thereof, or (ii) such petition was otherwise dismissed, may file a motion requesting the destruction of all records pertaining to the charge of such an act of delinquency. Notice of such motion shall be given to the Commonwealth's attorney. Unless good cause is shown why such records should not be destroyed, the court shall grant the motion, and shall send copies of the order to all officers or agencies that are repositories of such records, and all such officers and agencies shall comply with the order."

2"All other court records, including the docket...."


JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. HAS EXCLUSIVE ORIGINAL JURISDICTION TO CONDUCT COMMITMENT HEARINGS FOR MENTALLY ILL CHILDREN AND CERTIFICATION HEARINGS FOR MENTALLY RETARDED CHILDREN.

September 27, 1979

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

You have asked whether persons other than the juvenile and domestic relations district court judge may conduct commitment hearings for mentally ill children and
certification hearings for mentally retarded children. Your question arises because of an amendment to § 16.1-241(B), which became effective July 1, 1979, giving the juvenile and domestic relations district courts exclusive original jurisdiction over these proceedings. See Ch. 628 [1979] Acts of Assembly.

The amendment to which you refer deleted the phrase "who is within the purview of this law" with regard to the jurisdiction of the juvenile court over commitment of a mentally ill child or certification of a mentally retarded child. The effect of this deletion is to bring within the jurisdiction of the juvenile court minors who are the subject of commitment or certification hearings, but who would not otherwise be within that court's jurisdiction.

As § 16.1-241(B) now reads, juvenile and domestic relations district court judges are vested with "exclusive original jurisdiction." (Emphasis added.) It is my opinion that this exclusivity of jurisdiction precludes persons other than juvenile court judges from conducting hearings for the commitment or certification of children.

I note that § 37.1-88 confers upon special justices "all the powers and jurisdiction conferred upon a judge by this title...." No statute in Title 37.1, however, specifically confers jurisdiction over the commitment or certification of minors. That jurisdiction is derived from the general jurisdictional grant of Title 37.1 over the commitment and certification of mentally ill and mentally retarded individuals. That general jurisdictional grant is subject to limitations made by later enacted, more specific jurisdictional statutes. It is my opinion that § 16.1-241(B) is such a specific jurisdictional statute, and that special justices now have no jurisdiction over minors.

You next ask for guidance in dealing with emergency situations. You state that you hold court in different counties each day, Monday through Friday, and ask how you can deal with a child who becomes violent and needs an immediate hearing while court is in session in a jurisdiction other than that in which the child is found.

The juvenile judge may issue an ex parte temporary detention order for a child alleged to be mentally ill and in need of hospitalization. See § 37.1-67.1. It is my opinion, however, that such an order may be issued only by the juvenile judge because the authority to issue detention orders is derived from the juvenile court's exclusive jurisdiction. You may note that §§ 16.1-246 and 16.1-255 authorize issuance of detention orders by the intake officer and clerk of the juvenile court, as well as the judge. It is my opinion, however, that these provisions are not applicable in commitment or certification proceedings and that one must look only to the commitment and certification statutes in Title 37.1 for the proper procedure to follow.
Although a child may have originally been brought before the juvenile court for some other reason, § 16.1-280 requires the judge to commence commitment proceedings under § 37.1-67.1 if he believes the child is mentally ill. Disposition of children adjudged mentally ill or judicially certified for admission to training schools for the mentally retarded is governed by applicable provisions of Title 37.1. See § 16.1-279(G). Whenever the juvenile court is faced with the possibility of commitment for mental illness, the procedures of Title 37.1 apply, and under § 37.1-67.1, the judge issues the detention order. Special justices may not issue detention orders because the 1979 amendments divested them of any jurisdiction over minors.

The court has a certain degree of flexibility, however, to deal with emergency situations where a child needs detention or an immediate hearing and the court is not in session. Under § 37.1-67.1, the child may be held for up to seventy-two hours on a temporary detention order before a hearing must be held. If the hearing cannot be held within this time limitation, the child must be released to the custody of his parents or guardians, on bond, or on his own recognizance. In addition, commitment hearings may be held at a convenient institution or other place even though such place is located outside the judge's jurisdiction. See § 37.1-67.4.

1 I further refer you to an Opinion regarding § 16.1-241 prior to its revision by the General Assembly. See Opinion to the Honorable Joseph R. Zepkin, Judge, Williamsburg General District Court, dated July 5, 1978, a copy of which is enclosed. That Opinion held that special justices possessed only those powers conferred upon them by Title 37.1. It was stated that those powers did not include the power to commit a minor within the exclusive original jurisdiction of the juvenile and domestic relations district court.

2 Note, however, that if the child is a delinquent child or a child in need of services, as those terms are defined in § 16.1-228, the intake officer and, if the judge approves, the clerk of the juvenile court may issue a detention order to hold the child until proceedings can be commenced. §§ 16.1-246 and 16.1-235.
You ask whether a magistrate may refuse as a matter of policy to issue any warrants for juveniles after having been instructed by the court that the intake officer and clerk are not reasonably available for that function after court hours.

Section 16.1-256 of the Code of Virginia (1950), as amended, restricts the issuance of juvenile arrest warrants by magistrates to three specific situations. A magistrate may issue such a warrant when there has been an appeal from a decision of an intake officer pursuant to § 16.1-260. In addition, when a child is known or alleged to be under the age of fifteen years, a judge, intake officer or clerk of the juvenile court or a judge or clerk of a circuit court can authorize such issuance.

The third situation, however, is more pertinent to your question. This arises when a child is known or believed to be between the ages of fifteen and eighteen years of age and there has been a finding of probable cause to believe that the juvenile is in need of services or is delinquent. Even here, the magistrate may only issue an arrest warrant for such a child when the court is not open, and the judge, intake officer or clerk of the juvenile court are not "reasonably available."

While the Code is of no aid in defining "not reasonably available," § 19.2-35 does give the chief circuit judge, or the chief general district judge if so delegated, full supervisory authority over magistrates within the jurisdiction. Such authority, moreover, includes the duty to establish reasonable rules and regulations necessary to supplement or clarify the duties of effected magistrates. This includes the power to fix the time and place of the sitting of such magistrates.

It is my belief that whether the judge, intake officer, or clerk of the juvenile court is not reasonably available is an administrative question which falls within the purview of the chief circuit or general district judge's supervisory authority over magistrates. I am of the opinion, therefore, that, while a policy stating when the judge, intake officer and clerk of the juvenile court are not reasonably available may be promulgated, such a policy may only be instituted by the chief circuit judge, or the chief general district judge if such authority has been delegated to him.

\[1\] See § 19.2-41.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. ONLY JUDGE, AND NOT INTAKE OFFICER, MAY ISSUE EMERGENCY REMOVAL ORDER.
September 25, 1979
The Honorable James M. Davidson, Judge
Juvenile and Domestic Relations District Court

You have asked whether a court's intake officer is authorized to issue an emergency removal order in a case of suspected child abuse or neglect, or whether such order may only be issued by the judge. You have also asked whether, if only the judge may enter the order, he may hear evidence and issue the emergency removal order over the telephone.

Only the Judge May Order Emergency Removal

An abused or neglected child may be taken into custody pursuant to an emergency removal order. See § 16.1-251(A) of the Code of Virginia (1950), as amended. Such an order may be issued ex parte by the court upon a showing that severe or irremediable injury is likely to result otherwise and that no less drastic alternative is available. Section 16.1-251(A) does not expressly authorize an intake officer to issue such an order. His only stated role is to hear sworn testimony in support of a petition for an order. The statute authorizes the "court" to issue the order, and "court," as defined by § 16.1-228(C), does not refer to its intake officer.

Other statutes in the same chapter authorize the intake officer to issue detention orders (see §§ 16.1-246 and 16.1-255), but those statutes concern delinquent children and children in need of services, as those classes are defined in that chapter. See §§ 16.1-228(F) and 16.1-228(I). Among the children in these two classes are habitual truants, runaways, and those charged with criminal offenses. Those statutes do not concern the third class of children, i.e., those children who are abused or neglected, and must be removed from their immediate family surroundings. Because the General Assembly has made a distinction between these classes of children, it is my opinion that it did not intend to authorize the court's intake officer to order emergency removal of a child from his family. This function is reserved to the judge. The statute does not authorize a judge to issue emergency removal orders over the telephone.

Other Removal Procedures

A physician, a child protective services worker, or law enforcement official may summarily remove a child from his family upon suspicion of abuse or neglect where certain criteria are met. See § 63.1-248.9. These criteria include the requirement that a court order not be immediately obtained, that the court has set up procedures for placing such children in appropriate temporary situations, and that the court be notified promptly that the action was taken. Such notification may be given over the telephone. After such a summary removal is accomplished, an emergency removal order must be obtained from the judge within seventy-two hours. See §§ 63.1-248.9(F) and 16.1-251.
JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. SENTENCING JUVENILE TO JAIL. ONCE COURT FINDS THAT JUVENILE IS AMENABLE TO TREATMENT AS JUVENILE FOR PURPOSES OF NON-TRANSFERRAL FOR TRIAL AS ADULT, IT MAY NOT THEN SENTENCE HIM TO JAIL WITHOUT INTERVENING OCCURRENCE SUBSEQUENT TO ITS INITIAL FINDING.

August 15, 1979

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

You have asked whether a juvenile and domestic relations district court judge, who has found that a child is amenable to treatment or rehabilitation as a juvenile and thus refuses to transfer him for trial as an adult under § 16.1-269 of the Code of Virginia (1950), as amended, may then impose a sentence which is authorized to be imposed on adults for such violations under § 16.1-284.

Before transferring a juvenile for trial as an adult under § 16.1-269, the court must find under subsections (b) and (d), respectively, that "[t]he child is not...amenable to treatment or rehabilitation as a juvenile..." and that "[t]he interests of the community require that the child be placed under legal restraint or discipline." Likewise, before imposing an adult disposition on a child under § 16.1-284, the court must make the same findings. The criteria, then, for the court's decision under both § 16.1-269 and § 16.1-284 are identical.

Since the findings required of the court under both statutes are findings of fact, it is my opinion that, once the court has refused to transfer a child because of the restrictions of § 16.1-269(b) or (d), it may impose an adult disposition under § 16.1-284 only when there has been an intervening occurrence subsequent to its original finding that the juvenile is amenable to treatment and does not require legal restraint.

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1The transfer of a juvenile for trial as an adult under § 16.1-269 is subject to the following conditions of subsection 3:

3. The court finds:
   a. There is probable cause to believe that the child committed the delinquent act alleged;
   b. The child is not in the opinion of the court amenable to treatment or rehabilitation as a juvenile through available facilities, considering the nature of the present offense or such factors as the nature of the child's prior delinquency record, the nature of past treatment efforts and the nature of the child's response to past treatment efforts; provided, however, when the alleged delinquent act is armed robbery, rape as provided in § 18.2-61 or murder, the court may certify the child without making the finding required by this subparagraph b;
c. The child is not mentally retarded or criminally insane; and

    d. The interests of the community require that the child be placed under legal restraint or discipline."

Section 16.1-284 reads, in part, as follows:
"If a child fifteen years of age or older is charged with an offense which if committed by an adult would be a misdemeanor or a felony and the court after receipt of a social history compiled pursuant to § 16.1-273 finds that (i) such child is not, in the opinion of the court, amenable to treatment or rehabilitation as a juvenile through available facilities, considering such factors as the nature of the present offense or the nature of the child's prior delinquency record, the nature of the past treatment efforts and the nature of the child's response to past treatment efforts and (ii) the interests of the community require that the child be placed under legal restraint or discipline, then the court may, in such cases, impose the penalties which are authorized to be imposed on adults for such violations...."

JUVENILES. ALLEGED DELINQUENT WHO FAILS TO APPEAR IN COURT HAS NOT EXPRESSLY WAIVED HIS RIGHT TO BE PRESENT AT HIS ADJUDICATORY HEARING.

November 19, 1979

The Honorable J. Davis Reed, III, Judge
Juvenile and Domestic Relations District Court

You have asked whether § 16.1-302 of the Code of Virginia (1950), as amended, enables a court to try a juvenile, charged with the commission of an act that would be a misdemeanor if committed by an adult, in his absence in the same manner as an adult. You hypothesize that the juvenile has been summoned to appear, but fails to do so on the court date.

Section 16.1-302 states that in any hearing held for the purpose of adjudicating an alleged delinquent act every juvenile "shall have a right to be present and shall have the right to a public hearing unless expressly waived by such person...." To do something in an "express" way means that the action is clear, definite, unmistakable and is directly or distinctly stated; an "express waiver" is the voluntary and intentional relinquishment of a known right. It is my opinion, therefore, that an alleged delinquent who fails to appear in court has not expressly waived his right to be present at his adjudicatory hearing.

Moreover, § 16.1-302 sets forth the specific procedure whereby a juvenile and his parent, guardian or other person standing in loco parentis to the juvenile, may waive a court appearance in cases where he is charged with a traffic infraction. Since it is a principle of statutory construction that the mention of one thing implies the exclusion of another, it is my belief that the section's
express provision for the waiver of court appearance in cases involving traffic infractions further indicates a legislative intent that such waivers may not be made in cases involving alleged delinquent offenses.4

You have also asked whether the procedures set forth in § 18.2-251, dealing with deferred adjudications of persons not previously convicted of a drug offense, may be used with regard to other types of offenses committed by juveniles. Section 18.2-251 provides that when a person who has not previously been convicted of the violation of a drug law is charged with possession of a controlled substance under § 18.2-250 or of marijuana under § 18.2-250.1 a court may defer proceedings and place him on probation upon terms and conditions. Section 16.1-279, however, specifically lists the dispositional alternatives available to a juvenile court when the court finds that the child is subject to the provisions of the juvenile code. The deferral of sentencing by the juvenile court plus a probationary period, imposed in lieu of an enumerated disposition by the court, does not fall into any of the categories in § 16.1-279.

Indeed, this Office has previously concluded that the alternative of a public service job, for example, in lieu of a valid disposition by the juvenile court, is not an alternative available under the dispositional section of the juvenile code. In so holding, it was noted that, since the dispositional section of the juvenile code expressly allows the imposition of conditions on probationers, "the lack of specific authorization for the deferred disposition program...implies that it is not a legal alternative under [§ 16.1-279]."5

It is my opinion, therefore, that the deferred disposition program you have in mind, dealing with juveniles accused of committing delinquent acts, is not a valid alternative under the juvenile code. I would note, however, that a reading of §§ 16.1-227 and 16.1-260 indicates that, in certain cases, juveniles may be diverted from the juvenile justice system, consistent with the protection of the public safety, by an intake officer prior to the filing of a petition. Even this procedure, however, is not available in a situation where the child is charged with the commission of an offense which if committed by an adult would be a felony or a Class I misdemeanor.6

Finally, you ask whether § 19.2-160 precludes the imposition of a jail sentence in any case in which the defendant is not represented by an attorney, even if the defendant has voluntarily waived counsel. In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.

In line with the Faretta decision, § 19.2-160 establishes a procedure for defendants in misdemeanor cases
to waive representation by counsel. As part of this procedure, § 19.2-160 sets forth the wording to be used for waiver forms.

Section 19.2-160 also reflects the holding in Argersinger v. Hamlin, 407 U.S. 25 (1972), wherein the Supreme Court ruled "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. at 37. Nothing in either Faretta or Argersinger indicates that a person may never be imprisoned if he stands trial without counsel. Both decisions provide that a person may be subject to the full range of punishment, including imprisonment, without the benefit of counsel so long as the waiver of counsel is knowingly and intelligently made.

The 1979 Session of the General Assembly amended § 19.2-160 to allow the trial of a defendant without counsel provided the court states in writing prior to the trial that no jail sentence will be imposed if the defendant is found guilty. This amendment was in anticipation of the decision in Scott v. Illinois, ___ U.S. __, 59 L.Ed.2d 383 (1979), where the Supreme Court held that the constitution required only that "no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 59 L.Ed.2d at 389.

It is my opinion that the 1979 amendment to § 19.2-160 allows the court to try an indigent defendant without affording him an opportunity to have the assistance of appointed counsel so long as the court states in writing before the trial that no jail sentence will be imposed should the defendant be convicted. In my view this amendment has no effect upon the imposition of a jail sentence upon a defendant who has made a knowing and intelligent waiver of counsel.

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1Black's Law Dictionary (4th ed. 1968) at 691.
2Id. at 1752.
4See Opinion to the Honorable Edwin A. Henry, Chief Judge for the Juvenile and Domestic Relations District Court of Norfolk, dated October 9, 1974, and found in Report of the Attorney General (1974-1975) at 235, which discusses the importance of the court being personally satisfied that a juvenile, if he is so disposed, intelligently and voluntarily waives his right to counsel.
Opinion to the Honorable Harold B. Singleton, Judge, Juvenile and Domestic Relations District Court for the Twenty-Fourth District, dated September 27, 1977, and found in Report of the Attorney General (1977-1978) at 212.

"[P]rovided that if, prior to the commencement of the trial, the court states in writing, either upon the request of the attorney for the Commonwealth or, in the absence of the attorney for the Commonwealth, upon the court's own motion, that a jail sentence will not be imposed if the defendant is convicted, the court may try the case without appointing counsel, and in such event no jail sentence shall be imposed."

JUVENILES. CERTIFICATION OF ALL CONTESTED PARKING CITATIONS CONCERNING JUVENILES SHOULD BE MADE TO APPROPRIATE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT.

November 19, 1979

The Honorable R. Baird Cabell, Judge
Juvenile and Domestic Relations District Court

You have asked whether § 46.1-254.1(a)(2) of the Code of Virginia (1950), as amended, is in conflict with the Juvenile and Domestic Relations District Court Law.

As stated in your inquiry, the City of Franklin has enacted a parking ordinance which, pursuant to § 46.1-254.1(a)(2), requires that the city administration certify in writing all contested parking citations to the "appropriate general district court." You further note that a violation of the city's parking ordinance would be a traffic infraction.

Section 16.1-241.A(1) vests the exclusive original jurisdiction of all matters concerning children alleged to be delinquent with the juvenile and domestic relations district court. The commission of a traffic infraction is a delinquent act.

While the term "general district court" is defined in § 16.1-69.5(b) to exclude juvenile and domestic relations district courts, § 16.1-69.5 is prefaced by the language "unless the context should otherwise require...." It is my opinion that the phrase in § 46.1-254.1(a)(2) requiring a return to the "appropriate general district court..." when viewed in the context of the jurisdictional section of the Juvenile and Domestic Relations District Court Law, must be construed to mean that the return of the written certification should be made to the appropriate juvenile and domestic relations district court. Such a construction, moreover, comports with the basic rule that all of the provisions of the Code of Virginia which deal with the same subject matter should be construed together and reconciled whenever possible.
Section 16.1-228(I) defines, in part, a delinquent child as "a child who has committed a delinquent act...." Section 16.1-228(H) defines a delinquent act to include traffic infractions.


JUVENILES. SENTENCING TO JAIL. JUVENILE BEFORE COURT FOR "MULTIPLE OFFENSES" CAN ONLY SERVE TWELVE MONTHS IN JAIL UNDER § 16.1-284.

September 6, 1979

The Honorable R. P. Zehler, Jr., Judge
Juvenile and Domestic Relations District Court

You have written to ask several questions pertaining to the sentencing of juveniles who are fifteen years of age or older to jail pursuant to § 16.1-284 of the Code of Virginia (1950), as amended. Section 16.1-284 essentially contemplates adult disposition when a child fifteen years of age or older is charged with an offense which, "if committed by an adult would be a misdemeanor or a felony." In such cases a juvenile and domestic relations district court may try the child and "impose the penalties which are authorized to be imposed on adults for such violations, not to exceed twelve months in jail for a single offense or multiple offenses...."

You first ask whether a juvenile who is sentenced to twelve months in jail on a felony charge under § 16.1-284, which sentence is suspended upon the condition of his good behavior, and who commits another felony and is sentenced to twelve months in jail, may be required to serve twenty-four months in jail. Since such a juvenile would, for all practical purposes, now be before the court for "multiple offenses," it is my opinion that § 16.1-284's time restriction would apply and such juvenile could serve only twelve months in jail.

You next ask whether the court can impose five twelve-month jail sentences to run concurrently upon a juvenile who is found guilty of five felony charges committed on a one-night spree. Again, since the juvenile would be before the court to be sentenced for "multiple offenses," the restrictions of § 16.1-284 would apply; however, since the imposition of concurrent sentences in such a situation would mean that the juvenile would serve no more than twelve months in jail, it is my opinion that the court could impose such sentences.

Your next question deals with a juvenile who is found guilty of felony charges in three separate jurisdictions. You inquire whether the respective courts in each jurisdiction
can impose twelve-month jail sentences and, if so, can the juvenile be required to serve the sentences consecutively. In my opinion the language of § 16.1-284 evinces an intention of the legislature to establish an absolute maximum of twelve months as the period a juvenile may serve in jail for a single offense or multiple offenses. If consecutive sentences were to be imposed, the restriction against serving more than twelve months in jail for multiple offenses would be violated, and it is my opinion, therefore, that, while these courts could sentence such a child to twelve months in jail, they could not order the juvenile offender to serve such sentences consecutively.

Finally, you pose a situation where a juvenile commits a series of offenses over a short period of time and the Commonwealth elects to bring the charges one at a time, and ask whether the court can sentence such juvenile to twelve months in jail on each charge. As noted above, a juvenile and domestic relations district court may not impose a sentence under § 16.1-284 which would run longer than twelve months even if the juvenile is before the court for "multiple offenses." It is my opinion, therefore, that, although the Commonwealth brings the charges one at a time, this must be seen as "multiple offenses," and the court could not impose a sentence of longer than twelve months in jail for these charges.

1Section 16.1-284 reads as follows: "If a child fifteen years of age or older is charged with an offense which if committed by an adult would be a misdemeanor or a felony and the court after receipt of a social history compiled pursuant to § 16.1-273 finds that (i) such child is not, in the opinion of the court, amenable to treatment or rehabilitation as a juvenile through available facilities, considering such factors as the nature of the present offense or the nature of the child's prior delinquency record, the nature of the past treatment efforts and the nature of the child's response to past treatment efforts and (ii) the interests of the community require that the child be placed under legal restraint or discipline, then the court may, in such cases, impose the penalties which are authorized to be imposed on adults for such violations, not to exceed twelve months in jail for a single offense or multiple offenses and subject to the provisions of § 16.1-249 B (i), (ii) and (iii). Provided, however, no child who is found guilty of an offense which would be a misdemeanor if committed by an adult shall be confined pursuant to this section for a longer period of time than is authorized for an adult in § 16.1-11 of the Code."

LAW-ENFORCEMENT OFFICERS. CHESAPEAKE DOG WARDEN IS NOT "LAW-ENFORCEMENT OFFICER" AS DEFINED IN § 2.1-116.1.
November 19, 1979

The Honorable William T. Parker  
Member, House of Delegates

You have asked whether the Chesapeake dog warden is included within the definition of "law-enforcement officer" set forth in § 2.1-116.1 of the Code of Virginia (1950), as amended.

Sections 2.1-116.1, et seq., establish certain procedural guarantees which must be observed when disciplinary measures are contemplated against law-enforcement officers. Section 2.1-116.1 defines those officers entitled to these guarantees. This section defines a law-enforcement officer as: "any person, other than a Chief of Police...who, in his official capacity, is authorized by law to make arrests and who is a nonprobationary member of...[the] police department, bureau or force of any political subdivision of the Commonwealth of Virginia where such department, bureau or force has ten or more law-enforcement officers; provided however, this shall not include the sheriff's department of any city or county."

Chesapeake's City Code establishes an office of city dog warden, who in part shall have all the powers and duties of a game warden in the enforcement of the provisions of the city's and Commonwealth's dog laws. Thus, whether dog wardens are "law-enforcement officers" under § 2.1-116.1 depends upon the question whether game wardens (whose powers are bestowed upon Chesapeake's dog warden) can be considered police officers.

Under § 29-32, a game warden is empowered to arrest "any person found in the act of violating any of the provisions of the hunting, trapping and inland fish laws." Further, a game warden has general police power in the performance of his duty on properties owned or controlled by the Commission of Game and Inland Fisheries. Also, game wardens may make warrantless arrests of people committing several specified offenses, and may execute certain searches and seizures.

Despite these powers possessed by game wardens, it is my opinion that they cannot be considered police officers. While game wardens have some powers similarly held by police officers, their authorities are distinguishable in that, unlike policemen, they may act only with regard to the various game and related laws.

I note that this Office has taken comparable positions in previous Opinions. For example, it has been held that the authority of a game warden to make arrests does not extend to arresting a person having in his possession a stolen boat or outboard motor. This Office has also concluded that a game warden is not a conservator of the peace for the enforcement of any provisions other than hunting, trapping, inland fish and dog laws.
Therefore, since Chesapeake's Code equates the powers of its city dog warden with those of a game warden, it is my conclusion that the former likewise cannot be considered a police officer. Accordingly, a city dog warden is not encompassed within the provisions of § 2.1-116.1.

1Chesapeake, Va., Code § 4-14(1970) states: "The office of City dog warden is hereby created...The City dog warden shall have all the powers and duties of a game warden in the enforcement of the provisions of this article and the dog laws of the City and State and such other duties as may be prescribed by this Code or other ordinance of the city."

2Section 29-32.
3Section 29-32.1.
4Section 29-33.

LAW-ENFORCEMENT OFFICERS. WHETHER VARIETY OF OFFICIALS AND INVESTIGATORS ARE "LAW-ENFORCEMENT OFFICERS" AS DEFINED IN § 9-108.1H.

November 19, 1979

Mr. R. H. Geisen, Executive Director
Criminal Justice Services Commission

You have asked whether a variety of officials and investigators are encompassed within the term "law-enforcement officer", as defined in § 9-108.1(H) of the Code of Virginia (1950), as amended.

Under § 9-108.1(H), a law-enforcement officer includes "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, and shall include any member of the Enforcement or Inspection Division of the Alcoholic Beverage Control Commission vested with police authority." Thus, apart from its other prerequisites, this provision on its face applies only to a full-time employee of a police department or sheriff's office.

Previous Opinions of this Office dealing with the definition of a law-enforcement officer, when taken as a whole, stand for the proposition that employees of State administrative agencies are not such officers, even though they may exercise certain powers similarly possessed by police officers.1 This results both from the fact that they are not members of police departments as such, and also that individuals using law-enforcement powers in a limited sphere and for primarily administrative or regulatory purposes are
simply not police officers. For example, this Office held
that officers of the Animal Welfare League in Arlington
County were not "law-enforcement officers" despite the fact
that they were statutorily empowered to make arrests and
conduct certain searches and seizures. Similarly, it was
held that deputy sheriffs who were courtroom security
officers did not fall within the terms of § 9-108 (the
predecessor statute of § 9-108.1(H)) since they did not have
law-enforcement as their primary responsibility.

Further, I believe that the definition of a police
officer as set forth by one court is highly pertinent:

"'[T]he title of policeman [may] be properly applied to
one who performs services critical to public safety in
the investigation and detection of serious crimes - a
person trained, equipped (with gun, handcuffs, badge
of office and motor vehicles) and actually engaged in
the detection of persons suspected of crime....'

"'[F]ire marshals, mine inspectors, factory inspectors,
boiler inspectors, and milk inspectors are all charged
with law enforcement duties, but they help enforce laws
affecting only special subjects, while a policeman's
duty is the enforcement of all laws whose violation
affects the peace and good order of the Community.'"

Another reason exists for construing § 9-108.1(H) to
exclude from its application agents of administrative or
regulatory agencies who possess limited law-enforcement
powers. This statute explicitly includes any member of the
Enforcement or Inspection Division of the Alcoholic Beverage
Control Commission vested with police authority. Under
familiar rules of statutory construction, the express
inclusion of one such regulatory body is the implied
exclusion of other comparable bodies.

Therefore, because they are not employees of a police
department (or a sheriff's office), it is my opinion that the
following do not fall within the terms of § 9-108.1(H):
fuels tax investigator; industrial safety representative;
OSHA voluntary compliance and training representative; State
park ranger; motor carrier investigator; humane officer for
the City of Norfolk; State forest warden; marine resources
inspector - mate A and captain A; game wardens A, B, and C;
game patrol pilot; game and assistant game warden
supervisors; game law enforcement chief and his assistant
chiefs; and vehicle regional representative B.

In contrast, my review of the job summaries you have
closed indicates that the following are "law-enforcement
officers" under § 9-108.1(H): institutional policemen and
their police chief at State mental hospitals; institutional
policemen on D.M.V. grounds; and a vehicle investigation and
security chief on D.M.V. property. Although an employee's
duties will have to be examined on an individual basis and a
determination made as to each factual context, it appears
from the enclosed job summaries that these various officials are properly classified as law-enforcement officers. They constitute organized departments with the authority to exercise law-enforcement powers in a broad manner. They seemingly may arrest anyone for a violation of law, and may conduct investigations on a variety of possible criminal acts. Under these circumstances, I think that they fall within the scope of § 9-108.1(h).}

1See, e.g., the following Opinions in which the official in question was held not to be a "law-enforcement officer": Reports of the Attorney General (1974-1975) at 116 (air crash rescue/security attendants); (1974-1975) at 111 (correctional personnel); (1970-1971) at 346 (state fire marshal). See, also, Report of the Attorney General (1973-1974) at 217 (policeman for Virginia Port Authority is "law-enforcement officer"). Cf. Reports of the Attorney General (1975-1976) at 3; (1974-1975) at 237.


3Report of the Attorney General (1973-1974) at 327. See, also, Report of the Attorney General (1972-1973) at 247, 248 (deputy sheriff is "law-enforcement officer" under § 14.1-73.2 if he is primarily responsible for law enforcement, "as would be comparable to a municipal police officer in a detective or patrol assignment.").


5See Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).


LIABILITY. RESTAURANT EMPLOYEE WHO USES "HEIMLICH MANEUVER" TO AID CHOKING VICTIM RATHER THAN TECHNIQUE ENDORSED BY RED CROSS DOES NOT CREATE BASIS FOR LIABILITY IF EMPLOYEE ACTS IN GOOD FAITH AND WITHOUT COMPENSATION.

September 19, 1979

The Honorable Herbert H. Bateman
Member, Senate of Virginia

This is in reply to your inquiries concerning Virginia's "Good Samaritan" statute. You have asked whether a restaurant employee, who has completed a voluntary or a compulsory training program in antichoking procedures, is a person rendering emergency care "without compensation" within the meaning of the statute.

The Good Samaritan statute grants immunity to "[a]ny person who, in good faith, renders emergency care or assistance, without compensation, to any injured person... at any life-threatening emergency..." (Emphasis added.) See § 54-276.9. A literal reading of this statute is that
restaurant employees may qualify for this immunity, as any other person may, if they act in good faith and without compensation for their efforts.

"Compensation" is not defined affirmatively in the statute but rather negatively. This definition excludes the salaries of various public employees, such as policemen and emergency medical personnel. That the statute's protection is extended to persons, who can be expected to confront life threatening emergencies, such as choking incidents, routinely in their duties, is persuasive that the General Assembly was striving to extend the statute's immunity not merely to an untrained layperson but rather to any person, including one who may have received specialized training.

Despite certain remedial aspects of the statute, it must be strictly construed since it is in derogation of the common law. Sellars v. Bles, 198 Va. 49, 53, 92 S.E.2d 486 (1956). The Supreme Court of Virginia has construed "compensation" in other instances to be "a recompense given for a thing received..." or "an earned emolument of...labor." Consequently, I conclude that restaurant employees who voluntarily complete training in antichoking techniques may enjoy the immunity of the statute, if they act in good faith as paid employees of the restaurant because they receive no compensation for assisting choking victims.

With respect to employees who are required by a restaurant's owner to take the course, I am of the opinion that they, too, may enjoy the statute's immunity, but only so long as the conditions of the employment do not require them to lend assistance. Simply because a restaurant owner requires training as a condition of employment is not tantamount to a requirement that the employee must use his knowledge in an emergency situation in a restaurant. In the latter case, it would appear the employee would be rendering emergency care for compensation, i.e., his or her salary, and, therefore, he or she would not qualify for the statute's immunity. This interpretation of the law is, in my opinion, consistent with a strict construction of the statute and Supreme Court's past definitions of "compensation."

You have also asked whether there is any basis for liability if a restaurant employee uses the "Heimlich Maneuver" to disgorge food from a choking victim, rather than using a similar procedure endorsed by the American Red Cross. In my opinion, no liability would arise merely because a "good samaritan" elected to use a particular procedure. Whether or not a procedure has been endorsed by private organizations has no bearing on the issue of liability if the person using the procedure acts in good faith and without compensation.

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1The statute is currently § 54-276.9 of the Code of Virginia (1950), as amended. Effective October 1, 1979, that
statute is repealed in Title 54 and is reenacted in Title 8.01 as § 8.01-225. The provisions of the law are not changed in any significant fashion by the transfer.

Section 54-276.9(e) provides: "For the purposes of this section, the term 'compensation' shall not be construed to include the salaries of police, fire or other public officials or emergency service personnel who render such emergency assistance, nor the salaries or wages of employees of a coal producer engaging in emergency medical technician services or first aid service pursuant to the provisions of § 45.1-101.1 or § 45.1-101.2."


LICENSES. BEAUTY SALONS. ELECTROLYSIS NOT COSMETIC TREATMENT OF TYPE REQUIRING LICENSE.

February 8, 1980

Mrs. Ruth J. Herrink, Director
Department of Commerce

You have asked whether the statutes and regulations governing the activities of professional hairdressers would allow: (1) an electrologist to perform electrolysis in a beauty salon; (2) a manicurist, shampoo girl or apprentice to perform electrolysis in a beauty salon; or (3) a licensed hairdresser or licensed barber to perform electrolysis in a beauty salon.

Section 54-112.26 of the Code of Virginia (1950), as amended, states that no person, firm or corporation shall operate or attempt to operate a beauty salon unless duly licensed. Section 54-112.2(4) defines a beauty 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 54-112.2(1) defines "cosmetic" as "any external application or substance intended to beautify and improve the complexion, skin or hair."

For any of your questions to be answered in the negative, electrolysis would have to qualify as a cosmetic treatment as defined in § 54-112.2(1). Electrolysis is defined as the "removal of unwanted hair from the body by destroying the hair roots with an electrified needle." See Webster's New World Dictionary of the American Language, Second Edition, Collins & World, 1976. In a previous Opinion I have held that the use of electrical instruments in effecting skin treatments is not included in the definition of "cosmetic" under § 54-112.2(1). See Opinion directed to yourself dated December 27, 1978, and found in Report of the Attorney General (1978-1979) at 207.
I am, therefore, of the opinion that the answer to each of your three questions is yes.

LICENSES. REQUIREMENT FOR OUT-OF-STATE EMPLOYMENT AGENCY TO BE LICENSED IN ORDER TO CHARGE PLACEMENT FEES.

July 26, 1979

Mrs. Ruth J. Herrink, Director
Virginia Department of Commerce

You have asked whether an employment agency located in Maryland need be licensed in Virginia to: (1) place a Maryland resident with a Virginia employer and charge a service fee to the Virginia employer; (2) place a Virginia resident with a Maryland employer and charge a service fee to the Virginia resident; (3) place a Virginia resident with a Virginia employer and charge a service fee to either the Virginia employer or the Virginia resident. You further inquire whether § 54-872.17(7)(a) of the Code of Virginia (1950), as amended, would require a Maryland employment agency needing a license in any of these circumstances to maintain an office in Virginia.

An employment agency must be licensed to "do business" in the Commonwealth. See § 54-872.17(1).

Hence, the answer to your questions hinges on whether the various factual circumstances they describe constitute doing business in the Commonwealth.

Virginia law defines the term "engaged in business," which is essentially synonymous with the terminology "do business" of § 54-872.17(1), as follows:

"It means a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit.***It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction, in the absence of a statute specifically providing otherwise." Krauss v. City of Norfolk, 214 Va. 93, 95, 197 S.E.2d 205, 206-207 (1973); Young v. Town of Vienna, 203 Va. 265, 267, 123 S.E.2d 388, 390 (1962).

Particularly instructive with respect to your inquiry is Walton v. Commonwealth, 187 Va. 275, 46 S.E.2d 373 (1948). In that case an embalmer, funeral director and undertaker, who was licensed in Tennessee but not in Virginia, conducted a funeral in Virginia after embalming the body in Tennessee. He was convicted of violation of a statute making it unlawful to engage in the funeral directing business in Virginia without a license. On appeal the Supreme Court reversed, holding that one act of conducting a funeral in Virginia did not constitute doing business in Virginia. The court noted that the terms "doing business" or "conducting a business"
were generally considered to contemplate performance of a continued series of acts, and stated: "The idea of continuity or sustained activity is implicit in the terms." Id. at 282.

Important considerations in the determination of whether the activity in question is continuous are: (1) whether substantial revenue is derived from it, Jackson v. National Linen Service, 248 F.Supp. 962, 965 (W.D. Va. 1965); (2) whether continuous solicitation resulting in sales and payment of commissions is employed, Eastern Livestock Cooperative Marketing Ass'n v. Dickerson, 107 F.2d 116, 118 (4th Cir. 1939); whether an intent to engage in the business is clearly apparent, Guynn, v. Shulters, 223 Miss. 232, 251-252, 78 So.2d 114, 121 (1955).

The answer to all of your questions is therefore dependent upon whether the Maryland employment agency is performing the actions about which you inquire on a continuous basis. If it is, then it must be licensed in Virginia to continue this activity. And if it must be licensed, it also must maintain an office in Virginia conforming to the requirements of § 54-872.17(7)(a).

The section states in part: "No license shall be granted to conduct an employment agency without an office in this Commonwealth consisting of at least a room or rooms furnished as an office."

LICENSES. SALE AND INSTALLATION OF OFFICE EQUIPMENT. NO NEED FOR CONTRACTOR'S LICENSE.

January 18, 1980

The Honorable Raymond R. Guest, Jr.
Member, House of Delegates

You have asked whether those who sell and install office equipment and fixtures, including carpeting, are required to register with the State Registration Board for Contractors under § 54-128 of the Code of Virginia (1950), as amended. That section requires, in pertinent part, that it shall be unlawful for any person to engage in, or offer to engage in, general contracting or subcontracting in this State unless he has been duly licensed and issued a certificate of registration by the State Registration Board for Contractors. Section 54-113 defines "general contractor" or "subcontractor" as "any person, firm, association, or corporation that for a fixed price, commission, fee or percentage undertakes to bid upon, or accepts, or offers to accept, orders or contracts for performing or superintending in whole or in part, the construction, removal, repair or improvement of any building or structure permanently annexed to real property owned, controlled or leased by another
person or any other improvements to such real property when either (a) the total value of all such construction, removal, repair or improvements referred to in a single contract or project is sixty thousand dollars or more or (b) the total value of all such construction, removal, repair or improvements undertaken by such person within any twelve-month period is four hundred thousand dollars or more." The answer to your question turns upon whether the installation of office equipment and fixtures, including carpeting, would be considered to be an "improvement" to a building or structure as contemplated by the statute.

In answering this question, there are two obvious limitations which can be imposed at the outset. First, even if the activity about which you ask were to be considered an improvement under the statute, there would be no need for an individual performing such work to be licensed unless he performed such work in excess of the values established. Second, in addressing exactly what an "improvement" is under the statutory definition, it seems clear that the term refers to a permanent enhancement to the building or structure itself, not to a mere addition of moveable chattels. Thus, such items as desks, file cabinets, tables and other articles of office furniture would not be covered.

This leaves us with the question of whether items of office equipment may become fixtures and, if so, if they would be covered by the statutory language. "A fixture is an article which was a chattel, but which, by being affixed to the realty, becomes accessory to it and parcel of it." 8B M.J. Fixtures § 2 (1977). An improvement to the realty would become a fixture if: (1) it were annexed to the realty or something appurtenant thereto; (2) it was the intention of the party making the annexation to make a permanent addition to the freehold; and (3) it was so adapted to the element of the reality to which it was annexed that its severance would diminish the usefulness of that reality. See, supra, § 3. Applying this tripartite test to office equipment and carpet, it seems clear that these items would not be considered to be fixtures. Not being fixtures, they would not constitute improvement to the realty and would thus not necessitate that a licensed contractor install them.

LINE OF DUTY ACT. PAYMENT FOR DEATH WHILE PERFORMING DUTIES IN ANOTHER JURISDICTION.

February 18, 1980

The Honorable Richard J. Holland
Member, Senate of Virginia

You ask whether the Line of Duty Act (the "Act") obligates a political subdivision to make payments on behalf of firemen or rescue squad members killed while performing firefighting or rescue squad duties in another jurisdiction.
Section 15.1-136.2 of the Code of Virginia (1950), as amended, provides that the benefits of the Act are available to certain law enforcement officers, firemen and rescue squad members whose death occurs "as the direct or proximate result of the performance of his duty...." Accordingly, benefits would be payable in the case of one killed while rendering services to another political subdivision when he was under a duty to do so.

Whether such a duty exists will depend on the facts of a particular case. However, any time there is an agreement between political subdivisions for such services, the Act would apply.

LOTTERIES. CONDUCTING "INSTANT BINGO" GAMES.

December 14, 1979

The Honorable Taylor C. Wilson, Jr.
Commissioner of the Revenue for the City of Hampton

You ask three questions concerning the operation of bingo games by organizations that hold bingo and raffle permits. First, you ask when "instant bingo" can be played; how many times it can be played, and at what time instant bingo cards can be sold.

Section 18.2-340.5 of the Code of Virginia (1950), as amended, states that "'instant bingo' may be conducted only at such times as a regular bingo game as defined in § 18.2-340.12 is in progress and only at such location and at such times as are specified in the bingo application permit...." This language makes it clear that "instant bingo" can only be played in conjunction with a regular bingo game. The statute, however, does not specify the number of times a night "instant bingo" may be played, nor does it indicate when such "instant bingo" cards may be sold.

In answering these questions weight must be given to the object of the statute and the purpose to be accomplished thereby, and reasonable construction of the statute must be made so that the purpose of the statute will not be limited or defeated, but instead will be promoted. Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961). To interpret the language used in the statute literally would mean that "instant bingo" could only be played at the same exact time as regular bingo is being played. This would make the playing of "instant bingo" practically impossible and is obviously not what the legislature intended. It is my opinion that a reasonable interpretation of the language used would lead to the conclusion that "instant bingo" cards can be sold for a short period before and after regular bingo games, as well as during any intermissions. Such an interpretation would facilitate the playing of "instant bingo," without expanding its scope beyond the permissible limits. Additionally, it is my opinion that "instant bingo"
can be played as often as it is practical, within this time frame, and as long as the proceeds of the "instant bingo" games do not exceed the limitations placed upon them by the legislature.¹

You further ask whether "Nevada" cards can be substituted for the regular "instant bingo" cards under § 18.2-340.5. "Nevada" cards are different from the usual "instant bingo" cards in that they do not spell out the word bingo but use other symbols to determine a winner. Section 18.2-340.1(4) defines "instant bingo" as a "specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the preprinted appearance of the letters B.I.N.G.O...." The language used by the legislature in defining the type of cards to be used in "instant bingo" is clear, and leaves no room for construction. It is my opinion, therefore, that the "Nevada" cards cannot be used for "instant bingo" since they do not conform with the statute.

Finally, you have asked about jackpots awarded in bingo games. You want to know how a jackpot is defined, and how often a jackpot can be awarded. These questions have been answered in an Opinion to the Honorable James A. Cales, Jr., Commonwealth's Attorney for the City of Portsmouth, dated November 13, 1979, a copy of which is enclosed for your information.

¹§ 18.2-340.5 states in part that "[t]he gross receipts in the course of a reporting year from the playing of 'instant bingo' shall not exceed thirty-three and one-third per centum of the gross receipts of an organization's bingo operation."

LOTTERIES. CONSIDERATION. INCENTIVE PROGRAM WHERE PURCHASE REQUIRED CONSTITUTES CONSIDERATION.

April 22, 1980

The Honorable Gladys B. Keating
Member, House of Delegates

You ask whether a Virginia corporation may encourage its employees to take part in its annual savings bond drive by running a lottery for those participating. You have advised this Office that once an employee buys a savings bond, his or her name will be placed in a pool. At the end of the drive, a name will be drawn from the pool with the prize to be an additional savings bond. However, employees will not be required to participate and no pecuniary benefit will accrue to the corporation.

This Office has often been asked whether a certain activity constitutes illegal gambling or an illegal lottery under the provisions of § 18.2-325 of the Code of Virginia
(1950), as amended. Consistent with the decision of the Virginia Supreme Court in Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931), this Office has repeatedly stated that a certain activity constitutes illegal gambling or an illegal lottery when the elements of the prize, chance, and consideration are present together. In the factual situation you pose, the elements of prize and chance are clearly present.

With respect to consideration, as noted in a recent Opinion of this Office, a copy of which is attached, both the Virginia Supreme Court and this Office have liberally construed consideration for the purpose of defining illegal gambling. Since eligibility for the prize is dependent upon an initial purchase, it is my opinion that consideration is present. Because of the required purchase, § 18.2-332 would not be applicable. Therefore, such a lottery would be considered illegal gambling and its implementation would be barred by § 18.2-326. In this connection, I refer you to an Opinion of this Office, dated December 10, 1968, to the Honorable Royston Jester, III, Commonwealth's Attorney for the City of Lynchburg, in which a similar situation was considered and discussed. See Report of the Attorney General (1968-1969) at 142.

1Section 18.2-325 provides in part: "(1) 'Illegal gambling.'--The making, placing or receipt, of any bet or wager in this State of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling."


3See Opinion to the Honorable W. Alan Maust, Commonwealth's Attorney for the City of Hampton, dated February 12, 1980.

4Section 18.2-332 provides: "In any prosecution under this article, no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith." (Emphasis added.)

LOTTERIES. ELEMENTS OF ILLEGAL GAMBLING UNDER § 18.2-325(1).
The Honorable W. Alan Maust
Commonwealth's Attorney for the City of Hampton

You ask whether the Hotel Chamberlain, a privately owned non-charitable facility, may conduct bingo games for its guests in an effort to attract new guests. You state that no charge would be added to the customers' bill for the games, and that small prizes would be awarded.

The Hotel Chamberlain obviously does not qualify as an organization under the definitions as set forth in § 18.2-340.1 of the Code of Virginia (1950), as amended, and, therefore, a bingo permit cannot be issued to it. Thus, the dispositive issue of your inquiry is whether the activities outlined above constitute illegal gambling under § 18.2-325.

In past Opinions of the Attorney General this statute has been interpreted to mean that when the elements of prize, chance, and consideration combine, the activity constitutes illegal gambling. There is no question that the bingo games sought to be conducted by the Hotel Chamberlain involve the elements of prize and chance. It is my opinion that the element of consideration is also present in such a situation, and, therefore, conducting such games would constitute illegal gambling under § 18.2-325(1).

In reaching this conclusion I have taken notice of the fact that historically the Virginia Supreme Court has taken a broad view of what constitutes consideration for the purposes of defining a lottery. In Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931), the Virginia Supreme Court held that where the object of the defendant in conducting a lottery was unquestionably to attract persons to the premises with the hope of deriving benefit from them, then sufficient consideration existed for a lottery conviction.

Opinions of this Office have also liberally construed consideration for the purpose of defining illegal gambling. Since participation in the bingo games to be conducted at the Hotel Chamberlain would be limited to persons who have paid for a room at the hotel, pecuniary benefit would be derived by the hotel from conducting the games, and consideration would thus exist. I am, therefore, of the opinion that all the elements of illegal gambling (prize, chance, consideration are present in the Hotel Chamberlain's plan, and thus the operation of such games would be barred by § 18.2-325.

Section 18.2-325 states that "illegal gambling" constitutes "[t]he making, placing or receipt, of any bet or wager in this State of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest
REPORT OF THE ATTORNEY GENERAL

or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling."


3Section 18.2-332 which was enacted after the Maugh decision, has invalidated the holding in Maugh that mere "attendance upon the premises of another" is sufficient consideration for a lottery. However, the impact of the decision remains basically the same, i.e., for purposes of defining a lottery the element of consideration will be liberally construed.

4See, e.g., Reports of the Attorney General (1962-1963) at 119 and (1968-1969) at 142-143.

LOTTERIES. FILING FEES COLLECTED BY LOCALITIES FOR AUDITING BINGO RECEIPTS SHALL BE CHARGED FOR ONLY THE PERIOD SINCE § 18.2-340.7(B) HAS BEEN EFFECTIVE. § 18.2-340.7(B) SHALL NOT APPLY RETROACTIVELY.

January 7, 1980

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

You ask whether § 18.2-340.7(B) of the Code of Virginia (1950), as amended, is to be applied retroactively. This section operates in conjunction with § 18.2-340.6, and allows local governing bodies to charge organizations conducting bingo games for auditing their annual reports. The reports on which the auditing fee is to be charged are to cover a twelve month period running from October to October. Since these sections became effective on July 1, 1979, you have asked whether the auditing fee may be charged for the previous twelve month period, or only on those receipts received since the new statute became effective.

One of the most basic rules of statutory construction is that a new law, except as to matters of remedy, will be presumed to be prospective and not retroactive in its application. See Papen v. Papen, 216 Va. 879, 224 S.E.2d 153 (1976), citing § 1-16. This general rule will apply absent a contrary intent indicated by the legislature. See, also, Martin v. Bankers Trust Co., 417 F.Supp. 923 (W.D. Va. 1976). Since these statutes allowing local governing bodies to charge auditing fees do not manifest an intent by the legislature that they apply retroactively, it is my opinion that they apply prospectively only. Thus, the auditing fee set out in § 18.2-340.7(B) can only be levied on the proceeds generated by bingo operations conducted on and after July 1, 1979.

1Section 18.2-340.7(B) states: "[t]he local governing body shall establish a reasonable audit fee not to exceed one per
The language in § 18.2-340.3(2) is somewhat unclear. It provides that upon relocation, a qualified organization must both meet the requirements of § 18.2-340.3(1), and further, that such organization be the holder of a valid permit at the time of relocation. A literal interpretation of this language could lead to the conclusion that after relocation an organization which already holds a bingo permit would have to be in residence for two years before it could be issued a bingo permit in the jurisdiction to which it relocated. I do not believe that this is what the legislature intended when it provided for the issuance of bingo permits upon the relocation of qualified charitable organizations under § 18.2-340.3(2). If the legislature had intended that an organization which relocated wait two years before being granted a permit, there would have been no necessity of providing the exception for relocation. Under the provisions of § 18.2-340.3(1) any qualified organization which has been in existence and has met on a regular basis for at least two years may receive a permit. Therefore, the provision in § 18.2-340.3(2) relating to relocation would be without meaning.

It has been judicially stated that, "But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislature to enact it...." Simpson v. Simpson, 162 Va. 621, 635, 175 S.E. 320, 326 (1934). (Emphasis added.) It is my opinion that the legislature intended § 18.2-340.3(2) to allow the immediate issuance of bingo permits to charitable organizations which already hold such permits before relocating in another jurisdiction.
Therefore, any ambiguity in the statute should be resolved in favor of the issuance of a bingo permit to qualified organizations already holding such permits which relocate in other jurisdictions within the State. Such organizations should not be required to maintain their new residence for two years before the bingo permit is issued.

Section 18.2-340.3(2) provides in part that "[A] permit may be issued to an organization which relocates its meeting place on a permanent basis from one jurisdiction to another and complies with the requirements of subsection 1 of this section and provided further that such organization was the holder of a valid permit at the time of such relocation...."

Section 18.2-340.3(1) requires that before the issuance of a permit, "Such organization shall have been in existence and met on a regular basis in the city or county where application is made for a period of at least two years immediately prior to making application for such permit...."

LOTTERIES. NO REQUIREMENT FOR RECORD KEEPING FOR WINNERS OF INSTANT BINGO.

August 13, 1979

The Honorable Nathan H. Miller
Member, Senate of Virginia

You ask whether the requirement of § 18.2-340.6(D)1 of the Code of Virginia (1950), as amended, pertaining to records of winners of prizes at bingo games, also applies to "instant bingo."

The 1979 Session of the General Assembly completely revised the laws concerning bingo games and raffles. Procedures were instituted to strictly regulate bingo, and § 18.2-340.6(D) prescribes the record-keeping requirement for door prizes, regular and special bingo games, and jackpot games.

"Instant bingo," although defined in § 18.2-340.1, is not mentioned in § 18.2-340.6(D). Moreover, record-keeping requirements for "instant bingo" are set out in § 18.2-340.5(D).

The reason for the requirements for record-keeping is to permit audits of the receipts and disbursements of funds derived from bingo. In bingo games this can only be accomplished by having the names and addresses of the winners. In "instant bingo," however, the receipts and disbursements can be easily determined by the record of the number and card value of "instant bingo" cards purchased and sold by the organization as required in § 18.2-340.5(D).
Accordingly, it is my opinion that § 18.2-340.6(D) pertaining to records of winners of prizes at bingo games, does not apply to "instant bingo."

1Section 18.2-340.6(D) provides in part:
"The organization shall maintain a record in writing of the dates on which bingo is played, the number of people in attendance on each date and the amount of the receipts and prizes paid on each such day. The organization shall also maintain a record of the name and address of each individual to whom a door prize, regular or special bingo game prize or jackpot from the playing of bingo is awarded, as well as the amount of such award."

2Section 18.2-340.5(D) provides:
"Any organization playing 'instant bingo' shall maintain a record of the date, quantity and card value of instant bingo supplies purchased as well as the name and address of the supplier of such instant bingo supplies. The organization shall also maintain a written invoice or receipt from a nonmember of the organization verifying any information required by this subsection."

MAGISTRATES. BAIL. REFUSAL TO RELEASE ON BAIL MAY BE BASED ON FAILURE TO OBTAIN IDENTIFYING INFORMATION.

May 1, 1980

The Honorable E. S. Kitchen, Jr.
Sheriff of Sussex County

You ask whether a magistrate may refuse to release an individual on bond until the person furnishes information identifying himself.

Section 19.2-123 of the Code of Virginia (1950), as amended, authorizes the release of an accused on an unsecured bond or promise to appear. In deciding whether to release an accused the statute requires the judicial officer to take into account the accused's family ties, employment, financial resources, the length of his residence in the community, and his record of convictions as well as other criteria in determining whether the defendant is likely to absent himself from court proceedings. In my opinion these factors necessarily require identifying information.

Section 19.2-120 provides that an accused shall be admitted to bail unless there is probable cause to believe such person will not appear for trial or his liberty will constitute an unreasonable danger to himself or the public. If an individual were to be released without furnishing information identifying himself, there would be no incentive for such person to appear at trial. Without identifying information the authorities would be in no position to ensure a court appearance, and the accused could disregard the
consequences of his arrest without fear of having to answer for it in the future.

It is my opinion that when a person refuses to supply information identifying himself probable cause arises that such person will not appear for trial, and a magistrate may refuse to release him on bond or upon his promise to appear.

MARINE RESOURCES COMMISSION. AUTHORIZED TO ISSUE LICENSES FOR DRAWN FISHING DEVICES TO RESIDENT CORPORATIONS. FOREIGN STOCK CORPORATION ADMITTED TO STATE IS RESIDENT CORPORATION.

January 22, 1980

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You ask two questions about the authority of the Marine Resources Commission (the "Commission") to issue licenses to corporations for "drawn fishing devices."

Authority to Issue Licenses for Drawn Fishing Devices to Resident Corporations

Your first question is whether, under §§ 28.1-67 to 28.1-72.1 of the Code of Virginia (1950), as amended, the Commission is authorized to issue licenses for drawn fishing devices to resident corporations, as distinguished from natural persons.

Section 28.1-67 makes it unlawful for any "person, firm or corporation" to operate the drawn fishing devices described therein, unless licensed. Vessels, boats and other craft are subject to complementary prohibitions, pursuant to § 28.1-68.

Section 28.1-69.1 authorizes issuance of certain licenses to unspecified entities, specifically including "nonresidents" under certain conditions. Section 28.1-70 similarly authorizes issuance of licenses to unspecified entities, upon payment of a fee for each boat so employed. Section 28.1-71 specifies what constitutes prima facie evidence that the operator or operators, master, and crew members are guilty of unlawful trolling or trawling.

The statutes, therefore, regulate drawn fishing devices by reference to persons, firms, corporations, vessels, boats, other craft, nonresidents, residents, operators, masters, crew members and unspecified entities, without defining or specifying the entities licensed.

Generally, the term "persons" comprehends corporations unless they are excluded by the statute's terms or by the nature of the subject to which the statute relates. For example, § 1-13.19 provides that the word "person" may extend and be applied to "bodies politic and corporate as well as
individuals. See Baltimore and Ohio R.R. Co. v. Gallahue's
Adm'rs, 53 Va. (12 Gratt.) 655, 662-665 (1855) (corporation
is person subject to being summoned as garnishee); Miller's
Ex'r. v. Commonwealth, 68 Va. (27 Gratt.) 110, '12-116 (1876)
(corporate legatee is person under statute imposing tax on
collateral inheritances); Sun Life Assurance Co. v. Bailey,
101 Va. 443, 446-447, 44 S.E. 692, 693 (1903) (corporation is
person under insulting words statute).

Inasmuch as there is no exclusion of corporations either
by the text of these statutes, or by the nature of the
subject to which they relate, I find that the Commission is
authorized to issue licenses to resident corporations.

Definition of "Resident" Corporations
Entitled to Licenses for Drawn Fishing Devices

Your second question is whether a foreign stock
corporation admitted to this State under Title 13.1 is a
"resident" corporation to which the Commission may issue
licenses.

Generally, a foreign corporation is authorized to
transact business in this State much as a domestic
their other powers, may conduct their business, carry on
their operations, hold property, have offices, and exercise
the powers granted by the Virginia Stock Corporation Act
(Ch. 1 of Title 13.1) within or without this State. See

There are a number of powers and purposes that foreign
corporations are expressly forbidden by law to exercise in
this State. For example, under the Constitution of Virginia
(1971), Art. IX, § 5, no foreign corporation may carry on in
this State the business of, or exercise any of the powers or
functions of, a public service enterprise. Also, under
§ 6.1-5, with certain exceptions, no foreign corporation may
do a banking or trust business in this State. I find no
comparable provision forbidding foreign corporations from
fishing in this State by means of the drawn fishing devices.

Further, the term "resident" as defined in § 28.1-1 does
not include the concept of primary nexus, or domicile, found
in the term "resident" as defined in § 24.1-1(11) (residence
for qualification to vote requires both domicile and place of
abode). Compare § 29-58 (inland fisheries and licenses for
domiciliary residents); also Opinion to you, dated July 31,
235 (foreign corporation admitted to State compiles with
procedural requirements and safeguards); Pendleton v.
(1909) (residence v. domicile, for tax purposes); Long v.
Ryan, 71 Va. (30 Gratt.) 718 (1878) (individual contractor
domiciled in District of Columbia, but resident in Virginia,
for attachment purposes).
Accordingly, I find foreign corporations admitted to this State under Title 13.1 are entitled to the privileges of licensure extended to resident corporations. The commission is authorized to issue to such corporations the licenses for drawn fishing devices.

1 Admission of a foreign corporation under Title 13.1 does not, however, authorize such corporation to exercise any corporate power or purpose that a foreign corporation is forbidden by law to exercise in this State. See § 13.1-103.

MEDICAID. VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS.
MEDICARE AND MEDICAID COST REPORTS IN POSSESSION OF COMMONWEALTH NOT EXEMPT FROM VIRGINIA FREEDOM OF INFORMATION ACT.

July 25, 1979

The Honorable James B. Kenley, M.D., Commissioner
Department of Health

You have asked whether certain medical cost information in possession of the State Health Department must be withheld from disclosure to the public under the Virginia Freedom of Information Act (the "Act").

Your first question is whether, in an audit information sharing agreement, the Commonwealth may preserve the confidentiality of any information received from Medicare fiscal intermediaries.

Your second question is whether the cost of reports submitted to the Commonwealth by providers of services under the Medicaid program are exempt from disclosure under the Act.

After researching applicable federal regulations and State law and regulations, it is my opinion that Medicaid and Medicare cost reports in the possession of the Commonwealth's Medicaid agency are not exempt from disclosure under the Act.

Recent federal court decisions interpreting the applicability of federal Freedom of Information Act exemptions to Medicare provider cost reports have differed upon whether those reports must be withheld from public disclosure. However, the stated exemptions to the Act of the Code, do not parallel those outlined in the federal Freedom of Information Act. See § 2.1-342(b). Moreover, no previous interpretation of the Act suggests that information exempt from disclosure by federal officials or agents is necessarily exempt from disclosure under the Act. In short, none of the exempt categories delineated in the Act are applicable to Medicaid or Medicare provider cost reports received by the Commonwealth.
The General Assembly has determined that the provisions of the Act shall be liberally construed to "afford every opportunity to citizens to witness the operations of government." See § 2.1-340.1. Further, the Act states that "[a]ny exception or exemption from applicability shall be narrowly construed...." Id. Medical and mental records are specifically excluded from public disclosure under the Act, except to the person who is the subject thereof. See § 2.1-342(b)(3). This exemption, though, makes no mention of medical assistance providers or corporate participants in the Virginia Medical Assistance Program. A narrow construction of "medical and mental records," therefore, would limit that exemption to individual, personal records.

No other provision of State law bars the disclosure of cost reports. The State Health Commissioner is required only to "safeguard information concerning applicants and recipients." See § 32-30.1(b). No corresponding language concerning providers of their cost reports can be found in either State law or in Title XIX of the Social Security Act. The confidentiality requirement in both the Act and in § 32-30.1 only concerns patient information. It cannot be inferred from that exemption that the General Assembly intended also to exempt institutional or provider information.

In summary, information "in possession of a public body" which is not otherwise excluded from disclosure, is required to be open to the public. Information contained in Medicare provider cost reports, if the reports were obtained for an audit information sharing project, cannot be withheld from the public under the Act. Comparable provider cost information now received by the Virginia Medical Assistance Program is likewise subject to public disclosure.

1Section 2.1-340 to 2.1-346.1 of the Code of Virginia (1950), as amended.
4The phrase "[e]xcept as otherwise specifically provided by law..." at § 2.1-342(a) has never been interpreted to include
provisions of federal law. It refers only to those exceptions "specifically provided" by the law of Virginia.

MENTAL HEALTH AND MENTAL RETARDATION. WHERE COMMITMENT MADE TO PRIVATE INSTITUTION PRIOR TO JULY 1, 1979, PETITIONER RESPONSIBLE FOR FEES AND EXPENSES OF HEARING.

August 17, 1979

The Honorable Beverly T. Fitzpatrick, Chief Judge
Twenty-Third Judicial District

You have asked a number of questions concerning the payment and collection of fees for mental health commitment hearings conducted in accordance with §§ 37.1-67.1, et seq., of the Code of Virginia (1950), as amended. With respect to the conflict you see between §§ 37.1-891 and 37.1-120, please note that the General Assembly has repealed the latter statute, effective July 1, 1979. See Ch. 534 [1979] Acts of Assembly. Hereafter, the State must pay all fees and costs prescribed by § 37.1-89, and may collect them from the subject of the commitment proceeding or his estate. This result will obtain whether the subject is committed to a public or private hospital or facility.

For those who were the subjects of commitment hearings before July 1, 1979, however, the two statutes must be reconciled to determine who pays the costs and fees associated with the hearings.

As originally enacted, § 37.1-89 provided that certain fees and expenses of commitment proceedings must be paid by the county or city of the subject's residence immediately prior to the admission. The fees and expenses covered were: special justices' fees, physicians' fees, clinical psychologists' fees, interpreters' fees, witnesses' fees, attorneys' fees, and costs of mileage for the foregoing persons.

This statute was amended, effective July 1, 1978, to read: "except as hereinafter provided, all expenses incurred, including the fees, attendance and mileage aforesaid shall be paid by the State." Monies expended by the State pursuant to this statute are recoverable by the State from the subject of the commitment proceedings or from his estate. The State may not recover from the person or his estate, however, when no good cause for admission exists or when recovery would create undue financial hardship.

You inquired who pays court costs if the patient and petitioner are indigent, but the patient would be eligible for medical benefits at no cost to himself or the State, and he is committed to a private institution.

Where commitment is made to a private institution, § 37.1-120 prior to its repeal provided that "[n]either the
State nor any county, city, or town thereof shall be liable in any event..." for costs of the commitment proceedings. In these situations, such costs were to be paid by those making the complaint. Where those making the complaint were indigent, such fees and expenses were not always recoverable. The commitment statutes make no distinction, however, between those who would be eligible for medical care at no cost in a private institution, and those who are not eligible for such free care.4 I am not empowered to read such a distinction into the statute at issue. Thus, where commitment was made to a private institution prior to July 1, 1979, § 37.1-120 prohibits payment of commitment costs by the State.

Moreover, § 2.1-224 provides that "[n]o money shall be paid out of the State treasury except in pursuance of appropriations made by law." Because § 37.1-120 prohibited payment of costs upon commitment to private institutions "in any event..." it is my opinion that § 2.1-224 prohibits disbursements from the State treasury for such commitment costs.

I am further of the opinion that § 37.1-120 cannot be interpreted to permit the State to pay costs upon commitment to a private institution and then seek recovery from the person or his estate. Although § 37.1-89 authorizes such recovery by the State, § 37.1-120 was an exception specifically provided for in § 37.1-89.

You next ask who pays court costs where there is no commitment and no dismissal, but the court has found a less restrictive alternative to institutionalization and orders out-patient treatment through an organization or individual other than a State hospital.

In such cases arising prior to July 1, 1979, the person making the complaint is responsible for costs if the out-patient treatment is afforded by a private institution. See § 37.1-120. If the treatment is given at a State operated mental health clinic, however, the State would pay the costs of the proceedings.

With the repeal of § 37.1-120, the State will become responsible for paying the fees and costs of all commitments according to § 37.1-89. Thus, special justices, physicians and attorneys will be paid by the State for services rendered in commitment proceedings, whether the proceedings result in commitment to a State hospital or to a private institution. For those commitment hearings held before July 1, 1979, fees and costs are payable by the State if the person is committed to a State hospital, and by the complainant if the person is committed to a private hospital. The State may, of course, recover costs from the subject of the hearing or his estate.

1Section 37.1-89 states: "Any special justice as defined in § 37.1-88 and any district court substitute judge who
REPORT OF THE ATTORNEY GENERAL

presides over hearings pursuant to the provisions of §§ 37.1-67.1 through 37.1-67.4 shall receive a fee of twenty-five dollars for each preliminary hearing, each commitment hearing and each certification hearing and his necessary mileage. Every physician, clinical psychologist or interpreter for the deaf appointed pursuant to § 37.1-67.5 who is not regularly employed by the State of Virginia who is required to serve as a witness or as an interpreter for the State in any proceeding under this chapter shall receive a fee of twenty-five dollars and his necessary expenses for each preliminary hearing, each commitment hearing and each certification hearing in which he serves. Other witnesses regularly summoned before a judge under the provisions of this chapter shall receive such compensation for their attendance and mileage as is allowed witnesses summoned to testify before grand juries. Every attorney appointed under § 37.1-65.1 or §§ 37.1-67.1 through 37.1-67.4 shall receive a fee of twenty-five dollars and his necessary expenses for each preliminary hearing, each commitment hearing and each certification hearing for which he is appointed. Except as hereinafter provided, all expenses incurred, including the fees, attendance and mileage aforesaid, shall be paid by the State. Any such fees, costs and expenses incurred in connection with an examination or hearing for an admission pursuant to § 37.1-65.1 or §§ 37.1-67.1 through 37.1-67.4 in carrying out the provisions of this chapter, when paid by the State, shall be recoverable by the State from the person who is the subject of the examination, or hearing, or from his estate. Such collection or recovery may be undertaken by the Department. All such fees, costs and expenses, if collected or recovered by the Department, shall be refunded to the State; provided further, no such fees or costs shall be recovered from the person who is the subject of the examination or his estate when no good cause for his admission exists or when the recovery would create an undue financial hardship."

2 "Section 37.1-120 states: "Neither the State nor any county, city, or town thereof shall be liable in any event for any costs or charges of sending a patient to a private institution, or connected with or arising out of his being sent there, but all costs of the proceedings, including fees payable to a special justice, district court substitute judge, attorney, physician or clinical psychologist shall be ordered to be paid by those making the complaint."

3 "Private institution" is defined in § 37.1-1(18) as: "an establishment which is not operated by the [State Mental Health and Mental Retardation] Board and which is licensed under Chapter 8 of this title for the care or treatment of mentally ill or mentally retarded persons, including psychiatric wards of general hospitals, but does not include an establishment solely for care or treatment of persons addicted to the use of drugs or alcohol." (Emphasis added.) This would not include State or federal hospitals.

4 It may be assumed that when § 37.1-120 was first enacted, indigents would in most instances be unable to afford the costs of a private institution. Those who could afford such care, on the other hand, would presumably be well-able to
afford the costs of commitment proceedings. Thus, the legislature chose to shift the burden of such costs upon the benefited party and not upon the taxpayers of the Commonwealth.

The rationale behind this provision has been substantially undermined since its enactment by the widespread development of health insurance benefits which are available to most of the population. In response to these and other developments, the General Assembly has recently repealed §37.1-120, as discussed in the body of this Opinion.

MINES AND MINING. MOVEMENT OF MINING EQUIPMENT WHERE PERSONS ARE INBY EQUIPMENT IN VENTILATING SPLIT IS PROHIBITED UNDER §45.1-89(k)(1).

March 24, 1980

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You ask for interpretation of two statutes pertaining to mining.

Transportation of Men and Equipment

You ask first whether the Division of Mines may, by ruling, permit under certain conditions, the transportation of equipment into and out of a mine with men inby.1

The ruling in question was that "Equipment can be transported into and out of the mine with men inby:

(1) If the equipment can be transported on a low boy or mine card,
(2) If there is twelve (12") inches of clearance from the trolley wire,
(3) If the side parallel with the trolley wire is insulated, and
(4) If there are no oil reservoirs or other flammable materials involved."

The ruling must be viewed in the light of §§45.1-89(k) and 45.1-89(k)(1) of the Code of Virginia (1950), as amended. These provisions provide as follows:

"(k) Except regular transportation equipment, no mining equipment shall be transported or trammed, other than daily sectional movement, unless by qualified personnel under the direction of a certified foreman.

(1) When equipment is being transported or trammed, no person shall be permitted to be inby the equipment in the ventilating split that is passing over such equipment."
This statutory language provides no exception when mining equipment is being moved, except in the case of "regular transportation equipment." A statute by its use of the words "no...shall" indicates a mandatory prohibition. Report of the Attorney General (1977-1978) at 117. Since the legislature knew how to create an exception by specific language in the case of "transportation equipment" and no others, and in view of the purpose of the statute, which is to promote the safety and health of those engaged in the mining of coal (§ 45.1-1), this provision should be interpreted exactly as written by the legislature. Accordingly, the interpretive ruling is ineffective to the extent that it applies to "mining equipment."  

Certification of "Shot Firers"

With regard to your second question whether the Division of Mines may give limited approval to three individuals to fire shots underground prior to their certification by the Board of Examiners, § 45.1-14(h) of the Virginia Mine Safety Law governs in this particular instance.

This section permits the board to grant certificates to persons holding certificates issued by other states. It has been reported to me that the three individuals who were granted limited approval to fire shots were holding certificates at that time from the State of West Virginia and that the requirements for certification in West Virginia were substantially equivalent to those in Virginia. Accordingly, I find that this grant of limited approval was valid.

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1"Inby" is a mining term which refers to the area from a designated point in a mine in toward the face of the mine. Walls v. Miller, 251 S.E.2d 491, 497 (W. Va., 1978).

2The term "mining equipment" is not defined in the Virginia Mine Safety Law. Nor are there any regulations defining what constitutes "mining equipment." While the chief mine inspector has authority after consultation with the appropriate safety advisory committee and in accordance with the provisions of the Administrative Process Act (§§ 9-6.14:1, et seq.) to formulate health and safety rules and regulations not in conflict with the statute, he has not promulgated any such regulations in this case. There are no reported Virginia cases interpreting this statutory phrase. A West Virginia court, interpreting the same language, has held that "mining equipment," "certainly would mean all heavy equipment which in any way has a potential for creating a greater than ordinary risk of a fire while it is being moved." Walls, supra, at 497-498.

3Section 45.1-14(h) reads in part as follows: "Any person holding a certificate issued by any other state may be granted a certificate permitting him to perform similar tasks in this State, provided that the board finds that the requirements for certification in such state are substantially equivalent to those of Virginia."
MOTOR VEHICLES. DEFINITION OF "AUTOMOBILES" AS USED IN § 15.1-27.1 SAME AS "MOTOR VEHICLES" IN § 46.1-1(15).

May 22, 1980

The Honorable Joseph P. Crouch
Member, House of Delegates

This is in response to your letter of April 21, 1980, in which you request my opinion as to the definition of the term "automobiles" as used in § 15.1-27.1 of the Code of Virginia (1950), as amended, in order to assist the Town of Altavista in drafting an ordinance authorized by that section.

Since the above Code section is not clear as to the definition of the term "automobiles," according to the principles of statutory construction, other sections using the term should be considered in pari materia in an attempt to find a definition. The section about which you inquire makes reference to §§ 46.1-42 through 46.1-49. These sections deal with "motor vehicles" which have been exempted from normal registration for one reason or another. By referring to these Title 46.1 sections for the purpose of establishing guidelines for the implementation of ordinances under § 15.1-27.1, the General Assembly has equated the term "automobile" under § 15.1-27.1 to the term "motor vehicle" as used in Title 46.1. This is further underscored by § 15.1-27.1 making reference to former § 33-279.3 (now § 33.1-348). There, again, it should be noted that the term "automobile" is equated with the term "motor vehicle."

In light of the foregoing, it is my opinion that the term "automobile" as used in § 15.1-27.1 should be defined the same as the term "motor vehicle" found in § 46.1-1(15).

Section 15.1-27.1 states: "The governing body of any county, city or town in this State may adopt an ordinance imposing a license tax, in an amount not exceeding fifty dollars annually, upon the owners of automobiles which do not display current license plates and which are not exempted from the requirements of displaying such license plates under the provisions of §§ 46.1-42 through 46.1-49 and 46.1-119 and 46.1-120, are not in a public dump, in an 'automobile graveyard' as defined in § 33-279.3 or in the possession of a licensed junk dealer or licensed automobile dealer. Such ordinance shall exempt from such tax any vehicles which are stored on private property for a period not in excess of sixty days, for the purpose of removing parts for the repair of another vehicle. Nothing in this section shall be applicable to any vehicle being held or stored by or at the direction of any governmental authority, to any vehicle owned by a member of the armed forces on active duty or to any vehicle regularly stored within a structure."

3Section 33.1-348(b)(2) defines "[a]utomobile graveyard" as "any lot or place which is exposed to the weather and upon which more than five motor vehicles of any kind, incapable of being operated, and which it would not be economically practical to make operative, are placed, located or found." (Emphasis added.)

4Note also that the legislature has enacted the Automobile Repair Facilities Act, Ch. 17.1 of Title 59.1, and the term "automobile" is equated to "motor vehicle" in that Act.

5"Motor vehicle'.--Every vehicle as herein defined which is self-propelled or designed for self-propulsion except that the definition contained in § 46.1-389(d) shall apply for the purposes of chapter 6 (§ 46.1-388 et seq.) of this title. Any structure designed, used or maintained primarily to be loaded on or affixed to a motor vehicle to provide a mobile dwelling, sleeping place, office or commercial space, shall be considered a part of a motor vehicle. For the purposes of this chapter, any device herein defined as a bicycle shall be deemed not to be a motor vehicle."

MOTOR VEHICLES. DRIVING WHILE PRIVILEGE TO DRIVE REVOKED.

INTERPRETING § 46.1-350(a).

September 18, 1979

The Honorable F. Nelson Light, Judge
Pittsylvania General District Court

This is in response to your recent letter wherein you inquire whether a nonresident is guilty of driving with a revoked permit if he drives in Virginia when (1) he is not licensed to operate a motor vehicle in Virginia and (2) his privilege to drive has been revoked in his state of residence.

Section 46.1-350(a) of the Code of Virginia (1950), as amended, prohibits an individual whose driver's license or privilege has been revoked from operating a motor vehicle on any highway in this State unless and until the period of such revocation shall have terminated. Being a penal statute, § 46.1-350 must be strictly construed. Rollins v. Town of Gordonsville, 216 Va. 25, 215 S.E.2d 637 (1975).

Several related provisions of Title 46.1, however, make it clear that the revocation discussed in § 46.1-350 refers to a revocation imposed by authorities of this State and not those of another state. Chief among these provisions are §§ 46.1-462 and 46.1-466. Section 46.1-462 states that whenever by the laws of the State of Virginia the Commissioner of the Division of Motor Vehicles may revoke the license of a resident, he may, likewise, revoke the privilege of operating a motor vehicle in Virginia by a nonresident. Section 46.1-466 directs the Commissioner of the Division of
Motor Vehicles to revoke the license of any resident of this State upon receipt of a notice that he has been convicted in a court of competent jurisdiction of another state of an offense which if committed in this State would be grounds for the revocation of the license granted to such person. Reading these two statutes as related matter, since a resident's license is not automatically revoked upon conviction of an offense in a foreign state, it is logical to assume, without specific statutory direction, that a nonresident would be treated similarly. Accordingly, the revocation by the foreign jurisdiction of a nonresident's license should not automatically revoke that individual's privilege to drive in this State.

Finally, § 46.1-350 itself suggests that the revocation referred to in that section is one effected by officials of this State and under the laws of this State. See Report of the Attorney General (1964-1965) at 236. Section 46.1-350 specifically refers in part to individuals who have been directed not to drive by the Commissioner or by operation of law pursuant to the provisions of Title 46.1 or of § 18.1-59 (currently § 18.2-271), or who have been forbidden to operate a motor vehicle in this State by the Commissioner, the State Corporation Commission, the State Highway Commissioner or the Superintendent of State Police. There is, however, no reference to individuals who have been directed not to drive by the comparable officials of other states or by the operation of comparable laws of those states.

Accordingly, I am of the opinion that an individual is not guilty of driving on a revoked privilege in violation of § 46.1-350 unless such person's privilege to drive in this State has actually been revoked by the authorities of this State rather than those of another state. Your question therefore is answered in the negative.

I should note, however, that it is an offense to drive a motor vehicle on a highway in this State without having first procured the necessary Virginia driver's license. There is an exemption from the requirements of this section provided under § 46.1-355 for nonresidents who have been properly licensed by their home state. However, a nonresident whose license has been revoked by his state of residence no longer enjoys the privilege afforded by that license. Consequently, such a nonresident cannot invoke the exemption and would, therefore, be in violation of § 46.1-349.

1Section 46.1-350(a) states as follows: "Except as otherwise provided in §§ 46.1-352.1 and 46.1-387.8 as amended, no person, resident or nonresident, whose operator's or chauffeur's license or instruction permit or privilege to drive a motor vehicle has been suspended or revoked or who has been directed not to drive by any court or by the Commissioner or by operation of law pursuant to the provisions of this title or of § 18.1-59 or who has been
forbidden as prescribed by law by the Commissioner, the State Corporation Commission, the State Highway Commissioner, any court or the Superintendent of State Police, to operate a motor vehicle in this State shall thereafter drive any motor vehicle or any self-propelled machinery or equipment on any highway in this State unless and until the period of such suspension or revocation shall have terminated."

MOTOR VEHICLES. DRUNK DRIVING ON PRIVATE PROPERTY. CERTIFICATE SHOWING RESULTS OF CHEMICAL TEST ADMISSIBLE AS EXCEPTION TO HEARSAY RULE.

August 31, 1979

The Honorable J. Frank Greenwalt, Jr., Judge Martinsville General District Court

You ask whether, in a prosecution under § 18.2-266 of the Code of Virginia (1950), as amended, involving the operation of a motor vehicle on private property while under the influence of alcohol, the Commonwealth may, over an objection based on the hearsay rule, introduce into evidence the certificate showing the results of a test to determine the defendant's blood alcohol content, which test was requested by defendant and presumably administered as one of the tests provided for in § 18.2-268.

Notwithstanding the fact that § 18.2-266 makes it unlawful for any person to operate a motor vehicle while under the influence of alcohol, whether such operation be on private property or a public highway, Valentine v. County of Brunswick, 202 Va. 696, 119 S.E.2d 486 (1961), only those persons who operate motor vehicles upon the public highways are deemed by § 18.2-268, Virginia's "implied consent" statute, to have consented to submit to one of the tests provided for in § 18.2-268.1 Nothing in § 18.2-268 or related statutes, however, precludes an individual accused of driving while intoxicated on private property from taking either of these tests. Indeed, Art. I, § 8, of the Constitution of Virginia (1971), guarantees an accused the right to call for evidence in his favor. Accordingly, I am of the opinion, as were two of my predecessors, that a person accused of driving while intoxicated while on private property may take a test provided for in § 18.2-268. See Reports of the Attorney General (1977-1978) at 254; (1968-1969) at 148.

The mere fact that a test was administered at the defendant's request under circumstances beyond those for which § 18.2-268 implies consent, i.e., where the alleged offense occurred on private property, does not negate the fact that the test itself is indeed one of those expressly provided for in § 18.2-268, and is admissible in evidence as such. In fact, it is presumed that a test under § 18.2-268 is precisely that which the defendant requested. In the case of a blood sample, § 18.2-268(f) provides that the
certificate of analysis by the Division of Consolidated Laboratory Services "shall, when duly attested by the Director of the Division or his designated representative, be admissible in any court, in any criminal or civil proceeding, as evidence of the facts therein stated and of the results of such analysis." Similarly, in the case of the chemical analysis of a person's breath, § 18.2-268(rl) provides that the certificate of analysis "shall be admissible in any court in any criminal proceeding as evidence of the alcoholic content of the blood of the accused." In addition, § 19.2-187 makes certificates of analyses by the Division of Consolidated Laboratory Services admissible as evidence of the facts therein stated and the results of the analysis or examination referred to therein. When a statute authorizes the admission into evidence of a public officer's certificate concerning acts within the scope of his duty, such certificate is admissible under the documentary evidence exception to the hearsay rule. Bracy v. Commonwealth, 119 Va. 867, 89 S.E. 144 (1916). I am, therefore, of the opinion that the certificate in question is admissible as an exception to the hearsay rule: pursuant to the stated statutory provisions.

Section 18.2-268(b) provides in part as follows: "Any person...who operates a motor vehicle upon a public highway in this State...shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood...." (Emphasis added.)

MOTOR VEHICLES. EXEMPTION FROM REGISTRATION. TRANSPORTING SHOW HORSES BETWEEN FARMS.

March 28, 1980

The Honorable James H. Joines, Judge
General District Court of Grayson County

This is in response to your recent inquiry whether the transportation of show horses between farms and not to shows constitutes farm use under § 46.1-45 of the Code of Virginia (1950), as amended.

The exemption from registration requirements under § 46.1-45(a) is applicable to motor vehicles used exclusively for "agricultural purposes." The term "agricultural purposes" is nowhere defined in the Code. "Agriculture" has been defined elsewhere, however, as the science, art, and business of cultivating the soil, producing crops, and raising livestock useful to man. See The American Heritage Dictionary of the English Language (1970) at 26. Livestock is defined as domestic animals, such as cattle, horses, sheep, hogs, or goats, raised for home use or for profit.
Id. at 764. Similarly, "agricultural products" is defined in § 15.1-1508 to encompass livestock, including horses. Accordingly, I am of the opinion that the transportation of show horses between farms is within the scope of the exemption set forth in § 46.1-45, provided all of the other limitations of that section are met. Your question is therefore answered in the affirmative.

Section 46.1-45(a) provides in pertinent part: "No person shall be required to obtain the registration certificate, license plates and decals or to pay the fee prescribed therefor...for any motor vehicle, trailer or semitrailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin; provided, that the distance between the points shall not exceed ten miles...."

MOTOR VEHICLES. FLASHING, BLINKING LIGHTS AND SIRENS. WHEN LAWFUL TO EQUIP SHERIFF'S DEPARTMENT VEHICLE.

July 27, 1979

The Honorable Joe Harris
Sheriff for the City of Waynesboro

This is in reply to your recent inquiry whether a sheriff's department vehicle should be equipped with the warning devices mentioned in §§ 46.1-199, 46.1-225, 46.1-226 and 46.1-285 of the Code of Virginia (1950), as amended, when the vehicle in question is used primarily for the transportation of prisoners and the service of civil process, and only secondarily for the apprehension of criminals and the transportation of persons in need of medical treatment. Sections 46.1-199 and 46.1-226 provide that certain speed limits and traffic regulations do not apply to a vehicle when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or in response to emergency calls, provided, among other things, that the operator of such vehicle displays a flashing, blinking or alternating red light and sounds a siren, bell, exhaust whistle, or air horn as may be reasonably necessary.

Those vehicles which are authorized to be equipped with sirens and flashing red lights are specifically identified in §§ 46.1-285 and 46.1-267. Section 46.1-285 states that every police vehicle, in addition to certain other vehicles, shall be equipped with a siren, exhaust whistle, or air horn designed to give automatically intermittent signals of a type
not prohibited by the Superintendent of the Department of State Police. Section 46.1-267 authorizes police vehicles to be equipped with flashing, blinking or alternating red emergency lights of a type approved by the Superintendent.\footnote{The sheriff's department vehicle in question is stated to be used only occasionally for the transportation of persons in need of medical treatment, and is presumably not specially equipped for such purpose. Accordingly, such vehicle does not fall within any of the other potentially relevant classes of vehicles under §§ 46.1-285 and 46.1-226, since it is not owned for rescue purposes, is not an ambulance, \textit{i.e.}, a vehicle equipped for transporting the injured or sick, and is not a rescue vehicle designed or utilized for the principal purpose of resuscitation or emergency relief.}

The Code of Virginia does not define the term "police vehicle." Section 46.1-1(19), however, defines "police officer" as "[e]very officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations." Sheriffs and deputy sheriffs are specifically authorized to make such arrests by § 46.1-6. Accordingly, a sheriff's department vehicle used in the apprehension of criminals and traffic violators is a police vehicle within the terms of the statutes in question, and may therefore be equipped with warning devices as in the case of other police vehicles. As the traffic law exemptions in §§ 46.1-199 and 46.1-226 are positively conditioned upon the use of these warning devices as may be reasonably necessary, I am also of the opinion that, in the event a sheriff's department vehicle, when used in the apprehension of criminals and traffic violators, is driven in excess of the speed limit or contrary to traffic regulations as provided in §§ 46.1-199 and 46.1-226, such vehicle must be so equipped.

Accordingly, I am of the opinion that if the vehicle in question is to be operated at any time for the chase or apprehension of law violators, it may be equipped with the described warning devices. Indeed, it must be so equipped if the vehicle is not used in conformity with otherwise applicable traffic laws.

\footnotetext{1}{The sheriff's department vehicle in question is stated to be used only occasionally for the transportation of persons in need of medical treatment, and is presumably not specially equipped for such purpose. Accordingly, such vehicle does not fall within any of the other potentially relevant classes of vehicles under §§ 46.1-285 and 46.1-226, since it is not owned for rescue purposes, is not an ambulance, \textit{i.e.}, a vehicle equipped for transporting the injured or sick, and is not a rescue vehicle designed or utilized for the principal purpose of resuscitation or emergency relief.}

MOTOR VEHICLES. FORFEITURES. BOND FOR RELEASE MAY BE GIVEN PRIOR TO FILING OF INFORMATION.

February 14, 1980

The Honorable William W. Jones, Judge
Suffolk General District Court

This is in response to your recent inquiry whether, in the case of a motor vehicle seized pursuant to § 46.1-351.1 of the Code of Virginia (1950), as amended,\footnote{There is any provision for the posting of a bond to procure release of the...
vehicle prior to the filing of the forfeiture information provided for in § 46.1-351.2. If this question is answered affirmatively, you also wish to know where such bond should be filed and the procedure to be followed.

This Office has held in two separate Opinions that an owner of a vehicle seized pursuant to § 46.1-351.1 may give bond and obtain possession of the vehicle prior to the time the forfeiture information is filed. See Report of the Attorney General (1964-1965) at 191 and 194. I concur in these Opinions; consequently, I answer your first question in the affirmative.

As to your second question, § 46.1-351.2(a) directs that any information against a vehicle seized pursuant to § 46.1-351.1 shall be filed in the circuit court of the county or city wherein the arrest or seizure was made. Section 46.1-351.1(b) further directs that an appraisal of such a vehicle shall be made by the "clerk of the court where such information is filed." In light of the language contained in these two paragraphs, it is my opinion that, if an individual desires possession of a vehicle prior to the filing of an information under § 46.1-351.2, the bond should be filed in the clerk's office of the circuit court of the jurisdiction where the arrest was made and the forfeiture information will be filed. I am of the further opinion that the bonding procedures to be followed in such cases would be those prescribed in § 46.1-351.2(b)."
entered against the obligors on such bond for the penalty thereof, without further or other proceedings against them thereon, to be discharged by the payment of the appraised value of the property so seized and forfeited and costs, upon which judgment, execution may issue, on which the clerk shall endorse, 'no security to be taken.' Upon giving of the bond, the property shall be delivered to the owner or the lienor."

3Note that this same paragraph charges the sheriff or chief law-enforcement officer, as the case may be, with the actual responsibility of accomplishing the appraisal for the clerk. See Report of the Attorney General (1964-1955) at 199.

4See Opinion to the Honorable Michael M. Foreman, Clerk, Circuit Court of the City of Winchester, dated July 5, 1978, and found in Report of the Attorney General (1978-1979) at 106, which answers certain other questions concerning the proper bonding procedures.

MOTOR VEHICLES. FORFEITURES. COSTS IN EXCESS OF SALE PROCEEDS MAY BE PAID BY COMMONWEALTH PURSUANT TO § 19.2-332.

February 20, 1980

The Honorable W. Charles Poland
Commonwealth's Attorney for the City of Waynesboro

This is in response to your recent letter wherein you inquire whether, following the sale of a motor vehicle pursuant to forfeiture proceedings instituted under §§ 46.1-351.1 and 46.1-351.2 of the Code of Virginia (1950), as amended, costs, including payments for storage, towing, and an order of publication, may be paid by the Commonwealth when the proceeds from the sale of the forfeited vehicle are not sufficient to cover such costs. Having reviewed two Opinions of the Attorney General,3 a memorandum of the Technical Assistance Unit of the Office of the Attorney General,4 and § 19.2-332,5 you indicate that you can find no authority for the payment of costs over and above the proceeds realized from the sale of the automobile.

There are several references in § 46.1-351.2 to the payment of costs. Paragraph (h) thereof provides that in all cases the actual expense incident to the custody of the seized property, and the expense incident to the sale thereof, including commission, shall be taxed as costs. Where the vehicle is relieved of forfeiture pursuant to paragraph (d), the statute states that no cost shall be taxed against the claimant, and where the vehicle is relieved of forfeiture pursuant to paragraph (e), the statute provides that "the costs of the proceedings shall be paid by the Commonwealth as now provided by law."6 Similarly, where the vehicle is delivered to a lienor pursuant to paragraph (f), the costs are required to be paid by the Commonwealth. If the vehicle is in fact sold, paragraphs (f) and (g) provide that out of the proceeds of such sale shall be paid, first, the lien, if any, and second, the costs; and the residue, if any, shall be paid into the Literary Fund. There is no
language in § 46.1-351.2, however, which addresses the possibility that the costs will exceed the proceeds of the sale where the vehicle is ordered to be sold to enforce the forfeiture.

Section 19.2-332 expressly concerns certain expenses in criminal cases which are payable out of the appropriation for criminal charges. Forfeiture proceedings undertaken pursuant to § 46.1-351.2 are civil, not criminal, in nature. See Commonwealth v. Lincoln Automobile, 212 Va. 597, 186 S.E.2d 279 (1972). Notwithstanding this fact, however, this Office has repeatedly held that where the Commonwealth pays the costs in a vehicle forfeiture case, such costs should be paid pursuant to § 19.2-332. See Reports of the Attorney General (1976-1977) at 169, (1964-1965) at 234, (1955-1956) at 3, (1938-1939) at 50. The rationale for this position is founded upon the theory that although the forfeiture proceeding itself is technically a civil matter, it is undertaken in aid of, and is inextricably associated with the enforcement of the Commonwealth's criminal law which prohibits the operation of a motor vehicle while one's driving privilege is suspended or revoked. This association is apparent in several ways. In the first place, the premise in forfeiture cases is that the property is used by the owner, or someone with whom he has entrusted it, in violation of law, to the detriment of public and private interests, and those interests can only be effectively protected by confiscating the property itself as the offender. See Boggs v. Commonwealth, 76 Va. 989, 996 (1882). Additional support is set forth in § 46.1-351.1(a), which provides in part that "{w}"here any officer charged with the enforcement of the motor vehicle laws of this State reasonably believes that he has arrested any person who will be subject to the penalties prescribed by §§ 46.1-350, 46.1-351, or 46.1-387.8, he shall seize and take possession..." of the motor vehicle owned and operated by such person at the time of arrest. Finally, support is found in the provisions of paragraph (c1) of § 46.1-351.2 which states that the hearing on the information shall in no case be held prior to final judgment in the trial for violation of §§ 46.1-350 or 46.1-351, and that if the person charged is acquitted or the charges are for any reason dismissed, such acquittal or dismissal shall entirely relieve the property from forfeiture.

Accordingly, based on the foregoing, I am of the opinion that in those instances where the costs exceed the proceeds of the sale of the forfeited vehicle, the excess costs have been incurred within the meaning of § 19.2-332 and are payable in accordance thereto.

1Section 46.1-351.2 requires a policeman who arrests an individual for driving a motor vehicle with a revoked or suspended driver's license in violation of §§ 46.1-350, 46.1-351 or 46.1-387.8, to seize the vehicle owned and operated by such individual at that time of arrest.
Section 46.1-351.2 provides for disposition of the vehicles seized under § 46.1-351.1.

One of those Opinions to the Honorable James D. Swinson, Sheriff of Fairfax County, dated August 7, 1974, and found in Report of the Attorney General (1974-1975) at 283, held in part that where the Commonwealth is expressly required to pay costs under paragraphs (d) and (e) of § 46.1-351.2, such costs "should be paid out of the State treasury on the certificate of the court stating the nature of the service."

The other Opinion to the Honorable John J. Ambler, Jr., Commonwealth's Attorney for Caroline County, dated December 15, 1976, and found in Report of the Attorney General (1976-1977) at 169, stated in part that vehicles seized pursuant to § 46.1-351.1 but held beyond the time allowed for the filing of an information as provided in § 46.1-351.2 should be released to their respective owners, and that the storage costs which accrued while the vehicles were impounded should be paid by the Commonwealth pursuant to § 19.2-332.

The memorandum dated August 16, 1978, was sent to the Honorable C. Phillips Ferguson, Commonwealth's Attorney for the City of Suffolk, and concerns whether a Commonwealth's attorney may refuse to file a forfeiture information when he believes the costs of the proceeding will exceed the value of the seized vehicle. Several Opinions of the Attorney General which answer this question in the negative are reviewed therein.

Section 19.2-332 states in part: "Whenever in a criminal case an officer or other person renders any service required by law for which no specific compensation is provided, or whenever any other service has been rendered pursuant to the request or prior approval of the court, the court shall allow therefor such sum as it deems reasonable...and... appropriation for criminal charges on the certificate of the court stating the nature of the service...."

When §§ 46.1-351.1 and 46.1-351.2 were added by Ch. 396 [1964] Acts of Assembly 659, costs payable by the Commonwealth incident to vehicle forfeitures were paid pursuant to former § 19.1-315, now § 19.2-332. See Report of the Attorney General (1955-1956) at 3.

MOTOR VEHICLES. FORFEITURES. DISPOSITION OF SEIZED VEHICLE ABANDONED BY OWNER.

October 30, 1979

The Honorable William Roscoe Reynolds
Commonwealth's Attorney for Henry County

This is in response to your recent inquiries concerning the proper disposition of vehicles seized pursuant to § 46.1-351.1 of the Code of Virginia (1950), as amended.

You first inquire as to the proper procedure for disposition of a motor vehicle seized pursuant to § 46.1-351.1, when the defendant fails to appear, and
consequently is not tried, on the criminal charge of driving after having been directed not to do so. Section § 46.1-351.2(c) states that the hearing on the forfeiture information shall in no case be held prior to final judgment in the trial for the violation of §§ 46.1-350 or 46.1-351. Accordingly, if the accused is never tried on the criminal charge, forfeiture of the vehicle pursuant to § 46.1-351.2 is precluded.

This Office has in the past, however, recognized the inherent power of the circuit courts to enter an order in appropriate cases determining that a seized vehicle has been abandoned. Reports of the Attorney General (1974-1975) at 281, (1964-1965) at 4, and (1949-1950) at 3. A court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction. 5A M.J. Courts § 3 (1976). Accordingly, I am of the opinion that, in a case wherein the accused has failed to appear on the criminal charge, the Commonwealth's Attorney may, after notice to the accused and any lienholders, petition the court for an order declaring the vehicle to have been abandoned by its owner and directing its sale by the sheriff of the county or the chief law enforcement officer of the city, as the case may be. Out of the proceeds of such sale should be paid, first, liens, if any, and second, the costs. The residue, if any, should be paid into the Literary Fund as indicated by § 46.1-351.2(f).

You next inquire as to the proper procedure for disposing of a motor vehicle for which the information has not been filed within the time prescribed by § 46.1-351.2(a), when the owner cannot be contacted or refuses to pick up the vehicle. This Office has previously expressed the view that the untimely filing of an information requesting forfeiture is a nullity and those vehicles which have been held beyond the time allowed for filing of an information are relieved of forfeiture and should be released to their respective owners. See Report of the Attorney General (1976-1977) at 169. Such release may not be conditioned upon payment of storage costs which accrued while the vehicles were impounded by the Commonwealth, and such costs should be paid by the Commonwealth pursuant to § 19.2-332. Id. In any such case, if the owner cannot be contacted or refuses to pick up the vehicle I am of the opinion that the Commonwealth's Attorney may dispose of the vehicle in the same fashion as indicated in response to the first question.

Finally, you ask whether the owner of a garage wherein a vehicle seized pursuant to § 46.1-351.1 is stored has any options available to him to get rid of the vehicle. Except for the possibility of returning the vehicle to the sheriff or chief law enforcement officer, as the case may be, a garage owner is not authorized to initiate action to rid his storage facility of any such vehicle, since in the case of a vehicle seized pursuant to § 46.1-351.1, custody and control of the vehicle continues in the sheriff or chief law
enforcement officer. Accordingly, I am of the opinion that those statutes which might otherwise afford a garage owner a remedy, namely, §§ 43-34 and 46.1-555.10, are inapplicable.

1Section 46.1-351.1(a) requires a policeman who arrests an individual for driving a motor vehicle with a revoked or suspended driver's license in violation of §§ 46.1-350, 46.1-351 or 46.1-387.3, to seize the vehicle owned and operated by such individual at the time of arrest.

2For purposes of this Opinion, I assume no basis exists in the present case for releasing a vehicle to an innocent lienholder in accordance with § 46.1-351.2(a).

MOTOR VEHICLES. HANDICAPPED PARKING. LOCALITY ENACTING ORDINANCE UNDER PROVISIONS OF § 46.1-181.4:1 MUST CONSIDER §§ 46.1-104.1 AND 46.1-254.2 IN PARI MATERIA.

June 19, 1980

The Honorable Virgil H. Goode, Jr.
Member, Senate of Virginia

This is in response to your recent letter concerning § 46.1-181.4:1 of the Code of Virginia (1950), as amended. Specifically, you inquire whether a local governing body may adopt an ordinance which prohibits the use of a handicapped parking space "unless such motor vehicle is transporting a handicapped person and bears or displays a valid special license plate, decal or parking permit lawfully issued to or for use by the handicapped person."

Section 46.1-181.4:1 does not address the question you raise nor does it define what individuals will qualify as "handicapped" or whether such handicapped persons must evidence the fact that they are handicapped by placing a placard or other notification on their vehicle. Therefore, in accordance with the principles of statutory construction, other parts of the Code which deal with the same subject should be considered in pari materia in an attempt to find a definition. Section 46.1-104.1 designates those individuals entitled to special consideration because of physical handicaps, the types of vehicles which may be used for private transportation of these persons as well as providing for specialized license plates and/or decals for display. This section also establishes the privileges attendant to such designation, and the sanctions for abuse. In a like manner, § 46.1-254.2 deals with parking permits for handicapped persons. Construing § 46.1-181.4:1 in light of §§ 46.1-104.1 and 46.1-254.2, the localities enacting ordinances under § 46.1-181.4:1 are entitled and required to comply with §§ 46.1-104.1 and 46.1-254.2. As a consequence, I am of the opinion that any city, county or town wishing to enact an ordinance under § 46.1-181.4:1 is not limited to the specific language of that statute but must also look to
§§ 46.1-104.1 and 46.1-254.2 in the drafting of any such ordinance. Further, it is my opinion that the language of the ordinance set out in your letter comports with those sections and, accordingly, is lawful under § 46.1-181.4:1.

1Section 46.1-181.4:1 states: "The governing body of any county, city or town may adopt an ordinance making it unlawful for a nonhandicapped operator of a motor vehicle to park in a parking space reserved for the handicapped at privately owned shopping centers and business offices; and any such governing body may further provide that a summons for such offense may be issued by its police officers without the necessity of a warrant being obtained by the owner of such shopping center or business office."


3Section 46.1-104.1 states: "(a) Upon receipt of an application on a form prescribed by the Commissioner, the Commissioner shall issue appropriately designated license plates to persons with physical handicaps which limit their mobility. Issuance of such plates shall be limited to passenger vehicles and pickup or panel trucks as defined in § 46.1-1. The designation thereon shall be in the discretion of the Commissioner. The fee for the certification of registrants and license plates issued to such person shall be as provided in § 46.1-149.

(a1) The Commissioner shall also issue to any person with physical handicaps which limit his mobility, or to the owner of any vehicle specially equipped and used for the transportation of groups of such physically handicapped persons, a removable decal, to be used on any passenger car, pickup or panel truck operated by such person, or on any such specially equipped vehicle when being used in the transportation of groups of such handicapped persons, which decal shall allow such handicapped person or operator of such specially equipped vehicle the same parking privileges as allowed by special plates issued under this section. Such decals shall be of a design determined by the Commissioner and shall be displayed in a manner determined by the Superintendent of State Police. Issuance of such decal shall be limited to physically handicapped persons, passenger vehicles, pickup or panel trucks, and vehicles specially equipped and used for the transportation of groups of physically handicapped persons. A reasonable fee to be determined by the Commissioner shall be charged each person or vehicle owner issued a decal under this section; provided, that no fee shall be charged any person exempted from fees by § 46.1-149.1.

(b) The disabled person or vehicle owner to whom such special plates or decal are issued or any person to whom special plates have been issued under § 46.1-149.1 shall be allowed to park the vehicle upon which such plates are
displayed for unlimited periods of time in parking zones restricted as to length of parking time permitted and shall be exempted from paying parking meter fees of any county, city or town. The provisions of this subsection shall take precedence over any county, city or town ordinance; provided, however, this subsection shall not apply to any such ordinance which creates zones where stopping, standing or parking is prohibited, or which creates parking zones for special types of vehicles, nor shall it apply to any such ordinance which prohibits parking during heavy traffic periods during specified rush hours, or where parking would clearly present a traffic hazard.

(c) Any person who is not a person described in subsection (a), (a1), or (b) of this section and who willfully and falsely represents himself as having the qualifications to obtain the special plates or decal or (2) utilizes the parking privilege accorded by this section shall be guilty of a traffic infraction and punishable as provided in § 46.1-16.01."

4Section 46.1-254.2 states: "A. Upon receipt of an application on a form prescribed by the Commissioner, the Commissioner shall issue a special vehicle parking permit to persons whose physician certifies that they have a permanent physical handicap which limits their mobility.

B. Use of such permits shall be limited to passenger vehicles and pickup trucks during times when the permit owner is being transported in such vehicle. The permit owner may give the permit to the vehicle operator who is chauffeuring the permit owner; provided, however, upon completion of the trip, the permit shall be returned to the permit owner.

C. The permit shall be displayed in the window of the transporting vehicle and the operator shall be allowed to park the vehicle for unlimited periods of time in parking zones restricted as to length of parking time permitted and shall be exempt from paying parking meter fees of any county, city or town. The provisions of this subsection shall take precedence over any county, city or town ordinance; provided, however, this subsection shall not apply to any such ordinance which creates zones where stopping, standing or parking is prohibited, or which creates parking zones for special types of vehicles, nor shall it apply to any such ordinance which prohibits parking during heavy traffic periods during specified rush hours, or where parking would clearly present a traffic hazard.

D. Any person who is not a person described in subsection A or B of this section and who (i) willfully and falsely represents himself as having the qualifications to obtain the special permit or (ii) utilizes the parking privilege accorded by this section shall be guilty of a traffic infraction and punishable as provided in § 46.1-16.01."

MOTOR VEHICLES. OPERATION OF MOTOR VEHICLES EQUIPPED UNDER PROVISION OF § 46.1-257(a) NOT LIMITED TO OWNER.
The Honorable Charles L. Waddell
Member, Senate of Virginia

This is in response to your letter of June 3, 1980, in
which you ask whether a vehicle, owned by a member of a
volunteer fire company which has been legally equipped with
lights under the provisions of § 46.1-267(a) of the Code of
Virginia (1950), as amended, may be legally operated by
a member of the owner's family. In answering this inquiry, I
am assuming that the family member has a valid operator's
permit.

Section 46.1-267(a) provides:

"A member of any fire department, volunteer fire
compny or volunteer rescue squad may equip one vehicle
owned by him with no more than two flashing or
steady-burning red lights of a type approved by the
Superintendent, for use by him only in answering
emergency calls.

Any person violating the provision of this section
shall be guilty of a misdemeanor." (Emphasis added.)

It is my opinion that the restrictive phrase "for use by
him only" refers not to the operation of the vehicle but to
the operation of the red lights. To find otherwise would
abrogate the intent of the General Assembly in authorizing
the use of such lights. The organizations designated in the
section rely upon their members' ability to respond to
emergencies even when those members are not "on duty." This
is especially true of the volunteer organizations who employ
little or no full-time staff and must call up their
membership to respond to emergencies from whatever locations
those members may be at that particular time. These members
could be at their homes, places of business or any other
location in the community. Thus, because such members must
respond from these various locations, it was the intent of
the General Assembly to authorize them to use emergency
lights to aid them in safely reacting to emergency calls. To
restrict the use of such vehicles described in § 46.1-267(a)
to the use by the member "only in answering emergency calls"
would require him to employ a separate vehicle for his
family, business or recreational use. Furthermore, since he
could only operate the equipped vehicle while answering
emergency calls he could not use it at any other time and
would have to park it at one location and leave it there
until another emergency arose. If the daily events of his
life caused him to travel within the community during the
day, it is possible he would not be close enough to the
vehicle to employ it in response to an emergency call.
Obviously this was not the intent of the General Assembly.

In light of the foregoing it is my opinion that the
member or any other person authorized by the member may use
the vehicle in question; provided, however, that the operation of the red lights must be restricted solely to those situations where the member is responding to an emergency call.

MOTOR VEHICLES. OPERATION OR USE FOR RENT OR FOR HIRE. WASTE REMOVAL SERVICE WITHIN DEFINITION.

March 20, 1980

The Honorable James H. Joines, Judge
General District Court of Wythe County

This is in response to your request for my opinion as to whether a company which collects and removes solid waste from the premises of various businesses and institutions is operating "for rent or for hire" within the meaning of § 46.1-1(35) of the Code of Virginia (1950), as amended.¹

The company in question owns solid waste containers which it places on the premises of its customers pursuant to written contracts. The contents of the containers are periodically emptied and removed in the company's trucks in accordance with these agreements. You have indicated, furthermore, that once the waste is placed in the containers, it becomes the property of the refuse removal company.

The essential service which this company contracts to perform, therefore, is solid waste collection and removal by truck over the highways of the Commonwealth. That the waste is owned by the company while being transported does not change the fact that the company receives compensation for transporting the property. Accordingly, I am of the opinion that the company in question operates for rent or for hire within the meaning of § 46.1-1(35), and your question is therefore answered in the affirmative. A similar view was expressed by my predecessor in an Opinion to the Honorable Lucas D. Phillips, Member, House of Delegates, dated April 8, 1966, and found in Report of the Attorney General (1965-1966) at 192.

As to your concern for the use of the word "indirectly" in § 46.1-1(35), I note that § 56-275.1 provides in part that merchants maintaining a bona fide and regular place of business and transporting to and delivering from such place of business by motor vehicle merchandise sold by them are not deemed to be operating such vehicles for compensation. In view of this statutory provision, any comparison with building supply and fuel oil companies would appear inapposite.

¹Section 46.1-1(35) states: "'Operation or use for rent or for hire,' etc.--The terms 'operation or use for rent or for hire, for the transportation of passengers, or as a property
carrier for compensation, and the term business of
transporting persons or property, wherever used in this
title, mean any owner or operator of any motor vehicle,
trailer or semitrailer operating over the highways of this
State who accepts or receives compensation for the service,
directly or indirectly; but such terms shall not be construed
to mean a 'truck lessor' as defined herein.'"

MOTOR VEHICLES. PUBLIC USE LICENSE PLATES. ABC INSPECTORS
EXEMPT FROM REQUIREMENT OF DISPLAYING.

September 17, 1979

The Honorable H. Selwyn Smith
Secretary of Public Safety

This is in response to your recent inquiry whether the
State-owned vehicles used by Inspectors of the Department of
Alcoholic Beverage Control are used solely for police work
and consequently exempt from the requirement of displaying
"Public Use" license plates as provided in § 46.1-49 of the
Code of Virginia (1950), as amended. You express concern
with the fact that their job is primarily one of
investigating applicants for licenses.

The Code of Virginia does not define the term "police
work"; however, the word "police" has been variously defined
in the common law. One definition views the term "police" in
a very broad sense and states that it signifies the
regulation, discipline and control of a community. 72 C.J.S.
Police (1951). In a more restricted sense, however, it has
been defined as the department of government which is
concerned with maintenance of order and enforcement of law.
Id. Obviously the General Assembly intended to use the term
"police work" in § 46.1-49 in a restricted sense, since to
have intended otherwise would have rendered the requirement
of displaying "Public Use" license plates inapplicable to any
government vehicle and therefore meaningless.

The police status of ABC Inspectors as contemplated by
the General Assembly is indicated in several related sections
of the Code. First, § 9-108.1(H), pertaining to the Criminal
Justice Services Commission, defines "law-enforcement
officer" to include any member of the Inspection Division of
the Alcoholic Beverage Control Commission vested with police
authority. Similarly, the Line of Duty Act defines
"deceased" to include a person whose death was the result of
the performance of duty as a member of the Inspection
Division of the Virginia Alcoholic Beverage Control
Commission vested with police authority. See
§ 15.1-136.2(a). Section 4-8 provides that such officers,
agents and employees of the Alcoholic Beverage Control
Commission as shall be designated by it shall be vested, upon
being so designated, with like power to enforce the
provisions of the Alcoholic Beverage Control Act, §§ 4-1, et
seq., and the criminal laws of this State as is now vested in
sheriffs of counties and police of cities and towns. Consequently, whether an Inspector has police status depends on whether he has been vested with police authority by the Alcoholic Beverage Control Commission. All Inspectors are in fact so vested since I am advised that pursuant to § 4-8, they take and subscribe to an oath to perform all duties incumbent on them with like power to enforce the provisions of Chapters 1, 1.1 and 2 of Title 4 as is now vested in sheriffs of counties and police of cities and towns. Report of the Attorney General (1975-1976) at 3. Thus, Inspectors are empowered to arrest for violations of the enumerated chapters notwithstanding the fact that they are also admonished administratively not to exercise their arrest powers except in cases of emergency and situations in which they are being assaulted or otherwise hindered in the performance of their duties. In point of fact, ABC Inspectors are armed and regularly engage in police work in the most restricted sense of that term, i.e., they inspect for and investigate violations of the Alcoholic Beverage Control Act.

In addition to inspecting for and investigating violations of the ABC laws, Inspectors also routinely investigate the suitability of applicants for ABC licenses. In light of the foregoing, I am of the opinion that this activity falls within the scope of "police work" as that term is used in § 46.1-49. Such investigations are in fact part of the regular work of individuals enjoying police status. Even a policeman who spends the bulk of his time in the surveillance and apprehension of dangerous criminals will spend a portion of his time on training, public relations and administrative duties, and such activity is just as much a part of the work of that department of government which is concerned with maintenance of order and enforcement of law as is the actual arrest of criminals. Furthermore, it is unlikely that the General Assembly intended through § 46.1-49 to require a policeman to change cars in the course of a day's work simply because he stopped investigating crimes and began investigating license applicants. Accordingly, your question is answered in the affirmative.

1Section 46.1-49 reads as follows:
"Motor vehicles, trailers and semitrailers owned by the State and counties, cities and towns thereof and used purely for State, county and municipal purposes shall be required to be registered and no fee shall be collected for such license plates and registration, but all such license plates issued for such purposes, for which no fee is collected and paid, except such plates as are issued to be used on cars devoted solely to police work or by the Division of Industrial Development to the extent approved by the Governor and those for use on the cars of the Governor and the Attorney General, shall have conspicuously inscribed, stamped or printed thereon so as to be easily seen and read the words 'Public Use' and any other or additional license plates whether paid
for or not shall not be used on cars for which public use plates have been issued except in the case of cars used solely for police work. Counties, municipalities and the agencies of the federal government shall certify to the Commissioner of Motor Vehicles the cars to be used solely for police work."

MOTOR VEHICLES. SUSPENSION OF SENTENCE AFTER CONVICTION UNDER § 46.1-350. COURT MAY SUSPEND PORTION BUT NOT ENTIRE JAIL SENTENCE, EXCEPT IN CERTAIN EMERGENCIES.

January 15, 1980

The Honorable Andrew G. Conlyn, Judge
General District Court

You ask whether a court has authority to suspend a portion of the jail sentence assessed against a person convicted under the provisions of § 46.1-350 of the Code of Virginia (1950), as amended, without regard to the minimum limits set by that section.

Section 46.1-350 prohibits any person whose license to operate a motor vehicle has been suspended or revoked to thereafter drive any motor vehicle or self-propelled machinery or equipment on any highway in this State unless and until the period of suspension or revocation shall have terminated. This statute, in paragraph (b) thereof, sets certain penalties for a violation including jail sentence and possible fine. In respect to jail sentence, it provides that persons violating this section "shall for the first offense be confined in jail not less than ten days nor more than six months... and for the second or any subsequent offense be confined in jail not less than two months nor more than one year...."

Section 53-272 addresses the general proposition of suspending sentences by providing that after a plea, a verdict or a judgment of guilty the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment. Section 19.2-303 provides the court with similar authority. It has been held that statutes, such as these, which confer upon the trial court power to suspend sentences, are constitutional. It has also been held that such statutes are highly remedial and should be liberally construed.

In construing § 46.1-350, the general authority to suspend sentences under the provisions of § 53-272 or § 19.2-303 must be considered in conjunction with the provision found in § 46.1-350 which modifies them by prohibiting the court from suspending the entire jail sentence in any case of a conviction under the latter section, except where "the operation of the motor vehicle was due to an emergency involving danger to the health or life of any person, or to property." In the absence of a plain
indication of an intent that a general act shall repeal a special act, the special act will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly, so that the two are deemed to stand together, one as the general law of the land, and the other as the law of the particular case.\(^2\) The applicable provision in § 46.1-350, which follows immediately after the clause requiring a jail sentence, states "[t]he court shall not suspend the entire jail sentence in any case, but may in its discretion suspend a portion thereof...."

I find nothing in § 46.1-350, nor elsewhere, to limit the suspension of sentence to that portion of the jail sentence which exceeds the minimum provided in this statute, i.e., "not less than ten days" or "not less than two months." The minimum sentences for first and second or subsequent offenses guide the court or jury in fixing the punishment but do not have the effect of limiting the portion of the jail sentence the court may suspend in any case. Hence, in my opinion, the court could suspend any portion of the jail sentence set by the court or jury, as the case may be, so long as it did not suspend the entire jail sentence. As previously indicated, only in case of emergency involving danger to the health or life of any person, or to property, may the court suspend the entire jail sentence.

\(^1\)Section 46.1-350(b) reads in part as follows: "Any person violating this section shall for the first offense be confined in jail not less than ten days nor more than six months; and may in addition be fined not less than one hundred dollars nor more than two hundred dollars; and for the second or any subsequent offense be confined in jail not less than two months nor more than one year; and may in addition be fined not less than two hundred dollars nor more than one thousand dollars. The court shall not suspend the entire jail sentence in any case, but may in its discretion suspend a portion thereof, provided that this provision, in the discretion of the court, shall not apply if the operation of the motor vehicle was due to an emergency involving danger to the health or life of any person, or to property; and provided further that the court may in its discretion prescribe that the jail sentence shall be served at such time or times as the court may direct after considering the circumstances of the person convicted of violating this section."

\(^2\)Section 53-272 reads in part as follows: "After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation
officer, during good behavior for such time and under such conditions of probation as the court shall determine."

3"Section 19.2-303. Suspension of sentence; probation.—After conviction, whether with or without jury, the court, may suspend imposition of sentence or suspend the sentence in whole or part and in addition may place the accused on probation."


5See 17 M.J. Statutes § 100 (1951); City of South Norfolk v. Dail, 187 Va. 495, 47 S.E.2d 405 (1948).

MOTOR VEHICLES. TIME FOR RESTORATION OF LICENSE PURSUANT TO § 46.1-421(c) RUNS FROM DATE OF ORDER OF REVOCATION.

May 21, 1980

The Honorable Clifton A. Woodrum
Member, House of Delegates

This is in response to your recent inquiry concerning the proper interpretation of § 46.1-421(c) of the Code of Virginia (1950), as amended, which provides in part that any person who has had his driver's license revoked pursuant to § 46.1-421(b)1 may, "after the expiration of five years from the date of such revocation" petition the circuit court of his residence for restoration of his driving privileges. You state in your letter that the local circuit court judges interpret "date of such revocation" to mean the date on which the Commissioner of the Division of Motor Vehicles (the "Division") enters his order of revocation pursuant to § 46.1-421(b), whereas, the Division interprets the term to mean the date on which the driver in question was most recently convicted.2

The Division, I am advised, developed its construction of "date of such revocation" in part in recognition of the date that an individual convicted of driving under the influence of drugs or intoxicants suffered an immediate loss of driving privileges. Another consideration was the seemingly unfair discrepancy which resulted when the report of conviction was delayed, as is frequently the case with convictions in other states. Notwithstanding the fact that an administrative agency's construction of statutes within its purview is entitled to significant weight, I am of the opinion that § 46.1-421 is reasonably clear in this regard and will not support the interpretation placed on it by the Division.3 Paragraph (c) of § 46.1-421 speaks expressly in terms of a person whose driver's license is revoked "in accordance with subsection (b) above" and authorizes such individual to petition for the restoration of his driving privileges after the expiration of five years from the date of "such revocation." Similarly, § 46.1-421(b) authorizes petitions at the expiration of ten years from the date of the
"revocation hereunder." These statements are clearly references to the date on which the Commissioner of the Division enters his order of revocation pursuant to § 46.1-421(b). Accordingly, I am of the opinion that the earliest time an individual may petition for restoration of his driving privileges under § 46.1-421(c) is five years from the date on which the Commissioner enters his order of revocation.

1Section 46.1-421(b) states: "Notwithstanding any other provision of law, the Commissioner shall forthwith revoke and not thereafter reissue the operator's or chauffeur's license of any person upon receiving a record of a third conviction of such person for a violation of the provisions of § 18.2-266 pertaining to driving while under the influence of drugs or intoxicants, or a federal law, or law of any other state or a valid ordinance of any city, town, or county of this State, similar to § 18.2-266, notwithstanding the length of time between violations; provided, however, that each of said convictions occurs after July one, nineteen hundred sixty-four. At the expiration of ten years from the date of the revocation hereunder, such person may petition the circuit court in the county or city wherein such person resides, and for good cause shown, such license may in the discretion of the court be restored on such terms and conditions as the court may prescribe."

2Your inquiry is similar to that which I answered in an Opinion to the Honorable A. R. Giesen, Jr., Member, House of Delegates, dated August 11, 1978, and found in Report of the Attorney General (1978-1979) at 182, wherein I expressed the view that the earliest time an habitual offender may petition for restoration of his driving privileges under § 46.1-387.9:2 is five years from the date he was so adjudicated. The operative term in that instance was "date of such adjudication."

3I am mindful of § 46.1-441, which provides that when the Commissioner revokes a driver's license for a period of time on conviction of certain offenses, as is the case under § 46.1-421(b), then such period of revocation is counted either from one hundred eighty days after said conviction becomes final or from the date on which the license in question is surrendered, whichever event first occurs regardless of whether or not the Commissioner has received a record of such conviction. Section 46.1-441, however, does not fix the time when the period of revocation begins to run, but simply delays the counting time of the period of revocation until one of the enumerated events occurs. White v. Commonwealth, 203 Va. 816, 127 S.E.2d 594 (1962).

MOTOR VEHICLES. TWO WHEELED VEHICLES EQUIPPED WITH 1.2 TO 2 HORSEPOWER MOTORS CAPABLE OF 45 MPH SPEED ARE CLASSIFIED BY STATUTE AS MOTORCYCLES. LICENSE AND HELMET LAWS APPLY.
October 12, 1979

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

This is in reply to your recent letter in which you pose several questions relating to two-wheeled vehicles equipped with motors which produce ratings ranging from 1.2 to 2 horsepower and attain speeds up to 45 miles per hour.

In response to your question of whether such vehicles are motorcycles or bicycles, the statutory definition of "motorcycle" is found in § 46.1-1(14) of the Code of Virginia (1950), as amended. In accordance with that section, a motorcycle includes, among other things, "[e]very motor vehicle designed to travel on not more than three wheels in contact with the ground...." While this definition appears to include all two wheel vehicles, § 46.1-1(1a) provides an exception for bicycles. As you will observe, however, the vehicles in question do not meet the test for bicycles under that section since they have more than one horsepower and produce speeds exceeding 20 miles an hour. See Report of the Attorney General (1975-1976) at 231. Accordingly, it is my opinion that the vehicles in question are motorcycles and not bicycles.

In respect to your next two questions, every such vehicle is required to have a State motorcycle license and every operator or rider is required to wear a helmet and have the necessary equipment.

The answer to your final question of whether these vehicles, which you state "will not attain a 45 mile limit" are precluded from being used on interstate highways would depend upon the posted minimum speed for the highway. There is no State statute to exclude registered motor vehicles from the highways on the basis of their speed capabilities not exceeding 45 miles per hour. Section 46.1-193, which controls as to maximum and minimum speed limits for motor vehicles operated over the highways of this State, provides, in part (2)(a) thereof, that, no person shall drive a motor vehicle "at such a slow speed as to impede the normal and reasonable movement of traffic except where reduced speed is necessary for safe operation or in compliance with law." On a link of interstate or other highway on which the posted minimum speed is higher than the speed attainable by the vehicles in question the operation of any such vehicle, except by special permit, would be in violation of law. Having decided that these vehicles are motorcycles, however, in the absence of a posted minimum speed limit which such vehicle could not attain, I find no law which would preclude their operation upon the interstate highways.

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1Section 46.1-1(14) "'Motorcycle'.--Every motor vehicle designed to travel on not more than three wheels in contact..."
with the ground and any four-wheeled vehicle weighing less than five hundred pounds and equipped with an engine of less than six horsepower, except any such vehicle as may be included within the term 'farm tractor' as herein defined."

2Section 46.1-1(1a) "'Bicycle'.--'Bicycle' shall include pedal bicycles with helper motors rated less than one brake horsepower, which produce only ordinary pedaling speeds up to a maximum of twenty miles per hour...."

3Section 46.1-41 requires that every person owning a motor vehicle "intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division for and obtain the registration thereof and a certificate of title therefor in the name of the owner." Section 46.1-99 prohibits operation upon the highways of this State without displaying the required license plates.

4Section 46.1-172 requires, with exceptions not here applicable, that operators and riders on motorcycles "shall wear protective helmets." This statute requires certain other equipment such as a face shield, safety glasses or goggles for the operator and a footrest for the use of a passenger.

OPTICIANS. REGULATIONS OF BOARD OF OPTOMETRY REGARDING OPTHALMIC ADVERTISING NOT APPLICABLE TO OPTICIANS.

January 24, 1980

Mrs. Ruth J. Herrink, Director
Department of Commerce

You have asked whether the proposed advertising regulations of the Virginia Board of Optometry would be applicable to persons other than licensed optometrists. It is my understanding that the regulations contain certain disclosure requirements in eyewear advertising, and that the regulations by their terms are applicable to all persons, including those not licensed as optometrists.

Section 54-396(9) of the Code of Virginia (1950), as amended, is a criminal statute, violation of which is punishable as a misdemeanor. It provides:

"Section 54-396. Prohibited acts. - It shall be unlawful for any person: ***

(9) To publish or cause to be published in any manner an advertisement that (i) is false, deceptive or misleading, (ii) contains a claim of professional superiority or (iii) violates such regulations as may be promulgated by the Board governing advertising by optometrists." (Emphasis added.)

By its terms, § 54-396(9) applies to advertisements of any service that constitutes the practice of optometry, whether or not the person is licensed as an optometrist.
There is, however, substantial overlap of the practice of ophthalmology and that of optometry, and of the practice of opticianry and that of optometry. The question, therefore, remains whether ophthalmologists and opticians are subject to criminal sanctions for violations of § 54-396(9), or regulations promulgated thereunder by the Board of Optometry. I conclude that they are not.

Ophthalmologists are licensed physicians, and as such are expressly exempted from the statutes codified in the Optometry Practice Act. See § 54-369. They are, therefore, not subject to § 54-396 or to any regulation of the Board of Optometry.

The practice of opticianry is regulated by the Virginia State Board of Opticians under Ch. 14.1 of Title 54. A duly licensed optician may sell ophthalmic products and do certain other functions that would otherwise constitute the practice of optometry. See § 54-398.2(d).

Section 54-396(9) is a criminal statute, and must therefore be construed strictly. It does not expressly apply to opticians, nor does any other statute, in the Optometry Practice Act or elsewhere, authorize the Board of Optometry to promulgate regulations governing advertising by opticians. I, therefore, conclude that neither § 54-396(9) nor the regulations to which you refer apply to advertising by any duly licensed optician concerning services or goods he may provide under his license.

PARDON, PROBATION AND PAROLE. DISCRETIONARY PAROLE. METHOD OF COMPUTATION.

October 9, 1979

The Honorable Pleasant C. Shields, Chairman
Virginia Parole Board

You have inquired as to the proper method of computing discretionary parole eligibility as a result of the amendments to §§ 53-211 and 53-213 of the Code of Virginia (1950), as amended.

Sections 53-211 and 53-213 provide ten days good conduct credit for every twenty days prisoners serve without violating any written jail or prison rules or regulations. The amendments to these sections provide that any good conduct credit allowed under such sections shall be taken into consideration in determining parole eligibility.

Two methods of computing parole eligibility under these sections have been considered. They are:

1. Whole sentence--parole date is based on the prisoner's sentence less the total amount of good time he could earn.
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2. Incremental sentence--parole date is based on the prisoner's sentence less the amount of good time actually earned at the point of eligibility.

Sections 53-211 and 53-213 provide credit for good conduct only after it has been earned. In my opinion, therefore, only the incremental sentence method may be used in determining discretionary parole eligibility. Otherwise a prisoner could be considered eligible for parole sooner than he deserved.

Another amendment by the 1979 Session of the General Assembly, § 53-251.3, also impacts upon the duties of the Parole Board. This section is commonly referred to as mandatory parole and requires the Parole Board to discharge a prisoner on parole when six months remain in his sentence until his date of final discharge.

A prisoner's date of final discharge should be determined by the length of his sentence less any credit (for good conduct, vocational education or extraordinary services) he may have received. The date of final discharge is not fixed; it changes every time a credit is earned or lost. As I have previously stated with regard to discretionary parole, the Code sections allowing a prisoner credit for time toward the service of his sentence require that any such credit must be earned before it can be taken into consideration in computing his date of final discharge. Section 53-251.3 becomes effective when six months remain between the total of time served and the prisoner's date of final discharge.

PARDON, PROBATION AND PAROLE. ELIGIBILITY. PROVISION FOR CREDIT FOR GOOD CONDUCT TIME TOWARD PAROLE ELIGIBILITY IS RETROACTIVE.

July 17, 1979

The Honorable Robert C. Scott
Member, House of Delegates

You have asked whether the provisions of H.B. 1731, passed by the 1979 Session of the General Assembly, are to be applied retroactively. H.B. 1731 amends §§ 53-210 through 53-213 of the Code of Virginia (1950), as amended, as well as enacting a new § 53-251.3, providing for mandatory discharge on parole and repealing § 53-216, commonly referred to as the "recidivist" statute.

Generally, statutes are to be given prospective rather than retrospective construction. See § 1-16; Papen v. Papen, 216 Va. 879, 224 S.E.2d 153 (1976). But the legislature may declare a new or an amended statute dealing solely with matters of remedy to have retrospective application. See § 1-16; Paul v. Paul, 214 Va. 651, 203 S.E.2d 129 (1974); Duffy v. Hartsock, 187 Va. 406, 46 S.E.2d 570 (1948). A statute will always be interpreted so as to operate
prospectively, and not retrospectively, unless the language of the legislature is imperative. Washington v. Commonwealth, 216 Va. 185, 217 S.E.2d 815 (1975).

Sections 53-210 through 53-213, providing for credit towards sentences for good conduct, were amended by the addition of the following language: "Any credit allowed under the provisions of this section shall also be considered as reducing the term of imprisonment to which the prisoner was or is sentenced for the purpose of determining his eligibility for parole." (Emphasis supplied.) It is clear from this language that the General Assembly intended that credit for good conduct time be given not only to defendants sentenced subsequent to July 1, 1979, the effective date of this statute, but also to those sentenced prior to such date.

Newly enacted § 53-251.3 applies to every person "who is sentenced and committed under the laws of the Commonwealth to any state correctional institution or as provided for in § 19.2-308.1." The language of this statute is not confined to defendants who are sentenced on or after July 1, 1979, and thus the provisions of the section apply to persons sentenced both before, on, and after July 1, 1979.

PHYSICIANS. RECORDS. PATIENTS DO NOT OWN THEIR MEDICAL RECORDS.

November 19, 1979

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

You have inquired about a patient's right to review medical records in the possession of the Alexandria Health Department and about his right to have other parties review them.

The prevailing view in American jurisdictions, including this Commonwealth, is that a patient does not own his medical records absent a statute to the contrary. Instead, medical records are ordinarily the property of the physician or the hospital that possesses them. Moreover, the Fourteenth Amendment to the United States Constitution does not grant a patient any property interest in his medical records if state law does not create one. Gotkin v. Miller, 379 F.Supp. 859 (E.D.N.Y. 1974); aff'd, 514 F.2d 125 (2d Cir. 1975). Thus, if a patient in Virginia can compel release of his records, that authority must derive from a State statute.

Three Virginia statutes principally affect the release of patient records: § 2.1-382(A)(3)(a) of the Privacy Protection Act; § 2.1-342(b)(3) of the Virginia Freedom of Information Act (the "Act"); and § 8.01-413. The provision of the Privacy Protection Act merely refers to the more specific language of § 2.1-342(b)(3) of the Act.
2.1-342(b)(3) exempts medical records from the public disclosure requirements of the Act. Exemptions from that Act are not prohibitive in nature; in other words, a public body may release exempted material if it desires. See Report of the Attorney General (1977-1978) at 489. Consequently, nothing in the Act prohibits the release of medical records to someone other than the patient although there would be a breach of confidence if the patient did not consent.

In any event, the language exempting the medical records from the disclosure requirements of the Act has the effect of conferring upon a patient a statutory right to review personally records in the possession of a "public body" like a local health department or to have a physician of his choice review them. If, however, those records are mental records in which the treating physician has written that a personal review of the records would be injurious to the patient's physical or mental health or well-being, then only a physician of the patient's choice may review them. In my judgment, this provision about mental records does not affect the patient's right to compel a department to release the records to a physician of the patient's choice.

Section 8.01-413(B) also plays a role in determining whether a department must release records. Under this provision of law, copies of hospital or a physician's records "shall be furnished" to the patient or his attorney. In cases where the treating physician has written in those records that release to the patient would be injurious to the patient, the records must nonetheless be released to the patient's attorney.

The principal question about § 8.01-413(B) is whether it controls a local health department which is operated by the Commonwealth. Sovereigns are ordinarily not subject to their own laws. See Opinion to the Honorable Robert Carter, Chairman, Virginia Health Services Cost Review Commission, dated February 8, 1979 [and the cases cited therein] (copy enclosed). Title 8.01 is, however, generally applicable to the Commonwealth insofar as it prescribes procedure because it establishes the various mechanisms for the resolution of disputes by the courts, including those in which the Commonwealth is involved. Section 8.01-413(B) establishes such a procedural mechanism.

Having concluded that § 8.01-413(B) does apply to state entities, I must also conclude that it grants to a patient the right to require a local health department to release his records to his attorney even though the records might contain the specified statement from the treating physician that inspection of the records by the patient might be injurious to that patient. Moreover, the pendency of litigation is not a condition precedent to the patient's exercise of his rights under this provision of law.

In summary, §§ 2.1-342(b)(3) and 8.01-413(B) confer certain rights upon patients. These statutes allow a patient
to compel release of his medical records to himself, to a physician of his choice, or to his attorney. If the records contain the specified statement from the treating physician that personal inspection would be injurious, then the patient can compel the release to either his physician or his attorney. If no such statement is in the records, then no statute prohibits the release of the records to anyone whom the patient may designate. While the department may in theory deny access to persons other than the patient, his attorney, or his physician, I would not advise restricting such access unless the patient’s demands were harassing or unreasonable.

1 The Alexandria Health Department is operated under contract by the State Health Department pursuant to § 32.1-31 of the Code of Virginia (1950), as amended, and therefore is a state entity.


3 In pertinent part, § 2.1-342(b)(3) states: "[S]uch records can be personally reviewed by the subject person or a physician of the subject person’s choice; provided, however, that the subject person’s mental records may not be personally reviewed by such person when the subject person’s treating physician has made a part of such person’s records a written statement that in his opinion a review of such records by the subject person would be injurious to the subject person’s physical or mental health or well-being."

4 Section 8.01-413(B) 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."

5 See Report of the Attorney General (1977-1978) at 332. (Opinion construes § 8-277.1(B) which was recodified as § 8.01-413(B).)

6 Note that § 2.1-342(b)(3)’s specified statement refers only to "mental records" while § 8.01-413(B)’s statement refers to a "patient’s records" which apparently encompasses both medical and mental records. Because § 8.01-413(B) was enacted into law after § 2.1-342(b)(3), I conclude, as a practical matter, that if any type of medical record in the
possession of a "public body" contains such a statement restricting release, it is prohibitive insofar as release to the patient is concerned.

When the records are to be released to any party other than the patient, a written and notarized authorization from the patient is advisable in my opinion. Certainly, some kind of prior consent from the patient to release the records to a third party, even his attorney or a physician of his choice, is essential if a breach of the confidential nature of the records is to be precluded.

PRISONERS. UNLAWFUL FOR PRISONER TO "INJURE" PERSON LAWFULLY ADMITTED TO PENAL INSTITUTION BY HITTING HIM WITH URINE.

August 29, 1979

The Honorable Frank D. Harris
Commonwealth's Attorney for the County of Mecklenburg

You ask whether the word "injury" as used in § 18.2-55 of the Code of Virginia (1950), as amended, proscribing as a Class 5 felony the injury of persons lawfully admitted to correctional institutions by inmates, is broad enough to include instances where officers and other persons have been struck with urine and fecal matter.

The Acts of Assembly are silent as to legislative intent and the statute has not been judicially interpreted. In my opinion, the legislature is speaking of injury in the terms of criminal rather than civil law and, therefore, bodily contact in the sense of a criminal assault is contemplated. Compare Burlington Mills v. Hagood, 177 Va. 204, 13 S.E.2d 291 (1941) (civil injury includes psychological damage not necessarily resulting from bodily contact) with Bryant v. Commonwealth, 189 Va. 310, 53 S.E.2d 54 (1949) (bodily injury in the criminal sense requires physical touching with "any" resulting injury). I believe that the legislature intended by making the offense a Class 5 felony to elevate in stature conduct that would have otherwise been a crime punishable as a misdemeanor. Due to the criminal nature of the statute and the severity of the punishment, therefore, I conclude that the legislature intended to give "injury" its criminal connotation of bodily contact.

Once bodily contact is established, the question becomes whether the contact in question amounts to sufficient injury as the statute defines it. In Johnson v. Commonwealth, 184 Va. 409, 35 S.E.2d 594 (1945), the court distinguished a "wound" which required a breaking of the skin from an "injury" and accepted with approval the Webster's International Dictionary definition of injury as a "detriment, hurt, loss, impairment." Again, in Bryant v. Commonwealth, supra, the court cited extensively a treatise definition of bodily injury as "any bodily hurt whatsoever." I am, therefore, of the opinion that the definition of the word "injury" as used in § 18.2-55 includes any unlawful
bodily contact caused by an inmate of a correctional institution with persons lawfully admitted therein and would include hitting such persons with urine or fecal matter.

PROFESSIONAL AND OCCUPATIONAL REGULATION. REAL ESTATE LICENSEEES. REGULATIONS REQUIRE LICENSEE TO RETAIN SECURITY DEPOSITS RECEIVED ON RENTAL PROPERTY.

June 27, 1980

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

You ask as to the proper handling of security deposits received by a real estate firm. Specifically, you state that a broker licensed in Virginia who is the sole shareholder of a real estate firm is receiving security deposits pursuant to a management agreement between the firm and the owner of multi-family rental units.

You inquire first whether the real estate firm may properly remit the deposits to the owner and whether the answer to this question would be different if the owner were a non-resident of Virginia and the depository of such funds were outside of Virginia. You further inquire whether the firm would be required to demand and receive from the owner security deposits received by the owner prior to retention of the firm to manage the rental units.

You note that § 55-248.11 of the Code of Virginia (1950) as amended, provides in part that deposits will be held by the landlord while Virginia Real Estate Commission Regulation 8.2(24) requires a broker to hold such funds in escrow. The answer to your questions turn on whether the regulation is to be given effect.

It is a well established tenet of administrative law that a regulation will be given the force of law if it is within the granted authority of the agency, properly promulgated and reasonable. See 1A M.J. Administrative Law § 5 (1967); 73 C.J.S. Public Administrative Bodies and Procedure § 108 (1951); K. Davis, Administrative Law Treatise § 5.03; United States v. Johnson, 38 F.Supp. 4 (S.D.W.Va. 1941). The regulation in question was promulgated pursuant to powers granted by § 54-1.28(5). In that a broker may be liable to his principal or a third party to a transaction for the mishandling of money, the requirement of an escrow account is a reasonable one. See, e.g., 12 C.J.S. Brokers § 27 (1938); H. Reuschlein and W. Gregory, Handbook on the Law of Agency and Partnership § 122. The regulation meets the stated criteria and should be given the force of law.

It is an equally well established tenet that in construing two statutes which may be in conflict, the two should be construed so as to allow both to stand and to give effect to both. See 17 M.J. Statutes § 53 (1979); 82 C.J.S.
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Statutes § 363 (1953); Board of Supervisors of Albemarle County v. Marshall, 215 Va. 756, 214 S.E.2d 146 (1975); State v. Sims, 144 W.Va. 72, 105 S.E.2d 886 (1958); City of South Norfolk v. City of Norfolk, 190 Va. 591, 58 S.E.2d 32 (1950); American Cyanamid Co. v. Commonwealth, 187 Va. 831, 48 S.E.2d 279 (1948). This principle would also be applicable to construction of a statute and a regulation.

The Landlord-Tenant Act (the "Act") provides for receipt of security deposits and stipulates as to their disbursement at the termination of the lease. Where the landlord is dealing through an agent and that agent receives and disburses security deposits in accord with the provisions of the Act, the statute has been complied with and the landlord's obligations have been met. When the agent is also a licensee of the Commission, he is obligated to place funds received on behalf of another in an escrow account and to retain accurate records regarding the handling of such funds. 3

It is clearly possible for the licensee to comply with the requirements of the Act on behalf of his principal and at the same time comply with the requirements of the Commission. As the obligations imposed by the statute and the regulation are not mutually exclusive or in conflict, both should be allowed to stand and given effect.

Accordingly, I am of the opinion that the answer to your first question is that it is not proper for the firm to remit funds to the owner as this would be in violation of the Commission regulation. The answer to the question remains the same if the owner is a non-Virginia resident. Therefore, the answer to the second question is also in the negative.

In response to your third inquiry, I do not believe that the firm is required to receive from the owner those deposits received prior to its retention as manager. As the firm was not a party to those transactions, the Commission regulations would be inapplicable. However, for the firm to hold such deposits would provide greater protection for the tenants.

1Regulation 8.2(24) prohibits: "Commingling funds of any person by a broker or his or her agents with those of his or her corporation, firm or association or failure to deposit such funds in an account or accounts designated to receive only such funds in an insured depository located in the Commonwealth of Virginia."

2Section 54-1.28(5) gives the Virginia Real Estate Commission (the "Commission") the authority: "To promulgate rules and regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by such regulatory board and not in conflict with the purposes and intent of this chapter."

3Regulation 6.4 provides in part: "A complete record of transactions conducted under authority of the broker's or
rental location agent's Virginia license shall be maintained in the broker's main place of business in Virginia or in the office of a supervising rental location agent. In addition to any requirements under Section 8.2 in the case of real estate brokers and salesmen these records shall show from whom the money was received, date of receipt, place of deposit, date of deposit, and when the transaction has been completed the final disposition of the funds...."

PUBLIC CONTRACTS. LEASES OF PUBLIC PROPERTY FOR PERIODS OF FIVE YEARS OR LESS DO NOT REQUIRE COMPETITIVE BIDDING.

April 18, 1980

The Honorable J. Ray Dotson
Commonwealth's Attorney for Wise County and the City of Norton

You have asked my opinion whether the Cumberlands Airport Commission (the "Commission") must advertise for bids before leasing Lonesome Pine Airport to a fixed based operator for a period not exceeding five years.

The General Assembly created the Commission as an independent corporate body, without imposing any specific restrictions on its power to lease Commission property. See Ch. 439 [1958] Acts of Assembly 564. This corporate body, composed of a number of political subdivisions of the Commonwealth, may exercise all rights and powers granted to any single county, city or town by Art. 1, Ch. 3 of Title 5.1 of the Code of Virginia (1950), as amended. See §§ 5.1-35 and 5.1-36. However, the intent of these statutes is that a commission such as the Cumberlands Airport Commission will, in no case, have any powers "greater than those granted to a city, town or county." See § 5.1-36. Therefore, the Commission is subject to the same restrictions on disposition of public property imposed upon municipalities by the Constitution of Virginia (1971) and by statute.

Article VII, § 9 of the Constitution and §§ 5.1-40 and 15.1-308 require public bidding before leasing public property only when such a lease is to exceed five years. There is no other constitutional or statutory provision, including the public contracts provisions of Ch. 4, Title 11 requiring competitive bidding on leases of public property for a period of five years or less. Absent such a statutory or constitutional requirement, no competitive bidding is necessary for public contracts. See Taylor v. County Board of Arlington County, 189 Va. 472, 53 S.E.2d 34 (1949). Therefore, I am of the opinion that bids are not required for a lease of the Lonesome Pine Airport provided the lease term does not exceed five years.

PUBLIC CONTRACTS. LIQUIDATED DAMAGES. USE WHERE BIDDERS SELECT COMPLETION DATE.
The Honorable Raymond R. Robrecht  
Member, House of Delegates

You ask three questions regarding solicitation and acceptance of bids by political subdivisions for capital improvement projects.

Completion Date and Liquidated Damages

The question is whether it is appropriate for a local governmental body to solicit bids for a construction project which solicitation allows the bidders to select the contract completion date and includes a liquidated damage clause.

There is no express statutory authorization for the actions you describe. The fundamental principal of law in this State is that local political subdivisions have only such powers to make contracts as are granted to them by the General Assembly. Further, where particular forms or requirements for entering into such contracts are provided for they must be complied with. See American-LaFrance v. Arlington County, 164 Va. 1, 5-6, 178 S.E. 783, 784 (1935). Therefore, in determining what contracts they may enter into and what procedures must be followed, political subdivisions are distinguished from private persons who may enter into such contracts, and in such manner, as are not prohibited by law.

Provided the political subdivision may legally enter into a contractual arrangement, it may make such contract and include such terms in the same manner as other corporations or individuals if not proscribed by law. See 10 McQuillin, Municipal Corporations, § 29.21(3d Ed.). The Supreme Court of Virginia in the course of interpreting statutory language which closely parallels that found in Ch. 4 of Title 11 of the Code of Virginia (1950), as amended, has stated that "[a]uthority to make contracts certainly includes the power to specify or negotiate the terms and conditions thereof, especially such as will best promote speedy construction...." Aetna Co. v. Earle-Lansdell Co., 142 Va. 435, 450, 129 S.E. 263, 267 (1925). The statutory language which empowers the subdivision to enter into such contracts must of necessity be general in its nature since the specific duties and obligations which will be imposed on the contracts will necessarily vary with the infinite variety of the actual situations. Id., at 447. Since one of the primary purposes of a liquidated damages provision is to obtain the prompt completion of the contract, the political subdivision can legally use such contract language to protect itself against damage, which may be caused by the contractor's failure to compete within an agreed time period. Applying the same principles, the contracting agency, in establishing the time within which they may expect the construction to be completed, may permit the bidder to designate that time period.
Lowest Responsible Bidder

You also ask whether § 11-20 requires the local government to award the contract to the lowest responsible bidder.

The use of competitive bidding for public contracts as a means to prevent favoritism, fraud, and waste and to secure the best work at the lowest practicable price through encouraging free and full competition has been repeatedly recognized by the courts and commentators. Mohave County v. Mohave-Kingman Estates, 586 P.2d 978 (Ariz. 1978); Hanna, et al. v. Board of Education of Wicomico County, 87 A.2d 846 (Md. 1952), 10 McQuillen, supra, § 29.29. The Virginia Supreme Court has cited with approval competitive bidding requirements in city charters. Home Building Co. v. Roanoke, 91 Va. 52, 20 S.E. 895 (1895), City of Bristol v. Dominion National Bank, 153 Va. 71, 149 S.E. 632 (1929). Although § 11-20 does not explicitly refer to local political subdivisions, sections of Ch. 4 of Title 11 which deal with "Public Contracts in General," in particular § 11-23, do involve local political subdivisions. Because of the reference in § 11-23 to "contractor, as the lowest responsible bidder," this Office has previously held that the requirements of § 11-20 when read with § 11-23 "require all public works contracts, including those awards by local governments, to be awarded only to the lowest responsible bidder." Opinion to the Honorable Nathan H. Miller, Member, House of Delegates, dated August 6, 1975, found in Report of the Attorney General (1975-1976) at 72.

Award of Contract

You finally ask whether the liquidated damage clause should be taken into account in determining who is the low bidder when the bidders have selected differing completion dates.

The liquidated damage clause is primarily designed and used to give a certain amount of protection to the owner of a project from damages which he might incur if the completion of the project is delayed beyond the date he has been led to believe he can rely upon for access to or control over the project. Ordinarily, the owner would have some leeway in the required completion date. If he did, in fact, need the project completed by a specific date, that date should be made part of the specifications so that the bidders could consider it in making their bid. Otherwise, the completion date filled in by the bidder is provided for the owner's knowledge and convenience so that the owner may begin planning for whatever actions are still necessary once the project is completed. Thus, the liquidated damage clause is to protect the owner from dislocation caused by the contractor's failure to live up to the completion date he had provided to the owner.
Therefore, under ordinary circumstances, the liquidated damage clause would not be used in determining who is the low bidder. If it is contemplated that the completion date will be used in combination with the liquidated damage clause by the owner to calculate any possible damages to the owner from a later completion of the project by one bidder then would be incurred accepting the date submitted by another bidder, this fact should be made known to the bidders in advance and the means of making such calculations should be explicitly set forth in the bid documents so that the bid tabulations may be clearly understood by all bidders.

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1 This is often referred to as the Dillon rule which states that political subdivisions can exercise only those powers expressly granted by law, those freely implied from such express powers and those essential to the purposes of the governance of the political subdivision.

2 The court was interpreting § 1969 of Michie's Ann. Code, 1924, Ch. 403 [1922] Acts of Assembly 678, which has been carried over with only slight modifications in the present Code as § 33.1-187.

3 Although the cited case involved a contract by a State agency, the court cited with approval various cases involving municipal contracts of which the following quote is illustrative: "The power to make improvements and to let contracts therefore, and to exact of the contractor a bond for the faithful performance of his contract, necessarily implies the power to do everything necessary for the faithful performance of the works, for the protection of the city and its citizens, and for securing the best and lowest possible bids. Thus, a municipality authorized to make improvements upon its public streets, and to exact of the contractor his bond for the faithful performance of his contract, has power to require such bond to contain a condition that the contractor will pay all persons performing labor or furnishing materials at his request and for the purpose of assisting him in the completion of his contract." St. Louis v. Von Phul, 133 Mo. 561, 34 S.W. 843 (1896).

for construction of a courthouse, in anticipation of grants to provide permanent financing, which grants will not be forthcoming.

There is no question that the courthouse would constitute a project within §15.1-172(h) under normal circumstances. In the normal situation, approval and issuance of the bonds precedes construction of the project, and financial controls are established whereby the bond proceeds are directly applied to the costs of construction. Such a sequence assures compliance with §15.1-172(h), which makes it clear that use of bond proceeds for current expenses does not qualify as a project.

I have not been provided with the financial arrangements for segregating and applying the proceeds of the proposed bonds. I assume they have not been worked out in final form. I also assume the bond documents will have contractual requirements as to application of proceeds. The statutory requirements are stated in broad terms in §15.1-206.

There clearly is no statutory prohibition against using bond proceeds to reimburse a county for project advances from working capital. The last sentence of §15.1-172(i) expressly provides that any obligation or expense incurred by a county in connection with specified construction costs may be regarded as a part of the project cost, and reimbursed to the county out of the proceeds of bonds issued to finance the project.

Therefore, absent special circumstances of which I am not aware, replenishment of working capital is not to be viewed as the use of bond proceeds for current expenses. Furthermore, the financial result is no different than if the county's working capital had been left intact, and the project financed from the beginning with bond proceeds.

There may indeed be some time limit after which proceeds of a bond issue can no longer be said to provide permanent financing for a completed project. I have found no statutory time limit applicable to interim financing with working capital advances. Section 15.1-223 (loans in anticipation of bond issue) provides a guideline, however. Section 15.1-223 authorizes interim borrowings extendable up to an aggregate maturity of five years. I am advised that the first construction advances from working capital were made less than five years prior to the proposed bond financing. Accordingly, passage of time does not prevent the proposed bonds from being treated as permanent financing for the completed project.

The question then is whether a bond financing "after-the-fact" is consistent with the purposes and language of §§15.1-186 through 15.1-188, which require various steps preliminary to issuance of a county's bonds. There may be a disposition to think that the referendum required by §15.1-188 is intended to give the voters a veto over the
project. But in fact, the voters' veto is restricted to one kind of financing. If a project can be otherwise financed, by outside grants or current revenues, county voters are accorded no voice in the matter, apart from the periodic election of supervisors as provided by law.

The choice afforded the voters by § 15.1-188 is between paying for a project either by bonds (and deferred taxes) or by immediate taxes. Because of the costs and perils of debt, this is no small decision, so the referendum question put to the voters under § 15.1-188 is a meaningful one, even if there is no opportunity to veto the project.

Accordingly, under present circumstances, if the requirements of § 15.1-206 are observed, I find that general obligation bonds, issued to reimburse a county for advances from working capital, are bonds to finance a project under § 15.1-185, where the advances provided interim financing for construction of a courthouse.

1If county voters are to be given a veto on all major county projects, however financed, changes are needed in parts of the law other than the Public Finance Act (Ch. 5 of Title 15.1).

PUBLIC OFFICERS. COMPATIBILITY. CONSTITUTION. DEPUTY SHERIFF MAY NOT SERVE ON TOWN COUNCIL.

May 14, 1980

The Honorable Nathan H. Miller
Member, Senate of Virginia

You ask whether a deputy sheriff of a county may at the same time serve as a member of the governing body of a town.

Article VII, § 6, of the Constitution of Virginia (1971), provides that no person shall at the same time hold more than one office mentioned in that article. In the last sentence of § 6, there is mention of members of governing bodies, in § 4, there is mention of sheriffs.

Deputies of officers are themselves officers, and subject to the same requirements and disabilities as the officer. See Opinion to the Honorable H. J. Sturm, Jr., Clerk, Circuit Court of the City of Newport News, dated February 25, 1980 (copy enclosed).

Accordingly, I find that under Art. VII, § 6, a deputy sheriff of a county may not at the same time serve as a member of the governing body of a town.
PUBLIC OFFICERS. INCOMPATIBILITY. CONSTITUTION. DEPUTY CLERK OF CIRCUIT COURT MAY NOT SERVE AS MEMBER OF GOVERNING BODY.

February 25, 1980

The Honorable H. J. Sturm, Jr., Clerk
Circuit Court of the City of Newport News

You ask whether a deputy clerk of the Circuit Court for the City of Newport News may at the same time serve as a member of the city council.

Article VII, § 6, of the Constitution of Virginia (1971), provides that no person shall at the same time hold more than one office mentioned in that article. In the very next sentence of the same § 6, there is mention of the members of governing bodies. The article thus imposes a disability upon members of governing bodies during the term of office for which they are elected.

The deputies of officers are themselves officers, and subject to the same requirements and disabilities as the officer. See, for example, Opinion to the Honorable Russell B. Smith, III, Sheriff for the City of Clifton Forge, dated May 6, 1975, found in Report of the Attorney General (1974-1975) at 384 (deputy sheriffs); Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated January 19, 1976, found in Report of the Attorney General (1975-1976) at 148 (status of deputy clerks under grievance procedures); Opinion to the Honorable Ora A. Maupin, Commissioner of the Revenue for the City of Charlottesville, dated January 15, 1976, found in Report of the Attorney General (1975-1976) at 50 (deputy commissioners of the revenue).

Accordingly, I find that, under Art. VII, § 6, a deputy clerk of the circuit court of a city may not at the same time also serve as a member of the city council.

PUBLIC OFFICERS. INCOMPATIBILITY. COUNTY SUPERVISOR MAY NOT SERVE AS MEMBER OF TOWN PLANNING COMMISSION.

February 7, 1980

The Honorable E. Carter Nettles, Jr.
Commonwealth's Attorney for the County of Sussex

You ask whether a member of a county board of supervisors may serve at the same time as a member of the planning commission of a town located within the county.

Generally, no person holding the office of supervisor shall hold any other office, elective or appointive, at the same time. See § 15.1-50 of the Code of Virginia (1950), as amended. Membership on a local planning commission is a

Section 15.1-50 does provide a number of exceptions allowing certain county officers to serve as town officers as well: (1) as town attorney, § 15.1-50(1); (2) commissioner of revenue of a town located in the county, § 15.1-50(2); (3) treasurer of a town located in the county, § 15.1-50(2); and (4) town sergeant of any town within such county, § 15.1-50(5). No comparable exception exists, however, for members of a town planning commission.

Section 15.1-437 does provide that one member of a local planning commission may be a member of the governing body of the county or municipality. The same section, however, speaks of the members of the commission being appointed by the governing body, which means the governing body that created the commission under § 15.1-427.1, rather than some other governing body. See Opinion to the Honorable Robert C. Oliver, Jr., Commonwealth's Attorney for Northampton County, dated November 6, 1974, found in Report of the Attorney General (1974-1975) at 317 (§ 15.1-437 permits one member of town council to be on town planning commission). Section 15.1-437 does not, therefore, carve out a further exception to § 15.1-50 allowing county officers to serve as town officers. Compare Opinion to the Honorable Charles L. McCormick, III, Commonwealth's Attorney for the County of Halifax and the City of South Boston, dated August 14, 1972, found in Report of the Attorney General (1972-1973) at 306.

Accordingly, I find that a member of a county board of supervisors may not serve at the same time as a member of the planning commission of a town.

PUBLIC OFFICERS. OATHS. APPOINTEES TO BOARDS, COMMISSIONS, COUNCILS AND OTHER COLLEGIAL BODIES. UNDER ORDINARY CIRCUMSTANCES, MAY BE TAKEN BY CLERK, DEPUTY CLERK OR NOTARY PUBLIC.

June 12, 1980

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You ask whether the oath of appointees to boards, commissions, councils and other collegial bodies must be administered by a judge rather than by a clerk, deputy clerk, or notary public.

Section 49-3 of the Code of Virginia (1950), as amended, provides that the oaths to be taken by persons appointed to
most offices and posts, including membership on collegial bodies, shall (unless otherwise directed by law) be administered in a court of record or, if no bond is required of such officer, by the judge of such court or the clerk thereof in vacation. Section 49-4 provides that any oath required by law, which is not of such nature that it must be made in court, may be administered by or made before various designated officers, including notaries, clerks of court or deputy clerks of court.

In the ordinary case, there is no direction by law that appointees to collegial bodies take their oath in any manner other than as specified by §§ 49-3 and 49-4. Also, in the ordinary case, no bond is required of appointees to collegial bodies. See, for example, Title 9 (Commissions, Boards and Institutions Generally). Accordingly, under § 49-3 the oaths of such persons may be taken by the judge of a court of record or the clerk thereof in vacation. There is no requirement under § 49-3 that the oaths of such persons be administered in a court of record.1

The authority of such officers to administer oaths is purely a creature of statute. The authority of such officers under § 49-4 is limited to oaths not of such a nature that they must be made in court. See, Mendez v. Commonwealth, 220 Va. 97, 102, 255 S.E.2d 533 (1979). However, in the ordinary case, there is no requirement under § 49-3 that the oaths of appointees to collegial bodies be administered in a court of record.2

Accordingly, I find that in the ordinary case, as noted above, the oath of appointees to boards, commissions, councils and other collegial bodies may be administered under § 49-4, rather than under § 49-3.

1 The requirement to administer oaths in court, when no bond is required, was dropped in 1919. The old system of county courts and judges in every county had been eliminated, and circuit judges no longer lived in many of the counties, and in many of them, terms of court were not frequent. See Revisor's Note to the Code of Virginia of 1919, § 273 (precedessor to § 49-3).

2 Compare Opinion to the Honorable Lucille Rowland, Secretary, Chesapeake Electoral Board, dated February 26, 1974, found in Report of the Attorney General (1973-1974) at 155 (oath of officer of election need not be administered in court of record); Opinion to the Honorable Frank D. Harris, Commonwealth's Attorney for Mecklenburg County, dated April 22, 1975, found in Report of the Attorney General (1974-1975) at 387 (oath of deputy sheriff must be administered in court of record).
You ask whether the Division of Purchases and Supply (the "Division") may delegate to State agencies the authority for procurement of printing from commercial sources or other State agencies without requisition upon the Division.

Commercial Sources

The basic responsibilities of the Division as to public printing are set forth in § 2.1-458 of the Code of Virginia (1950), as amended, as follows:

"The Division of Purchases and Supply shall be responsible for the procurement of all public printing. The Division shall supply all the departments, divisions, institutions, officers and agencies of the State with such printing, lithographing, engraving, ruling, and binding as may be required by them for the proper conduct of the business of the State. It shall be the duty of such departments, divisions, institutions, officers and agencies to order all of their printing, binding, ruling, lithographing, engraving and advertising by requisition upon such Division, stating clearly and distinctly the description of the work, the quantity and the time delivery is desired. The Division shall furnish the various departments, divisions, institutions, officers, and agencies with the necessary blank requisitions upon which orders for printing are to be made."

This responsibility is further defined by § 2.1-460 which requires competitive bidding for the procurement of all "printing, binding, ruling, lithographing and engraving..." if practicable and in accordance with §§ 2.1-442 and 2.1-461.

Section 2.1-442 authorizes the Division to establish regulations for all purchases to be made by any department, division, officer or agency of the State but says nothing about printing. Nor does any language contained in § 2.1-461 authorize the Division to delegate the procurement of printing from commercial sources without requisition and the compliance with the necessary bid procedures by the Division. Accordingly, § 2.1-458 read together with § 2.1-460 requires that all printing, binding, ruling, lithographing and engraving for all the departments, divisions, institutions, officers and agencies of the State be purchased upon requisition issued by the Division after competitive bidding if practicable. Therefore, I answer your first question in the negative.
Procurement From State Agencies

The second question you asked was whether the Division could authorize a State agency to procure printing from other State agencies without State requisitions upon the Division. Section 2.1-465 authorizes the Division to establish criteria and procedures for the economical operation of State owned printing facilities. This section indicates both that State owned printing facilities will exist, and that the Division is responsible for their economical operation. In the discharge of this responsibility, the Division may establish criteria and procedures pursuant to which State agencies may secure printing through State owned printing facilities. Since § 2.1-465 specifically deals with these facilities and the Division's responsibilities for them, and pursuant to the normal rules of statutory construction to the effect that a specific statute supersedes a more general one, I must answer your second question in the affirmative.

1You have stated that your inquiry pertains only to those situations in which there is no question as to whether it is "practicable" to make the procurement by requisition.

RELIGIOUS EDUCATION. RELIGIOUSLY AFFILIATED HIGH SCHOOLS MAY BE REQUIRED TO BEAR COST OF ADMINISTERING BASIC COMPETENCY TESTS.

July 26, 1979

The Honorable Alexander B. McMurtrie, Jr.
Member, House of Delegates

You ask whether the Board of Education may require private church-related high schools to pay the costs of test booklets and grading for the minimum competency tests for high school students.

The current Standards of Quality for School Divisions revised and adopted by the General Assembly on March 4, 1978, provides for a program of testing to insure certain minimal levels of academic achievement for graduates of high schools in the State after January 1, 1981, Ch. 529 [1978] Acts of Assembly. Section 9C of the Standards of Quality provides that graduates of accredited high schools must pass a competency test in order to graduate.

Administration of the minimum competency test is thus a condition of accreditation for high schools whether public or private. The giving of such tests is not a condition of compliance with the Virginia Compulsory Attendance Law. See § 22-275.1 of the Code of Virginia (1950), as amended. No private high school is required to obtain accreditation by the State Department of Education. Whether a private, sectarian or non-sectarian school desires to obtain such
accreditation is entirely the choice of such school. Nevertheless, because of the legislative mandate of the Standards of Quality, it is necessary for an accredited non-public high school to administer the State's minimum competency tests in order that it may grant to its graduates a diploma as an accredited high school.

The United States Supreme Court has consistently reiterated that the states may impose certain requirements including hours of instruction, courses to be taught and qualification of teachers on church-related private schools. Board of Education v. Allen, 392 U.S. 236, 20 L.Ed.2d 1060, 88 S.Ct. 1923 (1968); West Virginia Board of Education v. Barnett, 319 U.S. 624, 631, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943); cf. Pierce v. Society of Sisters, 268 U.S. 510, 69 L.Ed. 1070, 45 S.Ct. 571 (1925). As recently as 1977, the court expressed the view that states may require testing of both teachers and students in private schools to insure that the State's interests in compulsory school attendance are being fulfilled. Wolman v. Walter, 433 U.S. 240 (1973).

Similarly, the State is not required to provide free booklets to private schools merely because free booklets are provided in public schools. It is not an unlawful discrimination to provide benefits to public schools and not to private schools. See Committee for Public Education v. Nyquist, 412 U.S. 756 (1973); Levitt v. Committee for Public Education, 413 U.S. 472 (1973).

Accordingly, I am of the opinion that the Board of Education is authorized to require that the tests be administered and that the schools bear the costs.

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1The State Board of Education is mandated by Art. VIII, § 2 of the Virginia Constitution (1971) to determine and prescribe standards of quality for all the school divisions in the State. The current Standards of Quality for School Divisions were adopted by the General Assembly pursuant to the power granted by said section of the Virginia Constitution to revise the Standards of Quality proposed by the Board of Education.

SALARIES. MILITARY LEAVE. EMPLOYEES COMING WITHIN § 44-93 ENTITLED TO LEAVE WITHOUT LOSS IN PAY FOR WORK DAYS MISSED DURING ONLY 15 CALENDAR DAYS OF "ANNUAL ACTIVE DUTY FOR TRAINING."

March 4, 1980

Mr. Kenneth B. Yancey, Director
Department of Personnel and Training

You have raised a question about the proper interpretation of § 44-93 of the Code of Virginia (1950), as
amended, which concerns military leave without loss of pay for various public employees. Specifically, you question whether the total amount of "annual active duty for training" to which the loss of pay protections of § 44-93 should be applied entitles an employee to fifteen days of paid leave or whether it entitles him only to pay for work days missed during a maximum of fifteen calendar days of annual active duty for training.

Annual Active Duty For Training

The phrase "annual active duty for training" as used in § 44-93 refers to the period of "annual" or "field" training required of members of the organized reserve forces each calendar year. The normal period of such training will not be longer than 15 days, regardless of whether the training is fragmented. Military regulations indicate that this training is usually performed at summer encampments and may also include participation in field exercises and maneuvers. Regulations further indicate that "annual training" is a particular type of "full time training duty" (FTTD) or "active duty for training" (ADT). It is distinguished, however, from various other types of FTTD, ADT, or "supplemental training" which include attendance at Army service schools, Army area schools, unit school training, command post exercises, various special exercises, participation in small arms schools and area and national competitive matches, attendance at military conferences, short tours for special projects, ferrying of aircraft, and participation in other similar duty.

Leave Without Loss In Pay

In my opinion, § 44-93 was only intended to apply to a maximum of 15 days of annual active duty for training per calendar year and was designed to protect against loss of pay for work days missed during only that normal 15 day period of training. My Opinion to Delegate George W. Jones of June 20, 1979, should not be read to the contrary. It was simply meant to address the question of the maximum number of work days for which an employee could receive leave without loss in pay under § 44-93. In recognition of the existence of fragmented annual active duty for training, in which it would be possible for each day of training to fall on a work day, I concluded that 15 days would be the maximum number of days for which an employee could be provided full pay. That conclusion, however, should not be taken to interpret § 44-93 to apply to more than a maximum of 15 days of annual active duty for training per calendar year.

This position is consistent with the interpretation of the federal government with respect to a related leave policy for various federal employees. It is a basic principle of statutory construction that in arriving at the meaning of a statutory provision, it is instructive to look to the interpretation placed upon similar statutes from other jurisdictions. See Hoffer Bros. v. Smith, 148 Va. 220, 138
Moreover, you indicate that this position is consistent with the general interpretation which has always been placed upon this statute by the State Department of Personnel and Training and by the Governor, as chief personnel officer. A review of the relevant State Personnel Rules shows that since at least January 1, 1943, there has been a provision in the rules limiting the loss of pay protections to a period of training not exceeding "fifteen calendar days in any calendar year." Such a longstanding construction of a statute by those charged with its administration is to be accorded great weight and may be accepted as reflecting State law. See, e.g., Commonwealth v. Progressive Community Club, 215 Va. 732, 213 S.E.2d 759 (1975); Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965); Commonwealth v. Cross, 196 Va. 375, 83 S.E.2d 722 (1954); Travelers Indem. Co. v. Nationwide Mutual Insurance Co., 227 F.Supp. 958 (W.D. Va. 1964). This is especially true given your indication that the General Assembly has long been aware of the Department of Personnel's interpretation of § 44-93 and has expressed no disapproval. In fact, the General Assembly is presumed to be cognizant of such an interpretation and when it has indicated no disagreement over the years it is presumed to be in agreement. See Nuttall v. Lankford, 186 Va. 532, 43 S.E.2d 37 (1947).

Accordingly, I am of the opinion that § 44-93 was not intended to apply to more than 15 calendar days of annual active duty for training per calendar year and was intended to protect against loss of pay during only that 15 day period.

A final question concerns to what extent my Opinion to Delegate George W. Jones of June 20, 1979, requires revision of Rule 10.9 of the Rules for the Administration of the Virginia Personnel Act. As clarified herein, that Opinion was not meant to take issue with Rule 10.9 except to the extent that it flatly limits leave with full pay to 10 work days in a calendar year for fragmented annual active duty for training. I note that this provision was first added to Rule 10.9 on July 1, 1977, in an attempt to provide equal treatment for employees on consecutive and fragmented training. As I have indicated, however, 15 days of fragmented annual active duty for training could result in as many as 15 work days missed where all such training days fall on work days.

Accordingly, in my Opinion Rule 10.9 should be revised to delete that 10 day limitation.

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."

2See, e.g., National Guard Bureau Pamphlet 350-1, §§ 1-2(c), 2-3 (October 1, 1978); Department of the Army Regulation No. 140-1, § 3-18(c) and Figure 3-1 (September 1, 1978).

3See, e.g., National Guard Regulation No. 350-1, § 1-5(d) (October 31, 1975); Allison v. United States, 301 F.2d 670 (C.Cl. 1962).

4See National Guard Regulation No. 350-1, §§ 1-5(d) and 1-5(i) (October 31, 1975).

5See Department of Army Regulation No. 310-25, p. 7 (June 1, 1979); Department of Army Regulation No. 140-1, §§ 1-3(a) and (c) (April 26, 1974).

6See National Guard Regulation No. 350-1, § 1-5(i) and Ch. 4 (October 31, 1975); Department of Army Regulation No. 140-1, Ch. 3 (September 1, 1978); Department of Army Regulation No. 140-1, §1-3(a) (April 26, 1974).


9Rule 10.9 of the Rules for the Administration of the Virginia Personnel Act (July 1, 1977) 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."

SCHOOLS. FREE TEXTBOOKS. SCHOOL DIVISION MAY PROVIDE FREE TEXTBOOKS FOR CHILDREN NOT LISTED IN § 22-72(8).
REPORT OF THE ATTORNEY GENERAL

December 3, 1979

The Honorable William E. Fears
Member, Senate of Virginia

You have asked whether a school board may limit distribution of free textbooks only to children who receive public assistance under the four programs enumerated in § 22-72(8) of the Code of Virginia (1950), as amended.

Section 22-72(8) provides that school boards shall provide free textbooks and workbooks required for courses of instruction for public school children where a parent or guardian is financially unable to furnish them. The statute designates four categories of children who are eligible for assistance. The problem then is whether children who do not fall within the four enumerated categories are excluded from eligibility for free textbooks.

The Constitution of Virginia (1971) at Art. VIII, § 3 does impose an obligation upon the General Assembly to ensure that textbooks are provided without cost to public school children whose parent or guardian is financially unable to furnish them. However, the Constitution does not define eligibility but refers to a broad class of children whose parents are without financial resources to buy books.

The history of § 22-72(8) does not indicate an intent by the General Assembly to narrow the sphere of eligibility. Rather, the purpose of the enumeration is to create a conclusive presumption that the parents of children receiving aid under the enumerated public assistance programs are unable to afford to buy books. However, a school division is not precluded from making any further determination of eligibility in cases not within the four statutorily designated areas. In this manner, the statute complies with the constitutional mandate that the school division assist its children who otherwise would not be able to afford the required instructional material.

Accordingly, I am of the opinion that the categories provided in § 22-72(8) are not restrictive. A school division must deem eligible those children who fall in either of the four categories, but it is not prohibited from deeming other children eligible for free textbooks who do not come within the scope of those categories.

Section 22-72(8) provides:
"Textbooks, etc., for eligible children. - School boards shall provide, free of charge, such textbooks and workbooks required for courses of instruction for each child attending public schools whose parent or guardian is financially unable to furnish them. Children who are receiving public assistance in the form of aid to dependent children, general relief, supplemental security income or foster care shall be
deemed eligible for the purposes of this subsection. In systems providing free textbooks, the cost of furnishing such textbooks and workbooks may be paid from school operating funds or the textbook fund or such other funds as are available; in systems operating rental textbook systems, school boards shall waive rental fees, or in their discretion, may reimburse the rental textbook fund from school operating funds."

2In Ch. 738, § 86, of the 1979 Appropriations Act we find that the legislature expanded the categories for eligibility. Under item 206, 2.2, an additional State payment is provided for each pupil in the first grade qualifying for the free or reduced school lunch program.

SCHOOLS. IMMIGRANT CHILDREN ENTITLED TO FREE ATTENDANCE IN SCHOOL DIVISION OF RESIDENCE.

September 5, 1979

The Honorable Mary A. Marshall
Member, House of Delegates

You have asked whether refugee children from Southeast Asia are eligible for tuition-free education in Virginia public schools if they live with sponsors, rather than with their parents or other legal guardians.1

The Virginia Constitution (1971) mandates a system of free public elementary and secondary education for "all children of school age throughout the Commonwealth...." Art. VIII, § 1. Each child is entitled to attend public school in the county, city or town of his residence. Section 22-218 of the Code of Virginia (1950), as amended.2

Whether a child is entitled to tuition-free education turns on his residence. If he is not a resident of Virginia, the school board must charge tuition for his public education. See § 22-220. If the child is a bona fide resident of the political subdivision, whether or not he lives with his parents or legal guardian, and if his residence was not contrived for the primary purpose of securing his attendance at that political subdivision's public school system, he is entitled to tuition-free education there. See Reports of the Attorney General (1954-1955) at 210; (1963-1964) at 262; (1972-1973) at 348; (1974-1975) at 378; (1976-1977) at 241.

Accordingly, refugee children who reside in a political subdivision will be entitled to tuition-free education there unless the residence is contrived for the primary purpose of securing education in its public schools.3

1These refugee children—and their parents—have been admitted into the United States under the Immigration and
Nationality Act of 1952, 8 U.S.C. § 1101. Section 1153(a)(7) thereof provides for conditional entry on immigrant visas to refugees who are fleeing from persecution on account of race, religion, political affiliation, or to avoid communist oppression. Such refugees may temporarily reside and may establish permanent residence in the United States. See 8 U.S.C. §§ 1153(g) and 1153(h).

Section 22-218 provides:

"The public schools in each county, city and town operating as a separate school division shall be free to each person, who is not less than five years of age, having reached their fifth birthday on or before December thirty-first of the school year, and who has not reached twenty years of age, residing in such county, city or town...Every such person shall be deemed to reside in a county, city or town when: (1) He or she is living with a natural parent or parent by legal adoption who actually resides in such county, city or town, (2) the parents of such person are dead and he or she is living with a person in loco parentis and who actually resides in such county, city or town, or (3) he or she is living with such parent or person on a military or naval reservation located wholly or partly within the geographical boundaries of such county, city or town."

School boards may also admit persons over the age of twenty who are residents of the locality. See § 22-218.3. School boards may also admit children of school age who are residents of Virginia, but not of that political subdivision. Because those children are residents of Virginia, the school boards have the discretion under certain circumstances to waive any tuition charge. See Report of the Attorney General (1975-1976) at 309. In addition, free education is available to any child who lives with a resident of that political subdivision where that resident provides for the care and support of the child, unless that child's residence there was contrived for the primary purpose of securing attendance at those schools.

You also ask whether the citizenship or visa status of the child and/or his parent(s) affects eligibility for tuition-free education. They do not. See Elkins v. Moreno, 435 U.S. 647 (1978).

SCHOOLS. LITERARY FUND. STATE BOARD OF EDUCATION HAS NO AUTHORITY TO MAKE LOANS TO FINANCE CONSTRUCTION COSTS OF COMPLETED FACILITIES.

May 19, 1980

The Honorable Jerry W. Davis, Treasurer
City of Manassas Park

You ask if the City of Manassas Park would be eligible for a loan from the Literary Fund to finance the construction of city schools already completed, and previously financed by local school bonds.
Article VIII, § 8, of the Constitution of Virginia (1971) establishes the Literary Fund which is to be held and administered by the State Board of Education ("State Board") as provided by law. In accordance therewith, the General Assembly has authorized the State Board, in its discretion, to make loans of money from the Literary Fund to the respective local school boards solely [for emphasis] "for the purpose of erecting, altering or enlarging schoolhouses...." See § 22-105 of the Code of Virginia (1950), as amended.

I note that the General Assembly has only authorized the State Board to allow Literary Funds to be used to retire existing debts on completed facilities when the loan proceeds would also be used to complete an addition to the existing facility. See § 22-111. In view of this, and the above language set forth in § 22-105, I am of the opinion that your question must be answered in the negative.  

The General Assembly has created the Virginia Public School Authority as the State agency authorized to purchase local school bonds utilized to finance the construction of school facilities. Section 15.1-172(i) specifically allows a locality to be reimbursed from bond proceeds for costs already incurred on the project.

SCHOOLS. SCHOOL BOARDS. AUTHORIZATION FOR VOTING CITY MEMBER ON COUNTY SCHOOL BOARD.  

January 29, 1980

The Honorable C. Richard Cranwell  
Member, House of Delegates

You inquire as to the permissibility, under the Constitution and laws of Virginia, of legislation which would allow the City of Salem to have a voting member on the school board of Roanoke County.

Salem became a city of the first class in 1968. At that time, the city gained responsibility for providing educational services. Pursuant to this duty, the City of Salem has contracted with the Roanoke County School Board to provide such services. Salem has a three-member school board, appointed by the city governing body. The contract allows the Salem school board members to attend and participate in Roanoke County School Board meetings and to serve on committees; however, the Salem City School Board members cannot vote on the matters considered by the Roanoke County School Board.

Virginia law currently makes it possible for the city to have voting rights if the provisions of § 22-99 of the Code of Virginia (1950), as amended, are followed. This provision allows for a consolidated school board where a city has
charter power to contract with an adjoining county to furnish school facilities. The county membership is made up of one member from each county magisterial district selected by the county school trustee electoral board; for the city's representation, the city council submits a list of three citizens from each city magisterial district or ward, with one from each area being chosen. Assuming Salem has the necessary charter provisions, it could have school board representation. In addition, this arrangement requires the approval of the State Board of Education. See Art. VII, §§ 4, 5 of the Virginia Constitution (1977); § 22-30; Bradley v. School Board, 462 F.2d 1058 (4th Cir.), aff'd 412 U.S. 92 (1973).

While general legislation could be enacted to provide for representation of a city on a school board whenever a county contracted to provide educational services to the city, such a provision would always be subject to the county's ability to decline or agree to the contract.

SCHOOLS. SCHOOL BOARDS. COMPLIANCE WITH COMPETITIVE BIDDING AND BONDING REQUIREMENTS PROVIDED IN §§ 11-23 AND 22-166.12.

December 21, 1979

The Honorable Andre Evans
Commonwealth's Attorney for the City of Virginia Beach

You have asked several questions involving the applicability of competitive bidding and bonding requirements to certain school contracts.

Competitive Bids

You first inquire whether the Virginia Beach public school system must obtain competitive bids for its contracts under $2,500 pursuant to § 11-17 of the Code of Virginia (1950), as amended.

Generally, school boards have no obligation to comply with the bidding requirements set forth in § 11-17. The only exception, as a matter of State law, is when State aid is involved in the construction of school buildings as provided in § 22-166.12. See Report of the Attorney General (1977-1978) at 90-91. Section 22-166.12 requires competitive bidding in all school construction contracts involving State aid, irrespective of the contract price.

Exemptions For Local Purchases

You have also asked for an interpretation of the language in §§ 11-17 and 11-23 which exempts from competitive bidding and bonding requirements such contracts for "the purchase of stone, soil, lumber, borrow pits, gravel, sand, hay, grain, repairs and supplies for standard equipment, and other materials bought locally from farmers, agribusinesses
and property holders...." You inquire whether all local businesses which hold property are thereby exempt from the applicable competitive bidding and bonding statutes with respect to "repairs and supplies necessary for the proper and continued operation of equipment that is used in the ordinary course of business of operating the schools."

As I have previously indicated, § 11-17 is inapplicable to school boards. Section 11-23, however, specifically applies to school boards requiring payment and performance bonds from their contractors, except in certain cases such as above mentioned.

The phrase "repairs and supplies for standard equipment, and other materials bought locally..." would pertain to contracts for construction, improvement, or repair of schools. Accordingly, contracts for personal repair service or for the purchase of equipment or supplies would not require competitive bidding or bonding since they are operational costs not involving construction. See Reports of the Attorney General (1965-1966) at 50; (1963-1964) at 267.

SCHOOLS. SCHOOL BOARDS. ELECTION OF AT-LARGE MEMBERS TO COUNTY GOVERNING BODY DOES NOT AFFECT MEMBERSHIP OF COUNTY SCHOOL BOARD.

December 19, 1979

The Honorable H. N. Osborne
Commonwealth's Attorney for Giles County

You inquire as to the number of members permitted by law to sit on a county school board after the election of two at-large members to the county board of supervisors.

Currently, Giles County is divided into three magisterial districts. The county has the traditional board of supervisors form of government. Prior to the November election, the board of supervisors had three members, one from each district. However, since the elections, the board of supervisors now has an additional two at-large members. Giles County also has a School Trustee Electoral Board; this board has one member from each of the three districts.

Section 22-61 of the Code of Virginia (1950), as amended, requires that each district have as many school board members as that district elects to the board of supervisors. It is my opinion that the recent election of two at-large members to the Giles County Board of Supervisors has no effect upon the membership of the school board. The two at-large members are elected not from any particular district, but from the county as a whole. Therefore, since they are not elected from a specific district, they cannot be used to increase the number of members upon the school board.
I enclose for your information an Opinion to the Honorable Frederick Lee Ruck, County Attorney for Fairfax County, dated December 18, 1975, and found in Report of the Attorney General (1974-1975) at 286, which touches, in part, upon this question.

SCHOOLS. SCHOOL BOARDS. HAVE AUTHORITY TO BUY OUT REMAINDER OF DIVISION SUPERINTENDENT'S CONTRACT IN EXCHANGE FOR HIS RESIGNATION.

May 22, 1980

The Honorable Michael G. McGlothlin
Commonwealth's Attorney for Buchanan County

You ask whether a school board has the authority to "buy out" a division superintendent's contract: i.e., to pay a superintendent an amount of money equal to his salary and fringe benefits under the remainder of his contract in exchange for his resignation.

Article VIII, § 7 of the Constitution of Virginia (1971) places the responsibility for the supervision of the schools in each division with the local school board. Although the formulation of educational policy, the certification of teachers, and the approval of textbooks are responsibilities of the State Board of Education, it is clear that the power to operate, maintain and supervise the public schools rests exclusively with local school boards. Bradley v. School Board, 462 F.2d 1058 (4th Cir.), aff'd, 412 U.S. 92 (1973). As noted in the decision in School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978), the function of applying local policies, rules and regulations is an essential function of the local school board.

In addition, § 22-63 of the Code of Virginia (1950), as amended, permits a local school board to sue and be sued, and § 22-56.1 permits the local board to employ counsel in certain situations. It is clear that the power to sue and employ counsel necessarily incorporates the power to compromise litigation, whether real or threatened. See McKennie v. Charlottesville and Albemarle Railway Co., 110 Va. 70, 65 S.E. 503 (1909). Indeed, this power to anticipate and handle legal claims can be viewed as another facet of the general supervisory powers vested in the local school board.

From the facts you have related, it appears that the local school board became dissatisfied with the performance of the division superintendent, evidently believing that it was at variance with their educational policies and programs. A compromise was reached: i.e., the division superintendent will relinquish his right to employment during the remainder of his contract and the school board will pay out the salary and fringe benefits which would have accrued thereunder. Thus, both the board and the superintendent are spared a protracted, complex lawsuit, and the board is free to employ
a new superintendent whose educational philosophy and working style will aid the board in its task of supervising and maintaining the local public school system.1

In light of the foregoing, it is my opinion that a county school board may reach the compromise you have reported.

1Section 22-32 provides a four-year term of office for division superintendents. Resignation vacates an office, Coleman v. Sands, 87 Va. 689, 13 S.E. 148 (1891), and is effective when accepted by the tribunal having authority to do so.

SCHOOLS. SCHOOL BOARDS. MEMBERS. MAY ATTEND, AS OBSERVERS, MEETING OF ORGANIZATION OF SCHOOL EMPLOYEES.

January 7, 1980

The Honorable Mary A. Marshall
Member, House of Delegates

Your recent letter inquires whether members of the Arlington County School Board acting as individual board members may accept the invitation of a labor organization, to which some employees of the school board belong, to attend the organization's meeting in order to observe and listen to the deliberations of such organization on subjects of wages, hours and working conditions, without taking part in such deliberations.

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.

It has been well established in previous Opinions and in statements by the present and immediate past Governors of the Commonwealth that facilitating communications between teachers and their employer is a lawful and beneficial purpose and should be a fundamental principle of local government. Communications may take the form of meetings between representatives of the school board and an employee organization, provided that such meetings do not restrict access to the school board by individual employees and that the school board retain final consideration and approval of all terms of employment. See Reports of the Attorney General (1969-1970) at 231; (1974-1975) at 22; and (1978-1979) at 222.

It is evident that attendance at an employee association's meeting in which individual members of the
school board observe the proceedings but do not participate or negotiate terms of employment would not constitute an unauthorized collective bargaining procedure. Accordingly, it is my opinion that individual school board members may attend as observers meetings of an employee organization which is discussing terms of employment.

It should be noted that the attendance of individual board members at meetings can be subject to provisions of the Virginia Freedom of Information Act (the "Act") in some circumstances. A meeting of such body whether sitting as an entity or in an informal assemblage where discussions of matters relating to the exercise of the official functions and duties of that body take place, is a "meeting" subject to the Act. See § 2.1-343 of the Code of Virginia (1950), as amended. See, also, Opinion to the Honorable Hunter B. Andrews, Member, Senate of Virginia, dated February 18, 1970, found in Report of the Attorney General (1969-1970) at 231; Opinion to the Honorable Donald G. Pendleton, Member, House of Delegates, dated September 30, 1974, found in Report of the Attorney General (1974-1975) at 579; Opinion to the Honorable A. Joseph Canada, Jr., Member, Senate of Virginia, dated November 5, 1975, found in Report of the Attorney General (1975-1976) at 411.

The Act specifically includes an informal meeting of at least three members of the board within its terms. See § 2.1-341(a). Excluded are certain gatherings of two or more members of a board which are not prearranged for the purpose of discussing or transacting any business of the board. See, also, Opinion to the Honorable Bernard G. Barrow, Member, House of Delegates, dated September 28, 1977, found in Report of the Attorney General (1977-1978) at 485.

SCHOOLS. SCHOOL BOARDS. MILEAGE REIMBURSEMENT TO EMPLOYEES OF SCHOOL BOARD GOVERNED BY § 14.1-7.

September 11, 1979

The Honorable Adelard L. Brault
Member, Senate of Virginia

You have asked as to the proper rate of mileage reimbursement which a public school board may make to its employees using private transportation on official business.

Although public school boards are by law established as bodies corporate independent of the respective local governing bodies, I am nevertheless of the opinion that the mileage reimbursement for school board employees would be governed by § 14.1-7 of the Code of Virginia (1950), as amended, which provides:

"Any person traveling on business of any county, city, or town except as hereinafter provided, wherein no part of the cost is borne by the State may be reimbursed by
such county, city, or town on a basis not in excess of that provided for persons reimbursed by the State when traveling on State business."

Section 14.1-5 establishes fifteen cents per mile as the rate for persons reimbursed by the State on State business.1

Public school boards are charged with the responsibility of administering and supervising the free public schools of the counties and cities, and thereby are an integral, though separate, part of local government. See, e.g., § 22-5 and Report of the Attorney General (1965-1966) at 23. Their employees when on official business further this responsibility and are thereby "traveling on the business" of the respective locality within the meaning of the above statute. Accordingly, the mileage reimbursement for public school employees would be fifteen cents per mile.

I would, however, suggest that § 14.1-7 be amended to refer specifically to public school boards in order to remove any question in this area.

1It should also be noted that § 22-67.2 authorizes county school boards to reimburse members of the board for travel to and from meetings at a rate not to exceed that of the said current State reimbursement per mile.

SCHOOLS. SCHOOL BOARDS. ONCE MONEY IS APPROPRIATED TO IT, SCHOOL BOARD EXERCISES EXCLUSIVE DISCRETION OVER FUNDS.

June 27, 1980

The Honorable Even T. Brumfield
Treasurer of Pittsylvania County

You ask if the local board of supervisors may cut the school budget once it has been approved in view of an anticipated shortfall in revenues. You further ask what the responsibility of the board would be to honor its contractual commitments, for example, teacher salaries.

Once the board of supervisors has appropriated funds for educational purposes to the school board, only the school board has the exclusive right to determine how such appropriated funds will be spent. Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 28 S.E.2d 698 (1944); Scott County School Board v. Scott County Board of Supervisors, 169 Va. 213, 193 S.E. 52 (1937). Until the time of appropriation, the board of supervisors would have the duty to provide funds, by tax levy or otherwise, necessary for the local educational program to meet the requisite Standards of Quality prescribed by the State Board of Education. See §§ 22-126.1 and 22-127 of the Code of Virginia (1950), as
amended. The mere approval of the budget would not necessarily operate as an appropriation. See § 15.1-162.

Accordingly, if the board of supervisors has not made its appropriation of funds for school purposes, the board would have the discretion to reduce the school budget to the level required by the Standards of Quality. In so doing, the board would not have authority to single out teacher salaries for reduction. See Reports of the Attorney General (1978-1979) at 29 and (1975-1976) at 22, 296.

Furthermore, local governing bodies, as any other persons, are legally responsible for their contractual commitments; e.g., teacher salaries. It is customary that teacher contracts be expressly conditioned on the approved appropriation of funds. See Report of the Attorney General (1976-1977) at 228. If the teacher contracts contain such a provision, and the appropriation is then reduced, teacher salaries may only be reduced to the extent that the major classification or lump sum appropriation percentage is also reduced. See Reports of the Attorney General (1978-1979) at 29 and (1975-1976) at 22, 296; and § 22-127. If, however, the full sum has been appropriated, the board of supervisors as noted must provide sufficient funds, by tax levy or otherwise, to honor the contractual commitments made to teachers.

SCHOOLS. SCHOOL BOARDS. TEACHING CERTIFICATES EXEMPT FROM REQUIRED DISCLOSURE UNDER VIRGINIA FREEDOM OF INFORMATION ACT.

March 27, 1980

The Honorable William E. Fears
Member, Senate of Virginia

You ask if a local school board must disclose upon request certificates of teaching personnel when the disclosure would involve twenty-five or more certificates. You further ask if disclosure is required, whether the school board must notify the affected teachers of such disclosures.

The Virginia 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. Such certificates are required by law, and issued pursuant to regulations of the State Board for Community Colleges. See § 22-204. As the certificates contain the professional qualifications of teachers, I am of the opinion that they are "personnel records" exempt from required disclosure. See Report of the Attorney General (1978-1979) at 317.

The fact that such records are free from required disclosure does not however prohibit their disclosure by the local school board. See § 2.1-380(1). In the event of such
disclosure, the board may make reasonable charges for the copying and search time expended in the supplying of such records. See § 2.1-342(a).

Notice of disclosure must be provided the affected teachers under the Virginia Privacy Act when the disclosure of personal information is made to public agencies, nongovernmental organizations or an information system maintained for record-keeping purposes, whether automated or manual, containing personal information of individuals. See §§ 2.1-382(2), 2.1-379(1), and 2.1-379(2). In any other case when personal information is disclosed, school boards would retain the discretion to provide such notices.

SCHOOLS. SCHOOL TRUSTEE ELECTORAL BOARD MAY NOT ELIMINATE AT-LARGE SEAT ON SCHOOL BOARD WITHOUT CONSENT OF GOVERNING BODY.

October 4, 1979

The Honorable George P. Beard, Jr.
Member, House of Delegates

You inquire as to the legality of the circumstances surrounding the appointment of a new member to the School Board of Rappahanock County. You ask several questions, and I will answer them in order:

1. May the members of the School Trustee Electoral Board eliminate an "at-large" position on the school board?

Section 22-61 of the Code of Virginia (1950), as amended, provides in pertinent part as follows:

"Except as otherwise provided by law, the county school board shall consist of the same number of members from each district in the county as there are members of the board of supervisors from each district in the county, each school board member to be appointed by the school trustee electoral board. In addition to the members selected by districts, the governing body may authorize the school trustee electoral board to appoint no more than two members from the county at large."

The time-honored "Dillon Rule" requires a narrow construction of the powers and authority granted to local units of government. Thus, as § 22-61 permits the appointment of at-large members only with the permission of the board of supervisors, it would be improper to assume that the School Trustee Electoral Board possesses a removal power separate from and greater than its appointive power. See, e.g., Walker v. Massie, 202 Va. 886, 121 S.E.2d 448 (1961); Bd. of Supervisors v. Corbett, 206 Va. 167, 142 S.E.2d 504 (1965); Reports of the Attorney General (1971-1972) at 104 and (1974-1975) at 57, respectively.
2. What qualifications must a candidate for the county school board possess?

The statutory requirement for eligibility to serve as a county school board member is found in § 22-68. This section stipulates that a candidate "shall be a bona fide resident of the magisterial district or town from which he is elected." In addition, § 22-69 prohibits a county or State officer, and supervisors and their relatives from sitting on the county school board in certain circumstances. Finally, § 2.1-33 permits certain enumerated classes of federal employees to serve in county positions.

3. May the School Trustee Electoral Board promulgate other criteria for county school board membership?

The powers of local units of government can be no greater than those conferred upon them by the General Assembly. Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977); Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967). Any doubts as to the existence of a power must be resolved against the locality. See T. J. Dillon Law of Municipal Corporations (1911). As noted above, the General Assembly has expressly established the criteria which must be met by candidates for county school board membership. Therefore, the School Trustee Electoral Board lacks legislative authority to publish additional eligibility requirements and this question must be answered in the negative. See Report of the Attorney General (1977-1978) at 189, 190 and 298.

4. What procedures must the School Trustee Electoral Board follow when considering an appointment to the county school board?

The School Trustee Electoral Board must follow the procedures set forth in the Virginia Freedom of Information Act (the "Act"). See §§ 2.1-344(b) and 2.1-344(c). These sections generally require the following actions to be taken in order to properly convene in closed session: 1) in open session an affirmative vote to go into closed session, specifically stating the purpose of the closed meeting and the applicable Code section; 2) during closed session, only the items mentioned in the affirmative vote may be discussed; 3) upon reconvening, any action taken during closed session must be affirmatively voted on again in public session.

Section 2.1-346 provides that any person denied the rights and privileges conferred by this Act may petition an appropriate court for relief. A newly, but improperly, appointed school board member would serve as a de facto officer. His own actions and those of the school board are valid until such time as he receives notice of his defective appointment. See Report of the Attorney General (1975-1976) at 417, a copy of which I enclose for your assistance.
5. Is the Virginia Conflict of Interests Act violated by a situation wherein a new school board member has a brother on the School Trustee Electoral Board which appointed him?

Section 2.1-349 prohibits a governmental officer from certain contractual and financial relationships with his own agency. In addition, contractual relationships with other agencies are forbidden in the absence of written disclosure of the officer's interest in such a transaction. Section 2.1-348(f) defines a material financial interest as "personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household." Finally, § 2.1-352 requires an officer who knows or should know that he has a material financial interest in his agency's transaction to disclose his interest to his agency's governing board and disqualify himself from voting on or participating in any consideration thereof.

On the facts as your constituents relate them, there appears to be no violation of the Virginia Conflict of Interests Act. First, the School Trustee Electoral Board and the school board are separate entities: the School Trustee Electoral Board exists solely to appoint the membership of the school board. Since the agencies are separate, there can be no violation of § 2.1-349 prohibitions against dealing with one's own agency. Second, you have stated no facts which suggest that there exist any financial dealings between either of the brothers and either of the two entities. Thus, there is no violation of the § 2.1-352 requirement of disclosure and abstention from voting. Finally, you have relayed the information that the brothers maintain separate households. Therefore, there is no violation of § 2.1-348(f). Thus, this question is answered in the negative.

SCHOOLS. STANDARDS OF QUALITY. GENERAL ASSEMBLY MAY PROVIDE SCHOOL DIVISIONS WITH OPTIONAL METHOD FOR ASSIGNING SCHOOL PERSONNEL TO SPECIFIC CLASSES.

February 27, 1980

The Honorable W. L. Lemmon
Member, House of Delegates

You ask if the General Assembly may, under the standards of quality, provide each school division with optional methods for assigning certified school personnel to specific classes. One method provides for a maximum of 30 pupils per teacher in grades kindergarten through three (K-3) with an average class size of 21 per teacher in grades K-6. The other choice allows slightly lower maximums and higher averages in grades K-3. This reflects a legislative judgment that quality education can be provided by balancing different ratios of average class size and maximum class size.
Article VIII, § 2, of the Constitution of Virginia (1971), provides in pertinent part: "Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly." This constitutional provision itself imposes no limitation to legislative discretion in such matters. See Report of the Commission on Constitutional Revision (1969) at 260; Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959); DeFebio v. County School Board, 199 Va. 511, 100 S.E.2d 760 (1957).

This legislative discretion, however, is not plenary, but must comport with constitutional requirements that may elsewhere be expressly provided. School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978); Harrison, supra. The exercise of such discretion must rationally further the governmental objective in mind. 4A M.J. Constitutional Law § 31 (1974). DeFebio, supra. There is a general presumption of constitutional validity attaching to acts of the legislature. Peery v. Board of Funeral Directors, 203 Va. 161, 123 S.E.2d 94 (1961); Hunton v. Commonwealth, 166 Va. 229, 183 S.E. 873 (1936). There is no indication that the proposed legislation constitutes anything but alternatives between two reasonable solutions within the discretion conferred upon the General Assembly by the Constitution.

Accordingly, I am of the opinion that the adoption of the proposed method would be constitutionally permissible.

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1Standards have been promulgated by the General Assembly. See Ch. 529 [1978] Acts of Assembly 786; as amended by Ch. 533 [1979] Acts of Assembly 776.

SCHOOLS. STANDARDS OF QUALITY. LEGISLATIVE REVISIONS MUST BE MADE BY BILL, AND NOT SIMPLY BY JOINT RESOLUTION.

April 8, 1980

The Honorable W. L. Lemmon
Member, House of Delegates

You ask if the General Assembly may revise the standards of quality for the several school divisions by resolution, rather than by bill. The standards are required by the Constitution1 and implementing legislation is provided in § 22-19.1 of the Code of Virginia (1950), as amended.

Unlike "resolutions" of the Assembly, "laws" must be submitted by "bill," approved by both houses of the Assembly, and presented to the Governor for his review before enactment. See Art. IV, § 11, and Art. V, § 6, of the Constitution of Virginia. The threshold question then is
whether revisions to the standards of quality have the force and effect of law requiring compliance with the constitutionally mandated process. Although the Assembly's power to legislate is plenary, it is nevertheless limited by constitutional requirements. School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978).


In establishing standards of quality, the General Assembly is constitutionally mandated to apportion fairly the costs of compliance between State and local government. See Art. VIII, § 2. Indeed, it was the intention of the constitutional framers directly to inject the General Assembly into educational policy for purposes of fiscal control. See Report of the Commission on Constitutional Revision, p. 256 (1969); II A. E. Howard Commentaries on the Constitution of Virginia, supra. Such standards are not promulgated in a vacuum, but are inextricably intertwined with appropriations of public funds. See Report of the Attorney General (1972-1973) at 351. Appropriations of public funds must be made by bill, and reviewed by the Governor. See Art. IV, § 11, and Art. V, § 6.

The General Assembly has revised the standards of quality. All school divisions of this Commonwealth must comply with the standards, or be subject to the institution of appropriate civil action. See Ch. 529 [1978] Acts of Assembly 786; as amended by Ch. 535 [1979] Acts of Assembly 777. Furthermore, school board members may be subject to criminal penalties for intentional violation of school laws. See § 22-215.

Accordingly, I am of the opinion that revision to the standards of quality cannot be made by resolution of the General Assembly, but must be by duly enacted legislation.
Article VIII, § 2 of the Constitution of Virginia (1971) states: "Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly.

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds."

SCHOOLS. STATE AND COUNTY OFFICERS PROHIBITED FROM BEING MEMBERS OF COUNTY SCHOOL BOARD. SUBSTITUTE JUDGE OF DISTRICT COURT IS STATE OFFICER.

January 22, 1980

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

You ask whether the post of substitute judge of a district court is an office within the prohibition of § 22-69 of the Code of Virginia (1950), as amended, that no State or county officer shall be chosen or allowed to act as a member of a county school board.

Section 16.1-69.21 provides that when a district court judge is unable to perform the duties of his office, the substitute judge shall serve as a judge of the court, and perform the same duties, exercise the same power and authority, and be subject to the same obligations as prescribed for the judge. A transition provision in § 16.1-69.9 speaks of certain persons continuing in office as judges or substitute judges. Section 16.1-69.14(a) refers to substitute judges in office completing their terms. Section 16.1-69.16 speaks of the residence requirements for the substitute judge during his term of office.

Further, § 16.1-69.17 requires every substitute judge to take an oath before entering upon the duties of his office. Section 16.1-69.19 provides that no person shall hold the office of substitute judge of a district court, and certain other offices at the same time. Section 16.1-69.22 provides how substitute judges may be removed from office (by two procedures rather than by the one procedure for judges).

The sections just cited repeatedly describe the substitute district court judge as the holder of an office. The post also meets all the standard requirements for status as a public office, as opposed to public employment. See,

Furthermore, in a slightly different context, this Office has already recognized the post as a State public office, as opposed to a local office. See Opinion to the Honorable William J. McGhee, County Attorney for Montgomery County, dated May 20, 1976, found in Report of the Attorney General (1975-1976) at 30 (not a county officer for purposes of § 15.1-535, but a State officer for purposes of § 15.1-50). Compare Opinion to the Honorable Benjamin B. Cummings, Jr., Substitute Judge, Eleventh Judicial District, dated July 9, 1976, found in Report of the Attorney General (1976-1977) at 117 (substitute judge may not be appointed to city council - separation of judicial and political functions).

Accordingly, I find that a substitute judge of a district court is within the prohibition of § 22-69 against State officers serving as members of a county school board.

SHERIFFS. COURTROOM SECURITY. DEPUTIES NOT REQUIRED TO PERFORM DUTIES NOT RELATING TO COURTROOM SECURITY.

May 1, 1980

The Honorable Charles H. Leavitt
Sheriff for the City of Norfolk

You have asked whether certain duties which your deputies have been requested to perform fall within the duties of providing courtroom security.

Section 53-168.1 of the Code of Virginia (1950), as amended, requires every sheriff to designate deputies to perform the duties necessary to ensure that courthouses and courtrooms within his jurisdiction are secure from violence and disruption. Any duties, therefore, which are necessary to carry out this purpose would be the responsibility of your deputies.

In reviewing the list of duties you furnished, I find that your deputies have been requested to receive the prisoners from jail, maintain order in the courtroom and halls, maintain security in the courtroom and cells, and receive persons who are sentenced to jail or remanded to custody. In my opinion these duties clearly fall within the responsibilities of your deputies to provide security for the courtroom.

Other duties requested of your deputies include obtaining and checking the court docket, separating felony and misdemeanor warrants, and separating bonds. These duties, and those of similar nature, are clerical in nature and are unrelated to providing security for the courtroom,
and in my opinion do not fall within the responsibilities of your deputies.

SHERIFFS. DEPUTY SHERIFF MAY PATROL AREAS HOUSING INMATES OF OPPOSITE SEX.

May 19, 1980

The Honorable Michael E. Norris, Sheriff
City of Alexandria

You ask whether deputy sheriffs of one sex may patrol portions of a jail which may include the living quarters of prisoners of the opposite sex.

The Civil Rights Act of 1964 provides, in part, that it is an unlawful employment practice for an employer to discriminate against any individual with respect to conditions or privileges of employment because of the individual's sex, or to limit an employee so as to deprive him or her of an employment opportunity or adversely affect his status as an employee, because of the individual's sex. The Civil Rights Act, however, permits sex-based discrimination "in those certain instances where...sex...is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

In a recent case, the United States Supreme Court had occasion to examine this exception in a prison setting. A female sued the Alabama Board of Corrections claiming that its administrative regulation establishing gender criteria for assigning correctional counselors to maximum-security institutions for "contact positions" violated the Civil Rights Act. Noting that the Alabama penitentiaries had been characterized as a "jungle atmosphere" and were unclassified as to offenders, the court held that "[a] woman's relative ability to maintain order in a male, maximum-security unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood." 433 U.S. at 335. The Supreme Court concluded that Alabama's decision to hire only males for such positions was a bona fide occupational qualification for the job. This case should not, however, be read to authorize sex discrimination in all prison settings, since the Supreme Court was careful to indicate its holding applied to the particular factual circumstances existing in the case.

Other cases have dealt with the question of employment in light of the right of inmates to privacy. It has recently been held that the job of a correctional officer can be equally well performed by any qualified and trained man or woman absent compelling considerations to the contrary, such as an inmate's right to privacy. The district court held that the right to equal job opportunity must give way in some measure to the right of the inmate's privacy. The court held
that male correctional officers should not be assigned duties at an institution housing female inmates where his duty assignments place him in a position to view the female inmates completely or partially in the nude or using toilet facilities.

Conflicts between an inmate's right to privacy and an employee's right to equal job opportunity have been resolved by the courts by applying a balancing test between the two rights. As an example, in one recent case a male inmate suggested that the fact that a female guard delivered mail to or walked by his cell once or twice a day at a specific time violated his right to privacy because of the possibility that he might be observed naked, partially clad or using the toilet facilities. Applying the balancing test, the court held that the inmate's right to privacy was not infringed by the delivery of mail when viewed in light of the goals of the Civil Rights Act of 1964. The court specifically noted that the inmate could easily regulate his daily routine to eliminate the possibility of any embarrassment.

I am of the opinion, in light of recent case law, that absent an extreme circumstance as found by the United States Supreme Court to be existing in Alabama, deputy sheriffs of one sex may patrol all portions of a jail, including those housing members of the opposite sex. Privacy, however, must be considered and some accommodation in scheduling reached so as to achieve a balance between an inmate's right to privacy and equal employment opportunity for employees. This result could be obtained by assignments which would not necessitate invasion of the inmate's privacy or by having assignments scheduled at specific times so that inmates could avoid possible embarrassment.

6Avery v. Perrin, supra.

SHERIFFS. DEPUTY SHERIFF WITH PRIOR FELONY CONVICTION MUST BE REMOVED FROM OFFICE DUE TO INABILITY TO MEET TRAINING STANDARDS.

February 14, 1980

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

You ask whether a deputy sheriff for a county, who has been convicted of a felony with all rights of appeal
terminated, forfeits his position pursuant to § 24.1-79.3 of the Code of Virginia (1950), as amended.

Section 24.1-79.3 provides that a public officer who is convicted of a felony by a court of the Commonwealth and whose rights of appeal have terminated "shall by such final conviction forfeit his office or post and be thereafter incapable of acting therein under his previous election or appointment...." The statute further provides that any subsequent pardon granted to him shall not void such forfeiture.

A deputy sheriff is a public officer and thus would be governed by § 24.1-79.3, which applies to "[a]ny person holding any public office of honor, profit or trust...." In the case of a deputy sheriff who assumes his position and subsequently suffers a felony conviction, it is my view that § 24.1-79.3 is clear on its face and would require the forfeiture of his position.

A different question arises, however, as to an individual convicted of a felony and who later is appointed a deputy sheriff. Section 24.1-79.3 states that after a conviction a public officer shall forfeit his position "and be thereafter incapable of acting therein under his previous election or appointment...." (Emphasis added.) The reference to a previous appointment suggests that § 24.1-79.3 is inapplicable to a person suffering a felony conviction prior to his appointment as a deputy sheriff. Obviously, at the time he was convicted of a felony, such an individual had not been elected or appointed to a public office. In the absence of any authority on this point, I construe § 24.1-79.3 not to apply to a deputy sheriff suffering a felony conviction prior to assuming office. I note that this is consistent with the view that procedures providing for the removal of public officers are highly penal in nature and must therefore be construed strictly.

Even though § 24.1-79.3 would not serve to cause a forfeiture of office under these latter circumstances, I nevertheless believe that a deputy with a prior felony conviction should be removed from office. Under rules promulgated by the Criminal Justice Services Commission and pursuant to § 9-109, compulsory minimum training standards have been established for law-enforcement officers subsequent to their employment. In addition, after a law-enforcement officer has undergone such training, he is thereafter required to take in-service courses and programs. Regardless of the officer's status or the nature of the training programs imposed upon him, he would be required to possess a firearm in order to meet such standards. Thus, this Office has held that a town sergeant convicted of a federal felony should be suspended from office because he could not satisfy minimum training standards due to his inability to possess a firearm transported in interstate commerce.
Consistent with this Opinion, I think that a deputy sheriff with a prior felony conviction who has not met compulsory minimum training standards or who is unable to meet compulsory in-service training standards for law-enforcement officers should be removed from office.

Section 24.1-79.3 states: "Any person holding any public office of honor, profit or trust in this State who may be convicted for commission of a felony by the courts of this State and all rights of appeal have terminated, shall by such final conviction forfeit his office or post and be thereafter incapable of acting therein under his previous election or appointment; and though a pardon be afterwards granted him, such pardon shall not void the forfeiture."

3Section 9-109(2) provides that the Criminal Justice Services Commission shall have power to "[e]stablish compulsory minimum training standards subsequent to employment as a law-enforcement officer...."
4Under § 9-108.1(H) any full-time employee of a sheriff's office who has responsibility for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of Virginia is included within the definition of a "law-enforcement officer."
5Section 9-109(3) states that the Commission shall have power to "[e]stablish compulsory minimum curriculum requirements for in-service and advanced courses and programs...."
6Rule 2(II)(A) of the Rules Relating to Compulsory Minimum Training Standards for Law Enforcement Officers requires such officers to complete twenty-four hours of firearms training. Rule 2(c) of the Rules Relating to Compulsory In-Service Training Standards for Law Enforcement Officers requires each officer to complete firearms training every twenty-four months.

SHERIFFS. EXECUTION OF UNLAWFUL DETAINER. SHERIFF ENTITLED TO EXPENSES FROM LANDLORD, WHERE NO STORAGE SPACE IS AVAILABLE.

January 7, 1980

The Honorable Harry O. Tinsley, Sheriff
County of Madison

You ask two questions about the proper procedure for removing personal property from a dwelling under a writ of unlawful detainer.

First, you ask whether the county or the landlord is liable to the sheriff for necessary expenses incurred by him
in the removal of such property in counties where the
governing body has not designated a storage area mentioned by
§ 8.01-156 of the Code of Virginia (1950), as amended.

I am of the opinion that it is the responsibility of the
landlord to make satisfactory arrangements with the sheriff
to pay for these expenses.

Second, you ask whether you would be required physically
to remove the property.

A writ of unlawful detainer is not properly executed by
merely serving a copy thereof upon the defendant. It is the
duty of the officer executing the writ to place the plaintiff
in possession of his property; and this necessitates the
physical removal of the defendant's property from the
premises. Certainly, it is not necessary that the officer
serving the writ personally remove the defendant's property
and place it upon the public way; but it is his duty to make
sure that this end is accomplished.

It is my opinion that the sheriff may discharge this
duty by arranging for temporary laborers to perform the task
under his immediate direction or the immediate direction of
his deputies.

This response to your inquiry is consistent with the
previous Opinion of this Office issued to the Honorable
Bernard Levin, Member, House of Delegates, found in Report of
the Attorney General (1965-1966) at 318.

SHERIFFS. RESIDENCE REQUIREMENTS. DEPUTIES AND JAILORS IN
CERTAIN POLITICAL SUBDIVISIONS NEED NOT BE RESIDENTS OF
COMMONWEALTH.

March 6, 1980

The Honorable M. Wayne Huggins, Sheriff
County of Fairfax

You ask whether deputy sheriffs and jailors for the
County of Fairfax, who by § 15.1-51 of the Code of Virginia
(1950), as amended, are not required to reside in the county,
may reside outside of the Commonwealth.

There is no requirement, to my knowledge, that such
appointed officers be residents of the Commonwealth. See
Opinion to the Honorable T. F. Tucker, Clerk, Corporation
Court of the City of Danville, dated February 15, 1972, found
in Report of the Attorney General (1971-1972) at 330; and
Opinion to the Honorable Helen C. Loving, Clerk, Henrico
Circuit Court, dated January 18, 1972, found in Report of the
Accordingly, I am of the opinion that under State law deputy sheriffs and jailors for the County of Fairfax may reside outside of the Commonwealth.

SHERIFFS. RESPONSIBILITY OF SHERIFF TO TRANSPORT PERSON INVOLUNTARILY DETAINED PURSUANT TO § 37.1-67.1.

March 18, 1980

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

You ask whether it is the responsibility of a sheriff's department or of a police department to transport individuals involuntarily detained pursuant to § 37.1-67.1 of the Code of Virginia (1950), as amended. You also ask whether the transporting officer is required under § 37.1-70 to remain at a hospital during the screening process of a person who has been judicially certified as mentally ill.

Sections 37.1-63, et seq., set forth a statutory scheme for the admission of allegedly mentally ill persons to hospitals for possible retention and treatment. Section 37.1-67.1 provides for the involuntary detention of such individuals.1 This statute authorizes a judge under specified conditions to issue an order of temporary detention in the case of any person "alleged or reliably reported to be mentally ill and in need of hospitalization...." It further provides that "[t]he officer executing the order of temporary detention shall place such person in [certain specified places]...for a period not to exceed forty-eight hours prior to hearing...." After execution of the detention order the judge must conduct a commitment hearing.2 Under enumerated circumstances which he must certify, the judge may order a mentally ill person to be taken to a hospital for treatment.3

Section 37.1-67.1 merely refers to "[t]he officer executing the order of temporary detention...." I note, however, that § 37.1-71 states that a person who has been certified for admission to a hospital may be delivered to the sheriff who shall then deliver him to a hospital. If this is not possible, then the sheriff shall keep and care for the person until such time as he can be conveyed to the hospital.4 Furthermore, several other Code sections relating to the transportation of certified individuals to hospitals refer to sheriffs, rather than to police departments.5

I believe that these statutes are in pari materia since they are part of the same chapter and relate to the same subject matter. Thus, it is my view that § 37.1-67.1 should be read to refer to a sheriff as the officer who is required to execute an order of temporary detention.

Your second question involves a construction of § 37.1-70.6 This statute requires the prompt examination of an individual presented to a hospital for admission. If this
examination discloses "sufficient cause" to conclude that the person is mentally ill, then he should be kept at the hospital. If there is no such finding, then the person should be returned to the locality in which the petition for his admission was initiated.\(^7\)

Section 37.1-70 does not state whether a sheriff is required to remain at the hospital during the time in which the staff physicians make a determination as to the mental condition of the prospective patient. My review of related Code sections discloses no other provisions which in any way indicate that a sheriff must remain at the hospital during the screening process.

The Code's failure to impose upon a sheriff the specific responsibility to remain at a hospital pending the determination of the person's mental state is in distinct contrast to the duty placed upon him under § 37.1-67.1 to execute an order of temporary detention. It also contrasts with other statutes detailing various duties and powers of a sheriff with regard to mental patients. I further note that if a sheriff were required to stay at a hospital until a decision had been made concerning the patient, then as much as twenty-four hours might elapse before he were free to resume his other duties.\(^8\) In the absence of any indication in the Code that the legislature contemplated such a potential drain on the time and resources of a sheriff's department, I conclude that a sheriff discharges his duty when he transports a certified individual to a hospital and he is not required to remain for the screening process.

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\(^1\) Section 37.1-67.1 states in pertinent part: "Any judge as defined in § 37.1-1, may, upon the sworn petition of any responsible person or upon his own motion based upon probable cause, issue an order requiring any person within his jurisdiction alleged or reliably reported to be mentally ill and in need of hospitalization to be brought before him and, if such person cannot be conveniently brought before him, may issue an order of temporary detention. The officer executing the order of temporary detention shall place such person in some convenient and willing institution or other willing place approved by the Board for a period not to exceed forty-eight hours prior to hearing and not in a jail or other place of confinement for persons charged with criminal offenses, unless such confinement is specifically authorized by such judge pursuant to regulations duly adopted by the Board, which regulations shall specify in which counties and cities such temporary detention in a jail or other place of confinement for persons charged with criminal offenses is authorized...."


\(^3\) Section 37.1-67.3 provides that once a commitment hearing has been held, if a judge "shall specifically find that such person (a) presents an imminent danger to himself or others as a result of mental illness, or (b) has otherwise been
proven to be so seriously mentally ill as to be substantially
unable to care for himself, and (c) that there is no less
restrictive alternative to institutional confinement and
treatment and that the alternatives to involuntary
hospitalization were investigated and were deemed not
suitable, he shall by written order and specific findings so
certify and order such person removed to a hospital or other
facility designated by the Commissioner for a period of
hospitalization and treatment not to exceed one hundred
eighty days from the date of the court order...."

4Section 37.1-71 states in part: "When a person has...been
certified for admission to a hospital under...§§ 37.1-67.1
through 37.1-67.4, such person may be delivered to the care
of the sheriff of the county or city who shall forthwith on
the same day deliver such person to the proper hospital or
the patient may be sent for by the director. When this is
impossible such person shall be kept and cared for by the
sheriff in some convenient institution approved by the Board,
until such person is conveyed to the proper hospital...."

5See §§ 37.1-73; 37.1-74; 37.1-75; 37.1-78.
6Section 37.1-70 states: "Any person presented for
admission to a hospital shall forthwith, and not later than
twenty-four hours after arrival, be examined by one or more
of the physicians on the staff thereof. If such examination
reveals that there is sufficient cause to believe that such
person is mentally ill, he shall be retained at the hospital;
but if the examination reveals insufficient cause, the person
shall be returned to the locality in which the petition was
initiated.
The Board is authorized to develop and institute
pre-admission screening to prevent inappropriate admissions
to the facilities and programs under its control."
7See § 37.1-67.1.
8See § 37.1-70.

SHERIFFS. § 53-19.35 APPLIES TO SHERIFFS' DEPARTMENTS AS
LOCAL AGENCIES SUBJECT TO STANDARDS OF BOARD OF CORRECTIONS.

January 15, 1980

The Honorable Carl H. Wells, Sheriff
Bedford County Sheriff's Department

You have asked for an opinion addressing the
applicability of § 53-19.35 of the Code of Virginia (1950),
as amended, to sheriffs' departments. That section provides,
in relevant part, that the State Board of Corrections shall
establish entrance and performance standards for personnel
employed by "local agencies subject to the standards of the
Board...." You question whether a sheriff's department is a
"local agency" to which § 53-19.35 applies.

As this Office has held in the past, absent statutory
authority, a sheriff, as a constitutional officer, has the
sole responsibility regarding personnel policies of his
office. See Opinion to the Honorable Harry O. Tinsley,
Sheriff of Madison County, dated November 7, 1977, found in Report of the Attorney General (1977-1978) at 383. However, the operation of local jails is subject to broad regulatory authority of the State Board of Corrections under § 53-133 and other sections, and a sheriff's department is accordingly subject to standards of the board.

The term "agency" is used broadly within the Code of Virginia; as an example, "governmental agency" is defined for purposes of the Virginia Conflict of Interests Act to include a sheriff's department. See § 2.1-348. The use of the term "local" in § 53-19.35 indicates that the coverage of the statute is not confined to State entities. Furthermore, this Office has suggested that § 53-19.35 does apply to jails in the Opinion to the Honorable R. H. Geisen, Executive Director, Criminal Justice Services Commission, dated November 15, 1977, found in Report of the Attorney General (1977-1978) at 106. Accordingly, I am of the opinion that § 53-19.35 does apply to sheriffs' departments as agencies subject to standards of the State Board of Corrections.

STATE AGENCIES. AUTHORITY TO MAINTAIN OFFICES OUTSIDE RICHMOND.

January 18, 1980

The Honorable Robert P. Joyner, Chairman
Department of Workmen's Compensation
Industrial Commission of Virginia

You ask whether § 65.1-16 of the Code of Virginia (1950),¹ as amended, precludes the Industrial Commission of Virginia (the "Commission") from renting or purchasing office space outside the City of Richmond for the purpose of establishing branch offices in other sections of the State.

Section 65.1-16 not only requires that the Commission be provided with offices in Richmond, but also requires that the Commission's records be kept in those offices and that its official business be transacted there during regular business hours. Nothing in the statute precludes the Commission from transacting business in places other than the City of Richmond. Accordingly, the Commission would have authority to lease or purchase property in the manner provided by law. Chapter 32, Art. 5 of Title 2.1 controls the lease or purchase of property by agencies of the Commonwealth.

¹Section 65.1-16 provides:
"The Commission shall be provided with adequate offices in the capitol or some other suitable building in the city of Richmond, in which the records shall be kept and its official business transacted during regular business hours; it shall
also be provided with necessary office furniture, stationery and other supplies."

STATE AGENCIES. LANDSCAPE ARCHITECTURAL SERVICES. DEPARTMENT OF GENERAL SERVICES NOT REQUIRED TO PROMULGATE SELECTION PROCEDURES FOR THOSE PROVIDING.

June 17, 1980

Mr. H. Douglas Hamner, Jr., Director
Department of General Services

Your letter of April 18, 1980, presents the following questions relating to Chapters 376 and 757 of the [1980] Acts of Assembly, which I shall answer in the order propounded:

"Does House Bill 601 (Chapter 376) require the Department of General Services to promulgate selection procedures for the services of certified landscape architects, uncertified landscape architects, or any other persons engaged in the 'practice of landscape architecture,' as defined in the amended version of Section 54-17.1?"

The referenced legislation adds a new Article 7 "Consultant Selections," to Ch. 32 of Title 2.1 of the Code of Virginia (1950), as amended. One of Art. 7's substantive provisions as set forth in § 2.1-548.3 is to require State agencies (as defined in § 2.1-548.2(1)) to establish procedures for the selection of professional consultants on capital projects in accordance with rules and regulations to be promulgated by the Department of General Services. The statute is directed toward selection of "the firm deemed qualified to perform the required services." § 2.1-548.4(3). As statutorily defined, for purposes of this selection process "firm" refers to "any individual, partnership, corporation, association, or other entity licensed to practice professional services in this Commonwealth." § 2.1-548.2(2). (Emphasis added.) The use of "professional services" in defining "firm" appears purposeful since that term is further defined in Art. 7, § 2.1-548.2(3) as meaning: "the 'practice of architecture,' the 'practice of land surveying,' the 'practice of engineering' as those laws are defined in § 54-17.1 of the Code of Virginia." The language of this definition is narrowly drawn in referring to only these three specific professional occupations. Had a more general purpose been intended it would have seemed more reasonable for the legislature to refer simply to "all professional services defined by § 54-17.1" or as similarly defined in § 13.1-543.

Because of the quite specific language of Art. 7, the reasonable conclusion is that it was not intended to refer to the contracting by State agencies for the performance of landscape architectural services. Such a conclusion is reinforced by the language adopted by this same legislature
in Ch. 757 which will provide for licensure of certified landscape architects. A procedure requiring State agencies to procure landscape architectural services from certified landscape architects or any other defined group which may be qualified to provide this service would appear to run afoul of the language of § 54-17.1(4)(c).1 Such a procedure would have the effect of eliminating from consideration for such contracts other groups and individuals otherwise qualified to provide these services and therefore restricting the rights of such persons to engage in those occupations or to render services in connection therewith, contrary to the clear expression of the statute. Accordingly, I answer your first question in the negative.

Your second question was as follows:

"May a certified landscape architect engage in the practice of architecture or the practice of engineering, as those terms are defined by Section 54-17.1,2 without holding a license to practice those professions?"

The primary purpose of statutory interpretation is, of course, to determine the intent of the legislature in enacting such language. The primary guide must always be the statutory language itself. It is immediately clear from comparing the statutory definitions that the scope of the "practice of landscape architecture" is much narrower than that given to the "practice of architecture"3 and the "practice of engineering."4 The former is limited to services "principally directed at the functional and aesthetic use of land" while architecture concerns services relating to "building, structures or property or the equipment thereof..." involving the principles and methods of architecture and engineering involves services relating to "utilities, structures, machines, equipment, processes, transportation system and work systems..." involving the principles and methods of engineering.

While there may be similarities between the practices of these professions, especially architecture and engineering, the commonly accepted view is that these professions are not the same. Dahlem Const. Co. v. State Bd. of Exam. & Reg. of Architects, 459 S.W.2d 169, 171 (1970); People v. Babcock, 73 N.W.2d 521, 343 Mich. 671 (1955); but cf. State v. Beck, 165 A.2d 433. The purpose of professional occupational licensing statutes is primarily to benefit and protect the general public in their dealings with these professionals so as to insure the safety and welfare of homes, buildings and projects for which the public may contract and protect against fraud. Johnson v. Equipment Specialists, 373 N.E.2d 837, 844, 58 Ill.App.3d 133 (1978); Sterling Ine. Co. v. Commonwealth, 195 Va. 422, 425, 78 S.E.2d 691 (1953). In states with licensing statutes similar to Virginia, the courts have narrowly interpreted the rights of engineers to perform architectural services even where permitted to do so "incident" to the performance of their own profession, Dahlem Const. Co., supra. The very fact that the legislature has
separated these professionals into separate and distinctive categories for purposes of licensing supports an interpretation that they view their capabilities as distinct and not overlapping. People v. Babcock, supra, at 525. The statutory language itself limits the landscape architect's performance of services which might be performed by a land surveyor. Because of the much more complex considerations involved in the professions of architecture and engineering and therefore the greater possibility of public harm where the practitioner is not qualified, the only reasonable conclusion to be derived from the statutory scheme is that the General Assembly did not intend for certified landscape architects to be permitted to perform the services of architects and engineers without complying with the required licensing requirements for these professions. Therefore, I must answer your second question in the negative.

1§ 54-17.1(4)(c) provides that "Nothing contained in paragraphs (a) and (b) above shall be construed to restrict or otherwise affect the right of any nurseryman, uncertified landscape architect, landscape designer, land planner, community planner, landscape gardener, golf course designer, turf maintenance specialist or any other similar person from engaging in such occupation, or from rendering any service in connection therewith that is not otherwise proscribed; provided, however, that no person may hold himself out as, or use the title of, 'certified landscape architect', unless he has been so certified pursuant to the provisions hereof."

2As defined by § 54-17.1(4)(b), "The 'practice of landscape architecture' by a certified landscape architect shall mean any service wherein the principles and methodology of landscape architecture are applied in consultation, evaluation, planning (including the preparation and filing of sketches, drawings, plans and specifications) and responsible supervision or administration of contracts relative to projects principally directed at the functional and aesthetic use of land.

Resulting plans and specifications, submitted under the seal, stamp or certification of a certified landscape architect, may be accepted by local and State authorities, in connection with both public and private projects; provided, however, that no landscape architect, unless he shall also hold an appropriate license as a land surveyor, shall provide boundary surveys, plats or descriptions for any purpose, except in conjunction with or under the supervision of an appropriately licensed professional who shall provide certification, as required."

3Section 54-17.1(1)(b). "'Practice of architecture' shall mean any service wherein the principles and methods of architecture are applied, such as consultation, investigation, evaluation, planning, design, including responsible administration of construction contracts, in connection with any private or public buildings, structures or projects, or the equipment thereof, or the accessories thereto."
Section 54-17.1(2)(b). "The 'practice of engineering' shall mean any service wherein the principles and methods of engineering are applied to, but are not necessarily limited to, the following areas: consultation, investigation, evaluation, planning and design of public or private utilities, structures, machines, equipment, processes, transportation systems and work systems, including responsible administration of construction contracts."

STATE AIR POLLUTION CONTROL BOARD. AUTHORITY OVER FEDERAL AGENCIES. BOARD HAS POWER TO COMPEL FEDERAL AGENCIES TO OBEY BOARD'S RULES, REGULATIONS AND ORDERS, AND TO REQUIRE FEDERAL AVIATION ADMINISTRATION TO OBTAIN INDIRECT SOURCE PERMIT BEFORE EXPANDING OR MODIFYING WASHINGTON NATIONAL AIRPORT.

July 24, 1979

The Honorable Clive L. DuVal, 2d Member, Senate of Virginia

This is in response to your request for an Opinion concerning the powers of the Commonwealth or certain citizens thereof to enforce the State Air Pollution Control Board's indirect source permit requirements against the Federal Aviation Administration (the "FAA"). Specifically you have inquired:

"(1) If FAA persists in its proposals to increase drastically the passenger load at [Washington] National [Airport] (which necessarily will require the construction at National of additional terminal and road facilities needed to support such growth, so as to require an Indirect Source Permit under Section 2.33 of Virginia Regulations for Control and Abatement of Air Pollution), but FAA fails to obtain or refuses to seek such a Permit, what power does the Commonwealth have to compel FAA to obtain such a Permit or to enjoin it from proceeding with its plans in the absence of such Permit?

(2) More specifically, does the Commonwealth have the power under the Federal Clear Air Act to sue the FAA for proper relief, given the circumstances set forth above?

(3) If for any reason the Commonwealth chooses not to take such legal action, would citizens of Northern Virginia impacted by the FAA proposals have the right to bring a citizens suit against FAA under the Clean Air Act?"

In answering your questions, it is important to note the recognition by Congress in adopting the Clean Air Act (the "Act") and amendments thereto "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments...." 42 U.S.C. § 7401(a)(3). To that end, it is provided in 42 U.S.C. § 7416 that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof..."
to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution...." Despite these declarations, however, prior to 1977, the United States Supreme Court held that, while federal agencies were obligated to adhere to State air pollution standards, they were not obligated to obtain State permits, and civil action in the appropriate federal district court was the only means by which a State could remedy non-compliance by federal agencies. See Hancock v. Train, 426 U.S. 167 (1976). In the wake of that decision, Congress completely revised the Act by Pub. L. 95-95, August 7, 1977, 91 Stat. 685, and expressly subjected all federal agencies to State and local air pollution standards and permit requirements, making those standards and requirements enforceable in State courts as well as in federal courts. 42 U.S.C. § 7418(a) (§ 118 of the Clean Air Act) states in pertinent part:

"Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, 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 air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including...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 or sanctions, 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.)

In response to your first two questions, in view of the authority established by the unequivocal language quoted above, I am of the opinion that the FAA is subject to the State Air Pollution Control Board's (hereinafter "SAPCB") power to regulate the abatement, control and prohibition of air pollution in the Commonwealth, as conferred by § 10-17.18(b) of the Code of Virginia (1950), as amended, and that the Commonwealth, acting through the SAPCB, has power to compel obedience to that board's rules, regulations or orders through injunction, mandamus "or other appropriate remedy..." as provided in § 10-17.23. Therefore, the Commonwealth could by mandamus compel the FAA to obtain an indirect source permit and could enjoin the FAA from proceeding with its plan to expand or modify National Airport in the absence of such a permit. In addition to the remedies of injunction and mandamus, § 10-17.23(B) provides for civil penalties which
could be assessed against the agency in the discretion of the circuit court up to $25,000 for each violation of the board's rules, regulations or orders. Each day of violation would constitute a separate offense. The SAPCB also has authority to issue a consent order against the agency providing for the payment of "civil charges" as opposed to civil penalties, not exceeding $25,000 per day of such violation. See § 10-17.23(C). Furthermore, § 10-17.29 makes a violation of any air pollution control provision of Ch. 1.2 of Title 10 or of any rule, regulation or order of the SAPCB a misdemeanor punishable by a fine of up to $1,000 per day of violation. Such misdemeanor could be prosecuted by an Attorney for the Commonwealth on the same basis and in the same manner as any other criminal act. Section 10-17.30 also gives effect to local air pollution control ordinances, provided they were validly adopted according to the requirements of that statute and provided they do not conflict with any rule or regulation of the board (unless the local ordinance is more stringent, in which case it controls). Since 42 U.S.C. § 7418(a) expressly subjects federal agencies to local air pollution control requirements and sanctions, affected Northern Virginia localities would be able to enforce their own ordinances by appropriate action in State court.

If the Commonwealth decided not to take any of the legal actions listed above, affected citizens of Northern Virginia would have no right to sue the FAA under the citizen suit provisions of the Act. Such a suit is authorized by § 304 of the Act (42 U.S.C. § 7604) only to enforce an emission standard, limitation or order issued pursuant to the Act, and Virginia's indirect source permit program is neither required by the Act nor a part of the approved State Implementation Plan (hereinafter "SIP") developed pursuant to the Act. Furthermore, there is no emission standard or limitation imposed by the Act or by the Environmental Protection Agency (the "EPA") for indirect sources; even though § 110(a)(5)(B) of the Act allows the EPA to promulgate indirect source regulations under § 110(c) to apply to federally assisted highways and airports, the EPA has not done so. For these reasons, I am of the opinion that the Act does not confer standing on private citizens to sue the FAA in federal court for failure to obtain a State indirect source permit.

However, Virginia's air pollution laws do confer standing on private citizens for actions in State courts. Section 10-17.23(A) provides that "(a)ny owner violating, failing, neglecting or refusing to obey any rule, regulation or order of the Board may be compelled to obey the same and comply therewith by injunction, mandamus or other appropriate remedy." The failure or refusal to obtain an indirect source permit would be a failure or refusal to obey a rule or regulation of the board which would subject the FAA to compulsion under this statute. The statute imposes no limitation on the standing of persons to sue under its provisions; therefore, it must be assumed that any person
aggrieved by the action of the FAA would have standing to bring such a suit.

I must advise you that these questions may soon be rendered moot by the SAPCB. It is my understanding that the staff of the board has recommended that the indirect source permit rule be abolished, and the board plans to solicit comments from local authorities concerning that recommendation. Following consideration of those comments, the board has indicated it may hold a public hearing on repeal or modification of the rule.

STATUTES. EMPLOYEES OF DEPARTMENT OF CORRECTIONS ARE NOT "PEACE OFFICERS" WITHIN MEANING OF § 18.2-253. § 53-23.1 GOVERNS DESTRUCTION OF CONTRABAND DRUGS AND DRUG PARAPHERNALIA FOUND WITHIN CORRECTIONAL INSTITUTIONS AND NOT TURNED OVER TO LAW ENFORCEMENT AUTHORITIES FOR PROSECUTION.

March 17, 1980

Mr. Terrell Don Hutto, Director
Department of Corrections

You have asked for an interpretation of § 18.2-253 of the Code of Virginia (1950), as amended, with respect to drugs and drug paraphernalia found within correctional institutions of the Department of Corrections. I understand that only drugs and drug paraphernalia seized in connection with prosecutions are routinely turned over to the State Police for destruction pursuant to § 18.2-253. You question whether § 18.2-253 or § 53-23.1 governs the disposition of other drugs and drug paraphernalia found within correctional institutions.

Section 53-23.1 provides, in relevant part, that any item of personal property, tangible or intangible, which an inmate is prohibited from possessing by the Code of Virginia shall be confiscated, sold or destroyed as the Board of Corrections or its agent may direct. Clearly, this language is broad enough to include contraband drugs and related paraphernalia.

Section 18.2-253 specifies the manner of destruction of drugs and drug paraphernalia which are seized in connection with violations of Ch. 7 of Title 18 or which come into the custody of a peace officer. I am of the opinion that employees of the Department of Corrections are not peace officers within the meaning of § 18.2-253. While there is no definition of "peace officer" in the Code, this Office has ruled that correctional personnel are not "law enforcement officers" within the definition of that term set forth in § 9-108.1. See Opinion to the Honorable L. T. Eckenrode, Director, Criminal Justice Officers Training and Standards Commission, dated October 14, 1974, and found in Report of the Attorney General (1974-1975) at 111. Accordingly, the disposal of contraband drugs and drug paraphernalia found by
employees of the Department of Corrections and not turned over to law enforcement authorities for prosecution is governed by § 53-21.1.

Despite the inapplicability of § 18.2-253 to the facts of your request, the section evidences a legislative intent that the disposal of contraband drugs and drug paraphernalia be accomplished with strict safeguards. Such safeguards are particularly important in a correctional institution. Accordingly, the disposal of such items should be carefully controlled and documented within the Department of Corrections.

STERILIZATION. STERILIZATION STATUTE AFFORDS ABSOLUTE IMMUNITY TO NON-NEGLIGENT PHYSICIAN IF HE Follows PROCEDURAL STEPS.

October 25, 1979

The Honorable Elise B. Heinz
Member, House of Delegates

You have asked for my opinion concerning the potential for liability arising out of a physician's performance of a surgical sexual sterilization upon an adult, mentally competent, consenting patient. You wish specifically to know whether any criminal or civil liability can attach to a physician who performs the operation in a non-negligent manner and whether the physician could be liable to the spouse of the patient.

Virginia's voluntary sexual sterilization statute has for some time been recognized as a statute which affords absolute immunity to a non-negligent physician if he or she complies with the procedural steps set forth in the law. See Reports of the Attorney General (1973-1974) at 340; (1977-1978) at 391; see, also, Doe v. Temple, 409 F.Supp. 899 (E.D.Va., 1976). The statute does not make an illegal procedure legal; the procedure has always been legal. The statute merely affords immunity to the physician.

The fundamental question implicit in your inquiries about liability is why the Commonwealth has a voluntary sexual sterilization statute if the surgical procedure is not illegal. I conclude that the General Assembly may have enacted the statute for two reasons. First, having no decision from the Supreme Court of Virginia which declares that sexual sterilization is not contrary to public policy, the General Assembly may have desired to make clear that such surgery is permissible and to provide physicians with a clear defense to any claim that the surgery is illegal. While my predecessors and I, as well as one federal court, have held that a sterilization is not illegal per se, it must be borne in mind that Opinions of Attorneys General are not binding upon the Supreme Court of Virginia and a federal district court decision interpreting a State statute is not binding.
precedent either. Therefore, the statute provides a clear mechanism by which to achieve immunity and to accomplish the second possible goal of the General Assembly.

The second possible reason and, perhaps, the more substantial of the two, is that the General Assembly intended to encourage a person who would seek a voluntary nontherapeutic sterilization first to consider the decision thoroughly. This procedure would discourage any hasty and premature decision that would have permanent consequences to the person and to society. The state has a "valid and important interest in encouraging childbirth." Beal v. Doe, 432 U.S. 438, 445 (1977). The offer of absolute immunity to a non-negligent physician would induce doctors to inform patients about the surgery and its consequences.

To answer your questions with more particularity, however, I have found no Virginia case or statute which would provide a basis for a physician's liability when a sterilization is performed without negligence upon a consenting, mentally competent adult patient. In other jurisdictions, the courts have held that no liability attaches under these circumstances. See Ponter v. Ponter, 342 A.2d 574 (N.J., 1975) [wife has a constitutional right to be sterilized without consent of her husband]; Murray v. Vandevander, 522 P.2d 302 (Okla., 1974) [consent of husband not necessary where wife is capable of consent]; Jessin v. County of Shasta, 79 Cal. Rptr. 359 (1969) [nontherapeutic surgical sterilization is legal when competent consent is given]; Kretzer v. Citron, 224 P.2d 808 (1950) [sterilization consented to is not assault and battery].

In addition, commentators have remarked that the prevailing view in the United States is that voluntary sterilizations, performed in a non-negligent manner and with the consent of a competent patient, are not violative of public policy. See Myers, The Human Body and the Law (1970). While, in theory, a patient or a patient's spouse could initiate a suit based upon a battery, or an invasion of privacy, or an interference with the marital relationship, the voluntary consent of the competent patient defeats any such claim. See Prosser, Torts § 125 (4th ed. 1971), "In practice, there are probably few dangers of civil liability resulting from the performance of, and submission to, a nontherapeutic voluntary sterilization. This result can be explained and is probably why so few cases are litigated in proportion to the alleged prevalence of the practice." The Human Body and the Law, supra, at 10.

The surgical procedure is not a maiming because with consent there can be no malicious intent. See, e.g., § 18.2-51; Jessin v. County of Shasta, supra. Moreover, since the explicit recognition of the right of privacy and the constitutional right of a woman to obtain an abortion, compare Grieswold v. State of Connecticut, 381 U.S. 479 (1965) with Roe v. Wade, 410 U.S. 113 (1973), it does not likely appear that the courts would find liability, civil or
criminal, if a competent patient consented to the procedure. Thus, while the Supreme Court of Virginia has not spoken definitively to the questions you have raised, I would answer each in the negative because I find no basis for liability.

1See §§ 54-325.3, 54-325.4, 54-325.5:1, and 54-325.6 of the Code of Virginia (1950), as amended.

SUBDIVISIONS. RESUBDIVISION OF LOTS. NO VESTED RIGHT TO MAINTAIN LOT SIZES IN ABSENCE OF GENERAL PLAN RESTRICTIONS.

October 26, 1979

The Honorable Geoffrey W. Cole
Commonwealth's Attorney for Clarke County

You ask whether owners of subdivision lots have a vested right to maintain the lots of other owners at a certain size, and whether § 15.1-482 of the Code of Virginia (1950), as amended, requires vacation of the recorded plat of a subdivision from which one or more lots have been sold before resubdivision of one or more lots may be effected.

You have stated that the parcels in question are of fifteen acres each and were part of a recorded subdivision. The Clarke County subdivision ordinance requires that the subdivision into parcels of forty acres or less be in conformity with the ordinance. The proposal giving rise to your inquiry is to resubdivide one of the fifteen-acre parcels into three five-acre plots.

Vested Rights

I assume that the persons asserting vested rights are persons whose lots were conveyed to them by reference to a subdivision plat that reflected a general plan of development. It has been held that, in the absence of a general plan for development restricting lots to a certain size, a conveyance of lots by reference to a recorded map or plat does not in itself raise any implied covenant that the lots shall remain as shown on the map or plat, or that they may not be later changed in size or further subdivided. 20 Am.Jur.2d Covenants, Conditions and Restrictions § 174 (1965). However, when the necessary covenants or other terms and conditions restricting lot sizes are in the deed of conveyance itself, or otherwise in the chain of title, the resubdivision of originally platted lots is prohibited. Friedberg v. Riverpoint Building Committee, 218 Va. 659, 239 S.E.2d 106 (1977).

The provisions of the enabling act regarding subdivisions, §§ 15.1-465 through 15.1-485, do not require a subdivider to set forth restrictions on lot sizes either in deeds or on plats; therefore, the recordation of deeds and
plats under those provisions does not in itself give rise to any implied covenant as to lot sizes. Accordingly, it is my opinion that unless there is a general plan for the development restricting lot sizes in a subdivision, there is no covenant between subdivider and purchasers, or among purchasers, as to the lot sizes and the purchasers have no vested right in retaining the status quo.

Vacation

You indicate that the local practice in the case of resubdivisions is to proceed to approve and record the plat just as in the case of a subdivision pursuant to § 15.1-475. Vacation of a plat under § 15.1-482 requires either an ordinance or the consent of the other landowners.

Section 15.1-430(1) provides that a resubdivision is to be treated as a subdivision, and that a resubdivision is any division into two lots. A resubdivision is handled in the same manner as a subdivision. J.C. Penney v. Village of Oak Lawn, 349 N.E.2d 637 (Ill. App. 1976); Wilkerson v. Marks, 538 P.2d 403 (Ariz. App. 1975). Accordingly, any division of subdivided property requires compliance with the provisions of § 15.1-475, governing approval of plats.

Not every change in a subdivision plat requires that the plat be vacated to effect the change. Certainly where the developer makes changes affecting lot sizes, vacation is necessary. See Opinion to the Honorable Benjamin L. Pinckard, Commissioner of the Revenue for Franklin County, dated September 26, 1978, a copy of which is attached. Vacation is proper where the purpose is to remove a lot from a plat. Bob Layne, Contractor v. Buennagel, 301 N.E.2d 671 (Ind. 1973). However, the division of one parcel of a subdivision into two or more parcels constitutes a resubdivision, which may be accomplished without vacating the original plat.

Accordingly, I am of the opinion that the situation you describe constitutes a resubdivision so that it is not necessary to satisfy the vacation requirements of § 15.1-482.

This case also holds that where a landowner acquires vested rights through the chain of title they are not extinguished by vacation of the plat.

SUBDIVISIONS. STATUTORY EXEMPTION FOR SUBDIVISIONS ANTE'DATING ADOPTION OF ORDINANCE. NO SEPARATE AUTHORITY TO PROHIBIT BUILDINGS ON LOTS ABUTTING PRIVATE "PAPER STREETS."
The Honorable William T. Parker  
Member, Senate of Virginia  

You ask whether a municipality, in a subdivision antedating its subdivision ordinance, is authorized to prohibit buildings on subdivision lots abutting private "paper streets," unless and until the private streets are improved and dedicated, and acceptance is at least pending.

With respect to newer subdivisions, § 15.1-466(e) of the Code of Virginia (1950), as amended, authorizes a municipality in its subdivision ordinance to include reasonable provisions for the extent and manner in which subdivision streets shall be graded, graveled, or otherwise improved. Section 15.1-466(f) authorizes the municipality in its subdivision ordinance to include reasonable provisions for accepting dedication of private streets, upon condition that the owner or developer provides certifications or guarantees as to improvement.

Section 15.1-473 provides that the requirements of Art. 7 (Land Subdivision and Development) of Ch. 11 (Planning, Subdivision of Land and Zoning), and the requirements of any subdivision ordinance, are to be effective only after adoption of a subdivision ordinance for the territory in question. Section 15.1-473 expressly exempts subdivisions lawfully created prior to adoption of a subdivision ordinance applicable thereto. See § 15.1-473(c). Compare Day v. Vaughn & Usilton, Inc., 193 Va. 168, 175, 67 S.E.2d 898 (1951) (1946 revision of subdivision laws not applicable by its terms to 1937 subdivision).

Furthermore, Art. 7 (Land Subdivision and Development) is a body of law intended to deal with subdivisions on a comprehensive basis, and inconsistent regulation by municipalities pursuant to other authority is not allowed. Opinion to the Honorable D. Wayne O'Bryan, Member, House of Delegates, dated April 24, 1979, found in Report of the Attorney General (1978-1979) at 257 (provisions of § 15.1-466 mandatory and exclusive). The proposed action by the municipality is to regulate a subdivision exempted by Art. 7. Accordingly, such regulation exceeds the authority of the municipality under Art. 7, which constitutes the municipality's exclusive authority as to the subject matter covered by Art. 7.1

Accordingly, I find that a municipality, in a subdivision antedating its subdivision ordinance, is not authorized to prohibit buildings on subdivision lots abutting private "paper streets."

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1The present Opinion deals solely with the authority of municipalities (and counties) to regulate pre-existing subdivisions under the particular wording of the Virginia
statutes. This Opinion does not reach the question whether it would be constitutional to regulate pre-existing subdivisions. Compare Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952) (constitutionality of provision in N.Y. Town Law). Similarly, this Opinion does not reach the question of whether pre-existing subdivisions may be regulated by ordinance under municipalities' (and counties') general police powers, inasmuch as the Virginia statutes grant specific regulatory powers as to subdivisions, but subject to a specific exemption as to pre-existing subdivisions. Compare Draper v. Haynes, 567 S.W.2d 462 (Tenn. 1978).

SUBDIVISIONS. VACATION OF SUBDIVISION PLATS. NOT NECESSARY WHERE OWNER OF ADJOINING PLATS ACQUIRE AND DIVIDE PLAT BETWEEN THEM.

November 2, 1979

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You ask whether in the following situation vacation of a subdivision is required or whether the described change may be effected by the procedures for resubdivision. The situation is as follows:

A and B are individuals who own lots 1 and 3, respectively, in a duly authorized and recorded subdivision. Owner A wishes to purchase the westerly half of lot 2 and owner B wishes to acquire the easterly half of the same lot. The perimeter lines and lot number would remain the same, with a lot division line being the only change.

Division of an existing subdivision lot is a resubdivision and § 15.1-430(1) provides that a resubdivision is to be treated as a subdivision. A resubdivision is handled in the same manner as a subdivision. J.C. Penney v. Village of Oak Lawn, 349 N.E.2d 637 (Ill. App. 1976); Wilkerson v. Marks, 538 P.2d 403 (Ariz. App. 1975).

Not every change in a subdivision plat requires that the plat be vacated to effect the change. Certainly where the developer makes changes affecting lot sizes, vacation is necessary. See Opinion to the Honorable Benjamin L. Pinckard, Commissioner of Revenue for Franklin County, dated September 26, 1978, a copy of which is attached. Vacation is proper where the purpose is to remove a lot from a plat. Bob Layne, Contractor v. Buennagel, 301 N.E.2d 671 (Ind. 1973). However, the division of one parcel of a subdivision into two or more parcels constitutes a resubdivision, which may be accomplished without vacating the original plat. See Opinion to the Honorable Geoffrey W. Cole, Commonwealth's Attorney for Clarke County, dated October 26, 1979, a copy of which is enclosed.
Accordingly, I am of the opinion that the situation you describe constitutes a resubdivision so that it is not necessary to satisfy the vacation requirements of §§ 15.1-481 and 15.1-482.

1Procedures for vacation of a subdivision plat are set forth in §§ 15.1-481 and 15.1-482 of the Code of Virginia (1950), as amended. 2Section 15.1-475 provides the method for resubdivision.

SUPPORT ACT. PROVISIONS OF § 20-61 DO NOT REQUIRE PARENTAL SUPPORT IF CHILD IS RECEIVING SUPPLEMENTAL SECURITY INCOME BENEFITS.

June 19, 1980

The Honorable R. Baird Cabell, Judge
Juvenile & Domestic Relations District Court

You have asked whether the parents of a child who is in the custody of a local board of welfare/social services can be required to make support payments to the local board if their child is retarded or handicapped and is the recipient of Supplemental Security Income ("SSI") benefits. The language of the statute which is the basis for your question is found in § 20-61 of the Code of Virginia (1950), as amended. 1 I am of the opinion that support payments cannot be ordered in this type of factual situation pursuant to § 20-61.

The relevant language of § 20-61 was added by the General Assembly in 1972 and 1973. See Ch. 845 [1972] Acts of Assembly 1568 and Ch. 346 [1973] Acts of Assembly 470. At that time, the principal program which provided federal and State financial assistance to retarded or handicapped persons would have been the Aid to the Permanently and Totally Disabled ("APTD") Program. See 42 U.S.C. § 1351, et seq. The APTD program clearly required that persons eligible for and receiving financial assistance pursuant to that program had to be 18 years of age or older. 2 Therefore, the exception to the support requirement found in § 20-61 for a child receiving assistance from a federal or State program for the permanently and totally disabled would have only been applicable to parents whose child was 18 years of age or older.

The APTD program was repealed, effective January 1, 1974, by Public Law 92-603. Retarded or handicapped persons, as well as blind persons, are now provided financial assistance pursuant to the SSI program, which is found in Title XVI of the Social Security Act. See 42 U.S.C. § 1381, et seq. The SSI program does not contain any age restrictions for eligibility and retarded or handicapped children who are less than 18 years of age can receive SSI.
benefits. I therefore conclude that if a handicapped or retarded child is receiving SSI benefits, the exception to the requirement for support found in §20-61 would become operative. The parents of the child receiving SSI benefits therefore cannot be ordered to make support payments pursuant to §20-61. This does not mean, however, that civil support payments could not be ordered pursuant to §16.1-279.

1That statute states, in part, that support payments cannot be required for the following: "[t]his section shall not apply to any parent of any child of whatever age, if the child qualifies for and is receiving aid under a federal or State program for aid to the permanently and totally disabled; or is an adult and meets the visual requirements for aid to the blind; and for this purpose any State agency shall use only the financial resources of the child of whatever age in determining eligibility."

242 U.S.C. §1355 states, in part, as follows: "For the purposes of this subchapter, the term 'aid to the permanently and totally disabled' means money payments to needy individuals eighteen years of age or older who are permanently and totally disabled...."

SUPREME COURT OF VIRGINIA. RULES OF COURT. JOINDER. ORDER OF COURT IS NECESSARY UNDER RULE 3:9A TO JOIN PARTY IN LITIGATION.

April 15, 1980

The Honorable David G. Brickley
Member, House of Delegates

You have asked whether the steps explicitly mentioned by Rule 3:9A of the Rules of the Supreme Court are sufficient to join a person as a litigant, or whether an order by the trial court is implicitly required to bring him into the suit.

Rule 3:9A provides, in part, as follows:

"(b) Method of Joinder.--A motion to join an additional party shall, subject to the provisions of Rule 1:9, be filed with the clerk within twenty-one days after service of the motion for judgment and shall be served on the party sought to be joined who shall thereafter be subject to all provisions of these Rules, except the provisions requiring payment of writ tax and clerk's fees."

It could easily appear from an initial reading of the rule that joinder is automatic and that no order of the court is needed. On the other hand, the term "motion" is commonly used to mean a request that the court grant the mover some right which he claims but cannot exercise unilaterally. See 27A Words and Phrases Motion at 354 (citing authorities).
Thus, it is arguable that the rule clearly implies the need to obtain a court order.

My research reveals no reported cases where the issue was discussed. I am of the opinion, however, that mere service of the motion is not enough. A person is not joined as a party unless and until the court enters an order to that effect. I reach this conclusion by reading Rule 3:9A together with § 8.01-5 of the Code of Virginia (1950), as amended. This statute provides, in part, as follows:

"A. No action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant, but whenever such nonjoinder or misjoinder shall be made to appear by affidavit or otherwise, new parties may be added and parties misjoined may be dropped by order of the court at any time as the ends of justice may require." (Emphasis added.)

There is an obvious possibility of conflict between the statute and the rule. The statute requires an order of court while the rule leaves open the inference that joinder may be automatic. It is a familiar rule of construction that interpretations which give rise to conflicts should be avoided. See Pereira v. David Financial Agency, 146 Va. 215, 223, 135 S.E. 823, 825 (1926). In this case, conflict can best be avoided by construing Rule 3:9A so that joinder depends upon a court order. Furthermore, under § 8.01-3, any variance between the rule and the statute must be construed so as to give effect to the statute.

Accordingly, I am of the opinion that a person sought to be joined does not become a party to the litigation unless and until the trial court enters an order granting the motion to join.

TAXATION. ASSESSMENT OF TANGIBLE PERSONAL PROPERTY. ALL TANGIBLE PERSONAL PROPERTY LISTED IN § 58-829 MAY BE ASSESSED FOR TAXATION AT PERCENTAGE OF FAIR MARKET VALUE, BUT SUCH PERCENTAGE MUST BE UNIFORM FOR ALL CATEGORIES OF PROPERTY LISTED IN § 58-829.

February 13, 1980

The Honorable C. B. Harrell, Jr. Commissioner of the Revenue for the City of Newport News

You ask if it is permissible to assess for taxation the various categories of tangible personal property listed in § 58-829 of the Code of Virginia (1950), as amended, at different percentages of fair market value.

Section 58-829 provides that while "[m]ethods of valuing property may differ among the separate categories..." of property listed therein, the "categories are not to be considered separate classes for rate purposes...."
The mandate of § 58-829 must be read in conjunction with Art. X, § 2, of the Virginia Constitution (1971), which provides that "[a]ll assessments...shall be at their fair market value, to be ascertained as prescribed by law..." and § 1 of Art. X which provides that "[a]ll taxes shall be...uniform upon the same class of subjects...."

Reading the statute and the constitutional requirements together, the assessing officer may assess tangible personal property for taxation in accordance with the following principles: (1) each category of property listed in § 58-829 may be valued under any method best designed to result in fair market value of that property (see § 58-829); (2) all categories of property listed in § 58-829 constitute only one "classification" of property, that is, tangible personal property (see § 58-829); (3) it is permissible under the "fair market value" requirement of Art. X, § 2, to derive the "assessed value" against which the tax rate is applied by using a percentage of such fair market value (see R. Cross, Inc. v. City of Newport News, 217 Va. 202, 206, 228 S.E.2d 113, 116 (1976)); (4) however, the tax imposed must be uniform upon the same class of property, here, tangible personal property. See Art. X, § 2, supra; Fray v. County of Culpeper, 212 Va. 148, 183 S.E.2d 175 (1971) and Washington County Nat'l Bank v. Washington County, 176 Va. 216, 10 S.E.2d 515 (1940).

Consequently, if the locality desires to assess tangible personal property for taxation at some percentage less than 100 percentum of fair market value, the fair market value of each category of property listed in § 58-829, i.e., cars, trucks, horses, boats, etc., must be multiplied by the same percentage.

Based upon the foregoing, it is my opinion that the various categories of property listed in § 58-829 may not be assessed for taxation at different percentages of fair market value.

TAXATION. COUNTY MAY NOT RAISE INTEREST RATE ON DELINQUENT TAXES.

March 14, 1980

The Honorable Ulysses P. Joyner, Jr.
County Attorney for Orange County

You ask whether a county board of supervisors may adopt an interest rate on delinquent taxes of ten percent despite the language of § 58-964 of the Code of Virginia (1950), as amended, which appears to restrict counties to a maximum rate of eight percent.

Section 58-964 contains a clause which permits cities and towns to adopt an interest rate that exceeds eight
percent when such city or town rate is "regulated by its charter or by other special provisions of law." A city ordinance enacted pursuant to a charter provision has been held to be such a special provision of law. *Southern Railway Company v. City of Danville*, 175 Va. 300, 7 S.E.2d 896 (1940). Section 15.1-522 of the Code grants county boards of supervisors "the same powers and authority as the councils of cities and towns...." Relying on the *Southern Railway* case and § 15.1-522, you suggest in a well-researched opinion that Orange County may lawfully adopt a county ordinance raising the interest rate charged on delinquent taxes from eight percent to ten percent. I regret that I must conclude that a county may not exempt itself from the plain wording of the statute by adopting an ordinance increasing the interest rate.

Section 15.1-522 does vest counties with the same powers and authority that the General Assembly has conferred by general law upon cities and towns. However, in the instant case there is no comparable general law which confers the power upon cities to adopt ordinances prescribing the interest penalty on delinquent taxes.

The powers set forth in the Uniform Charter Powers Act, Title 15.1, Ch. 18 of the Code, are not powers that a municipal corporation may exercise unless the power is included in its charter. Those statutes are not general laws which confer powers directly; rather, they constitute a blueprint of powers that may be conferred by the General Assembly in a municipal charter, but the General Assembly may opt to reduce the powers so granted. None of these powers may therefore be exercised by a county unless it has been authorized expressly so to do by a separate general statute, or if that power may be implied necessarily from a separate general statute. See *Board of Supervisors of Henrico County v. Corbett*, 206 Va. 167, 142 S.E.2d 504 (1965).

There is no general statute which gives local governments the authority to adopt interest rates other than as prescribed in § 58-964.

Accordingly, I am of the opinion that a county is granted no authority to increase by ordinance the statutorily prescribed interest rate on development taxes.

1"Interest at the rate of eight per centum per annum...shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid...But this section shall not apply to local levies in any city, or town when penalty or interest on such levies is regulated by its charter or by other special provisions of law."
June 23, 1980

The Honorable James H. Ward, Jr.
Commonwealth's Attorney for Middlesex County

You first ask whether a county has the authority to collect delinquent real estate taxes, as well as personal property taxes, by a motion for judgment filed in the general district court as soon as they become delinquent. Section 58-1014 of the Code of Virginia (1950), as amended, states that "[t]he payment of any taxes, State, county or municipal...may, in addition to the remedies now allowed by law, be enforced by warrant, motion for judgment at law, bill in chancery or by attachment before a general district court or a circuit court within this State in the same manner... provided by law for the enforcement of demands between individuals."1 (Emphasis added.) In Pollard v. City of Richmond, 181 Va. 181, 24 S.E.2d 564 (1943), the Supreme Court of Virginia announced that the Tax Code (now Title 58) provided alternative collection methods to insure the "prompt" and "expeditious" collection of taxes due. Therefore, a locality may "pursue whichever course it deemed most expeditious or advisable in the collection of taxes due to it." Supra, at 187. In Pollard some of the taxes collected were less than three years past due. After a review of § 58-1014 and the case law, I must agree with your conclusion that a suit for the collection of delinquent real estate taxes, as well as personal property taxes, may be instituted as soon as such taxes become due and are unpaid. See Report of the Attorney General (1964-1965) at 335.

You next ask to what compensation a private attorney hired by the board of supervisors is entitled. This determination is a matter of agreement between the attorney and the board. See Report of the Attorney General (1971-1972) at 448. Section 58-1117.2 states that the compensation for an attorney shall be on a salary, commission or other basis, and § 58-1020 permits an attorney to be compensated whether or not suit is instituted. If an agreement between the attorney and locality has not been reached, the court may tax as a part of reimbursable costs to the locality, an attorney's fee, if the matter goes to trial. See §§ 54-69, 54-71 and 14.1-196. Therefore, any reasonable compensation may be arranged. If such compensation is not specifically provided for in the agreement, it will be set by the court should the case go to trial.

1See, for example, §§ 8.01-27 and 8.01-426; note that § 8.01-27 permits an action for any past due installment.

TAXATION. DELINQUENT. REDEMPTION FROM SALE OF DELINQUENT LAND REQUIRES PAYMENT OF ALL TAXES, PENALTIES AND INTEREST DUE.
June 23, 1980

The Honorable V. Elwood Mason, Clerk
Circuit Court of King George County

You have asked whether a landowner must pay all delinquent taxes, penalties, interest and costs due on his real property in order to redeem it, after it has been made subject to sale for delinquent taxes under §§ 58-1117.1, et seq., of the Code of Virginia (1950), as amended. You specifically wish to know whether the landowner must pay those taxes, penalties, interest and costs for the most recent three years.

The sale authorized by § 58-1117.1 is "for the purpose of collecting all delinquent taxes on such property." (Emphasis added.) As you have noted, this statute also includes a suggested form of notice of publication which announces to the property owner the fact that he may redeem the property "at any time before the date of the sale by paying all accumulated taxes, penalties, interests and costs thereon." Such right of redemption is afforded by § 58-1117.10 which conditions "the right to redeem such real estate prior to the date set for a judicial sale thereof by paying into court all taxes, penalties and interest due with respect to such real estate...." (Emphasis added.) The words emphasized have often been quoted or recited in Opinions of this Office without qualification or limitation. See Reports of the Attorney General (1978-1979) at 263; (1975-1976) at 343; (1974-1975) at 347; (1973-1974) at 352(1). I am aware of no statute or case decision that alters the plain language of these statutory provisions. Therefore, it is my opinion that "all taxes, penalties and interest due with respect to such real estate" must be paid by the landowner prior to the date set for the judicial sale. The Opinion to the Honorable V. A. Etheridge, Treasurer for the City of Virginia Beach, dated February 5, 1976, and found in Report of the Attorney General (1975-1976) at 343, details the division of payments between the clerk's office and the treasurer.

TAXATION. LAND USE ASSESSMENTS. ROLL-BACK TAX. IN CERTAIN INSTANCES CHURCH MAY BE LIABLE FOR ROLL-BACK TAX.

May 1, 1980

The Honorable C. Phillips Ferguson
Commonwealth's Attorney for the City of Suffolk

You have asked if a church may be liable for the "roll-back" tax authorized by § 58-769.10 of the Code of Virginia (1950), as amended, in the following circumstance.
Facts

A church purchased a parcel of land which, at the time of acquisition, was qualified for and received the benefits of land use assessment and taxation. Thereafter, the church changed the use of the property to a "non-qualifying use" for purposes of land use taxation. It is assumed that the parcel is otherwise exempt from taxation from the date purchased by the church.

Question

Can the church be held liable for roll-back taxes which relate to the period before the church purchased the property?

Analysis

The Virginia Constitution (1971) guarantees that the real property owned by a church is exempt from taxation when used for certain specified purposes. See Art. X, § 6(a)(2).

A distinction must be made, however, between the taxation of property owned by a church and the accountability of a church to satisfy a liability arising from an encumbrance (choate or inchoate) which runs with the land and existed prior to the purchase of the land by the church.

Section 58-769.10 provides, and this Office has so ruled, that the roll-back tax is in the nature of an inchoate lien which runs with the land and is created at the time the parcel is accorded favorable tax treatment under the land use assessment and taxation program. See Reports of the Attorney General (1978-1979) at 271; (1976-1977) at 299; (1972-1973) at 423. The inchoate lien attaches on a year-to-year basis as long as the property is enrolled in the land use program and the owner is otherwise subject to property tax. See § 58-769.10. The fact that the church performs the act ("change in use") which triggers the inchoate lien does not change the fact that the church acquired the property subject to such lien.1 Id.

Based upon the foregoing, it is my opinion that the church is liable for the roll-back tax for each of the five years immediately preceding the year of "change of use" during which the land was taxed under a land use ordinance and was owned by a non-tax exempt entity.

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1Section 58-769.15 supports this position in that it clearly provides that "roll-back taxes shall be considered to be deferred real estate taxes" subject to the general law relating to tax liens.
TAXATION. LAND USE ASSESSMENTS. SPLIT-OFF BY CONVEYANCE OF 5 ACRE TRACT FROM OTHERWISE QUALIFYING TRACT OF FOREST LAND AFTER JUNE 30, 1978, SUBJECTS 5 ACRE TRACT TO LIABILITY FOR ROLL-BACK TAX.

September 21, 1979

The Honorable Dabney H. Bowles
Commissioner of the Revenue for Louisa County

You ask several questions concerning the Land Use Taxation Act (the "Act"), §§ 58-769.4, et seq., of the Code of Virginia (1950), as amended.

Facts


Questions

1. Whether a roll-back tax is incurred when the 5 acre tract is split-off by conveyance from the 75 acre tract?

2. Whether the 5 acre tract could be eligible for use-value assessment if it is reconveyed to the original owner?

3. Whether a new application is required for the remaining 70 acres to be eligible for use-value assessment?

4. Whether one new application is sufficient to qualify the 70 and 5 acre tracts?

Roll-Back

Section 58-769.13(a) provides:

"Separation or split-off of lots, pieces or parcels of land from the real estate which is being valued, assessed and taxed [on the basis of its use]...either by conveyance or other action of the owner of such real estate shall subject the real estate so separated to liability for the roll-back taxes applicable thereto...No subdivision of property which results in parcels which meet the minimum acreage requirements of this article...shall be subject to the provisions of this subsection."

The conveyance from "A" to "B" is clearly a "split-off" of a parcel within the meaning of the statute. Even if the conveyance were a "subdivision of property" within the meaning of the second paragraph of subsection (a) of the
statute, the 5 acre parcel fails to meet the minimum acreage requirements for forest land. See § 58-769.7(b). Consequently, there is no doubt that the conveyance "subject[s] the real estate so separated to liability for the roll-back taxes applicable thereto...."

The question remains, however, whether the word "subjects" means that the mere act of split-off triggers the roll-back, or whether an actual "change in use," within the meaning of § 58-769.10, must occur before the roll-back is imposed. A review of the legislative history of § 58-769.13(a) supports the former construction. See Ch. 385 [1978] Acts of Assembly. Prior to 1978, § 58-769.13(a) stated that a split-off would subject the real estate to liability for the roll-back only if the land so separated was put to "a use other than agricultural, horticultural, forest or open-space...." In 1978, the "change in use" proviso was eliminated from the statute. Additionally, the second paragraph of subsection (a) of the statute, also a 1978 amendment, contemplates that the split-off parcel can only escape the liability for roll-back if it meets the minimum acreage requirement of § 58-769.7(b). In this instance, however, the parcel was not split-off until June 30, 1978, the day before the effective date of the amendment to § 58-769.13(a). Consequently, the roll-back would not apply to this conveyance under any circumstances.

If, on the other hand, the conveyance had taken place on or after July 1, 1978, it is my opinion that the roll-back tax liability, as computed under § 58-769.10, would apply to the split-off parcel.

Eligibility of the Reconveyed Acreage

Even though the 5 acre tract, standing alone, does not meet the minimum acreage requirement for forest land (§ 58-769.7(b)), the parcel can qualify in the future if, after being combined with another contiguous tract(s) owned by the same person, the total acreage of the parcels meets the minimum size requirement. See Report of the Attorney General (1975-1976), supra. Consequently, if all other statutory and regulatory conditions of the Act are met, the 5 acre tract could qualify for forest use valuation because, upon reconveyance, it is contiguous with a forestal parcel larger than 15 acres which is owned by the same taxpayer.

Application Requirement

Section 58-769.8 provides that "[a]n application shall be submitted whenever the use or acreage of such land previously approved changes...." Irrespective of the reconveyance, the acreage of the previously approved tract changed in 1978. Consequently, a new application must be timely filed by the taxpayer to secure continued eligibility in the land-use program. The question remains whether a separate application is necessary for the 5 acre tract upon reconveyance. The general rule is that a separate
application is required for each tract which is separately stated on the Land Book. See Report of the Attorney General (1974-1975) at 456. In this instance, the 1979 Land Book should show the original 75-acre tract as two parcels, one 70 acres and the other 5 acres. See § 58-803. This Office has previously opined that the owner of contiguous tracts may petition the Commissioner of the Revenue to consolidate such tracts onto one line in the Land Book. See Report of the Attorney General (1958-1959) at 277. However, consolidation on one line of the Land Book should not be permitted until five years has elapsed since the split-off parcel has again qualified for favorable land use tax treatment.

Based on the foregoing, it is my opinion that a new application must be filed for both tracts in order for each to be eligible for continued assessment based on use.

1 This Office has previously ruled that "a change in acreage or a severance of a qualified parcel so that a portion thereof no longer meets minimum acreage requirements will not subject the land to roll-back taxes so long as a qualifying use continues." See Opinion to the Honorable Alice Jane Childs, Commissioner of Revenue, Fauquier County, dated February 18, 1976, found in Report of the Attorney General (1975-1976) at 341.

2 Under § 58-769.10, liability for roll-back taxes extends back for five years. Consolidation on one line on the Land Book would aggregate two parcels with different land use tax histories. If a later event triggered a roll-back of taxes, it would be very difficult to determine the amount of the liability. This result can be avoided by stating the parcels separately on the Land Book until each has at least a five year history of favorable land use tax treatment. Of course, this separate statement on the Land Book has no effect on the eligibility of the parcel to qualify or continue in the land use program.

TAXATION. LEGISLATION CONTINUING LOCAL TAX EXEMPT FROM REQUIREMENT OF MAJORITY VOTE OF SENATE.

September 25, 1979

The Honorable W. Ward Teel
Member, House of Delegates

You have asked whether Ch. 817 [1978] Acts of Assembly is an Act that continues a tax, which would have required it to be adopted by a majority vote of the membership of both houses of the General Assembly.

Chapter 817 amended § 58-266.1 of the Code of Virginia (1950), as amended. This statute, which in one form or another has been in effect since 1842, permits counties, cities and towns to levy and collect licence taxes. The Bill
which became Ch. 817 did not effect this grant of power: rather, it limited its exercise. In the Senate, the Bill received 20 affirmative votes. Article IV, § 11 of the Virginia Constitution (1971) provides that "No bill...which imposes, continues, or revives a tax, shall be passed except by the affirmative vote of a majority of all the members elected to each house, the name of each member voting and how he voted to be recorded in the journal."

The Bill which became Ch. 817 did not fall within the scope of Art. IV, § 11. That Bill merely established a limitation on the power of political subdivisions to impose license taxes on businesses, trades, professions, occupations and callings, and a moratorium on the enactment of new or increased local merchant’s capital taxes. It is a Bill of limitation, and did not effect the power to impose the tax.

Moreover, the Virginia Supreme Court construed § 50 of the 1902 Virginia Constitution, which required that laws imposing, continuing, or reviving a tax specifically state the tax, applied only to ordinary and general taxes for state purposes, and did not apply to local taxes for local purposes. Kirkpatrick v. Board of Supervisors of Arlington County, 146 Va. 113, 136 S.E. 186 (1926); Powers v. City of Richmond, 122 Va. 328, 94 S.E. 803 (1918), appeal dismissed 251 U.S. 539 (1919). The language of § 50 is essentially the same as that of Art. IV, § 11 in the present Constitution. I.A. E. Howard Commentaries on the Constitution of Virginia, at 525. Accordingly, I am of the opinion that Art. IV, § 11 did not apply to the Bill which became Ch. 817.

TAXATION. LICENSE TAX. CERTAIN PERSONS SELLING FLOWERS ON PUBLIC SIDEWALK ARE PEDDLERS, RATHER THAN ITINERANT VENDERS.

December 20, 1979

The Honorable Clive L. DuVal, 2d
Member, Senate of Virginia

You ask whether for licensure purposes certain persons selling flowers on the public sidewalk are peddlers under § 58-340 of the Code of Virginia (1950), as amended, or itinerant venders under § 58-381.

By way of comparison, the ordinary business selling goods, wares, or merchandise has a regular place of business, which it uses or occupies on an indefinite, rather than a temporary, basis. See § 58-266.5 (place of business as situs for local license taxation of businesses, occupations, etc.). The ordinary business may sell from inventory, or it may solicit orders for future delivery.

Peddlers do not have a regular place of business, but they do have an inventory of goods, wares or merchandise to carry from place to place for purposes of barter or sale.
All sales are from inventory, and the peddler does not solicit orders for future delivery. See § 58-340.

Some peddlers may fit the definition of itinerant vendors, but not all itinerant vendors are peddlers. Itinerant vendors may solicit orders for future delivery. Itinerant vendors may also establish temporary places of business, but their use or occupancy of that place of business is for a period of less than one year. See § 58-381.

The flower sellers presently in question have an inventory that they can move from place to place. They move at least daily, and do not establish temporary places of business as contemplated by § 58-381. They do not solicit orders for future delivery. Accordingly, I find that they are peddlers within the meaning of § 58-340.

TAXATION. LOCAL BOARD OF EQUALIZATION. LOCALITY AUTHORIZED UNDER § 58-769.3:1 TO CREATE DEPARTMENT OF REAL ESTATE ASSESSMENT IS REQUIRED TO APPOINT LOCAL BOARD OF EQUALIZATION UNDER §§ 58-895, ET SEQ.

September 25, 1979

The Honorable Frank M. Morton, III
County Attorney for James City County

You ask whether James City County is required to have a board of equalization of real estate assessments.

Pursuant to the authority granted under § 58-769.3:1 of the Code of Virginia (1950), as amended, James City County has established a department of real estate assessment which is required to assess all real estate within the county on an annual basis. Once the department of real estate makes its assessment, the property owner has "[t]he right of appeal provided in § 58-769.2...." Id.

Section 58-769.2 provides that a person aggrieved by an assessment "[M]ay apply for relief to the board of equalization created under chapter 19 ($ 58-895 et seq.) of this title and from action thereon to the circuit court of the county or city, as provided by law." Section 58-898 provides that "[t]he circuit court of any other county [including James City]1 or the judge in vacation shall for the year following any year an[n]...annual...assessment is conducted without the use of a board of assessors composed of free holders...create and appoint for the county a board of equalization of real estate assessments." Under § 58-899, the board of equalization must be comprised of freeholders in the jurisdiction in which they will serve, and shall be selected by the circuit judge. Your county's department of real estate assessment does not satisfy these statutory requirements. Therefore, James City County is required to have a board of equalization.
REPORT OF THE ATTORNEY GENERAL

I am advised that James City County does not operate under the county executive or county manager form of government, and is therefore governed by § 58-898.

TAXATION. LOCAL LICENSE TAX. LIABILITY OF "SELF-EMPLOYED" AUTHORS.

December 13, 1979

The Honorable Dorothy S. McDiarmid
Member, House of Delegates

You ask three questions with respect to the local license tax liability of an author under § 58-266.1 of the Code of Virginia (1950), as amended, and a local ordinance adopted pursuant to that authority.

Facts

The author in question is not otherwise employed by any person or organization and for the past ten years has written science fiction articles at her residence in Fairfax County. The author submits her writings to various out-of-state publishers and the revenue derived from any sales is reported as self-employment income for State and federal income tax purposes. The details of these sales are not stated in your letter.

Authority To Tax Authors

You first ask whether § 58-266.1 authorizes localities to tax authors on their gross receipts derived from the sale of their works?

Section 58-266.1 authorizes localities to "levy and provide for the assessment and collection of...license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein..." Generally, self-employed individuals, not the employee of any person or organization, may be subjected to local license taxes under a properly enacted local ordinance. I am unaware of any reason why an author may not likewise be subjected to local license taxation.

The Fairfax County ordinance does not specifically mention authors; however, it does contain a provision for "[o]ther professional or specialized occupations and businesses..." and includes in the same category such occupations as artist, building designer, lecturer, and sculptor. In an Opinion to the Honorable D. B. Hanel, Commissioner of the Revenue for the City of Martinsville, dated November 22, 1976, and found in Report of the Attorney General (1976-1977) at 281, this Office previously held that such a "catch-all" provision was sufficient to include a
taxpayer not specifically listed. I am of the opinion that the same result obtains here, i.e., authors are included in the category of "other professional or specialized occupations and businesses."

Is The Catch-All Provision Overbroad?

You next ask whether this catch-all phrase enlarges on the common law definition of "engaged in business" and thus contravenes the law of the State?

The term "engaged in business" is not defined by statute, but is well defined in common law. Krauss v. City of Norfolk, 214 Va. 93, 95, 197 S.E.2d 205, 206 (1973).

"'It means a course of dealing which requires the time, attention and labor of the person so engaged for the purpose of earning a livelihood or profit. *** It implies a continuous and regular course of dealing, rather than an irregular or isolated transaction, in the absence of a statute specifically providing otherwise.'" Young v. Town of Vienna, 203 Va. 265, 267, 123 S.E.2d 388, 390 (1962).

In Krause and Young, those individuals engaged only in an irregular or isolated transaction. In contrast, the author in question here has on a regular and continuous basis written science fiction articles and has been doing so for the past ten years. You have not given any specific figures, but it appears that this is not a situation involving irregular or isolated transactions. Based on the fact situation you have presented, I am of the opinion that this author is "engaged in business" within the common law meaning of that term.

No Effect On Interstate Commerce

You last ask whether a local license tax imposed under the authority of § 58-266.1 on an author who sells her articles solely to out-of-state publishers constitutes an impermissible burden on interstate commerce?

You have not specified the relationship between the author and her publishers in any detail; therefore, the following response proceeds on the assumption that the states in which those publishers reside have no authority to tax the income or gross receipts received by the Fairfax County author from the sale of her science fiction articles. Starting with that assumption it is then necessary to examine the business, trade, or occupation taxed to determine if the taxpayer is engaged in Fairfax County in those activities constituting the business. There are no facts in your letter indicating that the author does any work elsewhere than in Fairfax County; i.e., the creation and preparation of the articles, and the receipt of the sums paid for such articles, occur only in Fairfax County. These activities are peculiarly local in nature and distinct from the eventual
publication and circulation of such articles in interstate commerce. See Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258-259 (1938). These facts would bar taxation by non-Virginia authorities. Moreover, the business taxed has a substantial connection to Fairfax County so that even if there were some burden on interstate commerce, the tax does not discriminate impermissibly against it. See Department of Revenue v. Association of Washington Stevedoring Companies, 435 U.S. 268 (1978).

Based on the facts that you have presented, I am of the opinion that a tax imposed pursuant to § 58-266.1 on an author would not constitute an invalid burden on interstate commerce.

1 In Krause, a retired civil servant owned and rented five units in three duplex houses, and lived in the sixth unit. The Supreme Court held she was not "engaged in the business of renting...property within the meaning of the license tax ordinance." In Young, the lease by a housewife of one parcel for a twenty-five year term was held not the "business of renting."

TAXATION. MOTOR FUEL. RETAIL SALE BY LITER IS LAWFUL.

October 3, 1979

The Honorable Lewis W. Parker, Jr.
Member, House of Delegates

This is in response to your inquiry whether, in view of § 58-711 of the Code of Virginia (1950), as amended,¹ the retail sale of motor fuel by the liter is lawful.

You note several problems associated with the fact that the nine cents per gallon tax imposed by § 58-711 on the sale or the use of motor fuel does not convert into an even number of cents per liter. Thus, retailers of motor fuel who sell by the liter would have to charge their purchasers at a rate either more or less than the actual tax of nine cents per gallon. Similarly, such retailers would be precluded from selling at the precise lawful maximum sale price as set forth by United States Department of Energy regulations. Moreover, you note that a consumer who purchases fuel by the liter and pays less than the nine cents per gallon tax but who thereafter procures refunds at the rate of nine cents per gallon, would in fact be refunded more than he paid in tax.

Section 58-711 levies the motor fuel tax on a per gallon basis, and no reference is made in this statute or related statutes to liters. Section 3.1-920, however, provides that both the system of weights and measures customarily used in the United States and the metric system are recognized, and that one or the other, or both, of these systems shall be
used for all commercial purposes in the State of Virginia. Furthermore, the United States Code (15 U.S.C. § 204) provides that it shall be lawful throughout the United States to employ the weights and measures of the metric system, and that no contract or dealing 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. Accordingly, the retail sale of motor fuel by the liter is not of itself illegal.

The tax imposed by § 58-711 is an excise tax levied upon motor fuel sold and delivered or used in this State. Commonwealth v. Shell Oil Co., 210 Va. 163, 169 S.E.2d 434 (1969). In respect to any given quantity of motor fuel, the tax is collected by and paid to the State only once. § 58-711. Once the tax has been paid, no person who thereafter sells, delivers, or uses that motor fuel is actually subject to the tax. Commonwealth v. Shell Oil Co., supra. Pursuant to § 58-713, a dealer in motor fuel as defined in § 58-687, is required to report to the Commissioner of the Division of Motor Vehicles on a monthly basis the number of gallons of motor fuel sold and delivered or used in Virginia during the preceding calendar month and to pay the tax thereon. Dealers are required to render bills to purchasers of motor fuels, which bills must contain a statement that the liability to the State for the motor fuel tax has been assumed and that the dealer will pay on or before the last day of the following month. § 58-714. It is unlawful, furthermore, for any person to import or cause to be imported into this State any motor fuel unless he is the holder of an uncancelled license as a motor fuel dealer or unless the liability for the tax imposed by the Motor Fuel Tax Act of Virginia has been assumed by a licensed motor fuel dealer. Further, it is unlawful for any person receiving motor fuel which has been imported by a person other than a licensed motor fuel dealer, or on which the tax has not been assumed or paid by a licensed motor fuel dealer, to deliver or offer such fuel for sale or use within this State. § 58-691.1. The tax on any motor fuel imported illegally becomes immediately due and payable. Id. Accordingly, the incidence of the tax is at the wholesale level and, therefore, liability is incurred prior to retail sale.

Liability for the motor fuel tax having been incurred prior to sale at retail, there can be no actual conflict between the levy in § 58-711 on a per gallon basis and any subsequent sale. Use of the metric system in the retail transaction has, in fact, no effect upon calculation of the tax under § 58-711 since it is not necessary for purposes of such calculation to make a cents per liter conversion. Neither is this crucial fact affected by the provision in § 58-690 that dealers and all other persons selling motor fuel shall add the amount of the tax to the price of the motor fuel sold by them. This latter statute affects neither the rate nor the incidence of the motor fuel tax as imposed by § 58-711. It merely concerns the recouping of the tax in subsequent transactions.3
As shown by the calculations included with your inquiry, however, it appears that a retailer of motor fuel cannot sell such motor fuel by the liter and still sell at his maximum lawful selling price. This prohibition results because the United States Department of Energy's applicable regulations define such maximum lawful selling price solely in terms of cents per gallon and the use of the factor (the approximate number of liters in a gallon) for converting gallons to liters would cause the seller either to fall short of or to exceed his maximum lawful selling price. Compliance with those regulations is a federal matter and thus the lawfulness of any overcharge must be addressed by federal officials rather than by this Office. Accordingly, I have requested an opinion from the federal government on this specific question, and I will forward its response to you as soon as possible.

Your letter further illustrates that a similar problem arises in the case of a consumer who applies for a motor fuel tax refund pursuant to § 58-715. This statute, as well, speaks exclusively in terms of gallons and the calculations included in your inquiry would appear to indicate that conversion of liter purchases to gallons would result in some slight increase in the amount of refund otherwise due. I am, nevertheless, of the opinion that substantial compliance with the refund provisions would suffice and that where an applicant's motor fuel purchases were in fact by liters rather than gallons, the resulting slight increase in the refund thereby found to be due would not invalidate an otherwise proper application for refund.

1Section 58-711 states in part:
"There is hereby levied a tax of nine cents per gallon on all motor fuel, except aviation fuel, which is sold and delivered or used in this State...provided, that the tax herein imposed and assessed shall be collected by and paid to the State but once in respect to any motor fuel."

2Section 58-687(4) states in part:
"The term 'dealer' means any person who imports, or causes to be imported, into the State, motor fuel for use, distribution or sale and delivery in and after the same reach the State; any person who produces, refines, manufactures or compounds such fuel in the State for use, distribution or sale and delivery in this State; any person who maintains and operates a bulk storage within this State and who receives motor fuel by tank car, barge, pipeline delivery or any common or contract carrier or self-owned equipment from a point within this State; and also any person who sells over one million gallons of motor fuel in any year, and who elects to be licensed as a dealer."

While § 3.1-949, concerning signs advertising petroleum products, specifically mentions signs used to display the price per gallon of petroleum products at retail, I am of the opinion this statute does not preclude retail sale of petroleum products by the liter.
REPORT OF THE ATTORNEY GENERAL

TAXATION. RECORDATION. GRANTOR OF CONVEYANCE EXECUTED PURSUANT TO CONDEMNATION PROCEEDING EXEMPT.

June 24, 1980

The Honorable Charlton E. Gnadt, Clerk
Circuit Court of Prince William County

You have asked whether "there is a Code provision that exempts the grantor from paying the tax pursuant to Section 58-54.1 of the 1950 Code of Virginia, as amended, in a conveyance from a condemnation proceeding." The provisions about which you inquire are found in §§ 25-249 and 58-54.1. The former section requires any "State agency" acquiring real property in a condemnation proceeding to "reimburse the owner, to the extent the State agency deems fair and reasonable, for expenses he necessarily incurred for (a) recording fees, transfer taxes and similar expenses incidental to conveying such real property to the State agency...." The use of the word "State agency" within § 25-249 is defined by § 25-238(a) to mean "any department, agency or instrumentality of the State; or any public authority, municipal corporation, local governmental unit or political subdivision of the State; or any department, agency or instrumentality of any public authority, municipal corporation, local governmental unit, political subdivision of the State, or two or more of any of the aforementioned." Section 58-54.1 provides, in part, "The tax imposed by this section shall not apply...to any 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.) Inasmuch as § 25-249 requires such reimbursement, the tax imposed by § 58-54.1 does not apply.

TAXATION. RETROACTIVE AMENDMENT OF EXEMPTION PROVISION OF VIRGINIA RETAIL SALES AND USE TAX ACT IS PERMISSIBLE.

November 9, 1979

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked two questions pertaining to Ch. 562 [1979] Acts of Assembly 810 (S.B. 917), which amended and expanded the sales tax exemption granted to farmers under § 58-441.6(c) of the Code of Virginia (1950), as amended. You propose to introduce two amendments to the Virginia Retail Sales and Use Tax Act in the 1980 Session of the General Assembly to expand further the exemption granted to farmers. Your questions are:
1. Can this proposed legislation be made retroactively effective to July 1, 1979, the effective date of S.B. 917, and

2. Can the Virginia Department of Taxation forego collection of sales and use taxes on such items of tangible personal property until such time as the General Assembly can act on the proposed amendments?

Section 58-441.6 sets forth the many exemptions to the Virginia Retail Sales and Use Tax Act, and these exemptions by classification apply uniformly throughout the Commonwealth. So long as the classification has some rational basis and treats persons similarly situated in the same manner, it is prima facie valid. Mandell v. Haddon, 202 Va. 979, 989, 121 S.E.2d 516, 524 (1961). Section 58-441.6(c) is one of the farmer's exemptions, and farmers have long been recognized as a favored class in Virginia. See, e.g., §§ 58-266.1A(2), 58-340, and 58-342. Therefore, the question is whether the retroactive expansion of the exemption under § 58-441.6(c) somehow causes an arbitrary or discriminatory result. A retroactive amendment in this case would merely operate to relieve farmers throughout the State of certain sales or use tax liabilities for an additional year. All persons similarly situated would be uniformly treated. I, therefore, am of the opinion that there is no constitutional impediment to a retroactive amendment to § 58-441.6(c) along the lines you propose.

There is no statutory authority, however, which will permit the State Tax Commissioner to forego his responsibility to assess and collect State taxes due and owing, until the Bill you propose is enacted and signed by the Governor. See §§ 58-33 and 58-29.

If the retroactive expansion of § 58-441.6(c) you propose is enacted, a mechanism for promptly making the appropriate refunds already exists under the record-keeping requirements mandated by the Code and the regulations promulgated thereunder. See § 58-441.29; Regulations § 1-30.

TAXATION. REVALIDATION OF APPLICATION FOR TAXATION ON BASIS OF LAND USE. REVALIDATION FORMS NOT REQUIRED TO BE FILED WITH CLERK OF COURT.

August 27, 1979

The Honorable James T. Vaughan
Commissioner of the Revenue for Amelia County

You ask whether § 58-769.8 of the Code of Virginia (1950), as amended, requires that revalidation of applications for taxation on the basis of land use be recorded by the clerk of the court. You also ask whether a
county may recover fees paid to the clerk for recording if recording is not required.

Recordation of Revalidation of Applications

Section 58-769.8 provides that a locality may require certain property owners to revalidate any previously approved application for taxation based on land use annually on or before the date on which the last installment of property tax prior to the effective date of the assessment is due. The revalidation forms are filed with the local assessing officer. A revalidation declares or reaffirms that an application is still valid, but it is not an application itself. Because a revalidation form is not an application for taxation based on land use assessment, and § 58-769.8 provides neither for transmittal by the local assessing officer to the clerk for revalidation forms nor the subsequent filing of such forms by the clerk, it is my opinion that § 58-769.8 does not require that revalidations be recorded with the clerk of the court.

Payment and Recovery of Fees

The compensation of a clerk of the court is prescribed by general law or special act. See Art. VII, § 4 of the Virginia Constitution (1971). A clerk of the court is entitled to additional compensation for services only if such payment is authorized by statute. See Stone v. Caldwell, 99 Va. 492, 39 S.E. 121 (1901); Board of Supervisors v. Coons, 121 Va. 783, 94 S.E. 201 (1917); 3B M.J. Clerks of Court § 4 (1976); 15A Am. Jur.2d Clerks of Court §§ 11, 15 (1976). Section 58-769.8 provides that a local governing body shall compensate the clerk at the rate of one dollar per application filed and indexed, but is silent as to compensation for recording revalidation forms.

Although it is the general rule that voluntary monetary payments cannot be recovered when there is no mistake as to the facts, the rule does not apply to claims brought by states or their political subdivisions to recover public money paid under a mistake of law. See County of Norfolk v. Cook 211 Mass. 390, 97 N.E. 777 (1912). It has been held that a county court could recover unlawful payments made to a clerk out of the county treasury, County Court v. Duty, 77 W.Va. 17, 87 S.E. 256 (1915). Accordingly, it is my opinion that the county should request a refund from the clerk for the fees in question, and that the clerk should comply with that request.

TAXATION. § 58-16.2 SERVICE CHARGES. LOCALITY CANNOT IMPOSE FULL SERVICE CHARGE FOR "MERE AVAILABILITY" OF SERVICE IF OWNER OF PROPERTY ESSENTIALLY SUPPLIES SERVICE.
February 12, 1980

The Honorable Frank L. Hereford, Jr., President
University of Virginia

You have asked two questions relating to § 58-16.2 of
the Code of Virginia (1950), as amended, as the statute
relates to the University of Virginia (the "University"), an
entity which is exempt from real property taxation under

You first ask if § 58-16.2 allows a locality to impose a
service charge against the University for providing police
protection if the University operates its own police
department and the police protection provided by the locality
constitutes "mere availability" of services.

In § 58-16.2, the general authorization for localities
to impose various service charges is limited by the following
proviso:

"The expenditures for services not provided for certain
real estate shall not be applicable to the calculations
of the service charge for such real estate...."

This Office has ruled previously that the above-quoted
portion of § 58-16.2 allows a service charge only if the
chargeable service is actually rendered to the realty of the
owner. See Opinion to the Honorable David S. Thornton,
Member, Senate of Virginia, dated May 2, 1972, and found in
instance, the facts clearly show that the locality does not
actually provide the daily police protection function with
regard to the property of the University.

Based upon the foregoing, it is my opinion that a
locality may not impose a full service charge for police
protection under § 58-16.2 based upon the mere availability
of such services if the entity to be charged essentially
provides its own police protection.

You also asked, under the same facts as above, if
§ 58-16.2 allows the locality to impose a charge for
rendering extraordinary services to the University if the
locality has agreed under § 15.1-131 to provide such services
without charge.

This answer assumes that the University and the locality
have entered into a valid mutual aid agreement, as authorized
by and within the meaning of § 15.1-131 and that the phrase
"rendering of extraordinary services" relates to acts
performed in aiding the enforcement of certain laws and in
responding to certain emergencies enumerated in § 15.1-131.

Section 15.1-131 provides, as a necessary condition of
any such mutual aid agreement, that the parties thereto shall
"waive any and all claims against all the other parties
thereto which may arise out of their activities outside their respective jurisdictions under such agreement...." (Emphasis added.)

Based upon the foregoing, it is my opinion that a locality may impose a service charge (as computed under § 58-16.2) for the actual rendition of such extraordinary services, provided the service (protection) relates to property of the University located within the jurisdiction of the locality.

TAXATION. SITUS OF TANGIBLE PERSONAL PROPERTY. PLEASURE BOAT. DOES NOT ACQUIRE TAXABLE SITUS UNDER § 58-834 IN LOCALITY WHERE "NORMALLY PARKED, GARAGED OR DOCKED" FOR SUMMER MONTHS, IF LOCATED IN ANY SIGNIFICANT PORTION OF REMAINDER OF YEAR.

February 1, 1980

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have asked what minimum number of months a pleasure boat must be present in your locality to acquire a taxable situs for the purpose of imposing a personal property tax. This Opinion assumes that the boat is located in your locality for the three summer months, and is located elsewhere in another locality for the remainder of the year.

The controlling statute is § 58-834 of the Code of Virginia (1950), as amended, which provides that:

"[T]he situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked...."

The test is the normal location for garaging, parking or docking the vehicle, with normality of location to be determined as of January the first. See Opinion to the Honorable Lois B. Chenault, Commissioner of the Revenue for Hanover County, dated March 4, 1976, and found in Report of the Attorney General (1975-1976) at 338 and § 58-835. Note, however, that January the first is simply the date on which the factual determination of situs must be made. The physical location of the property on that date is not determinative of situs under § 58-834. See Report of the Attorney General (1973-1974) at 385.

This Office, when dealing with the situs for taxation, focused on the factual determination of where the boat is "normally docked." See Reports of the Attorney General (1975-1976) at 366 and 367; (1973-1974) at 384; (1971-1972) at 410. However, since the operative language of the statute is written in the disjunctive, it is also relevant to the
issue of situs to determine where the "vehicle" is normally "garaged" or "parked" provided the "vehicle" in question can be garaged or parked. As a matter of fact, it is assumed here that most pleasure boats can be "parked and/or garaged," as well as "docked." In this instance, the boat is "normally garaged, docked or parked" in your locality three months of the year.

Based upon the foregoing, and assuming that the boat is "normally garaged, docked or parked" elsewhere for the remainder of the year, it is my opinion that the boat has not acquired a taxable situs in your locality. If the boat is not "normally garaged, docked or parked" in any one locality for a significant portion of the year (e.g., six months), it is then taxed in the jurisdiction in which the owner resides. See Report of the Attorney General (1975-1976) at 367.

TAXATION. STANDARD FOR WAIVER OF PENALTY FOR LATE FILERS UNDER § 58-874.

May 12, 1980

The Honorable Emmett W. Hanger
Commissioner of the Revenue for Augusta County

You ask if Augusta County may amend its ordinance penalizing late filers of personal property tax forms. Augusta County's present ordinance follows the language of § 58-847 of the Code of Virginia (1950), as amended, while the proposed amendment employs the following language:

"The Commissioner of the Revenue may waive the penalty if in his judgment the penalty has been erroneously assessed or sufficient extenuating circumstances are brought to his attention by the taxpayer." (Emphasis added.)

Section 58-847 permits a locality to adopt an ordinance waiving both penalty and interest when the taxpayer's delinquency "was not in any way the fault of the taxpayer." (Emphasis added.) This standard is strict, and the factual determination it requires is one which may be properly delegated to the appropriate local official. See Report of the Attorney General (1976-1977) at 289. However, the standard contained in the proposed ordinance is less strict than that stated in § 58-847. Under Dillon's Rule, a political subdivision of the State has only such powers as are expressly delegated to it by the General Assembly, and those powers which can be necessarily and fairly implied therefrom. See Reports of the Attorney General (1973-1974) at 275; (1971-1972) at 104. The proposed amendment to Augusta County's ordinance would permit waiver of penalty and interest where delinquency was the fault of the taxpayer, though extenuating circumstances might exist, and this amendment does not fit the standard of § 58-847. Nor can power to amend as you suggest be fairly implied from that
statute. Therefore, I am of the opinion that the proposed Augusta County ordinance fails to conform to the limits of § 58-847 and exceeds the powers delegated to the board of supervisors.

In light of this holding, there is no need to address the "delegation" issue raised by the proposed ordinance. However, I note that the Titus Opinion approved such a delegation under a local ordinance utilizing language that conformed to or was identical to that contained in § 58-847.

TAXATION. TAX RELIEF FOR ELDERLY. CAN BE EXTENDED TO PARCEL OF LAND UPON WHICH TAXPAYER HAS HIS DWELLING PLACE IN ADDITION TO OTHER TAX RELIEF ACCRUING TO PARCEL BY VIRTUE OF LAND USE ASSESSMENT AND TAXATION UNDER TERMS OF ORDINANCES IMPLEMENTING SUCH TAX RELIEF MEASURES IN MIDDLESEX COUNTY.

October 29, 1979

The Honorable Stanley R. Lewis
Commissioner of the Revenue for Middlesex County

You ask whether tax relief for the elderly, § 58-760.1 of the Code of Virginia (1950), as amended, may be extended to a parcel which already enjoys a partial tax exemption under the land use taxation program (§§ 58-769.4, et seq.).

Facts

Copies of your local ordinances which authorize these two forms of tax relief show: (1) that the land use taxation ordinance provides a tax exemption based upon the difference in the assessed value of the parcel due to the difference between "fair market" and "land use" values and, (2) that the tax relief for the elderly is expressed as an exemption from a certain percentage of the tax otherwise imposed upon the parcel, which percentage is in indirect proportion to the combined income of the owner(s) of such parcel. Also, tax relief for the elderly cannot exceed $150 of tax liability.

The taxpayer in this case maintains his dwelling place upon the parcel in question.

Analysis

First, we are bound by the general rule of statutory construction which requires that each statute or statutory scheme be given its full effect unless doing so would clearly conflict with the purpose of another law. Board of Supervisors v. Marshall, 215 Va. 756, 214 S.E.2d 146 (1975).

Second, nothing in the two tax relief schemes, either as authorized by general laws or as implemented by your local ordinances, indicates that tax relief under one scheme is meant to preclude tax relief under the other.
Third, this Office has previously held that tax relief for the elderly can extend to the entire parcel upon which the taxpayer's dwelling house is situated. See Report of the Attorney General (1975-1976) at 346.

Fourth, administrative implementation of both measures is easily accomplished in this instance, to wit: (1) tax liability for the entire parcel is determined using the land use value for the parcel as the amount against which the tax rate is applied; (2) a further exemption from the tax liability computed under (1) is then determined in accordance with the "total combined income" formula set-out in your local ordinance; provided, in accordance with your ordinance, that such additional exemption may not exceed $150 of the tax liability determined in (1), above.

Based upon the foregoing, it is my opinion that both tax relief measures may be applied to this particular parcel of land under the terms of your local ordinances.

TAXATION. TRANSPORTATION DISTRICT FUELS SALES TAX. NO CEILING ON TAX REVENUES EXISTS FOR PURPOSES OF CALCULATING REQUIRED RATE REDUCTION.

May 1, 1980

The Honorable John H. Rust, Jr.
Member, House of Delegates

You have asked two questions concerning the construction of subparagraph C of H.B. 631, Ch. 225 [1980] Acts of Assembly. Subparagraph C provides for a local tax reduction in certain tax years in those localities within certain transportation districts, including the Northern Virginia Transportation District, and provides a formula to accomplish that reduction.

You first ask whether the subparagraph C formula places a ceiling upon a locality's revenues. I conclude that it does not; however, subparagraph C does require use of the same tax rate as used in the previous year, so that any increase in revenues can only result from an increase in the assessed value of real estate subject to taxation. While there is no revenue ceiling, the fuel tax proceeds applied against rail and bus service costs will result in a "credit," which credit will reduce the total amount of tax revenues which a locality may raise.

Nowhere in the Bill is any revenue ceiling established. Subparagraph C directs "a reduction of tax revenues which equals the particular locality's allocated share of the costs of rail and bus service, to the extent paid from the fuel sales tax." Tax revenue is the product of the applicable tax rate times the assessed valuation of real estate subject to taxation. Under H.B. 631, the formula for computing the tax reduction begins with the computation of
the revenues "which would have been collected" at the prior year's tax rate, i.e., last year's tax rate times this year's assessment. This hypothetical amount is the base figure from which is subtracted the locality's allocated share of costs paid by the fuel sales tax (the "credit"). There will be a dollar for dollar reduction in a locality's tax revenues for that portion of the locality's allocated share of rail and bus service costs paid by the fuel tax. Upon examination, it is clear that revenues will increase if the assessment increases significantly. The only factor in the formula which remains unchanged under the language of subparagraph C is the prior year's tax rate. The suggestion that the General Assembly intended to place a ceiling on revenues must be rejected because there is no basis in the statute for so concluding. By contrast, in framing § 58-266.1(C)(3), the General Assembly went to great lengths to specify the revenue base for a particular tax year. This detail is absent from H.B. 631. Had the General Assembly intended to make the prior year's tax revenue a ceiling, it would have plainly so stated.

You next ask whether the transportation district commission may develop a method for crediting the State tax revenues to its member jurisdictions for application to each locality's allocated share of the costs of the district's mass transit system. Because the General Assembly has provided the method for allocating costs among the localities, I conclude that the statute also provides the method for allocating the fuel tax revenues for purposes of rate reduction. In an Opinion to the Honorable Warren E. Barry, Member, House of Delegates, dated March 27, 1980 (copy enclosed), it was concluded that H.B. 631 does not require that each political subdivision within the transportation district receive a proportionate share of revenues from the fuel sales tax or derive proportionate benefits from the imposition of such tax. Nor is the tax structured to match, dollar for dollar, the fuel tax generated by retailers in each locality with that locality's allocated share of costs. In other words, the statute does not mandate distribution of fuel sales tax revenues on the basis of the location of the retailers who remit the fuel sales tax. Rather, because H.B. 631 specifically defines "allocated" with reference to the respective shares of costs, I conclude that the fuel tax revenues must be "shared" on the same basis as costs are shared. Where the General Assembly has expressed its intention to credit revenues dollar for dollar against transportation costs, the transportation district commission has no discretion to develop an alternative method.

Finally, subparagraph B of H.B. 631 states that the transportation district commission shall apply the fuel tax revenues "to the operating deficit and debt service of the mass transit system of such district." However, the statute provides no direction concerning whether the fuel tax
revenues should be applied first to the operating deficit or to debt service. As a matter of administrative law, this decision is left to the transportation district commission, which may adopt reasonable procedures by which the decision may be made within the overall intention of H.B. 631. See Report of the Attorney General (1978-1979) at 263.

1Subparagraph C of H.B. 631 provides: "The governing body of each county or city in which such tax is levied shall reduce the rate of its real estate tax, or its real estate tax and other locally levied taxes, in an amount that will result, both in the year following the first full fiscal year in which the two per centum tax and the first full fiscal year in which the additional two per centum tax authorized hereunder is levied, in a reduction of tax revenues which equals the portion of the amount which has been or would have been allocated to the county or city for rail and bus services but is paid by the Commission from the tax levy. The amount of the tax reduction shall be calculated by subtracting the amount collected at the reduced rates from the amount which would have been collected at the tax rates in effect for the tax year immediately prior to the tax year in which the rates are reduced. Such reduced rate shall not be raised during the entire tax year for which the rate is reduced, but may be raised subsequently. As used in this subsection 'allocated' shall mean the amount which a council or governing body has agreed to pay or agrees would be an equitable share of the costs of rail and bus service to be attributed to its jurisdiction." (Emphasis added.)

2To the extent that the Commission applies the fuel tax proceeds to debt service, no tax reduction is required.

3The following is an example of how the rate reduction will work in a particular locality:

I. Assume:
   1. Local real property tax in tax (calendar) year 1981:
      Assessed Value of Real Estate $1,000,000,000
      Local Real Estate Tax Rate $2.00/$100 assessed value
      Total Real Estate Revenues $20,000,000
   2. Locality's allocated share of costs paid by fuel sales tax and, therefore, required reduction in local tax is $2,000,000.
   3. Note that the 1981 tax rate is the only constant carried over for purposes of determining 1982 rate reduction (II, 2 below):
      $2.00/$100 assessed value

II. Procedure for determining rate reduction for tax (calendar) year 1982:
   1. Assessed Value of Real Estate $1,200,000,000
   2. Amount collected at prior year's tax rate ($2.00/$100 assessed value x $1,200,000,000) $24,000,000
   3. Required reduction $2,000,000
   4. Net collections permitted (2-3) $22,000,000
5. Noting that: Effective Tax Rate = Tax Revenues
   Assessed Value
   \[
   \frac{\$22,000,000}{\$1,200,000,000} = \frac{1.83}{100}
   \]

   Note that the procedures provided for under § 58-785.1 of
   the Code of Virginia (1950), as amended, come into play if
   the annual assessment results in an increase of one per
   centum in the total amount of real estate tax collected.

   Section 58-266.1(C)(3) provides: "A locality shall lower
   rates on categories which are above the maximums prescribed
   in subsection B for any tax year after nineteen hundred
   eighty-two if it receives more revenue in tax year nineteen
   hundred eighty-one or any tax year thereafter than the
   revenue base for such year. The revenue base for tax year
   nineteen hundred eighty-one shall be the amount of revenue
   received from all categories in tax year nineteen hundred
   eighty, plus one third of any increase in such revenue
   between tax year nineteen hundred eighty and tax year
   nineteen hundred eighty-one. The revenue base for each tax
   year after nineteen hundred eighty-one shall be the revenue
   base of the preceding tax year plus one third of the increase
   in the revenues of the subsequent tax year over the revenue
   base of the preceding tax year. If in any tax year the
   amount of revenues received from all categories exceeds the
   revenue base for such year, the rates shall be adjusted as
   follows...."

   TREASURERS. CHECKS. RELIEVED OF LIABILITY WHEN SIGNED BY
   ANOTHER OFFICIAL PURSUANT TO LAWFUL AUTHORITY.

   March 7, 1980

   The Honorable Otis Johnson, Treasurer
   City of Hampton

   You have asked whether you would be liable for any loss
   of funds drawn from the city treasury by check which was not
   signed by you. The duties of county and city treasurers are
   specified by statute, and in the case of city treasurers, may
   also be specified by the city charter. See §§ 58-916, et
   seq., of the Code of Virginia (1950), as amended; Report of
   the Attorney General (1974-1975) at 50. Where there is a
   conflict between the charter and the general statutes, the
   charter controls. See § 58-936; Report of the Attorney
   General (1972-1973) at 51.

   The General Assembly enacted a new charter for the City
   Section 6.04 of the charter provides that "[p]ayments by
   the city shall be made only in such a manner as the council may
   by ordinance prescribe." The city council has adopted an
   ordinance pursuant to that charter provision. That
   ordinance authorizes the city manager to sign checks in place
   of the treasurer in certain circumstances. In my opinion,
   this is a lawful grant of authority to the city manager.2
In reply to your specific question, it is my opinion that you have no liability for any loss which may result on a check which was countersigned on your behalf by the city manager. You have made reference to the statutes concerning investment of public funds, which are codified as Ch. 18, Title 2.1. Specifically, you referred to § 2.1-329.1 which exempts the treasurer or other public depositor from liability for any loss where investments are made in accordance with those statutes, "in the absence of negligence, malfeasance, misfeasance, or nonfeasance on his part or on the part of his assistants or employees." This statute assumes that the treasurer has the power to act, that he acts wrongfully or fails to act where he should have so acted, and the result is a loss of public funds. In the situation you present, however, the loss would result on a check lawfully signed on your behalf by the city manager. The act causing the loss would be the act of the city manager, not the act of the treasurer, and the city manager would be liable therefor.

1"(d) The countersignature of the Director of Finance and Treasurer shall be affixed on each and every check drawn on City funds except as provided for the Coliseum Event Account; provided, however, in the event of an absence, disability, sickness, death, resignation, or in a situation deemed an emergency by the City Manager, the City Manager may substitute his signature for either of the officers signatures. A special account for Coliseum events requiring one signature from the box office manager or assistant box office manager and one signature from the Coliseum Director or Assistant Coliseum Director may be established. The provisions of this section shall not apply to expenditures in compliance with court orders or transfers of monies from one fund to another, or remittances by the Treasurer due the State...."

2Your question what would constitute an emergency within the meaning of the ordinance does not require an interpretation of any State or federal statute or regulation. This Office renders opinions that touch upon city charter and code provisions only where they must be construed in light of applicable statutes or constitutional provisions. Your question raises only a question of interpretation of the local ordinance. "To render such an interpretation would unnecessarily insert this Office into a matter solely of local concern and over which the local governing body has control. It would appear that any ambiguity which may exist in the City Code is a problem which can and should be rectified by the City Council." See Report of the Attorney General (1976-1977) at 17.

UNIFORM STATEWIDE BUILDING CODE. BUILDING PERMIT FEES. COST OF CONSTRUCTION. PROPER BASIS FOR SETTING FEES, BUT REVENUE GENERATED MUST BE IN PROPORTION TO COST OF ENFORCEMENT AND ADMINISTRATION.
The Honorable Robert B. Fox  
Commonwealth's Attorney for Westmoreland County

You ask whether the cost of construction of a building or structure is the proper basis for determining the building permit fee to be levied to defray the cost of enforcement of the Uniform Statewide Building Code. Section 36-105 of the Code of Virginia (1950), as amended, provides that fees may be levied to cover the costs of enforcement and appeals.

A local governing body is accorded a wide discretion in setting regulatory fees and will not be interfered with unless its action is plainly unreasonable. A license fee set by such a body will be sustained unless its unreasonableness appears on the face of the ordinance or is established by extrinsic evidence. See 51 Am.Jur.2d Licenses and Permits § 114. Accordingly, I am of the opinion that a building permit fee based upon the cost of construction of a building or structure is a reasonable method of determining the tax.

If regulation is the primary purpose of a licensing ordinance, then the fee levied under it must have a reasonable relation to the cost of enforcing it. Charlottesville v. Marks' Shows, 179 Va. 321, 18 S.E.2d 890 (1942). Where the fee is out of proportion to the expenses involved, an ordinance will generally be regarded as a revenue measure and void as a regulation under the police power. See County Board of Supervisors of Fairfax County et al. v. American Trailer Company, Inc., 193 Va. 72, 76, 68 S.E.2d 115, 118 (1951). Accordingly, it is my opinion that the cost of construction is the proper basis for determining building permit fees only if the resulting fees generate revenue in proportion to the expenses involved in enforcement and administration of the building code.

The Honorable Frank M. Morton, III  
County Attorney for James City County

You ask whether the Board of Supervisors of James City County may enforce, in the case of buildings exempt from the Uniform Statewide Building Code ("USBC"), a county building code that was in effect prior to the effective date of the USBC. You state that § 103.4 of the Southern Standard Building Code of 1969 was adopted by your board on September 14, 1970, and that that section pertains to unsafe buildings. The issue is whether § 103.4 may be applied to farm buildings which are exempted from coverage of the USBC in § 36-97 of the Code of Virginia (1950), as amended.
You ask:

1. Are the terms of § 103.4 of the Southern Standard Building Code of 1969, as amended, still in effect in James City County?

2. Are certain farm buildings which are exempt under the provisions of the Uniform Statewide Building Code, § 36-9, subject to coverage under § 103.4 above, i.e., those farm buildings constructed prior to 1973?

Section 36-101 provides that no provision of the USBC shall be effective prior to January 1, 1973, or later than September 1, 1973. Section 36-101 also allows the Review Board to allow two years transition for localities whose codes were in substantial conformity with the USBC. You state that James City County was allowed such a transition period ending September 9, 1974, which is therefore the effective date of the USBC in that county. The USBC prescribes standards to be complied with in the construction of buildings and structures. Under §§ 36-97(12) and 36-97(18) farm buildings and structures are excepted from the coverage of the USBC.

Until July 1, 1976, § 36-101 provided that, in the case of a building constructed, or on which construction had commenced, prior to the effective date of the USBC, that building would remain subject to the building regulations in effect at the time of construction. A number of prior Opinions of the Attorney General have held that buildings exempted from the USBC may be subject to local building codes. See Reports of the Attorney General (1973-1974) at 261; (1977-1978) at 474.

Accordingly, it is my opinion that the building code that was in effect before September 9, 1974, is still in effect for buildings excepted from the provisions of the USBC by § 36-103 and for farm buildings and structures excepted by §§ 36-97(12) and 36-97(18).

As a county attorney, you are required by § 2.1-118 to state your opinion on the questions you raise and the basis for your conclusions. Your research was exceptionally well done, and I appreciate your compliance with the spirit of the statute as well as its letter.

UNIFORM STATEWIDE BUILDING CODE. LOCAL REGULATION OF EXEMPT BUILDINGS.

March 4, 1980

The Honorable John H. Tate, Jr.
County Attorney for Smyth County

You ask whether a building constructed prior to 1973 must be inspected in accord with the Uniform Statewide
Building Code after electrical service has been disconnected for thirty days.

Section 1502.4 of the building code requires inspection, and compliance with the code, of the electrical system of buildings to which service has been disconnected for more than thirty days. Section 36-103 of the Code of Virginia (1950), as amended, exempts from the building code buildings constructed prior to 1973, but makes them subject to regulations existing prior to 1973.

Since the building is exempt from the building code, it remains exempt from the inspection provisions of § 1502.4. See Report of the Attorney General (1975-1976) at 403. Accordingly, in the case of a building constructed prior to the effective date of the Uniform Statewide Building Code, I am of the opinion that the code does not have to be complied with upon resumption of electrical service.

This result is mandated by the exemption created by § 36-103, although it may not be consistent with the public safety in all instances. In the case of a structure which has been abandoned for a period of time, there may be a danger of fire if electrical service is resumed without inspection. An available solution lies in the fact that localities may adopt regulations for exempt buildings. See Report of the Attorney General (1973-1974) at 261.

UTILITIES. LIFELINE UTILITY RATES. AUTHORITY OF GENERAL ASSEMBLY TO ENACT.

October 4, 1979

The Honorable Robert C. Scott
Member, House of Delegates

This is in reply to your letter in which you asked two questions concerning so-called "lifeline utility rates."

You first inquire as to,

"The extent to which federal law, particularly the recently-enacted Public Utility Regulatory Policies Act, and any regulations promulgated pursuant thereto, would preempt any decision by the General Assembly regarding lifeline rates."

It is my opinion that the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. 2601 (1978), does not preempt any action by the General Assembly concerning lifeline rates.

In order to determine whether federal law has preempted State action concerning lifeline rates, it is necessary to determine whether Congress has expressly or impliedly replaced State authority in this area. See Northern

In the case of lifeline utility rates, there is no evidence of express or implied preemption by Congress. As § 114 of PURPA states,

SEC. 114. LIFELINE RATES.

(a) LOWER RATES--No provision of this title prohibits a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or a nonregulated electric utility from fixing, approving, or allowing to go into effect a rate for essential needs (as defined by the State regulatory authority or by the nonregulated electric utility, as the case may be) of residential electric consumers which is lower than a rate under the standard referred to in section 111(d)(1).

(b) DETERMINATION--If any State regulated electric utility or nonregulated electric utility does not have a lower rate as described in subsection (a) in effect two years after the date of the enactment of this Act, the State regulatory authority having ratemaking authority with respect to such State regulated electric utility or the nonregulated electric utility, as the case may be, shall determine, after an evidentiary hearing, whether such a rate should be implemented by such utility.

Congress has specifically intended that State regulatory authorities consider the appropriateness of lifeline rates. While adoption of lifeline rates by the Virginia State Corporation Commission is neither required nor prohibited, PURPA directs that some action be taken after an evidentiary hearing. The hearing must be held by November 9, 1980.

You next inquire as to,

"The constitutionality of offering different rates within the same class of customers in view of the constitutional requirement that no person within a state's jurisdiction be denied equal protection of the laws."

I assume that you are asking whether it is constitutional to charge all residential customers a lifeline rate for essential utility needs, while the charge for greater consumption is billed at a higher or nonlifeline rate.
It is my opinion that lifeline rates do not necessarily deny equal protection of the laws, and may be constitutional if properly designed.

In your letter, you define a lifeline rate as "a type of inverted rate in which a minimum, basic amount of household energy is supplied at discounted rates and the consumption of energy in quantities exceeding allowable lifeline limits is billed at higher or nonlifeline rates." In the PURPA, Congress directs the State Regulatory Authority to consider a lifeline rate which the Regulatory Authority believes will supply "essential needs." Section 114(a), PURPA, 16 U.S.C. 2624 (1978). House Joint Resolution No. 277 of the 1979 General Assembly directs your joint subcommittee to consider lifeline utility rates which allow "consumers to purchase a basic minimum allowance of household energy at discounted rates...." [1979] Acts of Assembly 1348.

In order to meet the constitutional requirements of equal protection, legislation which implements lifeline utility rates must be reasonably related to this purpose. Equal protection of the laws is not violated when citizens are placed in different categories, provided the classification rests upon some ground of difference having a fair and substantial relation to the object of the rule. Kahn v. Shevin, 416 U.S. 351 (1974); Fredericksburg v. Sanitary Grocery Co., 168 Va. 57, 190 S.E. 318 (1937). There is no denial of equal protection where the classification in a statute is neither arbitrary nor capricious, and based on a reasonable consideration of the difference or of a policy. Virginia Electric and Power Company v. Commonwealth, 169 Va. 688, 194 S.E. 775 (1938); Virginia Electric and Power Company v. Commonwealth, 174 Va. 316, 6 S.E.2d 680 (1940). Finally, the legislature has broad discretion to enact laws which affect some groups of citizens differently than others, if that classification is relevant to the achievement of the purpose of the statute. McGowan v. Maryland, 366 U.S. 420 (1961).

Therefore, lifeline utility rates do not deny equal protection of the laws if the initial "lifeline" block of consumption is set at a level which provides utility service for household necessities at a fair and reasonable price.

UTILITIES. UTILITY MAY NOT TERMINATE SERVICE TO EFFECT COLLECTION OF DELINQUENT LOCAL CONSUMER UTILITY TAXES.

March 24, 1980

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked whether a utility company can disconnect the service of a consumer for that consumer's failure to pay the utility tax imposed under § 58-617.2 of the Code of Virginia (1950), as amended. That section imposes a tax
directly on the consumer which is usually collected by the public utility company through its normal billing procedures. The amount of the tax is stated separately from the charges for utility service.

The practice of permitting the utility company to collect consumer taxes similar to the tax imposed by § 58-617.2 has been approved in other jurisdictions. See City of Modesto v. Modesto Irrigation District, 110 Cal. Rptr. III (1973); Peninsular Telephone Company v. City of Clearwater, 39 So.2d 473 (Fla. 1949). The language of § 58-617.2 contemplates collection of the Virginia tax by the appropriate utility. The section provides that a municipal utility required to collect a tax for another municipality is entitled to a collection fee. This language indicates that it was intended that the tax be collected by the utility when it renders its bill for service. There appears no reason to distinguish private utilities from municipal utilities in this regard, except that private utilities are not entitled to the collection fee. Accordingly, the utility, whether private or municipal, may collect the tax, on behalf of the locality imposing it, using the normal utility billing system. I have previously approved this practice because it allows for ease of administration of the tax. See Report of the Attorney General (1978-1979) at 289.

Whether the utility can collect the tax through its normal billing procedure is not completely dispositive of the question you raise with respect to whether utility service may be terminated for non-payment of the tax, however. Termination of utility service for non-payment of the charges is recognized as a reasonable method for utility companies to collect the charges they make for utility services. See Southwestern Tel. & Tel. Co. v. Ranaker, 238 U.S. 482, 489-490 (1915); See, also, Virginia Ry. and Power Co. v. House, 148 Va. 879, 139 S.E. 480 (1927). However, the tax imposed by § 58-617.2 is the liability of the consumer, not the utility. In addition, I am advised that in practice, the tax is not ordinarily considered a cost of doing business upon which rates for utility service are based. There is no language in § 58-617.2 which indicates that the utility may be liable for the tax if the consumer fails to pay it. Since the tax is not a liability of the utility company, collection of the tax is merely a collateral, non-utility service provided to the locality. A utility company is not permitted to use its State-granted monopoly to collect collateral obligations of the customer which are only tangentially related to the customer's duty to pay for utility service. See, e.g., Ashline v. Public Electric Light Company, 44 A.2d 164 (Vt. 1945). The locality may, of course, collect delinquent taxes imposed by § 58-617.2 by appropriate legal procedures. See City of San Jose v. Donohue, 123 Cal. Rptr. 804 (1975), appeal dismissed, 423 U.S. 1069 (1976).

It is my opinion, therefore, that a utility company may not terminate service for non-payment of that portion of its bill which consists of the tax imposed pursuant to
$58-617.2, although the utility may notify the locality of delinquent taxes identified in its billing process and the locality may take appropriate action to collect the taxes.

VIRGINIA CONFLICT OF INTERESTS ACT. ADVISORY AGENCY. LOCAL ECONOMIC DEVELOPMENT COMMISSION QUALIFIES AS.

May 19, 1980

The Honorable Henry E. Hudson
Commonwealth's Attorney for Arlington County

You ask three questions about the Virginia Conflict of Interests Act, Ch. 22 of Title 2.1 of the Code of Virginia 1950, as amended, as applied to the Economic Development Commission of Arlington County (the "Commission"), in connection with the Commission's activities concerning possible development of the Ballston community.

Applicability of Act to Commission as "Advisory Agency"

Your first inquiry is whether the Commission is an advisory agency within the definition in § 2.1-348(b).

I have reviewed the material furnished as to the Commission's establishment, duties and activities. The Commission is clearly a commission appointed by a governmental agency for the purpose of making studies or recommendations, or advising or consulting with a governmental agency.

The Commission's origin, status and role is, to be sure, different from other advisory agencies in local government, such as planning commissions, which are established and regulated by statute. Nevertheless, on the material presented, I conclude that the Commission is an advisory agency within the definition in § 2.1-348(b).

Material Financial Interest--Real Estate Within Proposed Development Site or in Immediate Vicinity

You next ask for guidance in determining whether real estate ownership within a proposed development, or in its immediate vicinity, gives rise to a material financial interest in the Commission's recommendations, thereby requiring a commissioner to disqualify himself pursuant to § 2.1-352.

The mandate of § 2.1-352 is operative only if there is some causal connection between the official transaction and some effect on the public official's pecuniary interests. This Office has regularly noted this requirement of causal connection under § 2.1-352, and it has specifically noted the requirement on several occasions where nearby or adjacent land was involved. Defining the required causal connection in each situation is largely a question of factual analysis.
I enclose a copy of this Office's recent Opinion to the Honorable Clinton Miller, Member, House of Delegates, dated February 18, 1980, in which it was concluded, in a particular situation, that a public official did not have a material financial interest in a zoning transaction requiring disqualification under § 2.1-352.

Transaction Not of General Application--Proposed Ballston Development Recommendations

You also ask for guidance in determining whether the Commission's proposed recommendations as to Ballston constitute a transaction not of general application under § 2.1-352.

One of the duties of the Commission is to recommend a comprehensive development plan for Arlington County. As to any given land parcel, the comprehensive plan is likely a transaction of general application. Compare Opinion to the Honorable Benjamin J. Lambert, III, Member, House of Delegates, dated May 26, 1978, found in Report of the Attorney General (1977-1978) at 480 (member of city council may vote on proposed city budget when spouse is employed by city within general salary classification).

As the plans recommended by the Commission become less comprehensive, and more concerned with a localized area, recommendation of the plan is more likely a transaction not of general application as to any given land parcel. Compare Opinion to the Honorable Alson H. Smith, Jr., Member, House of Delegates, dated June 18, 1979, found in Report of the Attorney General (1978-1979) at 304 (school principal and instructional supervisor, as members of governing body, must abstain on selection of school board members).

If, with these legal standards in mind, you would like this Office to review the situation in greater factual detail, please let us know.

VIRGINIA CONFLICT OF INTERESTS ACT. DEFINITION OF "MATERIAL FINANCIAL INTEREST." ZONING TRANSACTION NOT CHANGING PRESENT FAIR MARKET VALUE OF NEARBY LAND.

February 18, 1980

The Honorable Clinton Miller
Member, House of Delegates

You ask whether a member of a board of supervisors has a material financial interest in a zoning transaction, under § 2.1-352 of the Code of Virginia (1950), as amended, where the land in question is a potential site for a major plant project to be operated by a large national concern, and the supervisor owns nearby land that might, or might not, become part of the potential plant site.
The plant would be a manufacturing facility of very large capacity, designed to serve markets throughout the eastern United States. Because of the size of the potential investment, the national concern has been investigating a number of business and regulatory factors, and a number of plant sites. It is uncertain, however, whether a new plant will be built. It is also uncertain where it might be built, either in this State or elsewhere.

About a year ago, the national concern proceeded anonymously (through intermediaries) to take purchase options on some 1,800 acres on both sides of a major highway-railroad artery running through the county in question. Part of the 1,800 acres was owned by the supervisor. In time, the national concern identified itself and the project, and requested that 236 acres (out of the 1,800) be rezoned from agricultural to industrial. Part of the 236 acres was owned by the supervisor. The supervisor, who favored the project and the rezoning, resigned from the governing body, and a successor was appointed to fill the unexpired term. After the supervisor's resignation and appointment of the successor, the rezoning was approved by the governing body.

Subsequently, the former supervisor was re-elected for a new term commencing in January 1980. In his re-election effort, the supervisor campaigned as favoring the project. Before taking office, the supervisor agreed to extend his option. Meanwhile, the national concern began investigating another site (located within the 1,800 acres) that had not been rezoned from agricultural to industrial. The new site is on the other side of the highway-railroad artery.

Assuming the national concern requests a rezoning of land at the second potential plant site, the immediate question is whether, under § 2.1-352, the supervisor would be allowed to vote on the rezoning request. There is also the continuing question whether the supervisor would similarly be allowed to vote on other transactions in the near future that might facilitate (or impede) the plant project.

The applicable statutes are § 2.1-352, which requires disqualification under certain circumstances, and § 2.1-348(f) which defines "material financial interest." The two statutes must be read together. When read together, § 2.1-352 provides that any officer of any agency who knows that he has a personal or pecuniary interest coming to him as the result of any transaction, not of general application, in which the agency is concerned, shall disqualify himself from voting thereon [underlining reflects definition of material financial interest]. Therefore, the mandate of § 2.1-352 is operative only if there is some causal connection between the official transaction and some effect on the public official's pecuniary interests.

This Office has regularly noted this requirement of causal connection under § 2.1-352, and it has specifically noted the requirement on several occasions where nearby or
adjacent land was involved. The standard statement in the Opinions has been that the official transaction must "affect" the value of the nearby land or have some "effect" thereon, but no attempt has been made to define the required causal connection. Clearly, however, there must be a causal connection before § 2.1-352 applies. See Opinion to the Honorable F. Caldwell Bagley, County Attorney for Prince William County, dated October 12, 1972, found in Report of the Attorney General (1972-1973) at 479 (supervisor has no material financial interest in sale of land by county to town simply because supervisor leases other land from town).

The question of causal connection involves two steps in the present situation. One step is the relationship between the supervisor's optioned land and the rezoning of the second potential plant site. More fundamental is the relationship between the plant project, the option prices and the present market value of the entire 1,800 acres under option. The more fundamental question will be dealt with first.

The applicable principles of valuation and legal causation are clear. As in condemnation, the value affected must be present fair market value, considering the property's adaptability and suitability for any legitimate purpose, having regard to the existing business of the community or such as may reasonably be expected in the future. The effect must be on present value. Remote and speculative profits and advantages are not to be considered. See Appalachian Elec., etc., Co. v. Gorman, 191 Va. 344, 353, 61 S.E.2d 33 (1950) (land having immediate value for sale as building lots); Appalachian Power Co. v. Anderson, 212 Va. 705, 708, 187 S.E.2d 148 (1972) (although present actual value of land includes suitability for development, it is error to admit plat to show damages as though development had occurred).

I am advised that, absent the national concern's special requirement for a single large plant site, there is presently no demand or market for land zoned industrial near the 1,800 acres. This is not the usual situation in which land can be promptly sold on the general market at a substantial premium for industrial uses if only the zoning were changed. Therefore, absent the national concern's special requirement, a rezoning from agricultural to industrial could be expected to have little, if any, effect on the present fair market value of the 1,800 acres. If after rezoning the national concern decides not to build the project, or decides to build it elsewhere, little will have changed. Despite the rezoning, the situation would revert to the status quo existing prior to the taking of options on the 1,800 acres.

At the same time, the options taken on the 1,800 acres reportedly specify prices above the land's present value. Price premiums, of course, are not unusual when rapid land assembly is desired for a large project. The price premiums, however, are still purely speculative. The national concern is still free not to exercise the options. It is also free
to negotiate purchases at lower prices. The option prices are merely a ceiling, not a floor. The option prices will be a complete nullity unless the national concern decides to build the project somewhere on the 1,800 acres.

Appropriate zoning, of course, is a condition *sine qua non* wherever the project may be built, but rezoning of the second potential site will not cause the project to be built there, and therefore the rezoning of itself will not cause anyone to receive a premium option price. The fact that something would not occur "but for" a transaction is not sufficient for that transaction to be the cause of the occurrence. A cause is what produces an occurrence, and is not merely a condition *sine qua non*. See 13B M.J. Negligence § 20 (Proximate Cause Defined) (1979) at 259, 260, and Long's Transfer v. Moore, 198 Va. 608, 95 S.E.2d 221 (1956) (selection of route by cab driver not proximate cause of accident).

Similarly, rezoning of the second potential plant site could be expected to have little, if any, effect on the present market value of the supervisor's optioned land. I am advised that the geology of the second plant site may be advantageous to the national concern from the standpoint of water supply and subterranean load-bearing characteristics. If anything, the evaluation of the second plant site illustrates how rezoning of the first plant site changed little or nothing. The same can be said for any rezoning of the second plant site.

The plant project calls for a self-contained manufacturing complex. There will be no occasion for "satellite" industrial and commercial development in the immediate area. There is also no indication that the plant's substantial employment would create a market or demand for residential development in the immediate area. In fact, the national concern proposes to have a substantial "green belt" around the project. As a result, if the national concern locates within the 1,800 acres, it is likely to purchase much of the land for "green belt" purposes, regardless of which acres actually compose the plant site. Furthermore, the rezoning of the second plant site will not cause the national concern to locate in the area. The national concern already has appropriate zoning at the first plant site. The supervisor has no pecuniary interest in whether his acres compose part of the plant site or part of the "green belt."

Accordingly, I find the supervisor does not have a material financial interest in the rezoning of the second plant site requiring disqualification under § 2.1-352. You also asked about other transactions in the near future that might come before the governing body and might facilitate (or impede) the plant project. The same principles would presumably apply, but any decision must depend on the facts of each situation.
VIRGINIA CONFLICT OF INTERESTS ACT. MATERIAL FINANCIAL INTEREST. COUNTY TREASURER'S INTEREST IN BANK BELOW SPECIFIED FINANCIAL THRESHOLDS. COUNTY TREASURER MAY DESIGNATE BANK AS COUNTY DEPOSITORY.

May 30, 1980

The Honorable E. P. Greever, Treasurer
County of Tazewell

Your inquiry is a request for review, pursuant to § 2.1-356(b) of the Code of Virginia (1950), as amended, of a conflict of interests opinion rendered by the Commonwealth's attorney.

You ask whether a county treasurer may, under § 2.1-352, designate as county depository a bank of which he is a stockholder and director, where the treasurer (1) owns an interest in the bank of less than five percent, and (2) receives from the bank aggregate annual income, exclusive of dividend or interest income, of less than five thousand dollars.

Section 2.1-352 provides that an officer of a governmental agency shall disqualify himself from participating on behalf of his agency in any transaction, not of general application, in which his agency may be concerned, if the officer knows that he has a material financial interest in the transaction. If the officer has a material financial interest, the officer must also disclose the interest under §§ 2.1-352 and 2.1-353.

Section 2.1-348(f)(2) provides, however, that ownership of an interest of less than five percent in a business, or aggregate annual income from a business, exclusive of dividend and interest income, of less than five thousand dollars, shall be deemed not to be a material financial interest. See, also, Opinion to the Honorable Erwin S. Solomon, Commonwealth's Attorney for Bath County, dated September 27, 1974, and found in Report of the Attorney General (1974-1975) at 555.

In the present situation, the treasurer has an interest in, and income from, the bank below the financial thresholds...
provided in § 2.1-348(f)(2), and therefore, the treasurer does not have a material financial interest either in the bank or in its service as a county depository.

Accordingly, I find that, in the present situation, a county treasurer may, under § 2.1-352, designate as county depository a bank of which he is a stockholder and director. I also find that there is no material financial interest to disclose, either under §§ 2.1-352 or 2.1-353.

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1Compare § 2.1-348(f)(3) which provides that, for purposes of § 2.1-349 only, ownership of, an interest in a financial institution, or service on the board of directors, shall not be deemed a material financial interest; Opinion to the Honorable C. L. Glass, Treasurer of Culpeper County, dated February 8, 1973, found in Report of the Attorney General (1972-1973) at 472; prior to the 1976 amendment of § 2.1-348(f)(3), there may have been an implication that service on the board of a financial institution, etc., constituted a material financial interest under § 2.1-352, but since the 1976 amendment there remains no basis for such an implication. See Ch. 593 [1976] Acts of Assembly.

VIRGINIA CONFLICT OF INTERESTS ACT. MATERIAL FINANCIAL INTEREST. EXCLUSION OF SPOUSE'S REGULAR EMPLOYMENT ON OR PRIOR TO JUNE 30, 1971.

December 20, 1979

The Honorable Hermanze E. Fauntleroy
Mayor of the City of Petersburg

You ask whether a member of a governing body of a city may vote on the appointment of the school board when the member's spouse is employed in a senior administrative post with the school system, and was regularly employed as a teacher with such school system on or prior to June 30, 1971. Your inquiry is a request for review pursuant to § 2.1-356(b) of the Code of Virginia (1950), as amended, made by your attorney.

If the member of the governing body has a material financial interest in the appointment of the school board by reason of the spouse's employment contract with the school system, then pursuant to § 2.1-352 the member of the governing body may be required to disqualify himself from voting thereon. See Opinion to the Honorable Alson H. Smith, Jr., Member, House of Delegates, dated June 18, 1979, found in Report of the Attorney General (1978-1979) at 304. If, however, the member of the governing body has no "material financial interest" in the transaction as defined in § 2.1-348(f), then the member need not disqualify himself. See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated October 26, 1977, found in Report of the
Attorney General (1977-1978) at 357 (member of governing body may vote on appointment of daughter to school board if member and daughter do not reside in same household).

The statutory definition of material financial interest found in § 2.1-348(f)(5) states that the provisions of the Virginia Conflict of Interests Act relating to personal service or employment contracts do not apply to persons regularly employed by the same unit of government on or prior to June 30, 1971. This result is unchanged by the fact that the spouse may have received promotions or raises in salary since the effective date of the June 30, 1971, "grandfather clause." See Opinion to the Honorable Frank D. Harris, Commonwealth's Attorney for Mecklenburg County, dated February 26, 1972, found in Report of the Attorney General (1971-1972) at 461.

The legislative background for enactment of §§ 2.1-348(f)(4) and 2.1-348(f)(5) is of some interest. Neither subsection was in the original Act. Then in 1970, this Office issued a number of Opinions indicating that the scope of the Act was broader than perhaps had been contemplated. See, for example, Opinion to the Honorable William J. Hassan, Commonwealth's Attorney for Arlington County, dated May 28, 1970, found in Report of the Attorney General (1969-1970) at 301, and Opinion to the Honorable Herbert T. Williams, III, Commonwealth's Attorney for Dinwiddie County, dated July 6, 1970, found in Report of the Attorney General (1970-1971) at 439. In the Williams Opinion, which concerned 17 different employment pairings in one county's school system, this Office concluded its ruling by stating that the Office had fully explored and researched all possibilities in attempting to ascertain if a different ruling were possible.

Suit was brought that same month attacking the constitutionality of the Act, specifically as interpreted in the Hassan and Williams Opinions. On July 22, 1970, a temporary injunction was entered, enjoining enforcement of the Act except where there was a direct supervisory and/or administrative relationship between spouses. Compare § 2.1-348(f)(4). In 1971, the Act was amended by Ch. 176 [Ex. Sess. 1971] Acts of Assembly, particularly as it related to personal service and employment contracts, including the addition of subsections (4) and (5) to § 2.1-348(f). After enactment of Ch. 176, the suit challenging constitutionality of the Act's employment provisions (as applied to persons already regularly employed) was dropped as moot.

Accordingly, the statutory text and the legislative background both demonstrate that § 2.1-348(f)(5) was enacted as a comprehensive exemption for regular employment relationships "in place" on or prior to June 30, 1971. In the present case, I find that by reason of the spouse's regular employment on or prior to June 30, 1971, the grandfather clause applies and the member of the governing
body of the same unit of government need not disqualify himself under § 2.1-352.1

I thank both your counsel, and the Commonwealth's attorney, for the helpful memoranda of law that they have submitted.

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VIRGINIA CONFLICT OF INTERESTS ACT. MATERIAL FINANCIAL INTEREST. UNIVERSITY PRESIDENT SERVING ON BOARD OF DIRECTORS OF PARENT CORPORATION WHICH ACQUIRES SUBSIDIARY WHICH CONTRACTS WITH UNIVERSITY HOSPITAL. RECEIPT OF SPECIFIED INCOME FROM PARENT CORPORATION ESTABLISHES PROHIBITED INTEREST IN CONTRACTS BETWEEN SUBSIDIARY AND UNIVERSITY HOSPITAL.

May 22, 1980

Wyndham B. Blanton, Jr., M.D., Rector
Virginia Commonwealth University

You ask whether the president of Virginia Commonwealth University ("VCU") may receive aggregate annual income, exclusive of dividends and interest, of $5,000 or more from Whittaker Corporation ("Whittaker"), after Whittaker acquires ownership and control of General Medical Corporation ("General Medical") while General Medical is a vendor of goods to VCU.

Facts

I am advised that the president has been a director of Whittaker since 1975. The president was appointed by the VCU board of visitors in February 1978. The board of visitors of VCU agreed at the time that the president could continue to serve on the Whittaker board. On March 31, 1980, Whittaker bought the assets of General Medical through a wholly-owned subsidiary. In April 1980, the president received his quarterly director's fee plus an annual lump-sum payment for service on board committees, all totaling $7,750.

General Medical is a vendor of medical and surgical supplies and has made sales to VCU since April 1, 1980. I am also advised that, as a director of Whittaker, the president has no involvement in the operating management of General Medical, and that as president of VCU he has no involvement in purchasing, and does not profit personally from any
contract with General Medical. Under the by-laws of VCU, the president has general authority over the administration of VCU, including purchasing.

Interest Solely By Reason of Employment

On the basis of the facts presented, the issue is whether the Virginia Conflict of Interests Act is violated solely by reason of the president's employment by Whittaker for aggregate annual income in excess of $5,000, excluding dividends and interest. See Ch. 22 of Title 2.1 of the Code of Virginia (1950), as amended.

Section 2.1-349(a)(1) provides that no officer or employee of any governmental agency shall have a material financial interest in any contract with the governmental agency of which he is an officer or employee, and the fact that any such contract is let after competitive bidding or by negotiation shall be irrelevant.

Section 2.1-348(f) provides that a material financial interest includes a personal and pecuniary interest accruing to an officer or employee. In addition, § 2.1-348(f)(1) provides that aggregate annual income, exclusive of dividends and interest, of $5,000 or more from a firm, partnership, or other business shall be deemed to be a material financial interest in such firm, partnership or business.

Section 2.1-349(a)(1) prohibits material financial interests in contracts, but does not address the question whether a material financial interest in a business constitutes such an interest in a contract between the business and the governmental agency. Section 2.1-349(b)(3) specifies the point at which an interest arising solely as a result of employment by the contracting firm (Whittaker) constitutes a material financial interest in a contract. Because the president has the authority to participate in procurement and his income from Whittaker is in excess of $5,000, this interest is within the definition of a material financial interest. Compare Senate Document No. 11 (1970), p. 3.

Relationship of Whittaker to General Medical

As stated above, the president of VCU has a material financial interest in Whittaker which owns General Medical which contracts with VCU. I am advised, however, that Whittaker and General Medical are two separate entities. The question then becomes whether a material financial interest in Whittaker (and its contracts) constitutes such an interest in General Medical (and its contracts).

Even though General Medical is a separate entity from Whittaker, I am advised that Whittaker owns all the voting stock of General Medical, and controls General Medical. The language of § 2.1-348(f)(1) speaks only of interests in a firm, partnership or business. The words "proprietorship"
and "corporation" are not used. Section 2.1-348(f)(1) relies instead on the broader economic terms "firm" and "business." On the facts given, Whittaker and General Medical constitute the same firm or business, and a material financial interest in Whittaker amounts to such an interest in General Medical and its contracts with VCU.

Accordingly, I find that under §2.1-349(a)(1), the president of VCU may not receive aggregate annual income, exclusive of dividends and interest, of $5,000 or more from Whittaker, after Whittaker acquires ownership and control of General Medical while General Medical is a vendor of goods to VCU.

**VIRGINIA FREEDOM OF INFORMATION ACT. CHARGES FOR COPIES OF PUBLIC RECORDS.**

July 30, 1979

The Honorable Calvin G. Sanford
Member, House of Delegates

You have asked whether the Freedom of Information Act (the "Act") permits a local governing body to charge citizens for obtaining information on the cost of construction of a new public facility.

The Act provides that citizens of Virginia shall, except as otherwise provided by law, have the right to inspect and copy official records maintained by public bodies. See §2.1-342(a) of the Code of Virginia (1950), as amended. I understand your question concerning citizens obtaining "information" to refer to citizen access to official records. The provisions of §2.1-342(a) specifically provide that public bodies "may make reasonable charges for the copying and search time expended in supplying...records; however in no event shall the charges exceed the actual cost of supplying such records." (Emphasis added.) The Act also provides that an advance estimate of any charges shall be made at the request of the citizen. I, therefore, conclude that a public body may charge citizens for supplying copies of official records and for employee search time required to supply records, provided that such charges do not exceed the actual costs involved in supplying the requested records.

**VIRGINIA FREEDOM OF INFORMATION ACT. DISCLOSURE OF JUDGE'S NOTES NOT REQUIRED.**

January 15, 1980

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia
You ask whether the notes made by a judge concerning cases over which he presides are subject to public disclosure under the Virginia Freedom of Information Act (the "Act").

I conclude that a judge's notes are not subject to required public disclosure under the Act. Section 2.1-342(a) provides that all official records of public bodies shall be open to public inspection, except as specifically otherwise provided by law. "Memoranda, working papers and records compiled specifically for use in litigation..." are exempt from the above-mentioned disclosure requirements. See § 2.1-342(b)(5). The notes of a judge concerning a case over which he presides, in my opinion, fall within the class of records excluded from required disclosure by § 2.1-342(b)(5).

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETING NOT PERMITTED FOR DISCUSSION OF GENERAL PERSONNEL MATTERS. RECORDS OF SCHOOL SUPERINTENDENT EXEMPT FROM REQUIRED DISCLOSURE.

August 13, 1979

The Honorable Virgil H. Goode, Jr.
Member, Senate of Virginia

You have asked my advice on two questions concerning the Virginia Freedom of Information Act (the "Act"):  

1. whether a local school board can legally meet in executive session for discussion of a report, by the superintendent of schools, which assesses the order of priority among administrative positions in the school board's central administrative office; and

2. whether charts, lists of positions and other visual aids used by the superintendent in presenting the above-described report are records which are subject to required public disclosure.

The Act requires that all meetings of public bodies be public meetings except as otherwise specifically provided by law. Section 2.1-344(a)(1) of the Act allows public bodies to discuss certain personnel matters in executive meetings, including "[d]iscussion or consideration of employment, assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body...". The exception to the open meeting rule provided by § 2.1-344(a)(1) allows private discussion of personnel matters involving individual employees. The report of the superintendent which you describe does not, however, involve evaluation of the performance of school board administrative employees, but instead evaluates the relative importance of the positions themselves. I conclude that the subject matter of the superintendent's report does not fall within the scope of § 2.1-344(a)(1) or any other provision authorizing
executive meetings. The school board may not, therefore, meet in executive session for receipt of or discussion of the superintendent's report. Any discussion of the performance of identifiable individual employees which might arise during discussion of the report, however, may be the subject of a properly called executive meeting. See § 2.1-344(a)(1).

The charts, lists and other visual aids used by the superintendent in presenting his report to the school board are clearly "official records" of the superintendent. See § 2.1-341(b). Your letter indicates that these records have at all times remained in the possession of the superintendent and were not turned over to the school board when the report was presented. Section 2.1-342(b)(4) provides an exemption from required public disclosure for the "[m]emoranda, working papers and correspondence..." held by the chief executive officer of any political subdivision of the State. The superintendent of schools for a local school board is, of course, the chief executive officer of a political subdivision. I, therefore, conclude that the records in question are exempt from public access requirements of the Act. See § 2.1-342(b)(4).

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS.

April 18, 1980

The Honorable J. W. O'Brien, Jr.
Member, House of Delegates

You have asked whether a local governing body, meeting in executive session for purposes authorized by the Virginia Freedom of Information Act (the "Act"), may discuss other matters which are not authorized for executive session by the Act. I conclude that the Act does not permit such a practice.

Section 2.1-344(b) provides in relevant part:

"No meeting shall become an executive or closed meeting unless there shall have been recorded in open meeting an affirmative vote to that effect by the public body holding such meeting, which motion shall state specifically the purpose or purposes hereinabove set forth in this section which are to be the subject of such meeting and a statement included in the minutes of such meeting which shall make specific reference to the applicable exemption or exemptions as provided in subsection (a) or § 2.1-345... The public body holding such an executive or closed meeting shall restrict its consideration of matters during the closed portions to only those purposes specifically exempted from the provisions of this chapter." (Emphasis added.)
The foregoing provisions of the Act clearly require that public bodies limit executive meetings to discussions of the specific subjects authorized in the Act. Accordingly, I am of the opinion that a public body may not discuss any subject in executive session other than those authorized in the provisions of §§ 2.1-344(a)(1) through 2.1-344(a)(9).

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. NOTICE. ELECTION OF OFFICERS.

March 25, 1980

The Honorable A. Joe Canada, Jr.
Member, Senate of Virginia

You have asked two questions relating to the Virginia Freedom of Information Act (the "Act"):

1. whether the Virginia Beach Planning Commission violated the Act by holding a private briefing meeting without publicly announcing the time and place of the meeting; and

2. whether the election of planning commission officers at a closed meeting, after which the results were announced in the public meeting, violates the Act and, thereby, voids the election.

Planning commissions are public bodies subject to the requirements of the Act. See § 2.1-341(a) of the Code of Virginia (1950), as amended. Accordingly, all meetings of the planning commission are required to be public and comply with the other requirements of § 2.1-343, except as specifically authorized in § 2.1-344. See § 2.1-343. The fact that no public announcement of the time and location of the meeting was provided does not constitute a violation of the Act. The Act requires notice only to those individuals who request notice in writing. See § 2.1-343; Opinion to the Honorable Robert R. Gwathmey, III, Member, House of Delegates, dated November 18, 1974, and found in Report of the Attorney General (1974-1975) at 212. The private briefing meeting was, nevertheless, illegal unless the subject matter was among those specifically authorized for executive meetings in §§ 2.1-344(a)(1) through 2.1-344(a)(9). Further, any legally authorized executive meeting must be preceded by a public meeting at which a motion is adopted calling the executive meeting and stating its purpose. See § 2.1-344(b). I conclude from the information provided that the private briefing meeting was in violation of the requirements of the Act.

The election of officers of a public body in an executive meeting clearly violates the Act, notwithstanding subsequent public announcement of the result. See Opinion to the Honorable Charles A. Christophersen, Director, Division of State Planning, dated September 18, 1974, and found in
Your second question necessarily raises a third problem, that is the validity of any actions taken by the planning commission officers pending their proper election as required by the Act. The illegality of the planning commission's election of officers would not, of course, affect the validity of the members' individual or collective actions as planning commissioners, since their status as planning commissioners was not established by the improper election. Thus, the improperly conducted election would potentially invalidate only those acts of a commissioner taken as an officer, for example, as chairman or secretary of the commission. As a general rule, however, public officers whose election is legally defective are considered de facto officers and their official actions are deemed valid at least until such time as they are apprised of the defect in their election. See 15 M.J. Public Officers §§ 56-58.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. PUBLIC VOTE ON RESOLUTION ADOPTED IN EXECUTIVE MEETING.

January 15, 1980

The Honorable Theordore V. Morrison, Jr.
Member, House of Delegates

You have asked whether or not certain actions of the board of visitors of a State institution of higher education in conducting an executive meeting comply with the requirements of the Virginia Freedom of Information Act (the "Act"). You indicate that during a regular public meeting of the board of visitors an executive meeting was held, after which the board voted in public to adopt a resolution identified only as "Resolution W-3". You further state that no additional information regarding the nature of the resolution or the subject matter to which it pertained was provided during the public meeting. Inquiries with officials of the institution for more specific information concerning the nature of the resolution have resulted in responses that the resolution in question concerned a "real estate matter."

Based upon the foregoing facts, I conclude that the board of visitors has not complied with the requirements of the Act. Section 2.1-344(a)(2) permits executive meetings for:

"Discussion or consideration of the condition, acquisition or use of real property for public purpose,
or of the disposition of publicly held property, or of plans for the future of a State institution of higher education which could affect the value of property owned or desirable for ownership by such institution."

Section 2.1-344(c) provides that no resolution or other motion adopted or agreed to in an executive or closed meeting shall become effective unless such body, following such meeting, reconvenes in public and votes on such resolution or motion. Thus, while the Act permits executive meetings for the discussion of matters pertaining to real estate by public bodies, it also requires that any decision concerning such matters be made in public session. While the public vote upon the resolution need not reflect every detail of the proposed board action so as to undermine the purpose of the Act in authorizing executive discussion, § 2.1-344(c) obviously requires that the public vote inform the members of the public present of the general nature of the board's agreed upon action. The public vote to adopt "Resolution M-3" which you describe does not in any way inform the public of the nature of the decision made by the board of visitors. Accordingly, such action does not comply with the provisions of § 2.1-344(c). The responses to inquiries provided by institution officials do not cure the illegality of the board's actions in this case for two reasons: first, the responses are no more informative than the board's public vote on the resolution. Additionally, the administrative officials of the institution cannot cure illegalities in the actions of the board of visitors.

VIRGINIA FREEDOM OF INFORMATION ACT. LEGISLATIVE INTENT. EXECUTIVE MEETINGS OF GOVERNING BOARDS OF COLLEGES AND UNIVERSITIES FOR DISCUSSION OF PERSONNEL MATTERS.

March 20, 1980

The Honorable James H. Dillard, II
Member, House of Delegates

You have asked two questions concerning the Virginia Freedom of Information Act (the "Act"): (1) what is the overall legislative intent of the Act; and (2) whether § 2.1-344(a)(1) of the Code of Virginia (1950), as amended, permits executive meetings of public bodies for discussion of personnel matters relating to groups or classes of employees as well as individually identifiable employees.

Section 2.1-340.1 sets forth the legislative purpose of the Act as follows:

"It is the purpose of the General Assembly by providing this chapter to ensure to the people of this Commonwealth ready access to records in the custody of public officials and free entry to meetings of public
bodies wherein the business of the people is being conducted. This chapter recognizes that the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. To the end that the purposes of this chapter may be realized, it shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exception or exemption from applicability shall be narrowly construed in order that no thing which should be public may be hidden from any person."

In most cases there is no recorded legislative history concerning Virginia laws beyond that expressly stated in provisions of the statutes themselves. I am aware of no statement of legislative purpose concerning the Act other than the express provisions of § 2.1-340.1. I am, therefore, of the opinion that the above-quoted provisions of the Act reflect its legislative purpose.

Section 2.1-344(a) provides, among other things that: "Executive or closed meetings may be held only for the following purposes:

(1) Discussion or consideration of employment, assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of public officers, appointees or employees of any public body, and evaluation of performance of departments or schools of State institutions of higher education where such matters regarding such individuals might be affected by such evaluation."

The Act also exempts personnel records from required public disclosure. See § 2.1-342(b)(3). The exemption for personnel records has consistently been interpreted as applying only to records that pertain to identifiable individual employees. See Opinion to the Honorable Lewis P. Fickett, Jr., Member, House of Delegates, dated July 24, 1975, found in Report of the Attorney General (1975-1976) at 416; Opinion to the Honorable Mary A. Marshall, Member, House of Delegates, dated March 22, 1977, found in Report of the Attorney General (1976-1977) at 317.

Prior to its amendment in 1979, the Act did not require governing boards of institutions of higher education to conduct their meetings in public. When institutions of higher education were brought under the open meeting requirements, § 2.1-344(a)(1) was amended to permit executive meetings for "evaluation of performance of departments or schools of State institutions of higher education where such matters regarding such individuals might be affected by such evaluation."

I conclude that prior to its 1979 amendment § 2.1-344(a)(1) permitted executive meetings of public bodies for discussion of personnel matters concerning identifiable
individuals only. I further conclude that the 1979 amendment to § 2.1-344(a)(1), insofar as it permits executive discussions of personnel matters concerning groups or classes of employees, applies only to governing boards of institutions of higher education in the limited circumstances set forth therein.

VIRGINIA FREEDOM OF INFORMATION ACT. MEDICAL RECORDS. SUBJECT PERSON HAS RIGHT TO REVIEW HIS MEDICAL RECORDS. DOCTOR'S ORDERS, PERSONAL OBSERVATION OF PHYSICIAN OR MEDICAL STAFF, NURSING NOTES, MENTAL HYGIENE NOTES, ABSENT STATEMENT OF TREATING PHYSICIAN TO CONTRARY, ARE ALSO REQUIRED TO BE MADE AVAILABLE.

July 17, 1979

The Honorable W. Alvin Hudson, Sheriff
City of Roanoke

You have asked several questions about the nature of information which may be released concerning the medical records of residents of the Roanoke City Jail.

Your first question is whether you are required to permit an inmate personally to examine medical files pertaining to him while incarcerated or after his release or transfer. Section 2.1-342(b)(3) of the Code of Virginia (1950), as amended, provides that medical and mental records are excluded from the provisions of the Virginia Freedom of Information Act (the "Act"), "except that such records can be personally reviewed by the subject person or a physician of the subject person's choice...." (Emphasis added.) Therefore, I am of the opinion that the section gives the subject person the right to review his medical records in your possession either while incarcerated or after his release or transfer.

You next ask what information is required to be released if an inmate requests copies of his medical file. Section 2.1-342(b)(3) provides, specifically, that it does not require that a subject person be given access to his mental records if his treating physician has made a part of his records a written statement that in the physician's opinion a review of the records by the individual treated would be injurious to his physical or mental health or well being. The section does provide that medical records can be personally reviewed by the subject person or a physician of his choice. Consequently, such items as doctors orders, personal observations of the physician or medical staff, nursing notes and notes concerning mental hygiene, absent the statement of the treating physician to the contrary, are required to be made available to the requesting inmate. You should also note that the Act permits the providing of copies to a requestor but does not require it. A reasonable fee, not in excess of the actual cost of reproduction, may be charged to cover the cost of this expense.
You next inquire what type of information would be considered harmful to physical or mental health and therefore not be released to a patient. The type of information considered harmful to mental health, and thus excludable under the provisions of § 2.1-342(b)(3) can only be ascertained by the inmate's treating physician. However, the section provides that only access to mental records may be restricted in any event.

Your fourth question is whether you are required to release information to various law enforcement officials, defense attorneys, social workers, or family members without written consent of the patient or a court order. Section 2.1-342(b)(3) provides, as previously indicated, that medical and mental records are excluded from the provisions of the Act, "except that such records can be personally reviewed by the subject person or a physician of the subject person's choice...." Consequently, it is my opinion that the Act does not require the release of information such as you indicate, and whether you require written consent of the patient or a court order to divulge information is a policy decision within your discretion.

You next ask whether you are allowed to send copies of an inmate's medical file to other health care facilities or State institutions without a signed release. Inasmuch as the Act does not prohibit release of inmate medical records, it is my opinion that in this situation a release need not be obtained, and an inmate's medical records can be forwarded with him to a receiving State penal institution, or other health care facility. However, the requirement of a prior release would be within your discretion.

Your next inquiry is whether you may require a written release if the person requests information from a medical file about himself. It is my opinion that not only may you require a written release from an inmate of medical information, but that obtaining a written release would be a wise policy. It is only through the use of a written release that a record can be maintained so as to preclude any future allegation that the release was not given.

Your last inquiry is whether you are required to tell an inmate the specific name and action of medications prescribed by his physicians in more than general terms. The Act requires that an inmate's medical record be made available to him. It does not require that the medical terms contained in the record be explained. Consequently, I am of the opinion that personnel of the medical department of the Roanoke City Jail are under no duty to provide information concerning the nature or specific action of any particular medication.

VIRGINIA FREEDOM OF INFORMATION ACT. NON-MEMBERS OF SCHOOL BOARD. ATTENDANCE AT EXECUTIVE MEETINGS AND ACCESS TO RECORDS EXEMPT FROM DISCLOSURE.
May 23, 1980

The Honorable Mary A. Marshall
Member, House of Delegates

You ask whether newly designated Arlington County School Board members, whose appointments will not become effective until July 1, 1980, can legally attend executive meetings of the school board and have access to confidential board records and correspondence, such as student and personnel records and records prior to July 1, 1980. It is my understanding that the designees will not vote as board members but will attend meetings to discuss and familiarize themselves with current board business and procedures.

The Virginia Freedom of Information Act (the "Act") permits public bodies, including school boards, to hold closed or executive meetings for discussion of specified subjects. See §§ 2.1-344(a)(1) through 2.1-344(a)(9). Nothing contained in the Act, however, requires that such matters be discussed privately. Accordingly, the school board can legally allow persons who are not board members to attend lawfully authorized executive meetings.

Similarly, the school board may legally allow designees access to the board's personnel, student and other records which are not required to be disclosed to the public under the Act. The Act permits confidentiality but does not require it with respect to personnel, student and other records exempt from required disclosure. Further, permitting the designees access to such records would not violate the Privacy Protection Act, since disclosure of the records in question is not prohibited by other laws. See Opinion to the Honorable Elise B. Heinz, Member, House of Delegates, dated December 20, 1978, found in Report of the Attorney General (1978-1979) at 317.

Accordingly, I am of the opinion that the school board can legally permit board designees who have not taken office access to executive meetings and the records you describe.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS DISCLOSURE. ADVANCE CHARGES FOR COPIES.

September 6, 1979

The Honorable Bernard G. Barrow
Member, House of Delegates

You have asked whether a public body may require advance payment of charges for supplying copies of official records to citizens who request the same under the Virginia Freedom of Information Act (the "Act").

The Act provides that a public body may make reasonable charges for supplying copies of official records, not to
exceed the actual cost of providing the requested records. The Act also requires the public body to estimate in advance the amount of any charges if the citizen seeking the records requests an estimate. See § 2.1-342(a) of the Code of Virginia (1950), as amended. The Act is silent, however, regarding collection of such charges by public bodies, leaving this matter to the administrative discretion of the public body supplying the records. I am of the opinion that so long as the public body does not unlawfully limit access to official records, it may employ any reasonable means for collecting charges for supplying copies, including the requirement of advance payment of charges where they are subject to advance determination.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS DISCLOSURE. COMPUTER TAPE NOT IN POSSESSION OF PUBLIC OFFICIAL.

September 19, 1979

The Honorable Lee T. Keyes
Commissioner of the Revenue for Loudoun County

You have asked whether a computer tape containing county real estate assessment information is an "official record" as defined by the Virginia Freedom of Information Act (the "Act") and, if so, whether you are required to make the tape available for public inspection and copying in your office. Your letter indicates that the computer tape in question is owned by the county but is in the possession of a private corporation, located in the City of Richmond, which produces and maintains the tape under contract with the county. You further indicate that the same information which is contained on the computer tape is printed in county real estate records which are available in your office for public inspection and copying.

Section 2.1-341(b) of the Code of Virginia (1950), as amended, defines "official records" as all "written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body in the transaction of public business." I, therefore, conclude that the computer tape you described is clearly an official record of the county as defined by the Act.

Section 2.1-340.1 sets forth the purposes of the Act and provides, in relevant portion, that the Act is designed "to insure to the people of this Commonwealth ready access to records in the custody of public officials,..." (Emphasis added.) Section 2.1-342 provides that, except as otherwise specifically provided by law, all official records shall be open for inspection and copying by the citizens of this State "during the regular office hours of the custodian of such records." (Emphasis added.) The foregoing provisions indicate that the Act is intended to make available for
public inspection those official records which are in the custody of public officials and to provide for citizen inspection at the offices of public officials. The computer tape in question here is not in the possession of public officials because of the practical necessities of the contractual arrangement between the county and its contractual agent. Moreover, as you have indicated, the same information which is contained on the computer tape is presently available for public inspection and copying in printed form in county offices. Under these circumstances, I conclude that the Act does not require the county to obtain the tape or a copy thereof and provide the same for citizen copying and inspection.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS OF COMMISSION ON LOCAL GOVERNMENT.

April 14, 1980

Mr. Thomas J. Bliley, Jr., Chairman
Commission on Local Government

You have asked whether documents, data, or other records furnished by local governments to the Commission on Local Government (the "Commission") in connection with Commission investigations conducted under the authority of Ch. 19.1 of Title 15.1 of the Code of Virginia (1950), as amended, are subject to required public disclosure by the Commission under the Virginia Freedom of Information Act.

The Commission is empowered to investigate, analyze, and make findings of fact, regarding the probable effect of certain kinds of proposed actions by local governments, including any proposed annexation, establishment of a town or independent city, settlement of a boundary dispute, or economic growth-sharing agreement among local governments. The Commission is required to make a written report of its findings regarding any such proposed action when so ordered by a court considering such matters. The Commission's reports constitute admissible evidence in any subsequent legal proceedings regarding the subject matter of the report but are not binding upon the court in considering such matters. The Commission is also empowered to submit its report to any affected local government. See § 15.1-945.3.

Section 15.1-945.3 further provides that before making any such report the Commission shall conduct public hearings at which interested persons may testify. The same statute requires that prior to such hearings the Commission shall publish notice of the proposed hearing once per week for two successive weeks in a newspaper of general circulation in the affected counties and cities. Section 15.1-945.3 specifically provides, however, that:
"Except for any hearing or meeting specifically required by law, chapter 21 of Title 2.1 (§ 2.1-340 et seq.) shall not be applicable to the Commission...."

Chapter 21 of Title 2.1(§§ 2.1-340 et seq.) contains the Virginia Freedom of Information Act. Thus, I conclude that except for the Commission hearings provided for in § 15.1-945.3, the Commission is not subject to the requirements of the Virginia Freedom of Information Act. I am, therefore, of the opinion that documents, data, or other records submitted to the Commission by local governments are not subject to required public disclosure by the Commission. The fact that the Commission is not required to publicly disclose such records, however, would not exempt such records from public disclosure by local government officials unless the records are otherwise exempt from disclosure under the Virginia Freedom of Information Act or other provisions of law.

VIRGINIA FREEDOM OF INFORMATION ACT. SCHOOL BOARD ACCESS TO COUNTY SCHOOL RECORDS OF SPECIAL EDUCATION PROGRAMS AND PARTICIPANTS.

June 12, 1980

The Honorable Eva F. Scott
Member, Senate of Virginia

You ask whether the county school board can legally obtain from the superintendent of schools county school records concerning special education programs and the identities of students participating in such programs.

There are certain limitations upon public disclosure of student scholastic records. The Virginia Freedom of Information Act (the "Act") provides that "scholastic records" concerning individual students are exempt from required public disclosure. See § 2.1-342(b)(3) of the Code of Virginia (1950), as amended. County school records of the identity of students participating in special education programs would be "scholastic records" as defined by the Act. See § 2.1-341(f). The Family Educational and Privacy Act, known as the Buckley Bill, 20 U.S.C. § 1232g et seq., prohibits public disclosure of student educational records by state and local school officials receiving federal funds.

Neither the Act nor the Buckley Bill, however, prevents school officials from obtaining access to student scholastic or educational records. The county school administration's records maintained by the superintendent and his staff are the records of the school board, since the superintendent and staff serve as employees of the school board at its pleasure. The board clearly is not denied access to its own records under any provision of the Act. The Buckley Bill specifically provides that its limitations on public disclosure of educational records are not intended to prevent
state or local educational officials from having access to such records. See 20 U.S.C. § 1232g(b)(5).

The Privacy Protection Act, found in Ch. 26 of Title 2.1 of the Code of Virginia, would not prohibit school board access to the records in question, since the Privacy Protection Act limits dissemination of records containing personal information only where other laws prohibit dissemination. See § 2.1-380(1).

Accordingly, I am of the opinion that neither State nor federal law prevents the county school board from obtaining access to county school records concerning special education programs and the identities of program participants.

VIRGINIA PETROLEUM PRODUCTS FRANCHISE ACT. OWNERSHIP OF RETAIL OUTLET BY PRODUCER OR REFINER NOT PROHIBITED BY SECTION GOVERNING PRODUCER'S OR REFINER'S ABILITY TO OPERATE RETAIL OUTLET.

August 1, 1979

The Honorable Maurice B. Rowe
Secretary of Commerce and Resources

This is in response to your request for my opinion relating to the amendments to the Virginia Petroleum Products Franchise Act (the "Act") enacted by the 1979 General Assembly as H.B. 458. You have asked whether, as amended, the Act prohibits the ownership of a retail gasoline outlet by a producer or refiner of petroleum products.

Section 59.1-21.16:2 of the Code of Virginia (1950), as amended, prohibits a producer or refiner from operating a retail gasoline outlet "with company personnel, a parent company or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner...and further provided, that once in operation, no producer or refiner shall be required to change or cease operation of any retail outlet by the provisions of this section."

Your question arises because of an apparent conflict with § 59.1-21.10(i) which defines "operation of a retail outlet" to mean "the ownership or option to buy a properly zoned parcel of property for which a permit to build a retail outlet has been granted."

Read together, these two sections of the Act establish that a producer or refiner begins "operation" of a retail outlet on the date that he is issued a building permit. Nowhere does the Act prohibit the ownership per se of a retail outlet by a producer or refiner. Section 59.1-21.16:2 only prohibits ownership of a retail station if that station is operated in a manner prohibited by that
section. The intent of the Act is to control the method of operation and not the ownership of the land.

Accordingly, I am of the opinion that mere ownership of retail gasoline outlets by a producer or refiner is not in violation of law.

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT. APPLICABILITY TO AGRICULTURAL LABORERS DEPENDENT UPON AGREEMENT AND CIRCUMSTANCES UNDER WHICH LABORERS OCCUPY PREMISES.

August 9, 1979

The Honorable Robert C. Scott
Member, House of Delegates

You ask whether social workers and legal representatives of migrant laborers are subject to prosecution for criminal trespass "without authority of law" in seeking to work with agricultural workers in migrant labor camps or private property. You also ask whether migrant laborers may assert the rights of tenants.

Criminal Trespass

Section 18.2-119 of the Code of Virginia (1950), as amended, Virginia's criminal trespass law, prohibits unauthorized entry onto private property "without authority of law." While the Virginia Supreme Court has not been asked to consider the effect of this law on access of social workers and legal representatives to persons living in migrant labor camps, it has held in other contexts that persons whose right of entry is derived from law are not restricted by the criminal trespass law. Parker v. McCoy, 212 Va. 808, 188 S.E.2d 222 (1972) (police officer).

Section 63.1-108 requires a local superintendent of public welfare or social services to make an investigation to determine the completeness and correctness of statements made in support of an application for assistance. This mandate cannot be carried out without access by social workers to the applicants. The declared purposes of Congress for the establishment of the Legal Services Corporation would be frustrated by denying access of legal representatives to migrant workers, see 42 U.S.C. §§ 2296 and 2996(h), as would the purpose of Title III-B of the Economic Opportunity Act of 1964 (42 U.S.C. §§ 2861-2862). It has been held on public policy grounds that since there is no legitimate need for a farmer to deny a migrant worker living on the farmer's property the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him, State criminal trespass statutes do not apply to representatives of such agencies and organizations. State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971).
Accordingly, it is my opinion that social service workers and legal representatives of migrant laborers are not trespassing in violation of § 18.2-119 merely by entering a migrant labor camp in the performance of their authorized duties.

Rights of Tenants

Section 55-248.5 of the Code excludes from the coverage of the Virginia Residential Landlord and Tenant Act "[c]ondition upon employment in and about the premises..." The language of the provision codifies the common law rule that it is "sufficient to render the occupation of a property that of an employee if such occupation is convenient for the purpose of the service and was obtained by reason of the contract of hiring." Virginia Iron, Coal & Coke Co. v. Dickenson, 143 Va. 250, 129 S.E. 228 (1925). A person may be employed to cultivate land, receiving as his compensation a share of the crops, or the proceeds thereof, without the relationship of the landlord and tenant being created between the parties. Clark v. Harry, 182 Va. 410, 29 S.E.2d 231 (1944).

In any event, the question of whether the relation of the parties is landlord and tenant, landowner and cropper, or some other relationship, must turn upon the actual intention of the parties as gathered from the entire contract, the language in which it is cast, and the circumstances surrounding its execution. See 21 Am.Jur.2d Crops 38, Franceschina v. Morgan, 346 F.Supp. 833 (1972), and Folgueras v. Hassle, 331 F.Supp. 615 (1971).

Accordingly, it is my opinion that agriculture laborers may be considered as tenants and exercise the rights thereof only when it may be gathered from the agreement and circumstances under which the laborers occupy the premises that it is the intention of the landowner and laborers that they be tenants.

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1Because social workers and legal representatives are authorized by law to enter migrant labor camps, it is not necessary to address your question whether the First Amendment rights of tenants authorizes entry.


May 30, 1980

Mr. Glen D. Pond, Director
Virginia Supplemental Retirement System
You raise certain questions regarding changes made by H.B. 9, Ch. 722 [1980] Acts of Assembly, to Ch. 3.2 of Title 51 of the Code of Virginia (1950), as amended.

1. "Should House Bill 9 be read as though it does not exist for members as of March 31, 1980?"

Paragraph 2 of H.B. 9 provides in part "[t]hat the provisions of this act shall not apply to any member of the retirement system on March thirty-one, nineteen hundred eighty..." with a further exception which is not applicable here. Accordingly, the changes made in the Virginia Supplemental Retirement System ("VSRS") by H.B. 9 will not be applicable to any individual who is a member, as that term is defined in the Virginia Supplemental Retirement Act ("Act"), of the VSRS on the 31st day of March, 1980.

2. "Does Section 51-111.47(m) mean that the funding of post retirement supplements, on the basis of an actuarially determined level percentage of payroll, should be achieved by no later than June 30, 1992 for members employed after March 31, 1980 only?"

Based upon the answer given to your first question, the amendments made to the Act by H.B. 9 will only affect those individuals who became members of the VSRS on or after April 1, 1980. It would therefore appear that the legislative intent of adding subsection (m) to § 51-111.47 was to require an "actuarially determined level percentage of payroll" funding of post retirement supplements only for those who became members of VSRS on or after April 1, 1980. Therefore, I answer this question in the affirmative.

3. "If a former member (one who has withdrawn contributions and interest) becomes employed after March 31, 1980 and purchases the prior service credit...[does he become subject to] the provisions of House Bill 9 which affect new employees only?"

Paragraph 2 of H.B. 9, which was quoted in part above, also provides, "[t]hat the provisions of this act shall not apply...to any member whose benefit is based on service rendered prior to that date..." referring to March thirty-one, nineteen hundred eighty. The benefits to which a member would be entitled either upon retirement under § 51-111.55, upon disability retirement under § 51-111.57 or upon death under § 51-111.58:1 are based upon the member's creditable service. As defined by § 51-111.10(12) "creditable service" means prior service plus membership service for which credit is allowable under this chapter. Accordingly, a member's benefits are based on prior creditable service when they are based in any part upon either "prior service" as defined by § 51-111.10(10) or upon prior "membership service" as defined by § 51-111.10(11). In either situation, a member is entitled to be credited with either his prior service credit or his membership credit, or both, if the requirements of § 51-111.41:1 are satisfied.
Therefore, based upon the assumption that the member has purchased either "prior service" or prior "membership service," he would be "grandfathered" under the prior provisions of the Act and not subject to the amendments made by H.B. 9.

4. "Similarly, if a member employed after March 31, 1980 purchases prior service credit under the provisions of Section 51-111.41:4, is he 'grandfathered' or under the provisions of House Bill 9?"

Where a member is entitled as a matter of law such as under § 51-111.41:4 to be credited with service on the basis of service in the armed forces of the United States, or creditable service with another state, political subdivision or public school system, or of the United States, any part of which service occurred prior to March 31, 1980, his benefits are based on service rendered prior to that date and he would likewise be "grandfathered" and not be governed by H.B. 9.

5. "Do the provisions of Section 51-111.46(h) apply to employers who elect the options in this section after March 31, 1980 or to members employed by any employer after March 31, 1980?"

The answers to these two distinct but related questions are as follows. The language of § 51-111.46(h) presently allows any employer to pay the equivalent of employees' contributions required under that section. This payment is made to the retirement allowance account established under § 51-111.50. It is not considered a member contribution and does not go into the member's contribution account. The amendments to subsection (h) made by H.B. 9 permit any employer who makes an election effective prior to July 1, 1980, to pay employees' contributions to continue its prior practice of paying such sums into the retirement allowance account rather than the member's contribution account. Thereafter, those payments by such electing employers will not be considered member contributions for purposes of the applicable provisions of the Act.

The second half of your question asks whether the provisions of § 51-111.46(h) as recently amended apply to members employed by any employer after March 31, 1980. Provided the necessary election is made by its governing body, any employer may exercise the option of assuming and paying all member contributions required of its employees under Ch. 3.2. Because of the effect of paragraph 2 of Ch. 722 [1980] Acts of Assembly, the amended provisions apply only to those who were employed and thus became members after March 31, 1980. Accordingly, this part of the question is also answered in the affirmative.

6. "Do the provisions of Section 51-111.28(c) affect only those employees of institutions of higher education employed after March 31, 1980?"
Based upon the analysis which has been applied to answering the previous questions, in particular, question one, the answer to this inquiry is also in the affirmative.

WARRANTS. CRIMINAL CASES. DUTY OF TOWN POLICE TO SERVE ALL WARRANTS AND SUBPOENAS WITHIN THEIR JURISDICTION.

March 4, 1980

The Honorable G. Wayne Pike, Sheriff
Wythe County Sheriff’s Department

You have asked whether it is the responsibility of your office or the Wytheville Town Police to serve all criminal warrants and subpoenas which have addresses within the Town of Wytheville.

Section 15.1-138 of the Code of Virginia (1950), as amended, provides that the police forces of cities and towns within the Commonwealth shall execute such criminal warrants and summons as may be directed to them. Section 19.2-72 provides that in towns having a police department a warrant shall be directed to any policeman of such town and shall be executed by the policeman.

Therefore, it is my opinion that it is the responsibility of the Wytheville Town Police to serve all criminal warrants and subpoenas within their jurisdiction.

WATER AND SEWER AUTHORITIES. MANDATORY HOOK-UP REQUIREMENTS. ENFORCEABLE BY AUTHORITY, RATHER THAN LOCAL GOVERNMENT.

December 19, 1979

The Honorable William H. Logan, Jr.
Commonwealth’s Attorney for Shenandoah County

You ask whether mandatory water and sewer hook-up requirements authorized under § 15.1-1261 of the Code of
Virginia (1950), as amended, are to be enforced by the water and sewer authority, or by the local government involved.

Section 15.1-1261 authorizes mandatory hook-up requirements, if so required by the rules and regulations or a resolution of the water and sewer authority, with concurrence of such local government as may be involved.

The power to require mandatory hook-ups under § 15.1-1261 is separate from any similar power enjoyed by the local government. See Opinion to the Honorable Beverley Roller, Member, House of Delegates, dated July 13, 1970, found in Report of the Attorney General (1970-1971) at 449 (no independent authority found for county to require mandatory hook-ups), and Opinion to the Honorable Virgil H. Goode, Jr., Member, Senate of Virginia, dated January 6, 1976, found in Report of the Attorney General (1975-1976) at 423 (independent authority for municipal corporation to require mandatory hook-ups, pursuant to §§ 15.1-875 and 15.1-876).

Once a mandatory hook-up requirement is established pursuant to § 15.1-1261, only the water and sewer authority can initiate termination of the requirement. See Opinion to the Honorable Wm. Roscoe Reynolds, Commonwealth's Attorney for Henry County, dated June 3, 1977, found in Report of the Attorney General (1976-1977) at 326.

Furthermore, even though created by a local government, a water and sewer authority is an entity separate and distinct from the local government. See, for example, Opinion to the Honorable A. L. Philpott, Member, House of Delegates, dated August 25, 1977, found in Report of the Attorney General (1977-1978) at 500 (authority is independent entity, and its bonds are not bonds of the local government).

Under § 15.1-1260, the aggregate sum of all fees and charges for use of the authority's services go to defray the authority's operating costs, and to pay interest and principal on the authority's revenue bonds. Such fees and charges are not revenues of the local government. See Goode Opinion, supra.

Accordingly, I conclude that the mandatory hook-up requirements authorized under § 15.1-1261 are requirements of the water and sewer authority, not of the local government involved, and such requirements are to be enforced by the authority. See, also, Opinion to the Honorable Clinton Miller, Member, House of Delegates, dated June 21, 1977, found in Report of the Attorney General (1976-1977) at 327.

WATER AND SEWER AUTHORITIES. NO POWER TO COLLECT FEES IN ADVANCE OF HOOK-UP OR SERVICE. EVEN AS TO LAND PARCELS IN SUBDIVISION ALREADY PARTIALLY SERVED.
June 27, 1980

The Honorable J. G. Overstreet
County Attorney for Bedford County

You ask two questions about raising funds for a water system owned and operated by a public service authority under Ch. 28 of Title 15.1 of the Code of Virginia (1950), as amended, the Virginia Water and Sewer Authorities Act (the "Act").

Power to Collect Charges in Advance of Hook-Up Or Service

Your first question is whether the authority has power to collect fees in advance of hook-up or service—especially as to land parcels in a subdivision already partially served by the authority.

Section 15.1-1260 does grant power to fix rates, fees and charges for service to be furnished by a water system, but § 15.1-1260 relates to rate-making, which is legislative and normally prospective. The authority's power to collect from customers is found in § 15.1-1250(i).

Under § 15.1-1250(i), the power to collect from customers is restricted to amounts for use of, or service furnished by, the authority's water system. There is no mention of power to collect from prospective customers in anticipation of future use or service.

By way of comparison, § 15.1-1261 provides that owners or occupants of certain land parcels may be required to connect with a water system, and pay a reasonable charge for making the connection. Again, the power granted is restricted to current transactions. There is no mention of collecting in anticipation of future connections.

I find only one provision in the Act requiring customer prepayments. Section 15.1-1262(a) grants power to require persons obligated for use of, or for service furnished by, the system, to make a reasonable deposit to insure payment in the event of delinquency. Even this power is related to collecting for current use or service.

Accordingly, I conclude that an authority established under the Act may not collect fees in advance of hook-up or service—even as to land parcels in a subdivision already partially served by the authority.

Power of Supervisors to Impose Selective Tax

Your second question is whether the board of supervisors has power to impose a selective tax as to certain land parcels, with the tax proceeds contributed to the public service authority.
You propose no statutory basis for the selective tax, and I am aware of none. Indeed, Art. X, § 1 of the Virginia Constitution (1971) provides generally that all taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Compare Art. X, § 3 (taxes or assessments upon abutting property owners—not to exceed the peculiar benefits resulting from improvements).

Generally, localized taxes for localized public services are not permissible, except through the establishment of special taxing districts, such as sanitary districts organized under Ch. 2 of Title 21. Sanitary districts have the power to operate water systems. See §§ 21-118(1) and 21-118.4(a). Sanitary districts, however, are subject to special requirements and safeguards. See, generally, Opinion to the Honorable Leonard F. Jones, Commonwealth's Attorney for Fluvanna County, dated April 29, 1976, found in Report of the Attorney General (1975-1976) at 293.

The thrust of your inquiry is whether a board of supervisors has the power to establish informally a special taxing district (similar to a sanitary district) in aid of a water and sewer authority. I find no basis for any such arrangement.

Accordingly, I conclude that the board of supervisors does not have the power to impose a selective tax as to certain land parcels, with the tax proceeds being contributed to the public service authority.

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1Compare § 15.1-1263(a) (liens for charges—limited to real estate using system); also, Opinion to the Honorable William H. Harris, County Attorney for Stafford County, dated April 28, 1976, found in Report of the Attorney General (1975-1976) at 205 (liens of sanitary district limited to acreage using service).

WATER AND SEWERAGE SYSTEMS. 1980 AMENDMENT TO § 15.1-1261 DOES NOT APPLY TO THOSE PERSONS REQUIRED TO HOOK-UP TO PUBLIC WATER SYSTEM BEFORE JULY 1, 1980.

June 24, 1980

The Honorable Larry G. Elder
Commonwealth's Attorney for Dinwiddie County

You have asked whether the adoption of H.B. 196, which modifies § 15.1-1261 of the Code of Virginia (1950), as amended, would bar enforcement by Dinwiddie County of orders requiring connection of private residences to the Dinwiddie County Water Authority water system prior to the effective date of that amendment.
Section 15.1-1261 now states that any owner or occupant of property abutting a street or public way containing a water main shall, if required by the rules and regulations or a resolution of the water and sewer authority, connect any building on such property to the public water main, and cease to use any other private water supply. Under Virginia law, such connection may be required, when not plainly unreasonable or arbitrary, even where the individual homeowner already has an adequate and safe water supply and sewage facility. Weber City Sanitation Commission v. Craft, 196 Va. 1140, 87 S.E.2d 153 (1955). The constitutionality of mandatory connection ordinances adopted under § 15.1-1261 was upheld in Farquhar v. Board of Supervisors of Fairfax County, 196 Va. 54, 82 S.E.2d 577 (1954). H.B. 196 amends § 15.1-1261 to provide that persons having a residential water supply may not be forced to discontinue its use, but may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge. This amendment becomes effective on July 1, 1980. The question you present, therefore, is whether this amendment would bar enforcement of the mandatory connection ordinance before July 1, 1980, and whether the amendment would permit a landowner who has connected his residence to the public water system to resume using his private water supply. I conclude that the amendment would lead to neither result.

It is a fundamental rule of statutory construction that new laws in Virginia, except as to matter of remedy, are presumed to be prospective and not retrospective in their operation. Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974). Thus, statutes are to be construed prospectively unless a contrary intention is manifest and plain. McIntosh v. Commonwealth, 213 Va. 330, 191 S.E.2d 791 (1972). The subject amendment could easily have been made retroactive through appropriate language, but no such language was included. This leads me to conclude that the General Assembly did not intend H.B. 196 to operate retroactively.

Another cardinal rule of construction is that all parts of a statute must be read together and full force and effect given to each part. Commonwealth Natural Resources v. Commonwealth, 219 Va. 329, 248 S.E.2d 791 (1978). Further, there is a presumption that where there has been a revision of the laws, the old law was not intended to have changed "unless a contrary intention plainly appears in the new" (emphasis added). Hamilton v. Commonwealth, 143 Va. 572, 577, 130 S.E. 383 (1925). No intention of retroactive effect appears in H.B. 196.

Prior to the enactment of H.B. 196, § 15.1-1261 prohibited the continued use of private water supplies after a mandate to connect to the public system. This language was left unaltered by the 1980 legislation. H.B. 196 merely added language establishing an exception to the general prohibition of the existing law for those individuals who had not yet been required to connect. That is, the prohibition in § 15.1-1261 is that persons subject to its provisions
shall "cease to use" their private water supplies if so required. H.B. 196 amends this to provide that persons having private supplies not be required to "discontinue" the use of them. As every expression by the legislature is to be given effect, this amendment cannot be read to override the purpose of the existing statute. See Report of the Attorney General (1950-1951) at 1.

As a general rule of statutory construction, words must be given the meaning they have acquired from customary usage, unless the legislative history indicates a broader or different meaning. Greer v. Dillard, 213 Va. 477, 193 S.E.2d 668 (1973). The term "discontinue" in the amended statute implies that there must be a current lawful use of a private water supply that may remain uninterrupted. H.B. 196 goes no farther in affecting the general prohibition of § 15.1-1261. Nothing in the exception provided by H.B. 196 reaches those individuals who are lawfully required to connect to the public water system before July 1, 1980, and who have failed to connect. As explained above, the requirements of § 15.1-1261 prior to July 1, 1980, are not retroactively affected by the amendment. Thus, H.B. 196 applies only to those persons lawfully using private water supplies on or after July 1, 1980.

Finally, I note that H.B. 196 provides that a person with a residential water supply "may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge that shall not be more than that proportion of the minimum monthly user charge as debt service compares to the total operating and debt service costs. Such fees and charges may not be less than any monthly nonuser fee or service charge being charged by any county, city or town in which the authority operates." This language will limit the impact of the amendment upon the bond indentures of the authority and upon the obligation that underlies any bond guarantees that may exist. You may wish to review the bond indentures and any guarantees to determine what acts by the authority may be necessary to accommodate this change of the statute. See Report of the Attorney General (1977-1978) at 500.

Section 15.1-1261 reads in part as follows: "Provided, however, notwithstanding any other provision of this chapter, those persons having a domestic supply or source of potable water shall not be required to discontinue the use of same, but may be required to pay a connection fee, a front footage fee, and a monthly nonuser service charge that shall not be more than that proportion of the minimum monthly user charge as debt service compares to the total operating and debt service costs. Such fees and charges may not be less than any monthly nonuser fee or service charge being charged by any county, city or town in which the authority operates."
You ask whether three physicians summoned by the Commonwealth to testify in a hearing in the Juvenile and Domestic Relations District Court on a petition for custody of an alleged abused child brought by the Suffolk Department of Social Services may be paid expert witness fees.

Section 14.1-190 of the Code of Virginia (1950), as amended, relates to the compensation allowable to witnesses who qualify as an expert when compelled to attend and testify. Section 14.1-190 also directs that such compensation "shall be paid by the party in whose behalf he shall testify." The language is broad and applies to "every witness who qualifies as an expert witness...." (Emphasis added.) This statute is not limited to any particular court.

Thus, when § 14.1-189 provides for necessary travel allowances for all witnesses summoned for the Commonwealth, it would also appear that there is no prohibition against also allowing such additional compensation for qualified expert witnesses as the court may deem necessary. To limit the fees of a witness summoned on behalf of the Commonwealth to those enumerated in § 14.1-189 would not seem logical or proper. When a particular construction of a statute would result in an absurdity some other reasonable construction, which will not produce such absurdity, will be made. McFadden v. McNorton, 193 Va. 455, 69 S.E.2d 445 (1952). This coincides with the purpose and intent of the Juvenile and Domestic Relations District Court Law set out in § 16.1-227. Section 16.1-227 provides that the welfare of the child and the family are the paramount concerns of the State and in order to attain these goals, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

Therefore, in view of the broad authority of the court set out in § 16.1-227 and assuming that the physicians in the fact situation posed above were qualified as expert witnesses, it is my opinion that the court may allow such compensation as it deems reasonable under the circumstances.

You further ask whether § 18.2-117 is applicable when a bailee has retained a motor vehicle beyond the end of the bailment agreement. In the fact situation you have described, the bailee kept the automobile approximately three hours past the agreed upon return time.

Section 18.2-117 provides that a bailee is guilty of larceny for failure to return any animal, aircraft, vehicle, boat or vessel in accordance with the bailment agreement.
Furthermore, § 18.2-117 states that the failure of the bailee to return such animal, aircraft, vehicle, boat or vessel, within five days from the time he had agreed in writing to do so shall be prima facie evidence of larceny by the bailee thereof.\footnote{Section 18.2-117 provides that: "If any person comes into the possession as bailee of any animal, aircraft, vehicle, boat or vessel, and fail to return the same to the bailor, in accordance with the bailment agreement, he shall be deemed guilty of larceny thereof and receive the same punishment, according to the value of the thing stolen, prescribed for the punishment of the larceny of goods and chattels. The failure to return to the bailor such animal,}

The first sentence of § 18.2-117 sets forth two elements of the conduct prohibited thereunder.\footnote{Section 14.1-190 provides in part: "Every witness who qualifies as an expert witness, when compelled to attend and testify, shall be allowed such compensation and mileage as the court may, if requested in its discretion, order without regard to any limitation above set forth, but the same shall be paid by the party in whose behalf he shall testify."} Elements of common law larceny which are consistent with a taking by a bailee, such as the intent at the time of taking to permanently deprive another of his possession, would be incorporated, while elements not consistent with a taking by a bailee, such as trespassory taking, would not be. United States v. Parker, 522 F.2d 801 (4th Cir. 1975). The requirement of mens rea or scienter will be read into the statute by the court when it appears the legislature implicitly intended that it must be proved. Maye v. Commonwealth, 213 Va. 48, 189 S.E.2d 350 (1972). Thus, the statute establishes the statutory crime of "larceny after bailment." United States v. Closkey, 411 F.2d 1212 (4th Cir. 1969).

The second sentence of § 18.2-117 creates a presumption of larceny from the failure of the bailee to return the bailed property within five days of the date agreed upon in writing. United States v. Parker, supra. However, this is clearly a rebuttable presumption. \footnote{Section 14.1-189 provides in part: "[a]ll witnesses summoned for the Commonwealth shall be entitled to receive for each day's attendance all necessary ferriage and tolls, and such reimbursement for his daily mileage as prescribed in § 14.1-5..."} Thus, it is irrelevant as to the question of guilt whether the vehicle was detained more than five days after the expiration of a written bailment agreement.
aircraft, vehicle, boat or vessel, within five days from the
time the bailee has agreed in writing to return the same
shall be prima facie evidence of larceny by such bailee of
such animal, aircraft, vehicle, boat or vessel."

"The two elements are: (1) the actor must be a bailee of
an animal, aircraft, vehicle, boat or vessel; and (2) he must
fail to return such possession in accordance with the terms
of the bailment agreement.

ZONING. CIVIL ACTION TO ENFORCE ZONING ORDINANCE NOT BARRED
BY RESULTS OF PRIOR CRIMINAL ACTION FOR VIOLATION OF SAME
ORDINANCE.

April 8, 1980

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You have asked whether a civil action for injunctive
relief to enforce a zoning ordinance would be barred by the
results of a previous criminal action for a violation of that
same zoning ordinance. Specifically, you point out that the
prior criminal proceeding was dismissed with prejudice after
the prosecution elected to nolle prosequi.

It has long been recognized that cities, towns or
counties may enforce their zoning regulations and prevent
violations thereof by use of the injunctive process of the
courts. Whether the defense asserted be called res
judicata, collateral estoppel or double jeopardy, it also
seems very clear that the fact a prior criminal prosecution
did not succeed does not prohibit the use of the injunctive
process to prevent further violations of the zoning
ordinance, even where the same violation is alleged in both
cases. Although there are no Virginia cases that directly
address this issue, situations similar to that which you
describe have arisen in other jurisdictions. See Town of
Sostillo, 264 N.E.2d 664 (Mass. 1970); Borough of Saddle
River v. Perrin, 108 N.J. Super. 6, 259 A.2d 727 (1969);
Blackmon v. Richmond County, 224 Ga. 387, 162 S.E.2d 436
(1968); and City of New Orleans v. Lafon, 61 So.2d 270 (La.
1952). The fact that zoning ordinance violations could have
been criminally prosecuted but were not has also not
precluded local governments from obtaining injunctions
against those violations. Cf. Pinellas County v. Hooker, 200
So.2d 560 (Fla. 1967) and City of Tulsa v. Crain, 573 P.2d
707 (Okla. 1978). Whether the previous criminal proceeding
has been characterized as purely criminal or quasi-criminal
has made no difference. See Town of East Hanover v. Cuva,
supra, at 726-727, and Borough of Saddle River, supra, at
731.

The Supreme Court of Virginia has stated that although
the Rappahannock County zoning ordinance does not expressly
provide for enforcement by injunction, §§ 15.1-491 and
REPORT OF THE ATTORNEY GENERAL

15.1-499 of the Code of Virginia (1950), as amended, do. Accordingly, I am of the opinion that a civil proceeding for a violation of the zoning ordinance is not precluded by an acquittal of the criminal charge of violating that same zoning ordinance.

3See McNair, Administrator v. Clatterbuck, 212 Va. 532, 186 S.E.2d 45 (1972).

ZONING. COUNTIES, CITIES AND TOWNS. STATE AGENCIES. UNIVERSITY OF VIRGINIA EXEMPT FROM MANDATORY COMPLIANCE WITH LOCAL COMPREHENSIVE PLANS.

March 14, 1980

The Honorable George R. St.John
County Attorney for Albemarle County

You ask whether the University of Virginia is exempt under § 15.1-457 of the Code of Virginia (1950), as amended, from mandatory compliance with local comprehensive plans established pursuant to § 15.1-456.

Section 15.1-456 provides that whenever a comprehensive plan has been adopted by a local governing body, the plan shall control the general or approximate location, character or extent of each feature shown on the plan, and thereafter no public building or public structure, whether publicly or privately owned, shall be constructed, established or authorized, unless and until it is submitted to and approved by the local commission as being substantially in accord with the adopted comprehensive plan.

Section 15.1-457 provides that every agency of the Commonwealth which is responsible for the construction, operation or maintenance of any public facility within the territory within a comprehensive plan shall furnish information, and collaborate, cooperate and coordinate in connection with the comprehensive plan, but the authority of the State agency shall not be deemed to be abridged regarding the facilities now or hereafter coming under its jurisdiction.

Generally, the State and its agencies are not bound by any statute, unless the statute in express terms is made to extend to the State. See Opinion to the Honorable William G. Broaddus, County Attorney for Henrico County, dated July 15, 1975, found in Report of the Attorney General (1975-1976) at
400 (Uniform Statewide Building Code); compare Opinion to the Honorable William F. Parkerson, Jr., Member, Senate of Virginia, dated August 10, 1971, found in Report of the Attorney General (1971-1972) at 103 (local zoning requirements).

The University of Virginia is a State agency for purposes of the State's general exemption from statutory and local requirements. See Opinion to the Honorable Edgar F. Shannon, Jr., President, University of Virginia, dated March 29, 1972, found in Report of the Attorney General (1971-1972) at 106 (University of Virginia not subject to erosion control provisions of county subdivision and development ordinance).

Under the terms of § 15.1-457, the State and its agencies are obligated to coordinate with local governments in connection with their comprehensive plans, but their ultimate independence from local regulation is unaltered. Opinion to the Honorable Stirling M. Harrison, Commonwealth's Attorney for Loudoun County, dated August 2, 1963, found in Report of the Attorney General (1963-1964) at 155 (under § 15-964.11, predecessor to § 15.1-457); Opinion to the Honorable J. C. Knibb, Commonwealth's Attorney for Goochland County, dated July 15, 1964, found in Report of the Attorney General (1964-1965) at 258 (both Opinions on relationship between State highways and local comprehensive plans).

Accordingly, I find that the University of Virginia is exempt under § 15.1-457 from mandatory compliance with local comprehensive plans established pursuant to § 15.1-456.

ZONING. LIVESTOCK DEFINED.

August 8, 1979

The Honorable Frederick T. Gray
Member, Senate of Virginia

This is in reply to your June 28, 1979, letter requesting my opinion concerning § 21-3 of the Code of Chesterfield County. Your specific question was whether that ordinance's reference to "small domesticated livestock" includes honeybees kept in a manmade hive.

A review of the case law shows that the customary use of the term "livestock" is "domestic animals used or raised on a farm, especially those kept for profit." Van Cleave v. Comptroller of State of Maryland, 126 A.2d 865 (Md. 1956); Boland v. Cecil, 150 P.2d 819, 65 Cal.App.2d 832 (1944). The Restatement of Torts § 504 adds the criterion that they be "susceptible of confinement within boundaries without seriously impairing their utility."

Although bees are small and domesticated, they are not farm animals. Cases in other jurisdictions exclude from the

In view of the foregoing, I am of the opinion that the term "small domesticated livestock" does not include bees.

ZONING. NOTIFICATION OF AFFECTED LANDOWNERS. NO AUTHORITY FOR LOCALITY TO NOTIFY OWNERS OF MORE THAN 25 PARCELS BY MAIL OF ZONING CHANGES.

August 21, 1979

The Honorable George R. St. John
County Attorney for Albemarle County

You ask whether §§ 15.1-431 and 15.1-493 of the Code of Virginia (1950), as amended, empower the governing body of Albemarle County to expend funds for the purpose of sending written notice to each landowner in the county of the effect on his parcel of land of a proposed zoning ordinance. You indicate that to do so would involve notifying the owners of some 21,000 parcels.

In general, local governments have only such powers as are expressly or implicitly delegated to them by State statute. When doubtful, the question of whether a local government has a particular power is to be answered in the negative. This principle, sometimes referred to as the "Dillon Rule," is the rule of construction in Virginia. See Opinion to the Honorable L. Cleaves Manning, Member, House of Delegates, dated April 17, 1974, found in Report of the Attorney General (1973-1974) at 275.

Section 15.1-431 provides that when a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or fewer parcels of land, written notice must be given to the owner or owners, their agent or the occupant of each parcel involved, parcels abutting those involved and parcels immediately across the street or road from the property affected. Section 15.1-431 delegates no power either expressly or implicitly to provide written notice when more than twenty-five parcels are involved. Accordingly, it is my opinion that the governing body may not legally expend money to notify every landowner in the county.

ZONING. ORDINANCES. CONDITION OF ZONING APPROVAL. MUNICIPALITY HAS NO POWER TO REQUIRE PAYMENT FROM SUBDIVIDER TOWARDS COST OF RELOCATING PUBLIC ROAD.
April 14, 1980

The Honorable Owen B. Pickett
Member, House of Delegates

You first ask whether a city as a condition of rezoning of a seventy-five acre parcel of land may require a cash contribution of $127,500 from the landowner to help defray the cost of relocating a city access road so that it would front on the landowner's site. You further ask, in the event the required contribution is invalid, whether the rezoning would be valid if approved.

Requiring Contribution

The permissible scope of zoning ordinances is set forth in § 15.1-466 of the Code of Virginia (1950), as amended. Nothing therein expressly permits a locality to require a subdivider to contribute to, or pay a share of, the cost of constructing or of relocating roads outside the property limits of the land owned by the subdivider.

The powers of boards of supervisors and other local authorities are fixed by statute and are limited to those conferred expressly or by necessary implication. Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975). The Supreme Court of Virginia has recently held that a county did not have express or implied authority to require, as a condition of zoning approval, that a developer construct improvements to an existing public highway to abut a subdivision. Hylton Enterprises, Inc. v. Board of Supervisors of Prince William County, Va., 258 S.E.2d 577, 581 (1979). Your letter presents no facts to indicate that Hylton is not applicable to the situation you describe. Accordingly, I am of the opinion that a municipality has no power to require a payment from a subdivider towards the cost of relocating a public road to be contiguous to the subdivision property.

Validity of Rezoning

You next inquire whether the rezoning is nevertheless valid if the condition imposed on the rezoning is invalid.

In Hylton, the court upheld action by the lower court approving the subdivision plot but struck from the ruling those portions which unlawfully imposed conditions on the contractor. The rezoning ordered by the trial court was not reversed. In Hylton, the required improvements had been opposed by the applicant and he had exercised his statutory right of appeal under § 15.1-475.

Accordingly, it would be possible in an appropriate case for an unlawful restriction to be struck and the rezoning to remain in effect.
Section 15.1-466(c) provides for coordination of streets, but not for the charging of the cost against the subdivider. Section 15.1-466(f) provides for rights-of-way, streets, etc., within the subdivision. Section 15.1-466(j), while it provides for payment by a subdivider of a share of the cost of providing facilities outside the property limits, it is limited to payments for "sewerage and drainage facilities."

In Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), the court reserved the question whether the developer could be required to make improvements to assure proper access. In Hylton, supra, 258 S.E.2d at 581, the court assumed that there was authority "to assure adequate access." Accordingly, whether relocation of the access road is necessary to provide proper access could be a material and distinguishing fact.

ZONING. ORDINANCES. § 15.1-491.2 REQUIRES AMENDMENT OF ZONING ORDINANCE BEFORE COUNTY MAY ACCEPT VOLUNTARY PROFFERS OF REASONABLE CONDITIONS.

November 27, 1979

The Honorable Charles D. Barrell
County Attorney for Culpeper County

You ask whether § 15.1-491.2 of the Code of Virginia (1950), as amended, requires an amendment to a zoning ordinance before a county may accept proffers of reasonable conditions from an owner.

Statutes may be either enabling or self-executing and the language of § 15.1-491.2 is plainly that of an enabling statute. The board of supervisors is enabled, by § 15.1-491.2, to avail itself of the power to accept proffers of reasonable conditions if it chooses to do so. The point to be emphasized is that enabling legislation requires some appropriate form of action by the board before it can become effective; absent such action it has no local vitality. Jones v. Buford, 365 A.2d 1364, 71 N.J. 433 (1976).

The term "provide for" used in § 15.1-491.2 is not defined in the Code, therefore, its common meaning should be utilized in interpreting this statute. See 73 Am.Jur.2d Statutes § 206. The word "provide" means to take precautionary measures, to make provisions, to supply what is needed. Knapmiller v. American Ins. Co., 112 N.W.2d 586, 588, 15 Wis.2d 219 (1961). The term applied to § 15.1-491.2 then implies that a zoning ordinance must include language allowing voluntary proffers before such proffers may be accepted. Accordingly, it is my opinion that an amendment to the ordinance is necessary before the governing body may accept the proffers. Since § 15.1-491.2 does not indicate the length of the time such an amendment must be in effect before proffers may be accepted, however, it is my opinion
that the amendment enabling the governing body to accept the proffers and the proffers themselves may be submitted to the public hearings simultaneously and the proffers made part of the ordinance immediately after adoption of the enabling amendment.

Section 15.1-491.2 provides:
"A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a cash contribution to the county or municipality; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in § 15.1-466(f); (v) such conditions shall not include payment for or construction of off-site improvements except those provided for in § 15.1-466(j); (vi) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii) all such conditions shall be in conformity with the comprehensive plan as defined in § 15.1-446.1."

ZONING. SUBDIVISIONS. ORDINANCES. MOBILE HOME PARK COULD BE COVERED BY BOTH COUNTY ZONING ORDINANCE AND COUNTY SUBDIVISION ORDINANCE.

May 22, 1980

The Honorable David G. Brickley
Member, House of Delegates

You ask whether under a certain set of circumstances a submission under a county zoning ordinance would constitute a subdivision and must therefore also comply with the county subdivision ordinance. The facts presented are of an applicant seeking a special use permit from a county board of zoning appeals for the placement of a mobile home park within a residential zone. The applicant has requested permission to place six trailer units on lots upon a tract of land and then rent the trailer units to the public.

You state that the county zoning ordinance permits mobile homes in a residential district upon obtaining from the county board of zoning appeals a special use permit. The applicant has requested such a permit from the board of zoning appeals. I would agree that this is the appropriate procedure to follow.
You further state that the county subdivision ordinance applies to the division of any tract of land into more than four (4) parts where the individual lots are to be leased or rented. Placing the mobile homes on the property constitutes a division of land for development into six parts. See § 15.1-430(m) of the Code of Virginia (1950), as amended. It is my opinion that the applicant would be required to comply with the subdivision ordinance as well. Accordingly, I am of the opinion that the applicant would be required to comply with both the zoning and the subdivision ordinances.

1This opinion is not altered by the following language in the county zoning ordinance: "Mobile home parks in which lots are sold shall comply with the county subdivision ordinance." (Emphasis added.) This language in the county zoning ordinance cannot be used to limit the scope of the subdivision ordinance and hence to imply that mobile home parks need not comply with the subdivision ordinance if lots are rented. The scope of the subdivision ordinance must be determined by its own terms. The expression "expressio unius est exclusio alterius" is not applicable here, since that principle would only apply to limit the scope of the statute in which the exclusionary expression is found—in this case the zoning ordinance. In this connection it should be noted that zoning ordinances and subdivision ordinances are enacted to serve different purposes. Opinion to the Honorable John Alderman, Commonwealth's Attorney for Carroll County, dated September 16, 1976, found in Report of the Attorney General (1976-1977) at 199.
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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