OPINIONS
of the
ATTORNEY GENERAL
and
REPORT
to the
GOVERNOR OF VIRGINIA

From July 1, 1980 to June 30, 1981

Commonwealth of Virginia
Office of the Attorney General
Richmond
1981
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LETTER OF TRANSMITTAL

July 1, 1981

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, 1980, through June 30, 1981. 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 1979-1980 Report.

MANAGEMENT

We live at a time which demands that restraints be placed on all expenditures from the public purse. I am happy to report to you that, after three and one-half years in Office, we have achieved our goal of reducing by ten percent the large number of attorneys employed in this Office. We have taken several other steps to both economize and improve administrative aspects of Office operations.

But there has been no decrease in the services my Office provides. Indeed, there has been an increase in the caseload carried by the Office, the number of official Opinions we prepare has remained constant, and the general demands upon us as counsel to more than two hundred State agencies and institutions has grown. Although we have given a lot of attention to improving the management of this Office's resources, the fact that we have been able to increase our productivity and maintain high standards for our work is primarily attributable to the quality of the men and women who have been attracted to this Office. It has been a privilege to work with them.

FEDERAL-STATE RELATIONS

Your administration has sought to strengthen the role of state and local governments viz-a-viz the federal government. I share that philosophy. And now we have a new President dedicated to returning responsibilities to the states.

Throughout this letter you will find instances where my Office has challenged the extension of federal authority into State and local affairs. This has been a constant for both our Offices over the past three and one-half years. Virginia has become a nationally-recognized advocate of the federalism which our Founding Fathers embraced nearly two hundred years ago.

Defending the rights of our State legislature and our State courts to fix punishment for and to sentence criminals, defending the rights of State and local agencies to
administer their own social service programs, defending State and local rights to regulate land use and establish school curricula, defending the State's right-to-work law and the State's right to administer its own worker safety program, defending Virginia's tobacco and apple growers against an arbitrary and unfair farm laborer wage rate imposed by the federal Department of Labor—these are just some of the ways we have tried to keep the responsibilities of government at the level closest to the people and halt those intrusions into the private domain which are simply unnecessary.

CRIMINAL LAW

No public responsibility is greater than that of protecting the safety of the public. Our foremost deterrent to crime is the certainty of due punishment upon conviction. The Criminal Division continued its efforts to uphold convictions imposed by the State circuit courts, defending 1,015 petitions for habeas corpus filed by State prisoners in the last year.

Post-conviction review should be available in extraordinary cases, but habeas corpus should not be utilized to delay execution of judgment or to permit federal courts to simply second-guess State judges, juries and legislatures. For example, half of Virginia's sixteen death penalty cases are now under habeas corpus review. Although the first capital conviction under the present statute occurred in 1977, execution dates have been repeatedly stayed as convicted persons seek yet another hearing in still another court. Another case, a 1974 conviction for drug distribution, is now before the United States Supreme Court for the second time, seven years later, in order to determine whether the punishment imposed by the trial court is constitutionally permissible.

Drug abuse is another serious problem confronting Virginia. When I learned that a circuit judge in Cumberland County had ordered the release from prison of three men convicted in a large marijuana smuggling operation after serving only a few months of prison sentences ranging between ten and seventeen years, I asked the Supreme Court of Virginia to rule that the judge had exceeded his authority in ordering their release. A decision in this case is expected sometime this fall.

I am also preparing to defend an eleventh-hour attack by marijuana advocates on the constitutionality of the Virginia Drug Paraphernalia Act passed by the 1981 General Assembly. I will ask the United States District Court in Alexandria to uphold the Act in order that local law enforcement officials can take action to put out of business those who thrive on the drug culture and prey upon our young people.

Criminal Division attorneys also handled nearly 1,200 civil rights suits filed by prisoners seeking judicial review of the conditions of their confinement; prisoner complaints range from objections to the food and clothing provided inmates to allegations of brutality by correctional officers. Recently the federal courts have begun to require inmates with money in their prison accounts to pay at least a portion
of the filing fees in the lawsuits they initiate, in an effort to cut down on frivolous and harassing suits, and we are assisting the courts in determining whether an inmate is eligible to proceed in forma pauperis. Elimination of nuisance suits would permit fuller consideration of meritorious claims. My staff provides general legal assistance, on a daily basis, not only to State correctional and law enforcement agencies but also to local prosecutors and law enforcement officers.

Last summer, when there was a huge increase in household burglaries due to the rapidly escalating prices of precious metals and jewels, I provided local law enforcement officers and Commonwealth's attorneys with a model local ordinance which placed reasonable restraints on itinerant "gold and silver" dealers. Many localities adopted this ordinance immediately and a similar statewide measure was passed by the General Assembly this year.

Also at the General Assembly this year, I initiated and prepared legislation making commercial bribery a felony under State law. State Senator Stanley E. Walker sponsored the bill and secured its passage.

Two other pieces of legislation which I deem important, my revised uniform sentencing proposals (designed to make punishment both more certain and more fair) and my statewide grand jury bill (designed to give State legal officers the capacity for cross-jurisdictional prosecution of certain crimes), were defeated in committee. I expect both to be introduced again.

ENVIRONMENTAL PROTECTION

In February, I asked the United States Supreme Court to uphold a decision my Office had won before the United States District Court for the Western District of Virginia which declared key sections of the 1977 Federal Surface Mining Control and Reclamation Act unconstitutional. The case was argued in tandem with a similar appeal from Indiana.

In June, the Supreme Court reversed the District Court and upheld the facial constitutionality of the Act. The court set aside, on procedural grounds, several issues which may form the basis for future challenges to specific cases of the Act's enforcement. While the Supreme Court decision was disappointing, this case has, I believe, demonstrated dramatically Virginia's willingness to challenge unfair and burdensome federal regulations imposed on Virginia's industry. On the brighter side, the new administration in Washington has demonstrated a willingness to work with the states to implement the Act in a reasonable manner.

We are now helping the Department of Conservation and Economic Development to develop a permanent surface mining regulatory program for submission to the Department of the Interior. With the acceptance of this program, Virginia (under the federal Act) will retain primary responsibility for the regulation of this vital industry.

Our challenge to the Environmental Protection Agency's national air ambient quality standard for ozone remains
undecided by the District of Columbia Court of Appeals. In addition, my Office filed suit this year against EPA regulations designed to protect the view from federally-operated national parks, national forests, and other areas. The Commonwealth's concern here is that federal protection of "integral vistas" at Shenandoah National Park may block industrial development in much of the surrounding area.

Federal litigation for recovery of damages and cleanup costs incurred by the State from the February 1976 and February 1978 Chesapeake Bay oil spills has been concluded by settlements. Having established Virginia's right to recover for damages to natural wildlife resources as part of the 1976 case, I have negotiated settlements providing for recovery of over $143,000 for damage to wildfowl, over $31,000 in State cleanup costs, and approximately $13,000 in civil penalties.

This year has again seen a number of enforcement suits under the State Water Control Law and the National Pollutant Discharge Elimination System (NPDES), the major legal vehicles for the protection and restoration of the State's waters. A number of injunctions were obtained in the State and federal courts requiring compliance with NPDES permits. My Office has also filed, in Wythe County, the first major case testing the State's ability to protect its groundwater resources from oil spills.

In Tidewater, my office obtained a settlement establishing the first systematic plan for controlling the infiltration problems in that area's sewerage systems. Resolution of these problems is expected to prevent the closing of valuable shellfish growing areas.

My Office successfully defeated a challenge to the Commonwealth's ownership of a portion of the subaqueous bed of Broad Bay in the City of Virginia Beach, and is now currently defending an attack by Maryland crabbers on the Virginia law reserving commercial crab licenses for Virginia residents.

TRANSPORTATION

Virginia's continued prosperity will depend largely on our success in the area of industrial development. As Attorney General, I have been involved with the practical problems of recruiting new industries to expand their operations here. Top public officials can be very helpful with these tasks, through such things as promoting a stable work force and demonstrating sound fiscal management.

Nothing is more fundamental to Virginia's future industrial development and general economic health than the maintenance and expansion of Virginia's outstanding transportation system. My Office continues to render assistance with the whole gamut of transportation issues.

Our Transportation Division staff supervised the work of private firms with, and on occasion participated in, the disposition of 1,296 right-of-way condemnation cases for the Department of Highways and Transportation. There were 500 condemnation cases instituted during this past year, and the Division supervised and reviewed the legal steps in the
Department's acquisition of $48.5 million worth of right-of-way property.

Special Assistant Attorneys General are assigned to examine land titled and close real property transactions for the Department in each of the highway districts throughout the Commonwealth. They examined a total of 2,707 titles and closed 1,531 real property transactions by deed.

Also in 1980-1981, Division lawyers acted as counsel for the Department of Highways and Transportation in 219 cases both tried and pending before various courts and administrative agencies. This does not include the numerous actions which were amicably settled during the period.

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

My staff provided general counsel and numerous official Opinions to the Department of Highways and Transportation and other transportation agencies. In addition, numerous Opinions relative to transportation matters are given to judges and Commonwealth's, county and city attorneys throughout the State.

In cooperation with our Antitrust Section and the United States Department of Justice, the Transportation Division has had substantial involvement in the ongoing investigation of antitrust violations on State road contracts.

Our Transportation attorneys also play a major role in drafting the Highway Department's legislative program and is actively carrying forward a program in anticipation of the next Session of the General Assembly.

Ports. 1980-1981 saw renewed emphasis on our role as counsel to the Virginia Port Authority, providing general legal assistance to this agency in the management and development of Virginia's State-owned seaports.

I have remained deeply involved with efforts to expand the shipment of coal through Hampton Roads. My Office has advised and consulted with you, the Port Authority, other State agencies and private interests in an effort to protect and enhance the large sector of Virginia's economy related to coal production and coal export.

Over the past several months we have given the Port Authority counsel on what steps they should take concerning the construction of the new coal port facility at Craney Island. We assisted with the development of necessary legislation and its consequent passage by the General Assembly. Currently we are preparing for the environmental problems that will arise, the coordination of the western freeway with the rail facility that will serve the coal port, and the condemnation cases that will be necessary.
We also continue to represent the Port Authority in matters relating to the dredging of the Hampton Roads harbor and channels to a depth of 55 feet. This is vital in order to accommodate larger vessels and maintain and significantly increase commerce at our ports.

**Aviation.** My Office supplies legal representation to the State’s Department of Aviation. Probably most important during the past year has been our advice to the Department concerning the far-reaching proposals contained in the United States Department of Transportation’s new governing regulations for National and Dulles International Airports. Several important interests are at stake here.

I have been concerned about increasing noise and safety problems at National Airport. Airlines and distant cities have opposed a future cap on passenger traffic at National, and I have challenged them in federal court.

Air service at almost all other Virginia airports will, of course, also be affected by the National/Dulles regulations. My staff is working closely with the Department and with citizen groups to ensure that adequate service by both commuter and certificated air carriers is provided to all Virginia communities.

**HEALTH, MENTAL HEALTH, WELFARE**

The State Health Department shares (with the Water Control Board) major responsibility for preserving the quality of Virginia water. During the past year my staff has initiated or concluded twenty-three water and sewage enforcement suits for the Health Department, reflecting the continued need for legal services in these areas.

In a major breakthrough with federal authorities, my Office has successfully settled a lawsuit with the United States Department of Labor's Occupational Safety and Health Administration that allows Virginia to operate its own safety and health program without the threat of federal takeover. This new cooperative relationship with the Department of Labor under President Reagan promises relief from unnecessarily burdensome OSHA regulations during the years ahead. We now expect a successful resolution of our suit filed last year opposing OSHA-set personnel levels for State safety and health plans.

I have also assigned an attorney to the State Department of Health to concentrate on medicaid fraud and abuse and to help implement new State legislation dealing with the problem of medicaid fraud. In addition, my staff has successfully defended several civil lawsuits, both federal and State, which have attacked various aspects of the Commonwealth's medicaid program, thereby averting severe financial consequences for Virginia's taxpayers.

The Department of Mental Health and Mental Retardation continues to require a broad range of legal services. In the past year, major activities have included day-to-day advising of supervisory staff at Department institutions, labor negotiations and other personnel matters, and federal litigation involving patient rights.
In April, the United States Supreme Court, in a case to which we were a party, Pennhurst v. Halderman, decided a case with far-reaching implications for both patient rights and the extent of state government financial obligations to citizen-clients. The court ruled that the "Bill of Rights" contained in federal legislation to aid the developmentally disabled does not create a new group of substantive Fourteenth Amendment rights and that, through this legislation, Congress had not implicitly imposed massive financial burdens on the states.

The Department of Welfare's Support Enforcement Program was again assisted by my staff. As a consequence, the Department's collection effort with support monies has increased to an average of over $900,000 per month. In addition, my staff has assisted the Department in enforcing its licensing standards for welfare-supported facilities.

EDUCATION

The vitality of our nation and our State is critically dependent upon a sound, well-rounded educational environment. The legal rights and obligations of students, teachers and administrators must be mutually respected in order to foster the most productive possible educational opportunities. My Office continues to closely guide and counsel State educational personnel concerning the requirements of the law as it impacts on their daily duties.

My Office has also provided requested assistance at the local level, responding to numerous and complex legal questions raised by parents, teachers, students and governmental officers. I have sought to clarify student/teacher rights, effected conflict of interest standards mandated by the Virginia General Assembly, resolved difficult questions regarding education of the handicapped and children residing on military enclaves, and encouraged adoption of school policies promoting student discipline in the classroom.

I have examined the constitutionality of the Basic School Aid Formula and provided guidance to localities in structuring their school budgets and appropriations.

And I have also addressed many of the fundamental legal problems besetting local school boards as a result of reductions in available fiscal resources.

I have stressed my personal conviction, and the view of this Office, in all matters involving our public schools, that education is primarily a local matter. As you are aware, I assumed an aggressive role in resisting federal attempts to impose mandatory and inflexible bilingual education regulations upon local school systems. Educational methodology is best left to local school officials, free from federal constraints. Not only would such a federal imposition unduly rob localities of their traditional autonomy preserved under the United States Constitution, but it also would require inflexible programming at a large and unnecessary expense to Virginia taxpayers.

Also, over the past year, my Office has been involved in the successful defense of numerous civil rights and contract
claims. Fortunately, no judgment has been awarded against the Commonwealth in any education case during my tenure as Attorney General.

Finally, my Office has assisted, on an informal basis, individual citizen requests for information and, on occasion, community and professional groups.

CONSUMER

The provision of counsel to "represent the interests of the people as consumers" is a fundamental responsibility of the Virginia Attorney General, mandated by statutes passed in 1972 and 1977. Responsibilities are divided between representation before the State Corporation Commission, primarily in public utility cases, and representation in instances where a supplier appears to have engaged in a fraudulent consumer transaction.

Utility Activities. The Division of Consumer Counsel this year participated in 91 proceedings before the Virginia State Corporation Commission, involving electric, gas, telephone, and water and sewer utilities. We presented expert testimony to the Commission in many of these cases, in an attempt to insure that Virginia's utility customers are provided the best possible service at the fairest possible rates. The majority of these cases (48) involved requests by utilities to raise rates for their services.

The major electric utility rate case concluded during this period was Virginia Electric and Power Company's request for $77.1 million, pursuant to the Commission's Financial Operating Review procedure. Despite expert testimony presented by my Office showing that no rate increase was needed, the Commission awarded the company an increase of $60 million. In addition, Consumer Counsel staff participated in major Financial Operating Review rate increase cases involving Potomac Edison Company and Potomac Electric Power Company.

The major telephone utility case during this period involved Chesapeake and Potomac Telephone Company of Virginia. The Commission awarded C&P approximately $35 million of the $66 million requested, and adopted a range of return on equity slightly above the range recommended by this Office's expert witness. In an important case involving Continental Telephone Company of Virginia, the Commission concurred with a suggestion made by our Consumer Counsel staff that the company's authorized rate of return be kept at a minimum due to the relatively poor quality of service.

During the first half of 1981, the Commission considered a number of ratemaking issues suggested by Congress in the Public Utility Regulatory Policies Act of 1978 (PURPA), including seven cases involving implementation of cogeneration and small power production rates.

A major case involved implementation of certain PURPA policies by Vepco. Ratemaking issues addressed included cost of service, declining block rates, time of day rates, seasonal rates, interruptible rates, and load management techniques. My Office presented expert testimony in this
case and urged adoption of ratemaking standards designed to promote utility efficiency, energy conservation and equitable rates. As of July 1, the Commission had not issued a final order in this case.

Consumer Counsel lawyers also participated in 13 electric utility fuel factor hearings to ensure that customers pay only for prudently incurred fuel costs.

On March 31, Virginia Electric and Power Company filed a new application with the State Corporation Commission, requesting rate increases totaling $189.6 million. On June 29, my Office filed testimony indicating that Vepco rate increases should be limited to $57.3 million. Appalachian Power Company also asked for a major rate increase in May, and a major rate request from C&P Telephone is expected to be heard by the Commission in the fall. Substantial preparation is already underway in both these cases.

A recent analysis of rate hearings before the Commission over the past three and one-half years showed that, among major utilities only, $900 million in rate increases was requested and $590 million was granted. I am certain that much of the $310 million in rate increases denied was due to the vigorous effort by this Office to ensure that the utility companies proved the need for any increase granted.

Although we have provided to "the people as consumers" strong representation in these utility cases, I am also very mindful of the importance of having sound, fiscally-strong public utilities. When the Nuclear Regulatory Commission unnecessarily delayed the full-power licensing of Vepco's new North Anna II facilities, forcing Vepco to pay an extra $300,000 a day for fossil fuels, my Office entered a strong appeal to the NRC for approval of the license. The NRC subsequently approved the license, saving consumers millions of dollars in costs.

In a non-utility matter before the State Corporation Commission, my Consumer staff participated in a Commission hearing to determine rates for workmen's compensation insurance. As a result of this proceeding, these rates were reduced. We also participated in other insurance matters. In another important insurance case, the duty of Blue Cross/Blue Shield to reimburse psychologists, optometrists and opticians was clarified to the Commonwealth's satisfaction.

General Consumer Protection Activities. The protection of Virginians from fraudulent business practices remains an important priority for this Office. In this effort we continue to enjoy statewide cooperation from retail business organizations.

In the past year, my Office undertook several important investigations of consumer fraud. For instance, following numerous complaints from consumers, our Office investigated the activities of a firm calling itself International Security Corporation, which had placed advertisements for various devices in national magazines. Following up on information provided by our Office, the Commonwealth's Attorney for the City of Richmond arrested and prosecuted Roger Wayne Brown a/k/a Walter Stewart. Mr. Brown was
REPORT OF THE ATTORNEY GENERAL

convicted of grand larceny based on evidence that he never intended to provide the products for which he placed advertisements. Money from the bank account of International Security Corporation will be distributed pro rata to consumers later this summer.

My Office also filed a civil action against a wholesaler of used automobiles and two of its agents in order to enjoin them from engaging in unlawful, deceptive and fraudulent practices, and to recover civil damages, civil penalties and costs. In Commonwealth of Virginia v. Central Auto Sales, Inc., et al., we sued under federal odometer tampering statutes and the Virginia Consumer Protection Act, alleging that the defendants illegally reset the odometers on numerous automobiles and that they failed to disclose the actual mileage accrued by these vehicles when they were sold to Virginia consumers. Both the Antitrust Section and the Transportation Division have been active in similar investigations. Current litigation should bring our total recoveries in this area during my administration to well over $300,000.

In a case against a Richmond couple selling Mexican mail order divorces, the city's circuit court entered a decree approving an Assurance of Voluntary Compliance with this Office. The couple, trading as Southern Agency, agreed to cease and desist from making, in connection with the sale of services or goods to the public, statements that Mexican mail order divorces are valid in Virginia or are recognized as legally binding in most states. Southern Agency also agreed to make restitution of all monies received from consumers to process their divorce applications, if such consumers requested a refund.

An amendment to the Consumer Protection Act, prepared and supported by Consumer Counsel staff, was passed by the General Assembly. This amendment clarifies the procedure under which actions filed by the Attorney General under the Act are pursued. The record in actions resolved by Assurance of Voluntary Compliance will now include a complaint recording the allegations upon which the requests for the assurance is based.

Citizens continue to look 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, purchase of time-sharing residences, gambling and lotteries, automobile repairs, home solicitations, franchising, deceptive advertising, how to use the general district court and how to obtain information about business opportunity offerings.

If the question is about alleged illegal activity, we will frequently undertake preventive education measures to inform the general public about fraudulent schemes. For instance, this past year I issued a statewide public warning to consumer groups and others concerning "pyramid plans." These get-rich-quick schemes, which usually involved financial investment and some type of chain letter, enjoyed a brief resurgence of popularity in some parts of Virginia during the latter part of 1980.
Citizens also continue to look to our Office for resolution of their individual complaints. During the past year, we responded to over 2,000 telephone and mail inquiries by sending informational materials, referring citizens to other State agencies or attempting to resolve the complaint by communicating with other parties. Various consumer education presentations have also been made by members of my staff.

**ANTITRUST**

One of the most basic commitments of the Attorney General's Office is to promote a more competitive economy in Virginia through consistent and fair enforcement of the Virginia Antitrust Act and related statutes. Such enforcement, allowing the general marketplace to allocate goods and services, can help preclude more stringent economic regulation by government.

The Attorney General's role, however, in promoting competition includes more than bringing enforcement actions. In addition, as counsel to the Commonwealth's various agencies, the Attorney General advocates competitive policy in day-to-day advice to certain agencies and their regulatees. With every agency and with every case, my staff has sought to ensure that the Commonwealth's citizens recognize the benefits which flow from competition and their rights and duties under the antitrust laws.

Top priority for the Antitrust Section has been our investigation into bid rigging by State highway construction companies. Following a federal grand jury investigation and successful prosecution, my Office has entered into settlement agreements with four such companies, amounting to more than $1.2 million recovered for the Commonwealth. We are continuing to pursue these cases in order to obtain further restitution for Virginia taxpayers.

We expect this investigation to continue for several months. In preparation of our own independent cases, we have utilized Civil Investigative Demands (CIDs) as provided in the Virginia Antitrust Act. Consequently, some contractors have filed to quash these CIDs on constitutional and other grounds. This vital question is now pending before the Virginia Supreme Court. In addition, my authority to disclose CID material to Commonwealth's and other local government attorneys with whom we share antitrust jurisdiction has met opposition in actions now pending in Richmond Circuit Court.

My Office has concluded our three-year investigation into the operations of the State Division of Purchases and Supply. A $50,000 settlement early this year brought the total recoveries in DPS activity to $174,688.

Throughout this fiscal year, we have conducted a statewide seminar on bid rigging on road contracts, made speeches to business and consumer groups on antitrust violations, and circulated educational materials on Virginia antitrust enforcement.
LABOR

We have vigorously exercised the persuasive authority of the Commonwealth on behalf of Virginia's tobacco growers and orchardists who are faced with unreasonable and potentially economically disastrous regulations regarding wages paid to temporary foreign farmworkers. So-called "adverse effect wage rates" imposed by the Labor Department on Virginia growers who must utilize temporary farm labor during harvests bear no relationship to local labor market conditions. Early this year, the Carter Administration promulgated a national "adverse rate" of $4.23 an hour. Following strong protests by agricultural leaders, action by both our Offices, and help from friends in Congress, the new Reagan Administration revoked this wage rate and instituted a Virginia rate of $3.81 an hour. This is still not an economically feasible rate, and we are actively seeking a further reduction.

High labor costs continue to be a serious problem for publicly-financed road and rail construction in Northern Virginia. At the Washington Metropolitan Area Transit Authority, of which Virginia is a member, labor disputes submitted under contract to binding arbitration have resulted in costs escalating at 20% a year. In February, I appealed to the Metro Authority to discard their binding arbitration requirement and let the marketplace bring these construction costs more into line with the rest of the area's economy. I will continue to press for this, just as you and I, for nearly four years, have fought the unrealistic wages imposed under the federal Davis-Bacon Act.

TAXATION

This Office serves as counsel to the State Department of Taxation. We also respond to hundreds of general citizen inquiries as well as numerous requests from local government officials for day-to-day advice on tax-related matters. The Taxation Section also prepares numerous official Opinions concerning the administration of local tax laws and related matters.

Two cases in which this Office was involved in 1980-1981 were decided favorably in the Supreme Court of Virginia, one involving sales tax and the other involving capital tax. In both cases tax exemptions were claimed which would have substantially reduced State revenues and the Supreme Court upheld the Tax Department's denial of the exemptions.

Other substantial activities in this area included dozens of administrative hearings concerning citizen tax assessments, appeals from Compensation Board decisions, and suits seeking the reformation of charitable trusts in which the Attorney General is made a party to protect the interests of the public.

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 discharged its
responsibilities enthusiastically, effectively and honorably, thus demonstrating our loyal commitment to you, to the agencies of the Commonwealth, and to the citizens of Virginia.

Respectfully submitted,

Marshall Coleman
Attorney General
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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.
REPORT OF THE ATTORNEY GENERAL

ATTORNEYS GENERAL OF VIRGINIA

FROM 1776 TO 1979

†Abram P. Staples ....................................1934-1947
††Harvey B. Apperson .................................1947-1948
§J. Lindsay Almond, Jr. ...............................1948-1957
**Kenneth C. Patty ..................................1957-1958
A. S. Harrison, Jr. ..................................1958-1961
***Frederick T. Gray ................................1961-1962
Robert Y. Button ....................................1962-1970
Andrew P. Miller ....................................1970-1977
#Anthony F. Troy ...................................1977-1978
John Marshall Coleman ..............................1978-

†Hon. 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.
CASES DECIDED IN SUPREME COURT OF VIRGINIA

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 withdrawn.

Ashland-Warren v. Coleman. From Circuit Court, City of Richmond. Motion for preliminary injunction and declaratory judgment on disclosure of information obtained by the Attorney General by civil investigative demands to localities in Virginia. Supreme Court dissolved preliminary injunction.

Bahen v. State Water Control Board. From Circuit Court, City of Richmond, Division I. Appeal of State Water Control Board decision granting NPDES permit. Writ of error denied.


Bilokur v. Commonwealth. From Circuit Court, City of Hampton. Appeal from convictions of maiming, breaking and entering and of assaulting the arresting officer. Whether stipulation of a transcript into evidence violated defendant's statutory right to be present at trial and his constitutional right of confrontation. Affirmed.

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


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. Appeal dismissed.

Briley v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from convictions of rape, robbery, first degree murder, and use of a firearm. Whether defendant had been denied trial by impartial jury because the trial court had seated two veniremen he had challenged for cause. Affirmed.

Broadway Maintenance Corp. v. King, et al. From Circuit Court, City of Richmond, Division I. Writ of appeal denied.


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

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. Appeal denied.


Commonwealth v. Daniels Construction Company. From Circuit Court, County of Surry. Appeal of a circuit court decision upholding demurrer on OSHA citation. Appeal denied.

Commonwealth v. Mosteller. From Circuit Court, City of Richmond. Criminal action brought under § 18.2-178 for larceny by false pretenses. Conviction affirmed.


Craft v. Commonwealth. From Circuit Court, County of Pittsylvania. Criminal appeal concerning position of lawful control of defendant's clothing removed in the emergency room and bullet removed during surgery may deliver articles to police without warning. Affirmed.

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. Reversed, judgment in favor of Commonwealth.


Girardi v. Commonwealth. From Circuit Court, County of Arlington. Search and seizure. Inventory search of automobile. Whether the defendant properly preserved his claims. Affirmed.


Gutridge v. Commonwealth. From Circuit Court, County of Fairfax. Appeal of a criminal conviction for operating an overweight vehicle. Constitutionality of the permit provisions in Title 46.1 were challenged along with authority of officer to arrest the defendant. Petition for appeal denied.

Hairston v. Commonwealth. From Circuit Court, City of Martinsville. Appeal from conviction of sale of marijuana. Applicability of new statute in effect after crime committed but before trial held. Affirmed.


Hanks t/a IDunno v. Alcoholic Beverage Control Commission. From Circuit Court, City of Richmond, Division I. Appeal from court's decision affirming Commission's license suspension and restriction order. Appeal not timely perfected.

Harris v. Commonwealth. From Circuit Court, County of Fairfax. Transfer proceeding. Failure to enter a written order of the district court's judgment on transfer issue is a clerical error. Mistrial on motion of the defendant. Double jeopardy. Affirmed.

Holloman v. Commonwealth. From Circuit Court, County of Prince George. Criminal appeal concerning spring-operated gun having appearance of a 45-caliber automatic pistol is a firearm within the meaning of § 18.2-53.1. Affirmed.

Holloman v. Commonwealth. From Circuit Court, County of Southampton. Appeal from conviction of possession of marijuana with intent to distribute. Reversed and remanded.


IDunno Either v. Alcoholic Beverage Control Commission. From Circuit Court, City of Richmond, Division I. Appeal from court's decision affirming Commission's license suspension and restriction order for allowing disorderly conduct and drinking in public place. Appeal dismissed.


Keeter, et al. v. Commonwealth. From Circuit Court, City of Virginia Beach. Appeal from convictions of possessing marijuana with intent to distribute and of distributing marijuana. Whether trial court erred in failing to determine that there were no exigent circumstances to justify warrantless entry by police into the dwelling for which a search warrant was subsequently issued. Affirmed.


Lester Development Corp. v. State Highway and Transportation Commissioner. From Circuit Court, County of Tazewell. Condemnation proceeding involving admissibility of evidence. Petition for appeal denied.


Martin v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of capital murder; automatic review of sentence of death under § 18.2-31(f). Defendant challenges the constitutionality of death penalty statutes and the refusal by trial court to exclude a prospective juror for cause; and raises other constitutional and evidential issues. Reversed and remanded.

Martin v. Commonwealth. From Circuit Court, County of Sussex. Appeal from convictions of robbery and petit larceny. Whether conviction of both robbery and petit larceny constitutes double jeopardy. Affirmed.

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. Affirmed.


Parks v. Commonwealth. From Circuit Court, County of Henrico. Appeal from convictions of two charges of grand larceny by obtaining money by false pretenses. Whether petitioner had a legitimate expectation of privacy (standing) to permit him to assert illegality of search, and sufficiency of the evidence. Affirmed.
Pearson v. Commonwealth. From Circuit Court, County of Fairfax. Appeal from convictions of second degree murder and abduction. Whether trial court erred in failing to suppress certain physical evidence and extra judicial statements. Affirmed.


Shifflett v. Commonwealth. From Circuit Court, County of Rockbridge. Appeal from convictions of first degree murder, malicious wounding, use of a firearm in the commission thereof. Competency of jurors; psychiatric examination of defendant at request of Commonwealth when notice of insanity defense given. Affirmed.


Southeastern Tidewater Area Manpower Authority v. Coley. From the Industrial Commission. Appeal from determination that Authority was a statutory employer. Reversed and dismissed.

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

State Highway and Transportation Commissioner v. Cities Service, Inc. From Circuit Court, County of Fairfax. Appeal from decision in a condemnation case by the landowners. Writ of appeal denied.


State Highway and Transportation Commissioner v. Poole. From Circuit Court, County of Sussex. Award of commissioners in a condemnation proceeding. Settled.


Tatum v. State Highway and Transportation Commissioner. From Circuit Court, County of Tazewell. Condemnation case involving an instruction given to the commissioners. Petition for appeal denied.


The Southland Corporation v. Alcoholic Beverage Control Commission. From Circuit Court, City of Richmond, Division I. Appeal from court's decision affirming Commission's order granting a restricted license. Appeal withdrawn.


CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Anderson v. Warden. From Circuit Court, County of Fairfax. Effectiveness of counsel and validity of guilty plea. Appeal from denial of habeas corpus.
Bassett v. Commonwealth. From Circuit Court, County of Henrico. Death penalty case.

Beamon v. Commonwealth. From Circuit Court, County of New Kent. Confessions.

Best v. Commonwealth. From Circuit Court, City of Portsmouth. Sufficiency of the evidence to convict for the crime of grand larceny.

Black v. Commonwealth. From Circuit Court, County of Fairfax. Sufficiency of evidence in attempted statutory burglary conviction.

Blodinger v. Brokers' Title Inc. From Circuit Court, City of Charlottesville. Appeal from the dismissal of a declaratory judgment action concerning the alleged unauthorized practice of law. Amicus brief filed.

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


Brown v. Commonwealth. From Circuit Court, City of Richmond. Appeal from conviction of grand larceny of an automobile. Whether evidence of prior conviction of auto theft admissible.


Carbaugh v. Solem. From Circuit Court, County of Albemarle. Suit to enjoin the selling of raw goat's milk for human consumption. Injunction denied by Circuit Court. Petition for writ of error.

Carter v. Old Dominion University. Mandamus action to compel hearing for nontenured professor.

Commonwealth v. Board of Supervisors of Spotsylvania County. From Circuit Court, County of Spotsylvania. Appeal from decision dismissing claim brought by Commonwealth for moneys owed it by the appellee/defendants.

Commonwealth v. Clore. From Circuit Court, County of Madison. That consent to OSHA search be "informed" rather than "voluntary."

Commonwealth v. Eckhart. From Circuit Court, County of Henrico. Appeal from conviction of possession of marijuana with intent to distribute.

Commonwealth, et al. v. Morgan, et al. From Circuit Court, County of Lancaster. Appeal from decision that the Commonwealth does not own the bottom of Carter's Cove.

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.


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.

Dorantes v. Commonwealth. From Circuit Court, County of Arlington. Criminal appeal dealing with the issue of the sufficiency of the evidence.

Driscoll v. Commonwealth. From Circuit Court, County of Arlington. Appeal of a conviction for operating a motor vehicle in violation of § 46.1-387.8.

Dunn v. Commonwealth. From Circuit Court, City of Charlottesville. Appellant challenges his conviction for grand larceny arguing that the lower court erred when it refused to grant motions to strike the evidence as to the value of the good stolen.

Dunn v. Commonwealth. From Circuit Court, County of Albemarle. Appeal from conviction of arson and breaking and entering. Comment on defendant's failure to testify.
Godfrey v. Commonwealth. From Circuit Court, County of Culpeper. To reverse State Health Department decision denying a septic tank permit. Appeal granted.

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

Hagy v. Commonwealth. From Circuit Court, County of Augusta. Appeal from conviction of involuntary manslaughter. Competency of child witness; admissibility of evidence of other acts by defendant; admissibility of statement by defendant to third party.

Harris v. Woodard, et al. From Circuit Court, City of Fredericksburg. Appeal from grant of summary judgment to defendants. Petition for appeal.

Hill v. Black & White Cars, Inc. From Circuit Court, City of Norfolk. Appeal of order vacating a fuels tax assessment under § 58-757.01.

Howie v. Commonwealth. Appeal from revocation of probation alleging denial of due process.


In re: Davis. Petition for preemptory writ of prohibition.

In re: Williams. Motion for temporary restraining order.

In re: Williams. Petition for preemptory writ of mandamus.

John Driggs, Inc. & Shirley Contracting Corp. v. Commonwealth, et al. From Circuit Court, City of Richmond, Division I. Construction contract claim matter.

Johnson v. Riddle. From Circuit Court, County of Madison. Dismissal of 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.

Justus v. Commonwealth. From Circuit Court, City of Williamsburg and County of James City. Various issues in death penalty appeal.

Leisge v. Circuit Court of Arlington County. Petition for writ of prohibition.
REPORT OF THE ATTORNEY GENERAL

Leybourne v. Commonwealth. From Circuit Court, County of Prince William. Admission into the evidence of recent complaints relating to sexual misconduct.


Manley v. Commonwealth. From Circuit Court, County of Sussex. Criminal appeal regarding the sufficiency of evidence in a robbery.

Maxey v. Industrial Commission. From the Industrial Commission. Appeal from determination that claimant was not entitled to attorney's fees under the Victim of Crime Act.


Motley, et al. v. Commonwealth. From Circuit Court, County of Matthews. Appeal by a water supplier of a contempt of court finding for failure to obey an order obtained by Commonwealth compelling compliance with waterworks regulations.


Nearns v. Commonwealth. From Circuit Court, City of Richmond, Division I. Habitual offender adjudication. Waiver of counsel in underlying misdemeanor conviction. Judicial notice.


Nuckols v. Virginia Employment Commission and Blauvelt Engineering Co. From Circuit Court, County of Henrico. Unemployment insurance benefits.

Patterson v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from convictions of rape and abduction with intent to defile. Impeachment of witness by prior inconsistent statements.

Payne v. Commonwealth. From Circuit Court, City of Richmond, Division II. Appeal from conviction of obtaining merchandise by means of a worthless check. Existence of and effect of partnership between defendant and victim; cash transaction.
Pike Electrical Contractors, Inc. v. Commissioner of Labor and Industry. From Circuit Court, County of Buchanan. Appeal of decision upholding Occupational Safety and Health citation issued in response to accident electrocuting a Pike employee. Argued on the merits.

Potter v. Commonwealth. From Circuit Court, County of Warren. Criminal appeal dealing with propriety of instruction on "heat of passion" in homicide case.

Real Estate Commission v. Bias. From Circuit Court, County of Albemarle. Appeal from reversal of Commission's order suspending broker's license.

Shanklin v. Commonwealth. From Circuit Court, County of King George. Whether defendant was denied right to adequately cross-examine prosecution witness on leniency provided him in return for his cooperation and testimony.


Smith v. Commonwealth. From Circuit Court, City of Norfolk. Sufficiency of evidence.

Smith v. Commonwealth. From Circuit Court, City of Richmond. Revocation of a suspended imposition of sentence.

Squire v. Commonwealth. From Circuit Court, City of Richmond. Division I. Appeal from conviction of robbery, attempted rape and sodomy.

State Highway and Transportation Commissioner v. Benton and Davis, et al. From Circuit Court, County of Chesterfield. Appeal sought by Commissioner from an award in eminent domain.

State Highway and Transportation Commissioner v. Cantrell. From Circuit Court, County of Tazewell. Condemnation case involving evidence of the highest and best uses of the property.


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.
Stover v. Commonwealth. From Circuit Court, City of Richmond, Division I. Appeal from conviction of second degree murder and the use of firearm in the commission of a murder.

Taylor v. Commonwealth. From Circuit Court, County of Louisa. Criminal appeal regarding the propriety of a Fourth Amendment search.

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. City of Virginia Beach School Board. 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.

Virginia State Bar, ex rel., Eighth District Committee v. Bender. From Circuit Court, County of Fairfax. Appeal from disbarment order.

Wills v. Commonwealth. From Circuit Court, County of Fairfax. Criminal appeal.

Wooden v. Commonwealth. From Circuit Court, County of Chesterfield. Felony murder where the accomplice is the victim.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES


Turner v. Muncy. Inmate plaintiff appealed dismissal of claim attacking prison regulation prohibiting display of obscene or nude pictures on prison walls and lockers. Certiorari denied.


Virginia Surface Mining & Reclamation Assn., et al. v. Andrus, Civil Action No. 78-0224-B (W.D. Va.), the 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 were filed in the United States Supreme Court (Nos. 79-1538, 1596) and the case argued on February 23, 1981. On June 15, 1980, the Court reversed the District Court in affirming the constitutionality of the federal law.

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. Certiorari denied.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Young v. Kenley. Petition for certiorari filed in response to Fourth Circuit Court of Appeals decision holding State Health Department officers liable for attorney's fees after settling a suit brought by a public health nurse who filed suit to obtain a promotion for which she had never applied.

CASES DECIDED OR PENDING IN THE CIRCUIT COURTS OF THE STATE

Allied Ambulance, Inc. v. Wiecking, et al. Circuit Court, City of Richmond. Suit against Chief Medical Examiner and State Health Commissioner by private ambulance company over contract dispute arising from transportation and storage of dead bodies found on Richmond city streets. Pending.
Alvey v. Dickerson. Circuit Court, County of Prince William. Petition for declaratory judgment seeking to compel the Department of Rehabilitative Services to finance educational expenses for the plaintiff. Pending.

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.

Ardore, Ltd. v. Virginia Athletic Commission. Circuit Court, City of Richmond, Division II. Suit to enjoin Commission from enforcing cease and desist order against pending Toughman competition. Injunction granted.

Ashland-Warren v. Coleman. Circuit Court, City of Richmond. Motion for preliminary injunction and declaratory judgment on disclosure of information obtained by the Attorney General by civil investigative demands to localities in Virginia. Enjoined same for 90 days. Declaratory judgment also denied Coleman discretion to disclose to localities.

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.

Baisden v. Baisden. Circuit Court, County of Tazewell. Commonwealth intervened in divorce case to recover child support as a result of AFDC paid. Court ordered payment.


Baldwin v. Mason. Circuit Court, County of Nottoway. Petition for writ of prohibition against a Judge of the Juvenile and Domestic Relations District Court for Nottoway County. Dismissed.


Board of Funeral Directors and Embalmers v. Smith, et al. Circuit Court, City of Fredericksburg. Smith had been charged with committing fraud in the practice of the funeral service profession. The Board challenged the decision of the hearing officer in an administrative hearing held pursuant to § 9-6.14:12 quashing the Board's subpoena duces tecum.

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. Out-of-court settlement reached between plaintiff and defendant. Claims against third-party defendants pending in new lawsuit instituted by VCU against Basic and Cleveland.


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

Buschi v. Department of Mental Health and Retardation. Circuit Court, County of Augusta. Petition to determine grievability. Decision of the Commissioner upheld.


Carswell v. Murray. Circuit Court, County of Fairfax. Suit against State Health Department sanitarians alleging negligence in the siting and location of a septic tank and well. Demurrer on grounds of sovereign immunity sustained.


Century 21 Real Estate Corporation of Virginia v. Real Estate Commission. Circuit Court, City of Richmond. Seeking to enjoin enforcement of regulation pertaining to real estate franchises. Pending.

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. Case dismissed on defendants' plea of statute of limitations.


Clatterbuck v. Hutto. Circuit Court, County of Fairfax. Whether juvenile authorities can be held liable when it is alleged that they negligently released a dangerous individual and he committed a subsequent crime. 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.


Commonwealth v. A & L Construction Corporation. Circuit Court, City of Richmond. Seeking injunction while fair housing investigation is pending. Temporary injunction granted.

Commonwealth v. Bell. Circuit Court, City of Richmond, Division I. Petition for injunction to prohibit Mrs. Bell from operating an unlicensed home for adults. Consent order entered granting an injunction to prohibit Mrs. Bell from operating an unlicensed home for adults.

Commonwealth v. Big Lick Farms, Inc. Circuit Court, County of Bath. Suit by State Board of Health to enforce on-site sewage disposal regulations. Pending.


Commonwealth v. Coffman. Circuit Court, County of Albemarle. Suit to enjoin unlicensed activity. Defendant ordered to comply with license requirements for professional counselors, or to bring himself within the statutory exemptions to those requirements provided by law. Decided.

Commonwealth v. DANO. Circuit Court, County of King George. Require compliance with regulations of State Board of Health, State Water Control Board, and State Air Pollution Control Board. Decree enjoining defendants from constructing waste disposal facility in effect.

Commonwealth v. Dishner. Circuit Court, County of Scott. Suit by State Board of Health to enforce public water supply and camp ground regulations against unlicensed camp ground. Pending.


Commonwealth v. Jones. Circuit Court, City of Richmond, Division II. Petition to enjoin illegal operation of home for adults. Injunction granted with right to inspect premises.

Commonwealth v. Litton. Circuit Court, City of Richmond. Litton Company representative rigged bids of public officials in order to secure monopoly of printing game licenses. Settled.

Commonwealth v. Lucas. Circuit Court, County of Chesterfield. Appeal by James Eddie Lucas for a Juvenile and Domestic Relations District Court Order to pay $35 per week child support. Affirmed.

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


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 State Health Department sewage, trailer park, waterworks, and restaurant regulations. Settlement has been negotiated. Final order not yet entered.

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. Motion granted to lift stay entered during pendency of criminal case. Pending.

Commonwealth v. Petteway. Circuit Court, County of Henrico. Suit to determine whether defendant is operating a home for adults without a license in violation of injunction against same. Pending.

Commonwealth v. Prestige Management, Inc. Circuit Court, County of Prince William. Suit by State Board of Health to abate public nuisance and to secure conformance with sewage disposal regulations. Pending.


Commonwealth v. Sharpe. Circuit Court, County of Carroll. Suit by State Board of Health to enforce on-site sewage disposal regulations. Pending.

Commonwealth v. Shelton. Circuit Court, County of Northampton. Suit by State Board of Health to abate public nuisance and secure installation of sewage disposal facilities at rental property which had no sewage disposal facilities of any kind at all. Consent decree entered requiring construction of sewage disposal facilities. Case ended.


Commonwealth v. Yankee Point Marina, Inc. Suit by State Board of Health to abate common law public nuisance. Settled with consent decree requiring installation of sewage pumpout facilities for the removal of sewage from boats and with an agreement from defendant marina that it will allow no boats to use marina which have flow through marine sanitation devices discharging sewage.


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. Injunction entered. Pending.

Commonwealth, ex rel., State Water Control Board v. Clinchfield Coal Company. Circuit Court, County of Russell. Suit for injunctive relief and civil penalties for violation of NPDES permit and State Water Control Law. Final decree entered containing injunctive relief and payment of $30,000 to the State Treasury.
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. County School Board of Patrick County. Circuit Court, County of Patrick. Suit for injunctive relief for NPDES permit violations. 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. Compliance achieved; dismissal 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. Compliance achieved; dismissal 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. Compliance with special order achieved. Dismissed.


Commonwealth, ex rel., State Water Control Board v. Messick Branch Coal Company. Circuit Court, County of Russell. Suit for injunction and civil penalties for violation of NPDES permit. Compliance achieved; dismissal 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. Piedmont Fertilizer Corp. Circuit Court, City of Fredericksburg. Suit for injunction and civil penalty for no-discharge certificate violations and for fish kill recovery. Settled.

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, In Re An Inspection Warrant for the Farm of Charles Anderson. Circuit Court, County of Washington. Commonwealth sought a civil inspection warrant to determine the source of pollution of two springs. Civil warrant issued after hearing.


Commonwealth, Department of Welfare v. Baker. Circuit Court, County of Dickenson. Appeal from Juvenile and Domestic Relations Court judgment of paternity and later conviction of nonsupport. Upon evidence presented ore tenus, Circuit Court ruled that Defendant was the father of the child based on voluntary acknowledgement and upheld the conviction.


Commonwealth, Department of Welfare v. Burgin. Circuit Court, County of Lee. Petition to set child support and determine arrearage on the basis of public assistance paid. Arrearage judgment entered in the amount of $767.


Commonwealth, Division of Support Enforcement on Behalf of Vencille v. Dye. Circuit Court, County of Tazewell. Petition to determine paternity. Matter is pending on a motion to strike Commonwealth's evidence.


Department of Welfare v. Weaver. Circuit Court, City of Virginia Beach. Petition to enjoin operation of unlicensed home for adults. Pending.


Dnistransky v. Sparrow and Commonwealth. Circuit Court, City of Chesapeake. Motion for judgment seeking $100,000 damages for injuries sustained in automobile accident. Complaint dismissed as to Commonwealth.

Eaton's Inc. of Va., t/a C.C. Wheeler's Restaurant and Saloon v. Alcoholic Beverage Control Commission. Circuit Court, City of Virginia Beach. Declaratory judgment action seeking injunctive relief against Commission's service of notice of hearing. Pending.


Fentress v. Marine Resources Commission, et al. Circuit Court, City of Virginia Beach. Appeal from a decision of the Marine Resources Commission sustaining a decision of the Wetlands Board of the City of Virginia Beach. Pending.


Gaines v. Old Dominion University. Circuit Court, City of Norfolk. Defamation action. Dismissed.


Goodall v. Spicuzza, et al. Circuit Court, City of Richmond, Division I. Action instituted on behalf of infant plaintiff and former patient at MCV Hospital. Negligence alleged in the treatment of patient by the administration of medication (streptomycin) which allegedly caused hearing loss. Defendants' motion to dismiss on plea of sovereign immunity granted by the Circuit Court. Plaintiff's petition for appeal to the Virginia Supreme Court pending.
Goodall, et al. v. Virginia National Bank, et al. Circuit Court, County of Highland. Suit to set aside probate of the will of McChesney Goodall, Jr., which establishes a public trust of certain property in Highland County, Virginia. Pending.


Grey v. Department of Mental Health and Mental Retardation. Circuit Court, County of Augusta. Petition to determine grievability. Commissioner's finding overruled.


Groves v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Action for breach of lease on ABC Store #207, Norfolk, seeking $1,741.95 plus costs and attorney's fees. Pending.

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

Hammonds v. Hammonds. Circuit Court, County of Scott. Hearing to determine subrogation interest of Commonwealth, Division of Support Enforcement. Court raised child support to $115 per month for minor child.

Hanks t/a Idunno v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Petition for review of Commission's license suspension and restriction order. Affirmed.

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


Harris v. Kenley. Circuit Court, City of Richmond, Division I. Petition for injunction ordering restoration of license to operate an ambulance service. Petition dismissed.
Harrison v. Juvenile Domestic Relations Court of Fairfax County. Circuit Court, County of Fairfax. Petition for writ of prohibition based on alleged lack of authority for Juvenile and Domestic Relations Court to issue an injunction. Pending.


Higgs v. Real Estate Commission. Circuit Court, County of Henrico. Appeal from administrative decision regarding licensee. Dismissed for lack of standing.


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


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. Remanded to Water Control Board.

Huggins v. Hutto. Circuit Court, County of Fairfax. Motion for a preliminary injunction alleging that the Fairfax County Jail is overcrowded. Motion granted.

In re A & E Pizza, Inc. t/a Andy's Pizza House 2. Circuit Court, City of Norfolk. Petition for review of Alcoholic Beverage Control Commission's license suspension order for selling beer to a minor. Pending.

In re Adoption of Bishop. Circuit Court, City of Roanoke. Petition seeking disclosure of adoption records. Petition granted.
In re Agee. Circuit Court, County of Roanoke. Petition seeking disclosure of adoption records. Petition granted in part, denied in part.


In re Birdzell. Circuit Court, County of Rockingham. Adoption. Commissioner's denial. Adoption granted.

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

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

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

In re Brown. Circuit Court, City of Chesapeake. Grievance. Pending.

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

In re Burks. Circuit Court, County of Amherst. Appeal of employee termination for alleged patient abuse at Lynchburg Training School and Hospital. Employee reinstated.

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

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

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

In re Coffman. Circuit Court, County of James City. Appeal from agency determination of nongrievability of employee grievance. Agency determination upheld.

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

In re Coles. 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 nongrievability by agency head upheld.


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

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

In re DeSelvia. Circuit Court, County of Nottoway. Petition for appointment of guardian. Granted.

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

In re Disco Depot, Inc. Circuit Court, City of Roanoke. Petition for review of Alcoholic Beverage Control Commission's license suspension order. Pending.

In re Elliott. Circuit Court, County of Augusta. Appeal of employer termination from alleged patient abuse at Lynchburg Training School and Hospital. Employee reinstated.

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


In re Godsey t/a Eight Street Confectionary. Circuit Court, City of Roanoke. Petition for review of Alcoholic Beverage Control Commission's decision to grant a license restricted against the sale of chilled alcoholic beverages. Affirmed.

In re Graham t/a Harvest House. Circuit Court, City of Roanoke. Petition for review of Commission's mixed beverage license revocation order for failure to meet food-to-alcohol ratio. Affirmed.

In re Grey. Circuit Court, County of Augusta. Appeal from agency determination of nongrievability to employee grievance. Panel hearing granted.

In re Hardley. Circuit Court, County of Augusta. Appeal from agency determination of nongrievability in employee grievance. Agency determination upheld.

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

In re Hester. Circuit Court, County of Chesapeake. Grievance. Dismissed.
In re Holmes. Circuit Court, County of Dinwiddie. Petition for appointment of guardian. Granted.

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

In re Interest Schisler. Circuit Court, County of Wythe. Petition for order directing that the birth record be amended. The court entered an order that the birth record be reissued to remove the name of Russell William Schisler and replace it with Charles T. Chrisley as father of the child.


In re Jo-Gi Enterprises, Inc. t/a Klink's Handi-Dandi Mart. Circuit Court, City of Roanoke. Petition for appeal from Alcoholic Beverage Control Commission's order granting a license. Local objectors appealed decision. Appeal withdrawn.

In re Johnson. Circuit Court, City of Charlottesville. Petition to open adoption records. Pending.

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

In re King. Circuit Court, County of Amherst. Appeal of employee termination for alleged patient abuse at Lynchburg Training School and Hospital. Employee reinstated.

In re Kirby. Circuit Court, City of Staunton. Petition to open adoption records. Petition granted.

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

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

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

In re McIntosh. Circuit Court, County of Nottoway. Petition for appointment of guardian. Granted.

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

In re Neighborhood Bars, Inc. t/a Copa Cabana. Circuit Court, City of Richmond, Division I. Petition for review of Alcoholic Beverage Control Commission's license suspension order for allowing consumption of beer by minors. Affirmed.
In re Nichols. Circuit Court, City of Wytheville. Appeal of employee termination for alleged patient abuse at Southeastern Virginia Training Center. Pending.

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

In re O'Toole. Circuit Court, County of Amherst. Petition for appointment of guardian. Granted.

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

In re Pettie. Circuit Court, County of Nottoway. Petition for appointment of guardian. Granted.

In re Quick Serve, Inc. Circuit Court, City of Norfolk. Petition for review of Alcoholic Beverage Control Commission's license suspension order for selling beer to a minor. Reversed and remanded.

In re Request of Blank. Circuit Court, City of Williamsburg and County of James City. Petition for substitution of trustee. Pending.

In re Reynolds. Circuit Court, County of Northampton. Petition to release information in adoption records of Department of Welfare. Dismissed agreed.

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

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


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 and withdrawn. Settlement pending.


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

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

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


In re Waddle. Circuit Court, County of James City. Appeal from agency determination of nongrievability of employee grievance. Agency determination upheld.

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


In re Wilson. Circuit Court, City of Roanoke. Petition seeking disclosure of adoption records. Petition granted.


In re Wood. Circuit Court, County of Amherst. 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. Order to release information to court.


In the Matter of Carroll. Circuit Court, County of Floyd. Closed.


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 initially authorized by court to operate without State Health Department permit. After water showed continuing contamination, court agreed to hear reargument of case in July 1981.

Ingram v. George Mason University. Circuit Court, County of Fairfax. Personal injury case. Dismissed with prejudice.

Jackson v. Hutto, et al. Circuit Court, City of Chesapeake. Suit by an inmate of the Tidewater Correctional Unit #22 alleging injuries as a result of a defective mower. 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. Water supply upgraded by receiver and returned to original owner. Final order entered dismissing case.

Kenley v. Douglas and Dickinson, Inc. Circuit Court, County of King George. Public water supply ordered to undertake hydraulic engineering study by December 31, 1981, as preclude to increase in storage facilities. Pending.


Kite 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.

Leftwich v. Leftwich. Circuit Court, County of Tazewell. Commonwealth intervened in divorce case to get show cause order and have child support directed to Juvenile and Domestic Relations Court.


Logan v. Virginia Board of Dentistry. Circuit Court, City of Richmond. Appeal from Board of Dentistry revocation of dentist's license to practice. Venue transferred.


Lukhard v. Randolph. Circuit Court, City of Roanoke. Suit to enjoin unlicensed operation of home for adults. Operation without license enjoined.


Lynchburg Redevelopment and Housing Authority v. Board of Trustees, Virginia Supplemental Retirement System. Circuit Court, City of Lynchburg. Plaintiff sought to end its participation in social security. Stipulated settlement. Dismissed.

Mace v. Daymude. Circuit Court, County of Fairfax. False arrest and imprisonment suit against Clerk of Court. Pending.


McEachin v. National Corp. Circuit Court, City of Richmond. Suit to have bond requirements of § 8.01-129 declared unconstitutional. Pending.


Mercury 207 Corp. t/a Ivory Horse Lounge & Restaurant v. Alcoholic Beverage Control Commission. Circuit Court, City of Norfolk. Petition for review of Commission's license suspension and restriction order. Pending.

Meredith v. State Board of Community Colleges. Circuit Court, City of Norfolk. Motion for judgment seeking damages under building contract. Settled.

Meredith Construction Company v. Norfolk State University. Circuit Court, City of Norfolk. Meredith sought to enjoin award of a construction contract by Norfolk State. Judgment in favor of Norfolk State.


Miller v. Wood, et al. Circuit Court, County of Rappahannock. Action by executor of decedent's estate against named and potential beneficiaries under decedent's will to determine proper distribution of assets of the estate. Pending.

Morris v. State Water Control Board. Circuit Court, County of Matthews. Appeal of denial of § 401 certification by the State Water Control Board. Denial affirmed.


Nicky’s, Inc. v. Alcoholic Beverage Control Commission. Circuit Court, County of Fairfax. Petition for review of Commission’s mixed beverage revocation order for failure to meet food-to-alcohol ratio and to keep complete and accurate records. Reversed in part and remanded.


Norfolk Shipbuilding v. Industrial Commission. Circuit Court, City of Norfolk. Suit contesting the maintenance tax formula established in § 65.1-135. Pending.


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.

Owens t/a Royal Village Grocery v. Commonwealth. Circuit Court, County of Fairfax. Petition to refuse to grant a hearing on application for license. Appeal withdrawn.

Palmerston v. Old Dominion University. Circuit Court, City of Norfolk. Motion for judgment seeking in-state tuition rates. Pending.


Phillippi v. Department of Alcoholic Beverage Control. Circuit Court, County of Russell. Appeal by Local objector of decision to grant a license. Pending.


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.

Prine v. Department of Corrections. Circuit Court, County of Augusta. A former employee claiming unlawful discharge. Pending.


Richmond Redevelopment and Housing Authority v. Franklin Federal Savings & Loan Assoc. Circuit Court, City of Richmond, Division II. Petition for intervention filed by Alcoholic Beverage Control Commission to have court determine value of leasehold interest in ABC Store #190, Richmond, which was condemned by RRHA. Settled.

Rideout v. State Board of Funeral Directors and Embalmers. Circuit Court, County of Isle of Wight. Appeal of an action by the State Board of Funeral Directors and Embalmers suspending petitioner's license as a funeral director. The petitioner had been found guilty of committing fraud in the conduct of the funeral service profession after a hearing held in accordance with § 9-6:14:12. Pending.


Rosso & Mastracco, Inc. t/a Tinee Giant #30 v. Alcoholic Beverage Control Commission. Circuit Court, City of Norfolk. Petition for review of Commission's refusal to grant a wine and beer off premises license. 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. Dismissed by stipulation of the parties.


S. Galeski Optical Company v. State Board of Optometry. Circuit Court, City of Richmond. Petition for declaratory judgment relating to State statute prohibiting commercial and mercantile practice by optometrists. Pending.

S. P. Hite Company, Inc. v. Virginia Board of Pharmacy. Circuit Court, City of Roanoke. Appeal of Board order revoking a drug manufacturer's license. Pending.


Skeens v. Commonwealth, Bureau of Support Enforcement on Behalf of Hammond. Circuit Court, County of Scott. Appeal of paternity determination from Juvenile and Domestic Relations Court. Motion to dismiss by Commonwealth based on res judicata was granted.

Skeens v. Division of Support Enforcement, Commonwealth. Circuit Court, County of Scott. Petition alleging fraud on part of Division of Support Enforcement in procuring paternity acknowledgement. Division filed a cross-bill for a judgment in the amount of the pro rata share of the grant or in the alternative judgment for court ordered child support. Pending.

Smith v. Dixon. Circuit Court, City of Richmond. Action by an inmate at the State Penitentiary against an employee of the Department of Corrections for alleged negligence causing personal injury to the plaintiff. Pending.

Smith Mountain Lake Association, Inc. v. Commission of Game and Inland Fisheries. Circuit Court, County of Bedford. Complaint for injunctive relief against issuance of permit for fishing tournament on Smith Mountain Lake. Injunction denied.

Stanley and Loest v. Commonwealth, et al. Circuit Court, City of Richmond, Division I. Appeal from revocation of licenses to practice as professional engineers in Virginia. Pending.

State Air Pollution Control Board v. Lake Arrowhead Civic Association, Inc. Circuit Court, County of Stafford. Action for injunctive relief to enforce fugitive dust regulations on seven miles of dusty residential roads. Injunction denied and case dismissed.


Taliaferro v. Hutto. Circuit Court, City of Richmond. Allegation that plaintiff was inadequately protected while incarcerated at the State Penitentiary. Dismissed.


Taylor v. Douglas, et al. Circuit Court, City of Richmond. Petition for writ of mandamus to require judge to transfer a case from the Juvenile and Domestic Relations District Court to the Circuit Court. Pending.


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

The Fishworth Corporation v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Petition for review of Commission's order suspending licenses for allowing unauthorized consumption of beer. Reversed in part and remanded.

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 alcoholic beverages. Affirmed.

The Southland Corporation v. Alcoholic Beverage Control Commission. Circuit Court, City of Richmond, Division I. Petition for review of Commission's decision to grant a restricted wine and beer off-premises license. Pending.


Virginia Commonwealth University v. Basic Construction Company. Circuit Court, City of Richmond, Division II. Construction case involving early stages of hospital construction at MCV. Pending.

Virginia Commonwealth University v. Basic Construction Company and Cleveland Wrecking Company, et al. Circuit Court, City of Richmond, Division II. Derivative action by VCU against demolition and foundation contractors on new MCV Hospital construction project to recover costs incurred by VCU as a result of delays caused by said contractors. Pending.

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


Wall v. Department of Mental Health and Mental Retardation. Circuit Court, County of Augusta. Petition to determine grievability. Petition withdrawn by grievant.

Wasena Protective Assoc., et al. v. Alcoholic Beverage Control Commission. Circuit Court, City of Roanoke. Petition for review of Commission's decision to grant license filed by local objectors. Pending.

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


Wilkinson v. State Board of Medicine. Circuit Court, City of Hampton, Part II. Petitioner appeals the decision of the Virginia State Board of Medicine to revoke his license to practice medicine in the Commonwealth. The physician had been found guilty of prescribing scheduled drugs when he was not entitled to do so after a hearing held pursuant to § 9-6.14:12. Pending.


Winston v. Commonwealth. Circuit Court, City of Richmond, Division I. Motion to quash final orders of adoption. Motion dismissed.

Wolfe v. Holston Valley Hospital, et al. Circuit Court, County of Lee. Petition by Trustee to allow distribution of personal injury settlement on a priority lien basis. Virginia Medical Assistance Program claimed a priority statutory lien and Woodrow Wilson Rehabilitation Center claimed a priority based on a statutory lien and common law. Court ruled VMAC had priority lien for payment in full for medicaid payments made. Woodrow Wilson Rehabilitation Center had a statutory lien in the amount of $500.

Yankee Point Sailboat Marina v. Marine Resources Commission. Circuit Court, City of Richmond, Division I. Appeal of decision denying an application to expand marina facilities. Pending.

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

APAC-VA, Inc., a Delaware Corporation v. King, Commissioner, and State Highway and Transportation Commission. Circuit Court, City of Richmond, Division II. Temporary injunction denied to reinstate debarred contractor to prequalified bidding list. Declaratory judgment also sought. Later nonsuited.


Armco, Inc. v. Commonwealth. Circuit Court, City of Richmond, Division II. Injunction sought by contractor arising out of a construction project in Fairfax. Pending.

Ashland-Warren, Inc., a Delaware Corporation v. King, Commissioner, and State Highway and Transportation Commission. Circuit Court, City of Richmond, Division II. Temporary injunction denied to reinstate debarred contractor to prequalified bidding list. Declaratory judgment also sought. Later nonsuited.


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


Blankenship, et al. v. Commonwealth. Circuit Court, County of Roanoke. An action for $10,000 for damages to property due to excess water and an injunction to maintain a drainage system. Pending.

Bloomer v. King. Circuit Court, County of Wise. Motion for judgment for breach of implied contract. Motion to dismiss granted. Refiled as motion for declaratory judgment alleging a taking of property. Pending.

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.


Braithwaite v. Commonwealth, et al. Circuit Court, City of Virginia Beach. Suit to establish boundary lines on land resulting from accretion. Pending.


Central Contracting Co., Inc. v. Commonwealth. Circuit Court, City of Richmond, Division I. Construction contract claim. Pending.


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


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.

Consolidated Rail Corporation v. Commonwealth. Circuit Court, City of Norfolk. A motion for judgment for $921,000 for providing rail service to the Accomack-Northampton Transportation District Commission pursuant to a grant agreement obtained by the Commonwealth. Pending.


County of Franklin v. Taylor, et al. Circuit Court, County of Franklin. A petition for declaratory judgment to determine whether the Department of Highways and Transportation and other parties are entitled to the proceeds of a bond posted to cover the cost of a music festival. Pending.


Droves, et ux v. City of Suffolk and Department of Highways and Transportation. Circuit Court, City of Suffolk. Action in tort for surface water damage to private property. Pending.


Flint v. Elkton Limestone and Paving, Inc., et al. Circuit Court, County of Page. Suit to recover damages for death of Elkton Limestone and Paving, Inc. employee killed while hauling gravel. Motion to dismiss filed. Pending.


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


Hall v. Commonwealth. Circuit Court, County of Henry. An action for $200,000 for personal injuries allegedly caused by the failure to properly maintain a drainage ditch. Nonsuited.


Harris Structural Steel Co., Inc. v. Commissioner. Circuit Court, City of Richmond, Division I. Construction contract claim. Pending.


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


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.


Hurley v. State Highway Commissioner. Circuit Court, County of Buchanan. An action to enjoin the Department from trespassing on the plaintiff's property due to the location of a secondary road. Pending.

In re: Grievance of Barton. Circuit Court, County of Shenandoah. Determination of grievability. Decided that issue was not grievable.

In re: Grievance of Blair. Circuit Court, County of Wise. Petition to determine grievability. An employee of the Department requested the court to find that his grievance is grievable. Pending.
In re: Grievance of Helsley. Circuit Court, County of Shenandoah. Determination of grievability. Decided that issue was not grievable.

In re: McClanahan, et al. Circuit Court, County of Buchanan. Petition of appeal from a decision of the board of supervisors not to abandon a secondary road. Pending.

In re Stevens. Circuit Court, City of Salem. Petition to determine grievability. An employee of the Department of Highways and Transportation requested the court to find that his grievance is grievable. Pending.

In the Matter of the Grievance of Banks. Circuit Court, City of Williamsburg and County of James City. Complaint held to be not grievable.

In the Matter of the Grievance of Jones. Circuit Court, City of Williamsburg and County of James City. Complaint held not 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 and Harwood, State Highway Commissioner.  Circuit Court, County of Surry.  For compensation for land taken and damages in widening of Route 654.  Pending.

King v. Dominion Signs, Inc.  Circuit Court, County of Roanoke.  Department of Highways and Transportation seeks to recover damages to flora on right of way plus punitive damages.  Pending.


Lawhorn v. Commissioner.  Circuit Court, City of Richmond, Division I.  Breach of contract.  Pending.


McClanahan, et al. v. Belibe Coal Corporation, et al.  Circuit Court, County of Buchanan.  An action to enjoin defendants from using a secondary highway which they claim is a private roadway and to void the acceptance of the roadway into the State's secondary system.  Pending.


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. Dismissed.

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.


Ryder v. Virginia State Police. Circuit Court, County of Henrico. Issue is whether failure of Department of State Police to pay sworn personnel overtime for holidays and days off worked is grievable under § 2.1-114.5. Pending.


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


Shirley Contracting Corp. v. Commonwealth, Department of Highways and Transportation. Circuit Court, City of Richmond. Contractor requests additional time. 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.


Stickley v. Board of Supervisors of the County of Augusta, et al. Circuit Court, County of Augusta. Suit for damages and injunctive relief for curb and gutter constructed across abandoned alley. Motion to dismiss filed. Pending.


The Lane Construction Co. v. Commonwealth. Circuit Court, City of Richmond, Division I. Construction contract claim. 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


Baxter v. Commissioner. Circuit Court, City of Virginia Beach. Petition for restoration of driving privileges under §§ 46.1-421(c) and 46.1-387.9:2. Petition granted.


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.
REPORT OF THE ATTORNEY GENERAL


Cline v. Hill. General District Court, County of Wythe. Petition for restoration of driving privileges under § 18.2-271.1(b1). Petition denied.


Commonwealth v. Bridges. Circuit Court, County of Rockingham. Motion to vacate habitual offender adjudication for lack of jurisdiction. Motion granted.


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). Affirmed.


Cumberland Bank & Trust Company v. Division of Motor Vehicles. Circuit Court, County of Buchanan. Suit to compel issuance of a certificate of title. Dismissed.


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.


Fulton Trucks, Incorporated v. Hill and American Motor Sales Corporation. Circuit Court, City of Roanoke. Appeal of Division of Motor Vehicles' decision re additional jeep dealership in Roanoke pursuant to § 46.1-547. Pending.


Green v. Commonwealth and Hill. Circuit Court, City of Norfolk. Suit to enjoin State from revoking a driver's license under § 46.1-417. Dismissed.

Hall v. Williams. Circuit Court, City of Richmond. Suit for declaratory judgment on the constitutionality of §§ 46.1-421(b) and 46.1-421(c). Motion denied.


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.

Humes v. Commonwealth and Division of Motor Vehicles. Circuit Court, County of Fairfax. Suit to enjoin enforcement of a judgment under § 46.1-342. Dismissed agreed.

Hyman, Trustee in Bankruptcy for Sailboats, Inc. and Harding v. Williams. General District Court, City of Richmond. Petition to compel issuance of a certificate of title. Petition granted.

Hyman, Trustee in Bankruptcy for Sailboats, Inc. and Shaheen v. Williams. General District Court, City of Richmond. Petition to compel issuance of a certificate of title. Petition granted.

Hyman, Trustee in Bankruptcy for Sailboats, Inc. and Todd v. Williams. General District Court, City of Richmond. Petition to compel issuance of a certificate of title. Petition granted.

In re Ball. Circuit Court, County of Washington. Petition for restoration of driving privileges under § 46.1-421(c). Pending.

In re Boyer. Circuit Court, County of Fairfax. Appeal of a driver's license revocation under § 46.1-421(b). Pending.


In re Dickerson. Circuit Court, County of Middlesex. Petition for restoration of driving privileges under § 46.1-387.9:2. Pending.

In re Division of Motor Vehicles v. Agee. Circuit Court, County of Roanoke. Appeal of a driver's license suspension under § 46.1-167.4. Pending.


In re Elliott. Circuit Court, City of Norfolk. Petition for reinstatement of driving privileges revoked under § 46.1-421(a). Dismissed.
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. Affirmed.

In re Howlett. Circuit Court, County of Mathews. Appeal of a driver's license suspension under § 46.1-514.11. Pending.

In re Pope. Circuit Court, County of Mecklenburg. Appeal of a driver's license suspension under § 46.1-514.11. Pending.

In re Senker. Circuit Court, County of Fairfax. Petition for restoration of driving privileges under § 46.1-421(c). Pending.

In re Thomas. Circuit Court, County of Mathews. Petition for restoration of driving privileges under § 46.1-387.9:2. Pending.


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). Reversed and remanded.


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


MacHamer v. Williams. Circuit Court, County of Frederick. Appeal of a driver's license suspension under § 46.1-514.11. Modified.


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.


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.


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

Richardson v. Division of Motor Vehicles. Circuit Court, County of Frederick. Appeal of a driver's license suspension under § 46.1-514.11. Modified.


Stockes v. Hill and Bradbery. Circuit Court, City of Petersburg. Action to have § 46.1-421(b) declared unconstitutional. Pending.

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


Tidewater Imports, Inc. v. Hill. Circuit Court, City of Norfolk. Petition for a writ of mandamus to compel a change-of-address endorsement on a motor vehicle dealer's license. Petition denied.


Webster v. Commonwealth and Division of Motor Vehicles. Circuit Court, County of Prince William. Petition for restoration of driving privileges under § 46.1-421(c). Pending.


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. Dismissed as party defendant.


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. 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. Commonwealth dismissed as party.

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


Cummings & Dicks v. Capital Masonry Corp. et al. Circuit Court, City of Petersburg. Suit to determine priority of liens, withholding taxes unpaid. Pending.


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


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.


E-Systems, Inc. v. Department of Taxation. Circuit Court, City of Richmond, Division I. Application for correction of erroneous assessment of corporate income taxes. Pending.


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 v. City of Richmond. Circuit Court, City of Richmond, Division I. Suit to construe terms of charitable trust. 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.

FMC Corp. v. Department of Taxation. Circuit Court, City of Richmond, Division I. Application for correction of erroneous assessment of corporate income taxes. Pending.

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


First & Merchants National Bank v. 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.

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

First Commonwealth Life Insurance Company 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.


Flournoy, Bruce Motor Corp. v. Department of Taxation. Circuit Court, City of Norfolk. Motion for judgment seeking refund of sales and use taxes. Pending.

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


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


Hall v. Trustees of Protestant Episcopal Church. Circuit Court, City of Richmond, Division I. Suit to construe a will. 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.


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.

Island Creek Coal Company v. Department of Taxation. Circuit Court, City of Richmond, Division I. Application for correction of erroneous assessment of corporate income taxes. 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.

Minches v. Watts. Circuit Court, City of Richmond, Division I. Petition claiming subrogation rights to the assets of an insolvent insurer in the hands of the Treasurer. 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.


Princess Anne Inn, Inc. v. Commonwealth. Circuit Court, City of Virginia Beach. Suit to determine status with respect to exemption from sales tax set out in § 58-441.6. Pending.


Ryan Homes, Inc. v. Commonwealth. Circuit Court, City of Richmond, Division I. Application for correction of erroneous assessment of sales and use taxes. Pending.


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


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.


Steingold v. Commonwealth. Circuit Court, City of Richmond, Division I. Petition for declaratory judgment and relief from sales and use tax. Judgment for Commonwealth.


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. Closed.


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


Zaleski v. Comptroller. Circuit Court, City of Norfolk. Motion for judgment, award of attorney's fees. Comptroller dismissed as party.
CASES TRIED OR PENDING IN THE CIRCUIT COURTS
OF THE STATE IN WHICH THE VIRGINIA EMPLOYMENT
COMMISSION WAS INVOLVED

Abe Koplen Clothing Company v. Wells and Virginia Employment
Commission. Circuit Court, City of Danville. Pending.

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

Circuit Court, City of Radford. Affirmed.

All State Messenger and Delivery Service, Inc. v. Virginia
Employment Commission and Johnson. Circuit Court, County of
Arlington. Pending.

Allen v. Virginia Employment Commission and Norfolk Division
of Social Services. Circuit Court, City of Norfolk. Pending.

Allen, et al. v. Georgia-Pacific and Virginia Employment
Commission. Circuit Court, County of Greensville. Dismissed.

American Furniture Company v. Boone and Virginia Employment
Commission. Circuit Court, County of Smyth. Dismissed.

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

Arlington Yellow Cab Company v. Virginia Employment
Commission and Blocker. Circuit Court, County of Arlington.
Pending.

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

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

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

Auto Emergency Service v. Virginia Employment Commission and
Kauffman. Circuit Court, City of Norfolk. Pending.

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

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


Boyd v. Virginia Employment Commission and E. I. DuPont DeNemours and Co., Inc. Circuit Court, City of Richmond, Division I. Pending.

Braxton v. Virginia Employment Commission and Chippenham Hospital. Circuit Court, City of Richmond, Division I. Pending.

Buissett v. Virginia Employment Commission and McDevitt and Street. Circuit Court, City of Richmond, Division I. Dismissed.


Centric Services, Inc. v. Virginia Employment Commission and Mitchell. Circuit Court, City of Richmond, Division I. Dismissed.


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


Cole v. Virginia Employment Commission and S & K Famous Brands, Inc. Circuit Court, City of Richmond, Division I. Pending.

Coleman v. Virginia Employment Commission and Lynchburg Foundry Company. Circuit Court, City of Lynchburg. Remanded for further proceedings which are now concluded before the Virginia Employment Commission.


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


Covey v. Virginia Employment Commission and Wilderness Road Truck Stop. Circuit Court, County of Wythe. 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.

Drehmer v. Virginia Employment Commission and Bassett Table Company. Circuit Court, County of Henry. Pending.

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


Friesmuth v. Virginia Employment Commission and Bogart's Restaurant. Circuit Court, City of Richmond, Division I. Pending.


Harlowe v. Department of Highways and Transportation. Claimant quit work in anger. Sought benefits by saying she was forced to leave. Benefits denied.

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


Humphreys v. Virginia Employment Commission and Herbert Brothers, Inc. Circuit Court, County of Loudoun. Affirmed.


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


Jenkins v. Department of Highways and Transportation. Claimant left voluntarily for another job which he left before 30 days had lapsed. Sought benefits from Department of Highways and Transportation. Denied.


Levitt v. Acolex, Inc. and Virginia Employment Commission. Circuit Court, City of Virginia Beach. Pending.


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


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.

Mason v. Virginia Employment Commission and Seven-Eleven Stores. Circuit Court, City of Richmond, Division I. Pending.


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


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


Neal v. Virginia Employment Commission and Kraft, Inc. Circuit Court, City of Richmond, Division I. Dismissed.


Quinney v. Virginia Employment Commission and Capitol Area
Agency on Aging, Inc. Circuit Court, City of Richmond,
Division I. Pending.

Quintana v. Brink's, Inc. and Virginia Employment Commission.
Circuit Court, County of Henrico. Dismissed.

Company. Circuit Court, County of Fairfax. Dismissed.

Richmond v. Virginia Employment Commission and Sophisticated
Steak and Sandwich Shoppe. Circuit Court, City of
Williamsburg and County of James City. Pending.

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

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

Circuit Court, City of Richmond, Division I. Pending.

Rodak v. Virginia Employment Commission and Marine
Development Corporation. Circuit Court, County of Henrico.
Pending.

Circuit Court, County of Henrico. Affirmed.

Roulhac v. Virginia Employment Commission and Norfolk
Shipbuilding and Dry Dock Company. Circuit Court, City of
Norfolk. Dismissed.

Royal v. Virginia Employment Commission and Pulaski Furniture
Corporation. Circuit Court, City of Martinsville. Pending.

Safewright v. Virginia Employment Commission and Tazewell
National Bank. Circuit Court, County of Tazewell. Pending.

Sakis v. Annabelle Eversole, t/a Wine and Cake Hobbies and
Virginia Employment Commission. Circuit Court, City of
Norfolk. Pending.

Samuels v. Virginia Employment Commission and Leggett
Department Store. Circuit Court, County of Montgomery.
Pending.

Saylor v. Pizza Hut of Virginia, Inc. Circuit Court, City of
Newport News. Pending.

Schneider v. Virginia Employment Commission. Circuit Court,
County of Fairfax. Affirmed.


Tolliner 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.

Turlington v. E. Caligari and Son, Inc. Circuit Court, City of Newport News. Pending.


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


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

Bennett v. Commonwealth. General District Court, City of Virginia Beach. Action for attorneys fees for services rendered. Settled.

Boyd v. Ange. General District Court, City of Norfolk. Action by dentist for payment for services rendered. Settled.

Commonwealth v. Anito. General District Court, County of Washington. Suggestion in garnishment based on previous judgment in juvenile and domestic relations court for $3,045. Pay-in order obtained against military retirement.

Commonwealth (Board of Funeral Directors and Embalmers) v. Smith. General District Court, City of Fredericksburg. Settled.

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


Jenkins v. MCV. General District Court, City of Richmond. Action instituted by former patient of MCV Hospital to recover certain personal property allegedly not returned to plaintiff upon his release from the hospital. Dismissed.


The Shaw-Walter Co. v. Richmond Stationery Co., Inc. and Department of Highways and Transportation. General District Court, City of Richmond. Garnishment action. Pending.

Wright v. Rucker & Richardson, Inc. General District Court, City of Richmond. Seeking recovery from real estate transaction recovery fund. Dismissed.

CASES BEFORE THE STATE CORPORATION COMMISSION

Appalachian Power Company (Case No. PUE 790015). Application to revise its tariffs. Interim increase granted. Application to make permanent. Pending.


Appalachian Power Company (Case No. PUE 800062). Investigation to determine fuel factor pursuant to § 56-249.6 for Second Quarter and year end 1980. Investigations completed.


Appalachian Power Company (Case No. PUE 800089). Application for increase in rates. Interim increase granted in part.


Appalachian Power Company (Case No. PUE 810006). Investigation to determine appropriate tariffs pursuant to § 56-249.6. Investigation completed.

Appalachian Power Company (Case No. PUE 810033). Application to revise its tariffs. Pending.
Chesapeake and Potomac Telephone Company of Virginia (Case No. PUC 790002). Application for an increase in rates. Granted.

Chesapeake and Potomac Telephone Company of Virginia (Case No. PUC 800008). Application for approval of experimental local service rates. Implementation granted.

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


Chesapeake and Potomac Telephone Company of Virginia, Continental Telephone Company of Virginia, United Inter-Mountain Telephone Company, Clifton Forge-Waynesboro Telephone Company, General Telephone Company of the Southeast, Buggs Island Telephone Cooperative, Roanoke & Botetourt Telephone Company, Merchants & Farmers Telephone Company (Case No. PUC 790007). Investigation of community of interests between telephone exchanges. Investigation pending.

Colonial Natural Gas Company (Case No. PUE 800032). Application to revise its tariffs. Granted in part.


Commonwealth Gas Services, Inc. (Case No. PUE 800110). Application to revise its tariffs. Denied and rate reduction ordered.


Continental Telephone Company of Virginia (Case No. PUC 800019). Application for rate increase. Granted in part.

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

Delmarva Power and Light Company (Case No. PUE 800063). Investigation to determine fuel factor pursuant to § 56-249.6 for Second Quarter and year end 1980. Investigations completed.
Delmarva Power and Light Company (Case No. PUE 800074). Application to revise its tariffs. Granted in part.

Delmarva Power and Light Company (Case No. PUE 800096). Consideration for adoption of standards pursuant to § 111 of the Public Utility Regulatory Policies Act of 1978. Pending.


Delmarva Power and Light Company (Case No. PUE 810005). Investigation to determine appropriate tariffs pursuant to § 59-249.6. Investigation completed.

Determination Respecting the Advertising Standard Pursuant to §§ 113 and 303 of the Public Utility Regulatory Policies Act of 1978 (Case No. PUE 800021). Determination of standard for all natural gas, electric and electric cooperative companies. Final order issued.

Determination Respecting the Automatic Adjustment Clause Standard Pursuant to § 113 of the Public Utility Regulatory Policies Act of 1978 (Case No. PUE 800025). Determination of standard for all electric and electric cooperative companies. Final order issued.

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. Final order issued.

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. Final order issued.

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. Final order issued.

First Protection Life Insurance Company (Case No. INS 870004). For approval of credit life insurance policy form and rate. Granted in part.

General Telephone Company of the Southeast (Case No. PUC 870003). Application for an increase in rates. Granted in part.
Lake of the Woods Utility Company (Case No. PUE 800081). Application to revise its tariffs. Denied and refund ordered.

Lakeville Estates Water Corporation (Case No. PUC 810031). Application for an increase in rates. Pending.

Lynchburg Gas Company (Case No. PUE 800079). Application to revise its tariffs. Denied.

Lynchburg Gas Company (Case No. PUE 810028). Application to revise its tariffs. Pending.

Mecklenburg Electric Cooperative, Inc. (Case No. 800119). Application for revised rates for electric services. Granted in part.


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

Old Dominion Power Company (Case No. PUE 800064). Investigation to determine fuel factor pursuant to § 56-249.6 for Second Quarter and year end 1980. Investigations completed.


Old Dominion Power Company (Case No. PUE 810004). Investigation to determine appropriate tariffs pursuant to § 56-249.6. Investigation completed.

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

Potomac Edison Company (Case No. PUE 800065). Investigation to determine fuel factor pursuant to § 56-249.6 for Second Quarter and year end 1980. Investigations completed.


Potomac Edison Company (Case No. PUE 810003). Investigation to determine appropriate tariffs pursuant to § 56-249.6. Investigation completed.

Potomac Edison Company (Case No. PUE 810016). 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 Second Quarter 1980. Investigation completed.


Potomac Electric Power Company (Case No. PUE 810001). Investigation to determine appropriate tariffs pursuant to § 56-249.6. Investigation completed.

Potomac Electric Power Company (Case No. PUE 810019). Application for increase in retail electric rates. Pending.

Prince George Sewerage and Water Company (Case No. PUE 800097). Application for cancellation of its certificates of public convenience and necessity and to amend its charter. Granted.


Prince William Electric Cooperative (Case No. PUE 810010). Application for a rate increase and revision of rates, rules and regulations for service. Pending.

Rappahannock Electric Cooperative (Case No. PUE 800118). Application to revise its tariffs. Pending.


Roanoke Gas Company (Case No. PUE 800087). Application to revise its tariffs. Granted.
Shenandoah Valley Electric Cooperative (Case No. PUE 800101). Application for an increase in electric rates, service charges and fees. Granted.

Southside Electric Cooperative (Case No. PUE 800121). Application for rate adjustments. Pending.


Tri-County Electric Cooperative (Case No. PUE 810022). Application for an increase in rates. Pending.

United Inter-Mountain Telephone Company (Case No. PUC 800009). Application to revise its tariffs. Granted in part.

United Inter-Mountain Telephone Company (Case No. PUC 810015). Application for an increase in rates and charges. Pending.


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

Virginia Compensation Rating Bureau (Case No. INS 810045). Application for revision of workmen's compensation insurance rates. Pending.

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


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

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

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


Virginia Electric and Power Company (Case No. PUE 810002). Investigation to determine appropriate tariffs pursuant to § 56-249.6. Investigation completed.

Virginia Electric and Power Company (Case No. PUE 810025). Application to revise its tariffs. Pending.


CASES BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA


Carr v. Department of Corrections. Application by Department for cessation of benefits due to employee's ability to return to work. Pending.


Coleman v. Department of Highways and Transportation. The Department sought to terminate the award of compensation because the employee was able to return to gainful employment with another employer at a wage in excess of that wage which he was able to earn at the time of his injury. Compensation award terminated.

Estate of Ackerman v. Department of Highways and Transportation. Claimant's estate seeks benefits which were denied on account of willful misconduct. Pending.

Fletcher v. Department of Highways and Transportation. Claimant seeks to show he has not had one full recovery although he collected a $300,000 judgment arising out of injury. Pending.

Isom v. Department of Highways and Transportation. Employee sought compensation benefits for injury incurred at work. Compensation was denied but medical payments awarded.


O'Connor v. Arlington County. Commission determined that claimant was a State employee. Appeal to full Commission. Pending.


Simmons v. Department of Highways and Transportation. Renewed claim by claimant based on changed conditions. Deputy Commissioner's decision adverse to Department. Appeal to full Commission. Full Commission confirmed, but a change of condition brought again. Pending.

Stacy v. Department of Highways and Transportation. An application for hearing seeking workmen's compensation benefits for the death of an employee due to a heart attack at work. Pending.


<table>
<thead>
<tr>
<th>Date of Hearing</th>
<th>Name of Defendant</th>
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<tbody>
<tr>
<td>July 3, 1980</td>
<td>Charlotte L. Moore, a/k/a Charlotte Cole, a/k/a Charlotte Stockton Harold Bruce Shumate</td>
</tr>
<tr>
<td>July 9, 1980</td>
<td>Leroy Harding Harry Allen Smith</td>
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<tr>
<td>July 12, 1980</td>
<td>David Lee Mulholland</td>
</tr>
<tr>
<td>July 22, 1980</td>
<td>Donnie Lee Gamble</td>
</tr>
<tr>
<td>July 28, 1980</td>
<td>Robert J. Fell, Jr., a/k/a Robert J. Fell, a/k/a Robert Junius Fell</td>
</tr>
<tr>
<td>August 4, 1980</td>
<td>Ralph Michael Hollie</td>
</tr>
<tr>
<td>August 6, 1980</td>
<td>Larry Eugene Poor, a/k/a Larry Eugene Poore</td>
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<tr>
<td>August 11, 1980</td>
<td>Gary Lee Lang</td>
</tr>
<tr>
<td>September 3, 1980</td>
<td>Ronald James Simeth Nicholas Masterson</td>
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<tr>
<td>September 9, 1980</td>
<td>Raymond Frederick Schuyler Stanley M. Brinson</td>
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<td>September 10, 1980</td>
<td>Carl Edward Clary</td>
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<td>September 11, 1980</td>
<td>William S. Douros</td>
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<tr>
<td>September 18, 1980</td>
<td>James K. Hart James Phillip Reed Jack C. Bingham J. Thompson, a/k/a James Robert Thompson</td>
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<td>September 19, 1980</td>
<td>Donald Abernathy Freeman</td>
</tr>
<tr>
<td>September 30, 1980</td>
<td>Carl M. Short David Joseph Hiney</td>
</tr>
</tbody>
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October 15, 1980  Frank Sweeney
Johnny James Allen, a/k/a Moose
Elenor Maxine Evans, a/k/a Sarah Scott
James Earl Brown

October 27, 1980  Drew Avery Yeager
Francisco Q. Neto

October 28, 1980  Robert Leonard Stinson

November 3, 1980  Clyde G. Sarver

November 5, 1980  Sidney Dean Mullins

November 13, 1980  Sammie Lee Williams

November 19, 1980  John Brady Anderson, alias Christopher
John Landry
Caroline E. Norman
Betty S. Fungaroli

November 26, 1980  William Lloyd Adkins, Jr.
Yvette Boone

December 3, 1980  Willis H. Johnson
Arlin Gene Frazier, a/k/a Oliver
Edward Dewey
Herman Everett
Clifton R. Taylor

December 5, 1980  Joseph Harold Sias

December 9, 1980  Darrell Wayne Taylor
Robert Bowyer
John Durham, a/k/a John Arthur Durham

December 16, 1980  Kenneth Ray Carter
Rudolph Barry Tate

December 17, 1980  Thomas A. Forrester
Tambra Jenkins
John D. Vogel, Jr.
George V. Grites

December 18, 1980  Sherry M. Bunch
Diane Marie Braxton

January 5, 1981  Gayland D. Corson
Carol Ann Corson
Paul R. Hedrick
Bob Sparks

January 7, 1981  Jorge Willy S. Himan

January 8, 1981  Steven Asherfeld
January 13, 1981  Lance Koberlein
              Paul Carroll Worrell
January 14, 1981  Gary Meinhard
              Richard Lee Little
January 16, 1981  Keith E. Tasnady
              Larry Boggs
              Connie Sue Self
              James Patterson
January 26, 1981  Jeffrey Dudley
              Brian Lee Waldron
              Steven Childers
January 28, 1981  Sonya Lewis, a/k/a Sonya Hutchison
February 2, 1981   Steven L. Cimino
February 17, 1981  Donnie Lee Gamble
              Edgar B. Goodman
February 23, 1981  John D. Otto
              Bobby Joe Stevens, a/k/a Bobby J. Stevens
February 24, 1981  Donald L. Pope
              Franklin Eugene Moneymaker
March 2, 1981     Thurhan Delano Jackson
March 5, 1981     Elizabeth S. Fellows
              Steven Hodges, a/k/a Steve Vanvert
              Hodges, a/k/a Richard Terry Tharp
              Jerry Martin Roark
March 9, 1981     John Surham
March 11, 1981    Kendrick Levine Stoner
March 12, 1981    Jeffery Hammett
March 25, 1981    Barbara A. Lewis
March 27, 1981    Edward W. Weaver
              Joseph L. Stewart
April 2, 1981     Patrick Joseph Dolan
April 7, 1981     Gerald Edward Mitchell
              Charles Bell
April 8, 1981     Bonnie Jean Heath
April 23, 1981    Paul Stanley Shebora
              Clifford Harris
              Frank J. Gordon
<table>
<thead>
<tr>
<th>Date</th>
<th>Names</th>
</tr>
</thead>
</table>
| April 24, 1981 | Juanita Joyce Wiles  
                    Richard Anthony Green  
                    Bryan Murphy  
                    Ronnie M. Hart |
| May 7, 1981   | David Ware, Jr., a/k/a James Arthur Ware                               |
| May 8, 1981   | James Cliver                                                           |
| May 19, 1981  | Benjamin Ebhojaye  
                    James Kenneth Knochsb  
                    Dale G. Sollows           |
| May 21, 1981  | Carl Stanley, alias Paul A. Stanley                                    |
| June 3, 1981  | David Ray Hill, Jr.  
                    R. B. Cummings  
                    Roy L. Bowman           |
| June 5, 1981  | Mark Todd Custer                                                       |
| June 10, 1981 | Sylvester Vick                                                         |
| June 15, 1981 | Gregory Hibbits  
                    Raymond Bowen  
                    Richard Joseph Nickles, a/k/a Ricky Nickles |
| June 19, 1981 | Frederick Tyson Gooch                                                 |
| June 24, 1981 | Jerry Anderson Morris, a/k/a Jerry Anderson Morrison                   |
Almond v. Davis, No. 78-6273. Appeal from a dismissal of a civil rights action alleging that inmate plaintiff was denied his constitutional rights by virtue of inadequate assistance of counsel and library facilities at the Mecklenburg Correctional Center. Reversed in part and remanded.


CARE, et al. v. EPA, No. 80-1223. Fourth Circuit. State Air Pollution Control Board intervened in this challenge to support its original decision to issue a permit to Hampton Roads Energy Company and to support EPA approval of amendment to Virginia State Implementation Plan. Case was argued in January 1981 and in March the court affirmed the administrative action of EPA in this and a companion case.


Chesapeake Bay Foundation v. United States. Appeal of District Court decision upholding a NPDES permit. Appeal filed. Pending.

Coggens v. Richtmyer. Suit by State prisoner to enjoin his transfer to another institution for monetary damages. Pending.

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. Pending.
Commonwealth, et al. v. Harris, et al. Suit challenged procedure by which HEW denied the Department of Welfare's earnings policy. District Court opinion for Commonwealth was upheld.


Commonwealth, ex rel., State Air Pollution Control Board v. EPA, No. 81-1091 (D.C. Circuit). Consolidated with No. 80-2454 and other cases. Challenge filed to adoption by EPA of regulations respecting visibility protection for Federal Class I areas under Clean Air Act. Proceedings stayed pending administrative re-evaluation by EPA.


County of Kern and City of Bakersfield v. Civil Aeronautics Board, et al. Suit seeking proper constitution of § 419 of the Airline Deregulation Act requiring the CAB to guarantee "essential air transportation" to "eligible points." Appearances by Attorney General on behalf of Commonwealth as amicus curiae. Pending.

Dudley v. Stoneman and Alcoholic Beverage Control Commission. Appeal from dismissal of civil rights action alleging unlawful termination from employment. Appeal dismissed as to Commission; pending as to Stoneman.


Federal Aviation Administration v. Houston, et al., and Consolidated Cases. Challenging FAA's authority to promulgate, inter alia, a 1,000 mile perimeter rule on Washington National Airport, Attorney General on behalf of Commonwealth and affected Northern Virginia localities. Pending.


Fowler v. Sandidge and Jewell. Civil rights employment discrimination suit seeking compensatory and punitive damages. Affirmed District Court decision in favor of State defendants.


Hanks v. Costle. Appeal of District Court decision denying relief from State Water Control Board’s revision of its York River water quality management plan and issuance of NPDES permit to Hanover County.

Harrell v. Mitchell and McCloud. Appeal from District Court. Suit on an implied contract to maintain a fence through which a cow wandered onto an interstate highway causing an accident. Companion to Roadway case. Plaintiff was the driver of the truck which hit the cow. He sought compensation for personal injuries. Settled and appeal dismissed.


Harris v. Warden. Appeal from dismissal of habeas corpus. Issue concerns jurisdiction of federal court to consider a habeas case after discharge of inmate from State custody when State conviction enhances federal sentence. Pending.

Hummer v. Hutto. Suit by State prisoner for damages as a result of alleged overcrowded and unconstitutional conditions of confinement at two of Virginia's field units. Presently pending after briefing and oral argument.
In re Cuisinarts. Action brought under Sherman Act against kitchen food processor. District Court, Connecticut, denied motion under § 4F(b) of the Clayton Act seeking disclosure of federal grand jury materials to the Attorneys General. Appeal pending in Second Circuit Court of Appeals.

In re: Permanent Surface Mining Regulations, No. 80-1810 and Consolidated Cases (D.C. Circuit). Two decisions were issued by the District Court in February and May 1980 construing a large number of federal surface mining regulations issued under the federal act and challenged by industry and state petitioners, including Virginia. Cross-appeals are now pending before the Circuit Court of Appeals for the District of Columbia. Briefing schedules have been extended and no date set for oral argument. Pending.


Jones v. Purvis. Appeal of inmate from denial of habeas corpus whether the sentence constituted cruel and unusual punishment. Affirmed.


Melton v. Hutto, No. 80-6143. Appeal by the plaintiff of an action by the District Court in dismissing his complaint of racial discrimination. Reversed in part and remanded.


Oklahoma, et al. v. Harris, et al. Suit challenging Health and Human Services regulations requiring states to "pass through" certain costs of living increases. Adverse decision to states was upheld.

Orpiano v. Hutto. Appeal from award of $10,000 in damages in civil rights action alleging that inmate was subjected to cruel and unusual punishment by use of excessive force by prison employees. Reversed in part; affirmed in part.


Patterson v. Davis, No. 79-6132. An appeal by plaintiff from 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 and the Virginia State Penitentiary. Judgment in favor of defendants affirmed.

Renaissance Committee v. Hutto. Appeal from dismissal of civil rights action alleging that inmate plaintiffs were illegally prohibited from meeting as an unrecognized organization for purposes of assisting one another in legal matters. Affirmed.

Roadway Express, Inc. v. Mitchell and McCloud. Appeal from United States District Court. Suit on an implied contract to maintain a fence through which a cow wandered onto an interstate highway causing an accident. Compensation for personal property damages to the plaintiff's truck was sought. Companion to the Harrell case. Settled and appeal dismissed.

Ruhe, et al. v. Block, et al. Suit challenging food stamp regulations governing monetary resources was challenged. Pending.


Scruggs v. Campbell. Suit challenging a school board's role in a due process procedure and suit for damages and injunctive relief for failure to provide free appropriate education in violation of P.L. 94-142 and § 504 of the Rehabilitation Act. Affirmed lower court decision in favor of State defendants.


Smith v. Harris, No. 80-6416. Inmate plaintiff's appeal from summary dismissal of his claim that females regularly assigned to inmate living areas. Pending.


Supreme Court of Virginia v. Consumers Union. Appeal from award of attorneys' fees. Pending.

Talbot v. Cochran. Suit by State prisoner for damages as a result of alleged incompetency of public defender. Presently pending after briefing and oral argument on the issue of the immunity of a public defender under § 1983.

Turner v. Muncy. Appeal from dismissal of civil rights action alleging that prison officials violated inmate plaintiff's rights in prohibiting the display of nude or obscene pictures inside prison. Affirmed.

Via v. Superintendent. Appeal from District Court in Roanoke granting petitioner's petition for a writ of habeas corpus. Affirmed.


Young v. Godwin. Appeal from granting of injunctive relief and attorneys' fees of $7,500 to inmate plaintiff in civil rights action attacking various conditions of confinement at the Bland Correctional Center. Pending.


Zaczek v. Hutto, No. 78-6163. Appeal from a judgment by the District Court that the plaintiff's constitutional rights were violated by virtue of actions of an Institutional Adjustment Committee. Reversed.

CASES DECIDED OR PENDING IN THE UNITED STATES DISTRICT COURTS

AFL-CIO v. Marshall. Amicus case opposing implementation of proposed OSHA staffing benchmarks which would cost Virginia $2.8 million to implement. Pending.

Al-Ghani v. Cox, No. 80-337-N. Claim by inmate that prison officials improperly refused to address him by legal name. Pending.


Alston v. Dickerson. Action for damages based on alleged conspiracy to interfere with civil rights. Dismissed.


Barbour v. Department of Rehabilitative Services. Action for alleged race discrimination under Title VII. Pending.


Beasseau v. Hutto. Whether the defendants will be liable for an assault by one inmate upon another inmate. Pending.

Becker v. Russek. § 1983 action asking the court to enjoin an investigation of plaintiff's practice of chiropractic by defendant, assume jurisdiction of pendent State tort claims, and grant compensatory and punitive damages in the amount of $18 million. Pending.

Blankenship v. Horan. Whether an escapee can challenge his conviction under Arsinger. Decided.


Branch a/k/a Masud Sabir Hameed v. Commonwealth, Department of Highways and Transportation. Title VII of Civil Rights Act of 1964 suit alleging racial discrimination in a promotion situation. Dismissed due to failure of plaintiff to appear to take discovery deposition.


Cagle, et al. v. Cox, et al. Suit brought as a class action challenging the conditions of confinement at the Powhatan Correctional Center. Partially settled and portions still pending.


Clandy, et al. v. State Water Control Board. Suit for declaratory judgment and injunctive relief to find Potomac Embayment Standards illegal and to permit Mooney Advanced Wastewater Treatment Plant to relax effluent limitations. Dismissed without prejudice based upon abstention doctrine.


Coleman v. Hutto. Inmate civil rights suit under 42 U.S.C. § 1983 alleging plaintiff was subjected to an illegal body cavity search by prison officials. Dismissed.


Commonwealth v. Ashland-Warren, Inc. Motion to permit disclosure of grand jury materials to Attorney General by Antitrust Division, Department of Justice. Pending.


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. Settled.

Cross v. Virginia Commonwealth University. Action instituted by former student of School of Medicine who was dismissed and refused readmission to medical school. Discrimination on basis of race alleged. Voluntary dismissal taken by plaintiff.


Davis v. Buckley. Suit seeking damages and declaratory and injunctive relief on the basis of his physical handicap. Pending.
Davis v. Hutto. Suit by an inmate alleging theft from his inmate fund and tampering with his mail. Judgment for defendants.


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


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


Francer v. Department of Highways and Transportation. Plaintiff seeks an injunction to force Department to allow him access to his property which is located behind a limited access fence. Pending.


Gleaves v. VMI. § 1983 First Amendment and Fourteenth Amendment (due process) suit by former student convicted of honor violation. Pending.


Hamler v. V.P.I. Title VII action. Pending.


Harris, et al. v. Lukhard, et al. Suit challenging the manner in which the assessed value of property is considered in the determination of eligibility for medicaid. Pending.

Heslep, et al. v. State Highway and Transportation Commissioner. Action to compel the State to provide a service road to give access to property which had been previously landlocked through eminent domain. Pending.


Hollandsworth v. Department of Highways and Transportation, et al. § 1983 Civil Rights action seeking $75,000 for failure to give a correctional inmate prompt medical attention. Summary judgment granted to the defendant.


In re Allied Towing Corporation. Suit for wildfowl damage, cleanup costs and civil penalties for the 1968 Chesapeake Bay oil spill. Settled.

In re Ampicillin Antitrust Litigation. Action brought under the Sherman Act against pharmaceutical manufacturers. Distribution of settlement funds pending.


In re Big Ten Corporation. Suit to determine priority of claims in bankruptcy. Pending.

In re Chicken Antitrust Litigation. Action brought under the Sherman Act against broiler producers. Distribution of settlement funds pending.
In re Economy Cast Stone. Bankruptcy, subcontractor for Blake Construction on the Twin Tower and MCV project. Pending.

In re Scotti Muffler Centers. Suit to determine priority of claim 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. Settled.

In re Sugar Antitrust Litigation. Action brought under the Sherman Act against sugar producers. Distribution of settlement funds pending.

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. Decision dismissed Old Dominion Freight Lines and granted C&P Towing Co., Inc. limitation. Commonwealth recovered about 57% of its damage.


Jacobs v. Dalton. Civil action suit brought on behalf of mentally retarded and mentally ill citizens of the Commonwealth who have been adjudicated legally incompetent. Dismissed.


REPORT OF THE ATTORNEY GENERAL


Kassel v. Consolidated Freightways. Challenge to constitutionality of Iowa's statutory scheme regulating truck length under the dormant Commerce Clause. Appearance by Virginia as amicus curiae. Iowa's law held unconstitutional.


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


Lotz v. HUD, et al. Virginia Real Estate Commission named as defendant in alleged First Amendment violations resulting from fair housing complaint. Pending.


Mann v. Cox. Civil rights action alleging constitutional deprivations due to conditions at the Powhatan Correctional Center. Dismissed.


McManama, et al. v. Lukhard, et al. Cross-appeal related to entitlement and amount of attorney's fees. District Court opinion was upheld. Negotiated settlement on attorney's fees was approved by the District Court.


Meadows v. Honaker, No. 81-0095-B. Claim of deliberate indifference to medical need. Pending.


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.


Metropolitan Ambulance Service, Inc. v. Kenley. Suit to gain restoration of license to operate an ambulance service. Motion to dismiss 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.


Osborne v. Rea, No. 80-0068-D. Inmate claim of abuse by correctional officer. Dismissed after trial.


Page v. National Guard Bureau, et al. Equal Employment Opportunity complaint. Pending. All named defendants, including the Governor, Attorney General, and Adjutant General, Assistant Attorney General (the State defendants) were all dismissed from the case as improper parties with leave to the plaintiff to substitute the Secretary of the Air Force as a defendant. This Office is no longer involved in the litigation.
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Parker v. Robb, et al, No. 79-687-A. Complaint for damages, as well as declaratory and injunctive relief against State officials based upon alleged unconstitutionality of State statute registering slogan "Virginia Is For Lovers" for Virginia State Travel Service. Complaint dismissed by summary judgment for defendants. Plaintiff appealed to the Fourth Circuit Court of Appeals but dismissed that appeal voluntarily.


Pinkerton v. Moye. Suit for damages and injunctive relief for failure to provide free appropriate public education in violation of P.L. 94-142 and § 504 of the Rehabilitation Act. Dismissed.


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


Rucker v. McCutcheon, et al. § 1983 First Amendment suit by former unsuccessful job applicant with Department of Planning and Budget. Pending.


Scoggins v. City. An employee alleging racial discrimination against the City of Richmond and the Juvenile Court of the City of Richmond. Pending.


Smoot, et al. v. Andrus, et al. Complaint for injunctive and declaratory relief against local, State and federal agencies based upon construction of Yorktown waterfront recreational project. Motions of the State defendant (Commission of Outdoor Recreation) and all others to dismiss have now been granted.


Sykes v. Johnson. Civil rights action pursuant to 42 U.S.C. § 1983 alleging violations of constitutional rights because plaintiff was assaulted by correctional officers. Dismissed.


Tetterton v. Morris. Suit by an inmate alleging that he was beaten at the Mecklenburg Correctional Center and harassed by the officials. Judgment for defendants.


United States v. Colonial Chevrolet. Order of disclosure to Attorney General of investigative files and grand jury material by Antitrust Division, Department of Justice granted.

United States v. Commonwealth. Suit to determine whether AUI/NRAO is an institution of learning within the meaning of § 58-441.6(t). Decided in favor of Commonwealth.
REPORT OF THE ATTORNEY GENERAL


United States v. Rockingham Poultry Marketing Cooperative, Incorporated (Broadway Plant). Suit for injunctive relief and civil penalties for violation of Water Control Board special order. Settlement pending.


United States v. Virginia Surface Mining and Reclamation Assn., et al., No. 81-0060-R. Suit by Interior Department to force Commonwealth to re-submit permanent regulatory program under Federal Surface Mining Act and to declare State court injunction prohibiting such sumittal to be of no force and effect. Filed January 20, 1981, and dismissed by stipulation March 5, 1981.


Wallem Steckmest & Co. A/S SANVIKEN v. United States, District of Columbia, Commonwealth, State of Maryland. Admiralty action concerning the alleged negligent operation of the Woodrow Wilson Bridge spanning the Potomac River at Alexandria carrying I-95. Although the Commonwealth participates by agreement to pay for maintenance including the bridge's operation, the incident arose due to the alleged action of a D.C. bridge tender. Commonwealth dismissed as a party.


White v. Commonwealth. Suit alleging racial discrimination in employment. Motion to dismiss pending.


Williams v. Wilkerson. Suit by an inmate alleging improper medical care as a result of an emergency. Pending.


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

Wright v. Visitors of Longwood College. Action for denial of employment under Title VII. Judgment for defendant, case dismissed.

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.


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. License granted.


The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
The Honorable Paul M. Mahoney
County Attorney for the County of Montgomery

You have asked my opinion on several questions concerning the establishment of an agricultural and forestal district within the corporate limits of the Town of Christiansburg. You stated the factual situation as follows: "An application for the creation of an Agricultural and Forestal District containing approximately 816 acres has been submitted to the Board of Supervisors of Montgomery County, Virginia; approximately 60 acres of which lie within the corporate limits of the Town of Christiansburg. Pursuant to Section § 15.1-1-1511.B.1 the County asked if the Town wanted to 'propose a modification'. The Town Council requested that the 60 acres located within the Town's corporate limits be deleted from the proposed District."

You have asked three questions concerning this situation:

1. Can an agricultural and forestal district be created by a town?

2. Assuming that a District cannot be created by a Town, can a District be created within the corporate limits of a Town by a County? Could a District be created within a town over the town's objection?

3. Assuming that a county created a District within the corporate limits of a town, either with or without the approval of said town, what effects as listed in Section 15.1-1512 would apply?"

1. Chapter 36 of Title 15.1 of the Code of Virginia (1950), as amended, provides for the creation of agricultural and forestal districts to encourage development and improvement as well as preservation of agricultural and forest lands. Section 15.1-1509(A) empowers local governing bodies to enact ordinances to effectuate the purposes of the chapter. The term "local governing body" is expressly defined as the governing body of any county or city. See § 15.1-1508(G). The express language of these statutes indicates that only counties and cities are empowered to enact ordinances creating agricultural and forestal districts. Under Dillon's Rule, the powers of local governing bodies in Virginia are limited to those conferred expressly or by necessary implication. See Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977); Board of Supervisors of Fairfax County v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975). I, therefore, conclude that
agricultural and forestal districts cannot be created by a town.

2. In my opinion a county may establish an agricultural and forestal district which includes lands within the corporate limits of a town. Section 15.1-1511(B)(1) provides that after receiving a proposal for the creation of an agricultural and forestal district, the local governing body (county) shall refer it to its planning commission which shall publish notice of the proposal including "a statement that any municipality whose territory encompasses or is part of the proposed district may propose a modification in such form and manner as may be prescribed by the local governing body...." Subsequent to notice and receipt of recommendations of an advisory committee and the planning commission, the county is required to hold a public hearing on the proposal before adopting an ordinance establishing such a district. See § 15.1-1511(D). Any modification proposed by an affected municipality is to be considered by the county in establishing a district. Id. Thus, while participation of an affected town in creation of such districts is anticipated, the county has ultimate authority to establish districts after considering modifications proposed by affected municipalities. I am, therefore, of the opinion that a district may be created by a county containing lands within a town notwithstanding the objections of the town, provided all other applicable provisions of the law are satisfied.

3. After creation of an agricultural and forestal district, all land within the district used in agricultural and forestal production automatically qualifies for agricultural and forestal use value assessment by the local governing body establishing the district. See § 15.1-1512(A). Thus, that portion of the district within the town would qualify for use value assessment by the county. Insofar as the town taxes real estate within the district, it remains free to determine independently whether to adopt an ordinance applying use value assessment to qualifying lands. See § 58-769.6.

AGRICULTURE AND COMMERCE. PUBLIC OFFICERS. DE FACTO OFFICERS. MEMBERS OF BOARD UNDER § 3.1-1 TO ACT AFTER EXPIRATION OF TERMS PRIOR TO QUALIFICATION OF SUCCESSORS.

May 5, 1981

The Honorable S. Mason Carbaugh, Commissioner
Department of Agriculture and Consumer Services

You ask two questions about the members of the Board of Agriculture and Consumer Services (the "Board") under § 3.1-1 of the Code of Virginia (1950), as amended.
Members To Act After Expiration of Terms 
Prior To Qualification of Successors

You first ask whether members of the Board are to act after expiration of their terms, prior to qualification of their successors.

Section 3.1-1 provides that the Department of Agriculture and Consumer Services shall be under the management and control of the Board, composed of one member from each congressional district, appointed by the Governor for a term of four years, and confirmed by the General Assembly. Section 3.1-1 contains no provision that members shall continue to discharge the duties of their office until their successors have qualified.

In the absence of any constitutional or statutory prohibition, the general rule is that an incumbent in office holds over after conclusion of his term until qualification of a successor, and this is true notwithstanding a provision that the officer is ineligible to succeed himself.

This general rule is consistent with Virginia law. For example, § 24.1-73 provides that all officers chosen at a general election shall continue to discharge the duties of their respective office until their successors have qualified.

Further, § 33 of the Virginia Constitution (1902) expressly provided that officers, elected or appointed, were to continue to discharge the duties of their offices after their terms of service had expired until their successors qualified. Upon recommendation of the Commission on Constitutional Revision, this provision was deleted from the 1971 Constitution as unnecessary, leaving the matter of when terms of officers begin and end to general law. There is no indication that the deletion was to work a change in existing law.

Under the common law of Virginia, an officer holding over after expiration of his term remains an officer de facto. The acts of an officer de facto are as valid and binding as the acts of an officer de jure.

Accordingly, I am of the opinion that members of the Board are to act after expiration of their terms, prior to qualification of their successors.

In The Event Boundaries Of Congressional District Change, Governor Need Not Make New Appointment From New District

You next ask, in the event the General Assembly changes the boundaries of any congressional district, whether the Governor must make a new appointment to the Board from that district.
As a general rule, when new governmental election districts become effective for purposes of representation, the comparable positions on related local boards, commissions and similar bodies are vacated by force of law. This rule, however, has not been uniformly applied to State-wide regulatory and advisory boards. In connection with the 1971 congressional redistricting, this Office ruled that no seats were vacated on the State Board of Medical Examiners, and, therefore, no new appointments were required.

Accordingly, in the event the General Assembly changes the boundaries of any congressional district, I am of the opinion that, under § 3.1-1, no seats on the Board are vacated and the Governor need not make a new appointment to the Board for such district.


ALCOHOLIC BEVERAGE CONTROL LAWS. 19 YEAR-OLD WHO BUYS "TAKE-OUT" BEER WITH INTENT TO PROVIDE IT TO 18 YEAR OLD FOR OFF-PREMISES CONSUMPTION VIOLATES § 4-73 OR § 4-112.1 (EFFECTIVE JULY 1, 1981).

June 24, 1981

The Honorable Frank W. Nolen
Member, Senate of Virginia

You have asked my opinion regarding application of Ch. 24 [1981] Acts of Assembly, effective July 1, 1981, which raises the legal age for purchase of beer for off-premises consumption from eighteen to nineteen years of age. Your specific inquiry was:
"If a 19 year old buys 'take-out' or 'off premises' beer and gives it to an 18 year old somewhere off the premises, is the 19 year old in violation of any Virginia law?"

The new law amends § 4-62(1) of the Code of Virginia (1950), as amended, to prohibit sales (except pursuant to certain provisions not applicable here) where the seller knows or has reason to believe that the purchaser is "less than nineteen years of age if the beer is purchased for off-premises consumption, or if the purchaser is less than eighteen years of age if the beer is purchased for on-premises consumption...." Section 4-62(2) makes unlawful the purchase or possession of beer by any person to whom it may not lawfully be sold. The law also makes parallel amendments to § 4-112 to cover "3.2 beer."

Section 4-73 makes it a misdemeanor for any person to purchase alcoholic beverages for another person if at the time of purchase he knows or has reason to believe such other person "is enumerated in § 4-62 as a person to whom such alcoholic beverages shall not be sold...." The parallel prohibition for "3.2 beer" is § 4-112.1. In the circumstances you describe, the 19 year old will be in violation of § 4-73 or 4-112.1 if he purchases the beer with intent to provide it to an 18 year old for off-premises consumption.

Section 4-87 makes it unlawful for any person to "aid or abet another in doing, or attempting to do, any of the things prohibited by this chapter...." Thus, the 19 year old may also be charged with aiding or abetting the illegal possession of beer by the 18 year old by providing the merchandise involved.

ALCOHOLIC BEVERAGE CONTROL LAWS. SUPERMARKET CHAIN NOT AIDING AND ABETTING UNLAWFUL POSSESSION OF ALCOHOLIC BEVERAGES IF MINORS ARE EMPLOYED BY CHAIN AS PART OF CASHIERS AWARENESS PROGRAM.

February 10, 1981

The Honorable Michael J. Valentine, Judge
Juvenile and Domestic Relations District Court

Your recent letter states that a supermarket chain employs individuals under eighteen years old to attempt to purchase alcoholic beverages in order to maintain the "awareness" of its cashiers and to attempt to insure that minors are not allowed to make illegal purchases. You have asked whether the supermarket chain is contributing to the delinquency of minors by its undercover operations since the possession of alcoholic beverages by a minor is prohibited.

It is my understanding that the supermarket management has obtained approval of these minors' parents, who are
employees of the supermarket, prior to their participation in the program. I am also advised that the supermarket chain has security guards who supervise the minors involved to ensure that minors are not allowed to leave the premises before they have returned the alcoholic beverages to security personnel.

Section 4-62 of the Code of Virginia (1950), as amended, provides that a person under twenty-one years of age may not lawfully purchase or possess alcoholic beverages, other than beer. The minimum age for lawful purchase or possession of beer is eighteen. I have previously ruled that a minor employed by police officers for the purpose of uncovering evidence of illegal sales of alcoholic beverages to minors does not himself incur any criminal liability by purchasing alcoholic beverages in the course of such employment. See Opinion to the Honorable James A. Cales, Jr., Commonwealth's Attorney for the City of Portsmouth, dated February 17, 1978, and found in Report of the Attorney General (1977-1978) at 19.

Under § 4-62(3), the prohibition against possession of alcoholic beverages by an underage person "shall not be applicable to the possession of alcoholic beverages by a person less than twenty-one years of age making a delivery of alcoholic beverages in pursuance of his employment or an order of his parent."

In light of the specific facts set out above, it is my opinion that these minors are acting in pursuance of their employment within the scope and purpose of § 4-62(3). Since there is no violation of § 4-62, the supermarket chain is not contributing to the minors' delinquency in violation of § 18.2-371, nor is it aiding and abetting any prohibited act in violation of § 4-87.

APPROPRIATIONS. BAR TO FUNDING OF VIRGINIA MUSEUM THEATRE OUT OF CERTAIN VIRGINIA MUSEUM APPROPRIATION IS NOT BAR TO FUNDING THEATRE BY VIRGINIA COMMISSION FOR THE ARTS.

December 30, 1980

Mr. Charles L. Reed, Jr., President
Virginia Museum of Fine Arts

You have inquired whether Item 374 of the 1980-1982 Appropriations Act, Ch. 760 [1980] Acts of Assembly 1305, which prohibits the use of certain funds for the Virginia Museum Theatre (the "Theatre"), precludes a grant of funds to the Theatre from the Virginia Commission for the Arts (the "Commission").

Section 1-103, Item 374, of the 1980 Appropriations Act, which is the legislation pertinent to your inquiry, contains the following language:
"No part of the appropriations from the general fund in Items 371 and 372 shall be expended for the maintenance and operation of theatrical productions."

Items 371 and 372 fund the Administrative and Support Services and the Gallery Arts sections of the Virginia Museum of Fine Arts.

Item 374 thus prohibits the funding of the Theatre from two general fund line item appropriations to the Virginia Museum of Fine Arts. Item 374 does not, however, purport to restrict funding the Theatre from other general fund monies.

Similarly, the enabling legislation for the Commission, § 9-84.03 of the Code of Virginia (1950), as amended, does not prohibit grants to State agencies.

In my opinion, the Commission may fund productions at the Theatre, assuming the normal prerequisites for a grant are met.

APPROPRIATIONS. LOCAL GOVERNING BODY MAY INCREASE OR DECREASE SCHOOL APPROPRIATIONS FOR MAJOR CLASSIFICATIONS.

May 27, 1981

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask several questions concerning the method in which the City Council of Hampton may accommodate, in its appropriation process, the uncertain factors of federal and State revenues expected to be received for local educational purposes. I have consolidated and reordered those questions and answer them as follows:

1. Can the city council in adopting its appropriation ordinance modify or delete the estimated State and federal revenues which the school board included in the budget which it presented to the city council?

The supervision of the schools in each school division is the primary responsibility of the school board, rather than the local governing body. See § 22.1-28 of the Code of Virginia (1950), as amended; School Board of Carroll County v. Shockley, 160 Va. 405, 168 S.E. 419 (1933). The funds available to the school board of a school division for the support and maintenance of the schools consist in part of "local funds appropriated to the school board by a local governing body...." See § 22.1-88. State and designated federal funds are also available to the school board for school purposes.

Although the local school board has supervisory power over local schools, the local governing body has the power and duty of generally supervising school expenses through the
appropriation process. 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).

Prior to the appropriation process, the local governing body must review and approve the school board budget. It is the corresponding duty of the local school superintendent, with the approval of the school board, to estimate for the local governing body the money needed for the schools in the next fiscal year. This estimate must be made on the basis of the major classifications for educational program needs prescribed by the State Board of Education. See § 22.1-92. The local governing body then prepares its budget for the locality and approves, as well, an annual budget for school purposes. See § 22.1-93. The budget is for informational and planning purposes and is distinct from the appropriation process. See § 15.1-162.

Section 22.1-94, which describes the appropriation process, provides:

"A governing body may make appropriations to a school board from the funds derived from local levies and from any other funds available, for operation, capital outlay and debt service in the public schools. Such appropriations shall be not less than the cost apportioned to the governing body for maintaining an educational program meeting the standards of quality for the several school divisions prescribed as provided by law. The amount appropriated by the governing body for public schools shall relate to its total only or to such major classifications as may be prescribed by the Board of Education. The appropriations may be made on the same periodic basis as the governing body makes appropriations to other departments and agencies."

The local governing body may not increase, decrease or delete individual line items from the approved budget. It may, however, fund by major classification and increase or decrease the appropriations for major classifications, thereby achieving the same result of limiting expenditures. See Reports of the Attorney General (1979-1980) at 300; (1978-1979) at 29; (1975-1976) at 22, 296; (1973-1974) at 317; (1971-1972) at 25, 332; (1967-1968) at 19.

Therefore, it is my opinion that the city council in adopting its appropriation ordinance may not modify or delete line items which are estimates of State and federal revenues in the approved school board budget. However, the local governing body, consistently with § 22.1-94, may reduce its total appropriation or its appropriations for major classifications in proportion to the amount of the anticipated federal and State revenues which were included within those major school board budget classifications. This reduction, in no event, may be so severe as to impair the
ability of the school board to meet the standards of quality. Additionally, once it has appropriated sufficient funds to the school board to satisfy the standards of quality the city council may place additional funds in a contingency fund rather than appropriating the entire budgeted amount to the school board. See Report of the Attorney General (1978-1979) at 29. This gives the city council the ability, consistent with law, to use the contingency fund in the event of a shortfall, without appropriating funds initially for the entire amount set forth in the school board budget.

2. If the city council makes an annual total appropriation to the school board which includes anticipated federal and State revenues, may the city council later reduce that total appropriation if the anticipated federal or State funds are not received?

Through its adoption of this charter provision, the General Assembly has given city council the power to reduce existing appropriations when it appears that funds are unavailable to meet those appropriations.

The city council must appropriate funds sufficient to provide that portion of the cost apportioned to the city by law for maintaining an educational program meeting the standards of quality in Virginia. See §§ 22.1-94 and 22.1-97. Moreover, local governing bodies, as other persons, are legally responsible for their existing contractual commitments. See Report of the Attorney General (1979-1980) at 300. To the extent that unreceived federal or State funds were relied upon in the appropriation made to the school board by the city council to meet the standards of quality or existing contract obligations, the city council is obliged, through tax levy or otherwise, to replace unavailable federal or State funds.

3. Can the Hampton City Council, in adopting its appropriation ordinance, appropriate funds to the school board on a monthly, quarterly or semiannual basis, rather than on an annual basis?

Section 15.1-162 provides in pertinent part:
"No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the governing body."

This section clearly indicates that, absent specific provisions to the contrary, appropriations by local governing bodies can be made on a periodic basis throughout the fiscal year. Further, the last sentence of § 22.1-94 states that appropriations for public schools may be made by the governing body "on the same periodic basis as the governing body makes appropriations to other departments and agencies." This means that, unless provision is made to the contrary, it is legally permissible to have a periodic appropriation during the course of the fiscal year for school purposes.

However, the Charter for the City of Hampton provides that the city council, after holding the required hearings,

"shall approve its final budget for the next ensuing fiscal year by means of an annual appropriation ordinance."

The charter also provides for supplemental and emergency appropriations to be made by council resolution and for the reduction or transfer of appropriations to be made "at any time during the fiscal year" upon the fulfillment of certain conditions. Ch. 167 [1979] Acts of Assembly, §§ 6.11, 6.12 at 221.

It is my opinion that, although §§ 15.1-162 and 22.1-94 generally permit appropriations by local governing bodies to be made on a periodic basis, the Charter for the City of Hampton, by its specific provision for an "annual appropriation ordinance," envisions an annual appropriation which may be modified by resolution to accommodate emergency needs and unanticipated shortfalls in revenues. See 64 C.J.S. Municipal Corporations § 1887 (1950). Accordingly, the city council must appropriate funds on an annual, rather than shorter periodic basis.

4. If the city council approves the school board budget by total and makes an appropriation, but at a level lower than the total submitted by the school board to the council, can the school board modify or refuse to renew the contracts of probationary and/or continuing contract status professional personnel who have not been notified of the nonrenewal of their contracts by April 15 of this year?

Section 22.1-304 provides that notice of nonrenewal of both probationary and continuing contract status teachers' contracts must be given by April 15. Failure to give this notice ordinarily gives the teachers a right to employment for the ensuing year "in conformity with local salary stipulations including increments." The primary instance
where the April 15 notice date is without effect is where the
local governing body does not appropriate, for the ensuing
year, funds sufficient to renew all proposed teacher
contracts or to maintain them at the expected level of
payment. See Reports of the Attorney General (1976-1977) at
246; (1970-1971) at 342; (1955-1956) at 190. Section
22.1-304 provides, after setting forth the April 15th date
for the notification to teachers of proposed contracts,

"As soon after April fifteenth, as the school
budget shall have been approved by the appropriating
body, the school board shall furnish each teacher a
statement confirming continuation of employment, setting
forth assignment and salary.

Nothing in the continuing contract shall be
construed to authorize the school board to contract for
any financial obligation beyond the period for which
funds have been made available with which to meet such
obligation." (Emphasis added.)

These provisions clearly evidence the intent of the General
Assembly that the April 15th notification date be, under
ordinary circumstances, a signal date, constructed so that
both the teachers and the school board can know what plans
they can make in the event that adequate appropriations are
forthcoming. School boards may issue proposed contracts on
the basis of their planning budget. See Report of the
Attorney General (1976-1977) at 228. However, those proposed
contracts, by operation of law, and customarily by express
provision, are contingent upon available appropriations for
the coming term. If appropriations are not forthcoming to
fund those proposed contracts, the school board is bound, by
law, to tailor its expenditures, including those for
instruction, to the constraints of the available
appropriations. Section 22.1-91 provides in pertinent part:

"No school board shall expend or contract to expend, in
any fiscal year, any sum of money in excess of the funds
available for school purposes for that fiscal year
without the consent of the governing body or bodies
appropriating funds to the school board...."

Thus, the school board cannot agree to final contracts for
teachers for the ensuing year which exceed the available
appropriations for the ensuing year. If the school board
must decrease teacher salaries for the ensuing year or not
renew teacher contracts in order to stay within available
appropriations, these actions are permissible regardless of
the board's inability of compliance with the April 15th
notification date. See Report of the Attorney General
(1976-1977) at 246.

5. Can the school board cancel or modify existing
contracts for probationary and/or continuing contract
personnel during the next school year if State or
federal funds are not received and the appropriation to the board is reduced?

This Office has held that local governing bodies, as any other persons, are legally responsible for their existing contractual commitments. See Report of the Attorney General (1979-1980) at 300; 68 Am.Jur.2d Schools §§ 145, 148 (1973). Once the full sum has been appropriated to meet the terms of the teachers' contracts, the board of supervisors must provide sufficient funds, by tax levy or otherwise, to honor the unconditional commitments made to teachers. Supra. Thus, when a decrease in revenues requires a decrease in appropriations during the term of existing teacher contracts, any economies which are made by the governing body and school board must be made in areas in which the board does not have contractual commitments currently in force. See Report of the Attorney General (1975-1976) at 310.

It is customary, for final teacher contracts to contain a provision conditioning maintenance of the contract upon the continuing availability of revenues. See Report of the Attorney General (1979-1980) at 300. It is also permissible, and advisable, to provide in the contracts with teachers for the eventuality that federal or State funds will not be received. See Report of the Attorney General (1975-1976) at 310.

6. Can the school board include a special covenant in the contracts for probationary and continuing contract status professional personnel for the coming year conditioning the terms of those contracts on the receipt of federal and/or State funds?

It is customary and highly advisable that teachers' contracts be expressly conditioned on the continued appropriation of funds necessary to meet those contracts. See Reports of the Attorney General (1976-1977) at 228; (1979-1980) at 300. Therefore, it is appropriate for the City of Hampton to include a clause in teachers' contracts for the coming year as you suggest. I understand that the Hampton City School Superintendent has been advised by the Superintendent of Public Instruction also to this effect.

ARREST. ARREST OF PERSON FOR PROFANELY CURSING, SWEARING, OR BEING DRUNK IN PUBLIC. APPLICABILITY OF § 19.2-74.1.

August 26, 1980

The Honorable Raymond R. Guest, Jr.
Member, House of Delegates

You have asked whether a person charged with a violation of § 18.2-388 of the Code of Virginia (1950), as amended, may be arrested and held in jail pending trial in light of the provisions of § 19.2-74.1. Section 18.2-388 makes it a
Class 4 misdemeanor for a person to profanely curse or swear or be drunk in public.¹

Although the General Assembly recently enacted § 19.2-74.1 which specifies that an arresting officer may only issue a summons for any misdemeanor not punishable by a jail sentence,² subsection B of that section exempts any arrest or detention made under the provisions of § 18.2-388. Since § 19.2-74.1 is inapplicable, an officer must look to the other arrest provisions such as § 19.2-74. Section 19.2-74 gives an officer discretion to issue a summons or to bring the offender before a magistrate for the purposes of requiring recognizances when the officer believes that the person is likely to disregard the summons or is likely to cause harm to himself or another.

Therefore, I am of the opinion that a person charged under § 18.2-388 may be arrested and incarcerated for that offense, if appropriate, under circumstances as provided in § 19.2-74.

¹Note that a Class 4 misdemeanor is punishable by only a fine of not more than one hundred dollars. See § 18.2-11.
²See Opinion to the Honorable Andre Evans, Commonwealth's Attorney for the City of Virginia Beach, dated July 29, 1980, for a recent interpretation of § 19.2-74.1. A copy of this Opinion is enclosed.

ARREST. FOURTH AMENDMENT PROHIBITS POLICE, IN ABSENCE OF EXIGENT CIRCUMSTANCES, FROM MAKING WARRANTLESS AND NONCONSENSUAL ENTRY INTO SUSPECT'S HOME FOR PURPOSE OF MAKING FELONY ARREST.

September 12, 1980

The Honorable Lynn C. Armentrout
Sheriff of Warren County

You have asked if an officer armed with an arrest warrant is also required to obtain a search warrant for the accused as a prerequisite to gaining entry into the home of the accused or the home of a third party for the arrest of the accused on a felony warrant.

The United States Supreme Court held in Payton v. New York, U.S. ___, 48 U.S.L.W. 43 ___, decided on April 15, 1980, that the Fourth Amendment prohibits police, in the absence of exigent circumstances, from making a warrantless or nonconsensual entry into a suspect's home for the purpose of effecting a routine felony arrest. Therefore, in accordance with this holding, it is clear that if there is no consent or a sudden or unexpected happening or an unforeseen occurrence or condition which would justify a warrantless arrest, police cannot enter the home of an
accused for the purpose of effectuating a felony arrest without having first obtained an arrest warrant. The U.S. Supreme Court left open the question of whether police must have an arrest or search warrant to enter a third party's home to arrest a suspect.

The question of whether a search warrant is required to enter the home of a third party for the arrest of an accused on an arrest warrant has, however, been addressed by the United States Court of Appeals for the Fourth Circuit in Wallace v. King, decided on July 1, 1980, a copy of which is enclosed. The court held that in the absence of the consent of the owner of the dwelling or exigent circumstances a search warrant is a prerequisite to every search for a person named in an arrest warrant on the premises of a third person. The court stated that exigent circumstances may properly include hot pursuit or justifiable fear of injury to the persons or property if the arrest is delayed.

Thus, in my opinion, it is clear that absent exigent circumstances an arrest warrant must be obtained as a prerequisite to entering the home of an accused to effectuate a felony arrest. Further, even though the United States Supreme Court and the Supreme Court of Virginia have not addressed the question of whether an arrest or search warrant or both are required for entry into the home of a third party, it is my opinion, in view of Wallace v. King, that it would be advisable to obtain a search warrant prior to such entry.

ATTORNEYS. ETHICS. CIRCUMSTANCES WHEN ATTORNEY CAN ETHICALLY REPRESENT DEFENDANTS BEFORE CRIMINAL COURTS IN JURISDICTION IN WHICH HIS WIFE IS ASSISTANT COMMONWEALTH'S ATTORNEY.

September 29, 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 Informal Legal Ethics Advisory Opinion No. 501. The question presented by the Opinion concerns an attorney's representation of defendants before the criminal courts in a jurisdiction where the attorney's spouse is an Assistant Commonwealth's Attorney. The opinion was prepared by the Legal Ethics Committee of the Virginia State Bar.

The possible anti-competitive and economic effects of a standard, especially one established by the Commonwealth, are important given our long standing economic policy favoring competition. To the extent that ethics Opinions entirely close employment opportunities for lawyers or at least close them in certain substantive areas within the profession, the
number of competitors in the market, and thus competition itself, is reduced. In seeking to strike a proper balance between a goal of maximum competition and the obligation of lawyers to the public to practice with integrity and honesty, ethical standards should limit a lawyer's right to practice his profession only to the extent necessary to protect the public.

The relevant legal principles under which this Opinion should be evaluated have been set forth in my recent Opinions regarding proposed rules defining the unauthorized practice of law. In general, to withstand scrutiny under either an antitrust analysis or a challenge on Fourteenth Amendment grounds, standards must bear a reasonable relationship to the public welfare or public purpose served by the standard.

In Informal Legal Ethics Advisory Opinion No. 501, an attorney has asked whether he may ethically practice criminal law in juvenile and domestic relations court, police court and/or circuit court in the jurisdiction where his wife is an Assistant Commonwealth's Attorney. Specifically, the attorney's wife is one of eighteen attorneys in her office and is one of four attorneys who are assigned to the juvenile division. That division also has a supervisory attorney and two other attorneys. While the attorney's wife practices primarily in the juvenile and domestic relations court, she does handle some cases in the circuit court.

The Legal Ethics Committee (the "Committee") has held that the attorney cannot ethically represent defendants before any of the criminal courts in the jurisdiction in which his wife is an Assistant Commonwealth's Attorney even if she had no part in the prosecution of the husband's cases and full disclosure was made to the defendant. The Committee found that such representation would create an "appearance of impropriety," which is in derogation of Canon 9 of the Virginia Code of Professional Responsibility.

While the overall economic impact of the Committee's Opinion is not likely to be sizeable due to the fairly limited number of lawyers married to lawyers, the Opinion may work a substantial hardship on those lawyers which do fall within this class. In this case, for example, the effect of the Opinion will be to prohibit absolutely the lawyer from handling any criminal defense matters in the jurisdiction where his wife is an Assistant Commonwealth's Attorney. In light of this effect, it is necessary to inquire whether this limitation on the lawyer's right to practice his profession is in fact necessary to protect the public welfare. While the State has an important objective in protection of the public by prevention of conflicts of interests between lawyer-spouses, I am not convinced that absolute preclusion of the attorney in this case from criminal practice is warranted. To the contrary, I am of the opinion that adequate safeguard is provided through full disclosure, the informed consent of the defendant, avoidance by the wife of any involvement in the prosecution of the husband's cases,
and through discipline in cases where lawyers do in fact act improperly.

In reaching this conclusion, I take note that the harsh treatment of lawyers related to each other by marriage seems to be in sharp contrast to the relatively lenient treatment of the representation of differing interests by lawyers related in other ways.¹

In concluding that an attorney cannot ethically represent defendants before any criminal courts in the jurisdiction in which his wife is an Assistant Commonwealth's Attorney, the Committee argues only that such representation creates an "appearance of impropriety." In essence, the Committee has drawn a conclusive presumption that such representation would involve a conflict of interest which would appear to be improper and which would damage the public's confidence in the legal profession. There is, however, no indication from the Opinion of any basis in fact which would support such a presumption and in recent years such presumptions have been disfavored and have been found in a number of cases to violate due process.²

While avoiding the "appearance of impropriety" is a proper goal of the legal profession and is designed to ensure public confidence in the legal system, overzealous adherence to this goal will have the effect of unreasonably depriving clients of the right to counsel of their choice, while severely restricting the career opportunities of some lawyers. Where impropriety is apparent, appropriate action can be taken by enforcement of the specific proscriptions in other areas of the Virginia Code of Professional Responsibility.³ I am persuaded, however, that severe restriction of an attorney's right to practice should not rest solely on speculative claims of the "appearance of impropriety." I do not minimize the importance of avoiding the harm to the public and the legal profession which could result from conflicts of interest between lawyer-spouses. I find nothing, however, to indicate specifically that allowing the attorney in this instance to practice criminal law would impair the community's confidence in the administration of justice.⁴ Moreover, any such loss of confidence is made less likely where the two spouses avoid becoming directly involved on opposite sides of the same case and where full disclosure and consent are present.

For all of these reasons, I am of the opinion that Advisory Opinion No. 501 is not reasonably related to the public interest to be protected. Accordingly, I recommend that the Council of the Virginia State Bar direct a reconsideration of this matter.

REPORT OF THE ATTORNEY GENERAL

2See Opinions dated October 9, 1979, January 22, 1980, and June 3, 1980.
4See Note, Representation of Differing Interests by Husband and Wife: Appearances of Impropriety and Unavoidable Conflicts of Interest, 52 Denver L.J. 735, 738-739 n.23; ABA Formal Opinion 340 (September 23, 1975).
6See, e.g., Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client"); Canon 5 ("A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client").
7Moreover, I note that "[n]o disciplinary rule expressly requires a lawyer to decline employment if a husband, wife, son, daughter, brother, father, or other close relative represents the opposing party in negotiation or litigation." ABA Formal Opinion 340 (September 23, 1975).

ATTORNEYS. ETHICS. CIRCUMSTANCES WHEN ATTORNEY WHO SERVES AS SETTLEMENT OR CLOSING ATTORNEY IN CONNECTION WITH PURCHASE OR MORTGAGE FINANCING OF REAL ESTATE MAY ETHICALLY DISBURSE FUNDS FROM TRUST ACCOUNT.

September 29, 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 anti-competitive effects of proposed Legal Ethics Advisory Opinion No. 183. This proposed Advisory Opinion is a modification of former proposed Opinion No. 183 (printed as Opinion No. 182) which was disapproved by the Virginia State Bar Council on April 27, 1979. The question presented is when an attorney who serves as settlement or closing attorney in connection with the purchase or mortgage financing of real estate may ethically disburse funds from his or her trust account. The Opinion was prepared by the Legal Ethics Committee of the Virginia State Bar (the "Committee").

The relevant legal principles for evaluating the possible anti-competitive and economic effects on competition of an Advisory Opinion have been set forth in my recent Opinions regarding proposed rules defining the unauthorized practice of law.2 After careful consideration of these principles and the position taken in proposed Advisory Opinion No. 183, I can find no significant economic effect on competition which would be caused by promulgation and implementation of this Opinion.
In brief, the Opinion holds that an attorney who complies strictly with the provisions of the Wet Settlement Act (the "Act"), §§ 6.1-2.10 through 6.1-2.15 of the Code of Virginia (1950), as amended, will not be guilty of unethical conduct. The opinion further holds that disbursement of funds prior to actual crediting to the account of items deposited in an attorney's trust account which do not take the forms prescribed in the Act will constitute unethical conduct in violation of Disciplinary Rule 9-102.

In reaching these conclusions, the Committee has recognized that Disciplinary Rule 9-102, if strictly interpreted, will require that attorneys not disburse upon items deposited in their trust accounts until the depository bank had irrevocably credited them to that account. Such a requirement, however, would likely impose great inconvenience by preventing immediate disbursement by a settlement attorney. As a result, the Committee has attempted to strike a reasonable and appropriate balance between the need to protect the funds of other clients in an attorney's trust account and the desirability of an expeditious disbursement of funds received from the purchaser and lender in a real estate transaction. The Committee found that the requirements of the Act concerning the forms of funds to be delivered to the settlement agent were appropriate and completely reliable and, as a matter of ethical responsibility, the Committee was unwilling to impose a stricter rule than necessary to conform to the Act. Thus, even though some forms of funds designated in the Act are not "collected" in a commercial banking sense immediately upon deposit by the settlement attorney, the Committee found the risk of noncollectability so slight that an attorney will not be exposing his clients to any serious risk of harm by immediately disbursing funds. After careful consideration, I find these conclusions to be reasonable.

Accordingly, I am of the opinion that this proposal is rationally related to the public interest.

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2See Opinions dated October 9, 1979, January 22, 1980.
3The Act defines terms such as "loan closing," "settlement," "disbursement of loan funds," and "loan documents," to clarify the duties of the lender and settlement agent involved in a real estate closing and the Act requires the settlement agent to disburse settlement proceeds within two business days of settlement.
4Disciplinary Rule 9-102 provides in pertinent part:
"(B) A lawyer shall:

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(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
(4) Properly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive."

Section 6.1-2.10 defines the manner in which a lender may satisfy its obligation to disburse loan funds by requiring that the funds be delivered to the settlement agent: "in the form of cash, wired funds, certified checks, checks issued by a political subdivision of the Commonwealth, cashier's check, or checks issued by a financial institution, the accounts of which are insured by an agency of the federal or State government, which checks are drawn on a financial institution, located within the Fifth Federal Reserve District, the accounts of which are insured by an agency of the federal government."

ATTORNEYS. ETHICS. WHETHER ATTORNEY CAN ETHICALLY REQUEST SOCIAL SECURITY ADMINISTRATION TO INCLUDE NAME OF HIS LAW FIRM IN NOTICE MAILED TO CLAIMANTS ADVISING OF HOW MIGHT OBTAIN PRIVATE ATTORNEY.

September 29, 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 Informal Legal Ethics Advisory Opinion No. 462. That Opinion analyzes whether an attorney can ethically request the Social Security Administration (the "Administration") to include the name of his law firm in a notice mailed to claimants advising them of how they might obtain a private attorney. The notice lists the Lawyer Referral Service of the Virginia State Bar and several legal aid offices or community organizations. After considering this question, the Legal Ethics Committee of the Virginia State Bar (the "Committee") concluded that the attorney cannot ethically request the Administration to include his law firm's name in such a notice. The Committee found that such a request would violate a rule of the Virginia Supreme Court concerning solicitation. That rule, Rules of Court, Part 6, Section II: DR 2-103(C), was revised effective January 1, 1980, and with a few exceptions prohibits an attorney from requesting a person or organization to recommend his employment.

The legal principles regarding the possible anti-competitive and economic effects on competition of an Advisory Opinion similar to this have been set forth in my recent Opinions regarding proposed rules defining the unauthorized practice of law. After carefully evaluating the possible effects of the Committee's action in this case, I find that there is no sizeable anti-competitive impact in either permitting or disallowing the attorney to request to be listed on the Administration's notice. It is possible,
however, that to allow this kind of action could be more economical than requiring attorneys to resort to advertising in an effort to reach the same persons. I am informed, however, that the Administration office mentioned here has indicated that it does not allow law firms to be listed in these notices to claimants. As a result, it appears unnecessary for me to evaluate the legality of the Committee's opinion under First and Fourteenth Amendment standards.

The Committee has assumed that the attorney's request is for the purpose of seeking a recommendation of employment rather than a public communication permitted under DR 2-101. While the request thus would appear on its face to violate DR 2-103(C), it should be recognized that additional facts in a more specific case could render it proper. For example, if the Administration by appropriate adoption of a policy determined to compile a directory of attorneys regularly practicing before it, this would be permitted under Consumers Union of United States, Inc. v. American Bar Association, 470 F.Supp. 1055 (E.D. Va. 1979). The attorney's request to participate then would be allowed under DR 2-102(A), which allows participation in directories. The attorney could request that an organization establish a directory.

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2Disciplinary Rule 2-103(C) provides: "A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists and may pay its fees incident thereto, or any referral panel of prepaid legal services, legal services insurance or legal services plan authorized by law and qualified to do business in this State."
3See Opinions dated October 9, 1979, and January 22, 1980.

ATTORNEYS. LEGAL ETHICS CONCERNING USE OF CREDIT CARDS FOR PAYMENT OF LEGAL FEES AND EXPENSES AND CHARGING OF INTEREST ON OVERDUE ACCOUNTS.

June 2, 1981

The Honorable Samuel Clifton, Executive Director
Virginia State Bar

You have requested my opinion as to the economic effect on competition of Proposed Formal Legal Ethics Opinions 186-A and 186-B. This Opinion is required by Part 6, § IV, paragraph 10(e)(iii) of the Rules of Court.
Opinion 186-A approves the participation by attorneys in plans providing for the use of credit cards for payment of legal fees and expenses. Opinion 186-B deals with circumstances in which it is improper for attorneys to charge interest on overdue accounts.

While an attorney who accepts credit cards may gain a competitive advantage over those who do not, all attorneys are granted the right to accept credit cards if they wish. The attorney does not receive any interest on unpaid accounts, so use of the credit card does not create any competitive advantage over attorneys who are precluded by Opinion 186-B from charging interest. Accordingly, I am of the opinion that there is no economic effect or restraint on competition which may be caused by promulgation or implementation of the Opinions.

ATTORNEYS. NONPROFIT TRADE ASSOCIATIONS AND ADMINISTRATIVE AGENCY PRACTICE.

January 26, 1981

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

You have requested my comments, as required by the Rules of the Supreme Court of Virginia, on the possible anticompetitive effects of two advisory opinions defining the unauthorized practice of law ("UPL"). These opinions, Nos. 8 and 9, deal with nonprofit trade associations and administrative agency practice.

The report of the Committee on the Unauthorized Practice of Law (the "Committee") containing these proposed opinions is published in the Virginia Bar News (December 1980) and I will cite to that publication. The text of the unauthorized practice rules contained in these opinions will be quoted herein for convenience. In addition to reviewing the possible anticompetitive effects of these rules, they will also be examined for their compliance with relevant legal principles.

The possible anticompetitive and economic effects of a rule promulgated by the Commonwealth are important because of our commitment to an economic policy favoring competition. By design, unauthorized practice of law regulations are frequently anticompetitive because they limit or preclude non-lawyers, and in some instances lawyers, from performing certain activities thought to constitute the practice of law, thus reducing competition. In attempting to strike a proper balance between the objective of maximum competition and the Commonwealth's obligation to protect the purchasers of legal services, UPL rules should lessen competition only to the degree necessary to protect the public and promote the public welfare.
The relevant legal principles under which these proposed rules must be evaluated have been set forth in my previous Opinions on the unauthorized practice of law. In general, to withstand scrutiny under either an antitrust analysis or a challenge on First and Fourteenth Amendment grounds, rules must bear a reasonable relationship to the public purpose served by the rule.

In Unauthorized Practice Rule ("UPR") 8-101, 8-102, 8-103, 8-104
Trade Associations

Proposed UPL Advisory Opinion No. 8 addresses issues previously covered in former UPL Opinion No. 34, which broadly prohibited trade associations from furnishing legal opinions to individual members, soliciting new members with the promise of legal services by the association's lawyer, and use of the association's lawyer by a member in litigation. In proposing UPL Advisory Opinion No. 8, the Committee has attempted to bring former Opinion No. 34 in line with subsequent decisions of the Supreme Court of the United States construing the First Amendment rights of civil rights groups and labor unions. In re Primus, 436 U.S. 412 (1978); United Transportation Union v. Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R. R. Trainmen v. Virginia, 377 U.S. 1 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1963). Those decisions have greatly narrowed the power of states to regulate the offering of legal services by nonprofit associations.

Each of the decisions has been addressed in detail in the Committee's report and they join to stand for the general proposition that state regulations cannot infringe the associational rights of nonprofit organizations. As the Committee has concluded, "[t]he lesson of these cases is clear: a nonprofit organization is free to provide or recommend legal services to its members in pursuit of its associational goals, and to negotiate with lawyers on behalf of its members with respect to the fees charged." The Committee further concluded that "[t]he evils inherent in such practices (e.g., kickbacks, conflicts of interest, and the like) can and must be remedied after-the-fact, and will not justify any general, broad prior restraint, via a State regulation of lawyers or the practice of law."

While the constraints that are imposed by Opinion No. 8 may to some degree lessen competition between those attorneys representing trade associations and attorneys in private practice, such constraints are permissible where they effect a proper public purpose beyond a restriction of competition and so long as they conform to the United States Supreme Court decisions cited above.

In Unauthorized Practice Rule ("UPR") 8-101, the Committee has sought to carefully delineate those instances in which the Supreme Court has ruled that nonprofit associations may offer legal advice or provide legal
services. While the rule on its face appears to be consistent with the Supreme Court's rulings, it must not be applied in an overly restrictive fashion. Rather, prudence must be exercised because "broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." In particular, UPR 8-101(A)(3) and UPR 8-101(A)(5) call for great care in the assessment of whether an association is exerting improper control over the actual conduct of litigation and whether a particular matter relates to an association's collective activity and associational freedoms. Where only a "very distant possibility of harm" exists, broad application of a rule which can limit such freedoms cannot be justified. See In Re Primus, supra, at 436; United Mine Workers v. Illinois Bar Ass'n, supra, at 223.

The prohibition of UPR 8-102 against holding out with respect to legal advice or services is consistent with the Virginia Supreme Court's general definition of the practice of law and is similar to UPR 5-101(A) which has been adopted by the Court.

In UPR 8-103, the Committee has adopted language almost identical to UPR 3-101 requiring collection agencies to preserve the attorney-client relationship. As the Committee has noted, however, more stringent rules may be acceptable when dealing with collection agencies than with nonprofit associations which are lacking in a "pecuniary advantage." Specifically, I am of the opinion that the prohibition of UPR 8-103(A)(2) against a trade association attempting to fix a lawyer's compensation is not supportable. First, such a provision appears to be inconsistent with the clear holding of United Transportation Union v. Michigan, supra, at 584-586 and 595-596, in which the Supreme Court refused to uphold a prohibition against a union's control directly or indirectly of the fees to be charged by a lawyer. Moreover, 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 trade association should be prevented from establishing some limits on the rates to be charged by the attorneys it recommends. Finally, I note that the Committee in its report recognizes the freedom of a nonprofit organization "in pursuit of its associational goals...to negotiate with lawyers on behalf of its members with respect to the fees charged." Accordingly, I recommend amendment of UPR 8-103(A)(2) as follows:

(A) A trade association shall not:

(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, except that in matters of collective interest a association
may negotiate on behalf of its members with respect to the legal fees to be charged.

Consistent with my recommended revision of UPR 8-103(A)(2), I also recommend amendment of UPR 8-104(A)(3) as follows:

(A) A trade association may refer its members to a lawyer subject to the following:

(3) The lawyer shall be free at all times to communicate directly with such member, now his client; and, upon receipt of the initial referral, as well as upon the 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 trade association shall participate, in pursuit of its associational goals, may participate.

In other respects, UPR 8-104 is patterned after UPR 3-102 and in my opinion is lawful.¹¹

UPR 9-101, 9-102
Administrative Agency Practice¹²

In seeking to regulate administrative agency practice, the Committee recognizes the right of non-lawyers, authorized to practice before federal agencies, to give legal advice and prepare legal instruments affecting Virginia residents so long as they are acting within the scope of their authorized practice before such agencies. At the same time, the opinion forbids persons not licensed to practice law in Virginia to expand their legal activities outside the area of their authorized administrative agency practice or the area reasonably within the scope of that practice.

In allowing non-lawyers to practice reasonably within the scope of their authorized federal agency practice, the Committee has properly recognized the rule of federal supremacy as applied by the Supreme Court in Sperry v. Florida.¹³ Basically, the Committee's proposal is really no broader than the latitude already given non-lawyers in Virginia to prepare notices or contracts "incident to" the regular course of conducting a licensed business. As such, this provision is consistent with Virginia's general definition of the practice of law.

In prohibiting legal practice by a non-lawyer outside of the area reasonably within the scope of the non-lawyer's federal agency practice, the Committee has done nothing more than apply the fundamental requirement that persons must be properly licensed to practice law in this State. While licensing requirements certainly reduce competition, there is no argument that such regulation is not properly within valid State interests.
Accordingly, I am of the opinion that this proposal is in conformity with applicable principles of law.

2See previous Opinions to you dated October 9, 1979, January 22, 1980, and June 3, 1980.
3See Opinion to you dated June 3, 1980 at 2-3.
4UPR 8-101. Giving Legal Advice, provides:
   "(A) A trade association shall not give legal advice or provide legal services to its members, directly or through its employed or retained lawyer, except that a trade association may:
      (1) Distribute to its members any legal opinion rendered to the trade association by its lawyer on a matter which affects or may affect the general membership of the association.
      (2) Appear through its lawyer as an intervenor or amicus curiae in any case involving a member, to the extent otherwise permitted by the court.
      (3) Refer one or more of its member to its lawyer with respect to any legal matter so long as such lawyer is recognized throughout by all concerned as representing solely the interest of such member or members, free of control by or interference from the trade association.
      (4) Solicit the comments of its members on proposed legislation or regulations drafted by its lawyer which affect or may affect the general membership of the association.
      (5) Provide the services of its lawyer to one or more of its members in any proceeding seeking to
         (a) Further the political goals of the association;
         (b) Obtain meaningful access to the courts; or
         (c) Vindicate civil liberties guaranteed by the Constitution of Virginia or the United States."

UPR 8-102. Holding Out With Regard to Legal Services, provides:
   "(A) Except to the extent legal advice or services are permitted to be provided under UPR 8-101, a trade association shall not hold itself out as authorized to furnish its members legal advice or services."

UPR 8-103. Attorney-Client Relationship, provides:
   "(A) A trade association 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 itself between the lawyer and the member 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 8-104. Referral of Business, provides:

"(A) A trade association may refer its member to a lawyer subject to the following:
(1) The member shall first have the opportunity to select a lawyer of his own choosing.
(2) If the member does not so select a lawyer, the trade association shall submit a list of lawyers from which the member may make his selection, which list may include the customary fee of each lawyer on the list.
(3) The lawyer shall be free at all times to communicate directly with such member, now his client; and, upon receipt of the initial referral, as well as upon the 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 trade association shall not participate.

(B) A trade association 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 transaction. All decisions are to be those of the lawyer acting on behalf of his client."

7 Id. at 14-15.
8 United Mine Workers v. Illinois Bar Ass'n, supra, at 222.
9 Virginia Bar News, supra, at 15.
10 Id., at 14-15.
12 UPR 9-101. Holding Out as an Expert, provides:

"(A) 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, or administrative regulation or ruling applicable thereto, except that a person admitted to practice by an administrative agency may hold himself out as such to the extent permitted by such agency as long as he does not misrepresent the scope of his practice authorized by such agency.

(B) A person duly licensed or authorized to practice law in another State or before any administrative agency shall not use the descriptive term 'law office' or its equivalent on any signs or listings in Virginia, unless he is an employee or member of a firm with one or more lawyers duly licensed to practice law in Virginia."

UPR 9-102. Agency Practice, 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, or administrative legislation
or ruling applicable thereto, except:
(1) As an employee to his regular employer.
(2) As permitted by the rules of such agency and reasonably within the scope of his practice authorized by such agency.

(B) A non-lawyer shall not undertake, with or without compensation, to prepare for another legal instruments of any character incident to his practice before an administrative agency, except:
(1) As an employee for his regular employer.
(2) In the regular course and reasonably within the scope of his practice authorized by such agency.

(C) As to representing the interest of another before an administrative tribunal, see Rule 6.1-1."


ATTORNEYS. REAL ESTATE PRACTICES.

June 2, 1981

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

You have requested my opinion as to the economic effect on competition of proposed Unauthorized Practice of Law Advisory Opinions 6 and 7, which were issued by the Standing Committee on the Unauthorized Practice of Law (the "Committee") on April 4, 1981. Your request is made pursuant to Part 6, § IV, para. 10(c)(iii) of the Rules of Court.

Earlier proposals in this area were considered by the governing Council of the Virginia State Bar on February 8, 1980, and June 19, 1980. My Opinions to you regarding those proposals were issued on January 22, 1980, and June 3, 1980. Subsequently, on March 12, 1981, I submitted a competitive impact statement which provided additional analysis of the economic effect of the proposals on competition.

I note that the Committee's new proposals are related in all substantive respects to those considered on February 8, 1980. As a result, my prior Opinions together with my recent competitive impact statement shall constitute my comments concerning the new proposals.

BANKING AND FINANCE. COMPUTING CHARGES ON SMALL LOANS UNDER PER CENTUM PER MONTH METHOD, EACH DAY OF YEAR IS ACCOUNTED FOR.

July 9, 1980

The Honorable George W. Grayson
Member, House of Delegates

You have asked for my interpretation of the per centum per month method of computing interest charges on small loans
as set forth in § 6.1-277 of the Code of Virginia (1950), as amended. Specifically, you wish to know whether the finance charge for a one-year loan would be based on 365 days or on twelve 30-day periods.

Under § 6.1-277(a), charges may be made for 365 days of the year. Section 6.1-277(a) provides that:

"[f]or the purpose of computing charges under the per-centum-per-month method, whether at the maximum rate or less, a month shall be any period of thirty consecutive days and if more or less than thirty days has elapsed between payments, then computation shall be made to add or subtract from the charges the appropriate fraction of a month's charge. A day shall be one-thirtieth of a month where computation is made for a fraction of a month."

For 31-day months, an extra day of charge is added to the basic monthly charge. For 28 or 29 day months, a day or two of charge is subtracted. Therefore, in computing charges on small loans, each day of the year is accounted for. Accordingly, I am of the opinion that charges should be calculated on the basis of 365 days rather than twelve 30-day periods.


"[f]or the purpose of computing charges, whether at the maximum rate or less, a month shall be that period of time from one date in a month to the corresponding date in the following month but if there is no corresponding date then to the last day of such following month and a day shall be one thirtieth of a month where computation is made for a fraction of a month."

Under this previous version of § 6.1-277, charges for each month were computed without regard for the number of days in the month. But that result has been changed in the present wording of the statute.

BINGO. AUDIT OF RECEIPTS AND DISBURSEMENTS. ADDITIONAL QUESTIONS ADDED TO FINANCIAL REPORT FORM BY LOCAL GOVERNING BODY.

September 19, 1980

The Honorable John E. Kloch
Commonwealth's Attorney for the City of Alexandria

You have asked whether a locality may add additional questions to the financial report form which is set forth in § 18.2-340.6(D) of the Code of Virginia (1950), as amended. You state that these questions relate to the auditor's ability to trace bingo and raffle proceeds.
The legislature, in authorizing bingo and raffles, intended that the governing bodies of cities, counties or towns have the authority to strictly regulate these games according to the wants and needs of their locality. See §§ 18.2-340.1 through 18.2-340.12. One regulatory function these localities must complete is the periodic auditing of the gross receipts and disbursements of those organizations issued permits to operate such games. See §§ 18.2-340.6 and 18.2-340.7. There is no denying that bingo and raffle games are a big business in certain areas of the State with receipts totalling in the millions of dollars. What information one locality may need in order to complete their audit may not be sufficient in another locality. This problem is recognized by § 18.2-340.6(B)(1). That section authorizes that the financial report form "may be expanded to include any other information desired by the local governing body...."

It is recognized that municipal regulations relating to gambling must be reasonable and certain and must be within the scope of the power conferred. See 38 Am.Jur.2d Gambling § 13 (1968). See, also, Report of the Attorney General (1976-1977) at 153. You have submitted a list of additional questions¹ which has been approved by the city council. I believe the city council is in the best position to determine what additional information is needed to insure a thorough audit. It does appear to me that the additional questions which you have submitted are reasonable and permissible when viewed with the realization that §§ 18.2-340.1 through 18.2-340.12 were enacted to strictly regulate bingo and raffle games.

¹The additional questions are:

"(1) List all compensation of any kind of officers, managers, members, stockholders or any other affiliates of the organization derived directly or indirectly from bingo or raffle proceeds.

(2) Include a copy of the organization's most recent financial statements (audited if available).

(3) List all persons, by name and relationship to the organization, who received any payment, or who received services in lieu of payment from the organization, and who also participated in the management, operation or conduct of any bingo game or raffle.

(4) Attach list of land or facilities owned and/or used by the organization, and if not owned, the names of the owners and their respective interests.

(5) If a corporation, partnership or trust, provide report of officers and outstanding ownership interests."

BINGO. USE OF PROCEEDS. FOR CONSTRUCTION OF AND/OR UPKEEP OF ORGANIZATIONAL FACILITIES.
June 24, 1981

The Honorable Peter K. Babalas
Member, Senate of Virginia

You have asked whether a charitable organization qualified to conduct bingo games may use the proceeds from those games for the construction of and/or the upkeep of its facilities, including the payment of the mortgage.

This Office has previously held that organizations such as churches and volunteer fire departments may use bingo proceeds to finance the cost of and the upkeep of buildings in which they conduct their various activities. See Opinion to the Honorable Robison B. James, Member, House of Delegates, dated July 14, 1978, found in Report of the Attorney General (1978-1979) at 23; see, also, Opinion to the Honorable William H. Harris, County Attorney for Stafford County, dated August 28, 1978, found in Report of the Attorney General (1978-1979) at 26. In construing former § 18.2-335 of the Code of Virginia (1950), as amended, these Opinions concluded that the use of bingo proceeds in such a manner was not precluded by the statutory prohibition against the proceeds inuring directly or indirectly to the members of the organization.1

As you are aware, the 1979 General Assembly completely revised the laws concerning bingo games and raffles.2 While the prohibition against bingo proceeds inuring directly or indirectly to the members of the organization found in former § 18.2-335 was not specifically set out in the new bingo and raffle provisions, § 18.2-340.9(A) does prohibit the use of such proceeds for any purpose other than those for which the organization was established.3 In my opinion, this new statutory language not only reenforces the holdings of the Opinions cited above, but also allows any qualified organization properly issued a permit to conduct bingo games or raffles to use the proceeds from these activities in such a manner. Such a use does not violate the spirit of the statute. However, qualified organizations conducting such games should be mindful of other prohibitions set out in the rest of § 18.2-340.9. They should not regard the language of § 18.2-340.9(A) as a carte blanche to use these proceeds in any manner they wish.

Accordingly, it is my opinion that charitable organizations qualified to conduct bingo games and raffles may use the proceeds from these games for the purchase, construction and/or upkeep of their facilities.

1Former § 18.2-335 provided, in part: "that no part of the gross receipts derived from such activity inures directly or indirectly to the benefit of any private shareholder, member, agent or employee of any such volunteer fire department, rescue squad or organization...."
You have asked whether the Board of Supervisors of Roanoke County may condition approval of certain additions to the school board budget upon the school board's continuance of the specific programs funded by those added monies.

The school board budget is prepared by the division superintendent of schools and contains estimates of the amount of money needed for each major classification prescribed by the State Board of Education. It is proposed to the board of supervisors after it is approved by the local school board. See § 22.1-92 of the Code of Virginia (1950), as amended. The board of supervisors approves the budget submitted to it by the school board. The approval is made by certain statutorily mandated times, but there is no requirement that in the approval process the board of supervisors retain the exact form or content of the budget submitted to it by the school board. See § 22.1-93; Report of the Attorney General (1976-1977) at 228.

Even after approval by the board of supervisors, the budget does not operate as an appropriation of monies for school purposes. See § 15.1-162. It does, however, provide guidance to the school board in making its plans for the ensuing year. See § 22.1-89. For instance, school boards may issue proposed contracts, conditioned upon an actual appropriation, on the basis of the approved budget. See Opinion to the Honorable Hunter B. Andrews, Member, Senate of Virginia, dated May 27, 1981; Report of the Attorney General (1976-1977) at 228.

The main requirement imposed upon the board of supervisors is that when it appropriates funds for school purposes, the appropriation be made by total or by major classification. See § 22.1-94. Therefore, it is possible for the board of supervisors to articulate in the school
board budget its desires that particular programs be maintained by making specific provisions for those programs. The presence of such provisions, like that which is the subject of your question, does not, in and of itself, affect the validity of the budget approval for the purpose of meeting the time requirements under § 22.1-93.

It should be noted, however, that the efficacy of such special provisions placed by the board of supervisors in the school board budget is doubtful. As previously noted, the board of supervisors may appropriate funds to the school board by total or major classification only. It has been held consistently that the board of supervisors may not increase, decrease or delete individual line items in the approved budget as it appropriates funds for educational purposes. See Reports of the Attorney General (1979-1980) at 300; (1978-1979) at 29; (1975-1976) at 22, 296; (1973-1974) at 317; (1971-1972) at 25, 332; (1967-1968) at 19.

The supervision of the schools in each school division is vested in the local school board. See Art. VIII, § 7 of the Constitution of Virginia (1971). Once the appropriation is made, the school board has the primary responsibility and power of managing and controlling the funds made available to it consistent with the classifications set forth in the appropriations. See § 22.1-89; 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); Report of the Attorney General (1979-1980) at 300. The school board may not transfer appropriated funds from one classification to another, but within the major classifications of appropriated funds it has discretion in deciding how monies will be spent. See Report of the Attorney General (1979-1980) at 300.

Accordingly, it is my opinion that while the inclusion by the board of supervisors of certain provisions in the school board budget does not affect the validity of the board's approval of the budget for the purpose of meeting the time requirements of § 22.1-93, those provisions may not be included by the board of supervisors when it makes its appropriation. Further, those provisions have no controlling effect upon the school board.

As has been noted in prior Opinions, the board of supervisors is not completely without power to affect expenditures for educational purposes. See Reports of the Attorney General (1978-1979) at 29, (1975-1976) at 296. It may make appropriations on a periodic basis, or appropriate school funds for basic costs only, while establishing a contingency fund for nonessential expenditures. Alternatively, it may in its appropriation increase or decrease the budgeted amounts for major classifications proposed by the school board. These actions may accomplish the desired effect on school expenditures, consistent with the requirements of law. See Opinion to the Honorable
Hunter B. Andrews, Member, Senate of Virginia, dated May 27, 1981 (copy enclosed).

1 You indicated that the ordinance in question was adopted at a "recessed" meeting of the board. I would need additional information before I could determine whether the motion was ineffective, but since any question can be removed simply by a new vote, this Opinion assumes the validity of the ordinance.

BONDS. DEFAULT ON PERFORMANCE BONDS BY CONTRACTOR.

December 24, 1980

The Honorable Owen B. Pickett
Member, House of Delegates

You ask whether, in the case of default by a contractor, the Hampton Roads Sanitation District (hereinafter "Sanitation District") may dispense with public advertising and bidding requirements and instead enter into an agreement with the contractor's bonding company wherein the bonding company and the Sanitation District together select a general contractor without using public advertisement and competitive bidding.

As you relate the facts, the Sanitation District entered into a contract with a general contractor for the construction of an influent pump station to serve the proposed Atlantic Treatment Plant in the City of Virginia Beach. Performance and payment bonds were posted by the general contractor with a corporate surety. In the early stages of construction, the contractor defaulted and could not proceed.

The bonding company at this point is willing to proceed in one of two ways, although it prefers the second: (1) it could itself enter into a contract with a new general contractor and complete the project; or (2) it could reimburse the Sanitation District for the additional cost of entering into a new contract and let the Sanitation District do it in the following manner. From a panel of general contractors approved by the Sanitation District, the bonding company would offer one or more proposed general contractors, one of whom would be selected by the Sanitation District. A contract would be entered into between that contractor and the Sanitation District for the performance of the uncompleted portions of the original construction contract, with adequate performance and payment bonds being posted by the new contractor. If the new contract price exceeds the original contract price, which you expect to happen, the bonding company would pay to the Sanitation District the difference between the cost of the two contracts. The bonding company would then be discharged from its
responsibility under the existing performance bond, but not under the payment bond. The Sanitation District would look only to the new contractor and his surety for contract performance.

You state that the Sanitation District also favors the second alternative described since it would avoid dealing with administrative hierarchy of the bonding company in regard to change orders, etc., as would be the case if the bonding company were the entity to enter into a new contract to complete the project.

The Sanitation District was established by Ch. 66 of the 1960 Acts of the Assembly. Section 45 of that Act requires competitive bidding and advertising.

Additionally, § 11-17 of the Code of Virginia (1950), as amended, provides that every construction contract in excess of $10,000 to which a sanitary authority is a party, with certain exceptions, shall be let only after advertising for bids at least 10 days prior to the letting of the contract. Section 11-20 provides that such contracts shall be let to the lowest responsible bidder.

The reasons for public bidding are set forth quite well in 64 Am.Jur.2d Public Works and Contracts § 37 (1972):

"The purposes of the provisions so generally found in constitutions, statutes, city charters, and ordinances, requiring that contracts with public authorities be let only after competitive bidding, are to secure economy in the construction of public works and the expenditures of public funds for materials and supplies needed by public bodies; to protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things for the use of the state and its local self-governing subdivisions; and to promote actual, honest, and effective competition to the end that each proposal or bid received and considered for the construction of a public improvement, the supplying of materials for public use, etc., may be in competition with all other bids upon the same basis, so that all such public contracts may be secured at the lowest cost to taxpayers...."

In the situation you describe, those purposes were achieved when the project was initially advertised and bid. If the bonding company is to pay the additional cost of the second contract over and above the cost of the contract originally let by the public bidding system, public funds will have been adequately protected. Furthermore, since the bonding company is involved in the selection of the general contractor who will complete the project, the subsidiary purposes of preventing collusion and favoritism in the awarding of contracts should be accomplished, it being in the best interest of the bonding company to select a contractor
who will do the work for the lowest price or at least for a reasonable price. At the same time, the Sanitation District would be able to veto the selection of any particular contractor, thereby avoiding irresponsible contractors.

Unfortunately, where there is not some established principle allowing deviation from the literal declarations of a statute, statutes in Virginia must be strictly construed. Therefore, if the Sanitation District wishes to enter into a contract with a new contractor, releasing the surety from further obligations under its surety bond in return for a cash payment as described above, the Sanitation District will have to publicly advertise and conduct competitive bidding as required by statute.

For your convenience, I wish this were not so. The legislation being proposed in the final report of the Virginia Procurement Law Study which will be considered by the next Session of the General Assembly provides for "competitive negotiation" in situations where competitive sealed bidding is deemed impractical or disadvantageous. Such a procedure may have been used to advantage by the Sanitation District in this situation. I am sure you will want to make certain that any new procurement legislation deals adequately with the procedure to be followed in the event of contractor default.

CEMETERIES. MUNICIPAL CORPORATION MAY SPEND PUBLIC MONEY TO MOW GRASS IN PRIVATE CEMETERY--MAY CHARGE OWNER.

October 31, 1980

The Honorable Orby L. Cantrell
Member, House of Delegates

You have asked whether a municipal corporation may spend public monies to clean and maintain private land on which a cemetery is located. I understand, according to further information which you have provided, that the municipality involved does not desire to acquire the private cemetery; the cemetery has not been abandoned. The problem has arisen because the current owners have not maintained the cemetery and adjacent property owners object to the high grass allowed to grow on the cemetery land.

Section 15.1-11(2) of the Code of Virginia (1950), as amended, provides that a municipal corporation may, by ordinance, provide:

"That the owners of vacant property therein shall cut the grass, weeds and other foreign growth on such property or any part thereof at such time or times as the governing body shall prescribe; or may, whenever the governing body deems it necessary, after reasonable notice, have such grass, weeds or other foreign growth cut by its agents or employees, in which event, the cost
and expenses thereof shall be chargeable to and paid by the owner of such property and may be collected by the county, city or town as taxes and levies are collected..."

Section 15.1-860 allows municipalities by ordinance to regulate cemeteries. Further, § 15.1-867 provides a municipal corporation may compel the abatement and removal of all nuisances.

Therefore, if there is a municipal ordinance requiring the removal or control of grass and weeds, the municipality, upon the refusal of the property owner to do so, may expend public monies to mow the grass. The municipality then may charge the property owner for the costs involved in mowing the grass. In view of the city's authority under § 15.1-860 to regulate cemeteries, I am of the opinion that the municipality could cut the grass with or without charge to the property owners.

CEMETERIES. PROVISION OF SERVICES INCIDENTAL TO CREMATION REQUIRES LICENSURE UNDER § 54-260, ET SEQ.

January 7, 1981

The Honorable Glenn B. McClanan
Member, House of Delegates

You have made several inquiries regarding the legality of certain practices of a corporation operating a crematorium in Virginia. Under the circumstances described in your letter the corporation wishes to advertise the availability of the following services:

arrangement for receipt and transportation to the crematorium of a deceased human; procurement of the documents necessary to permit cremation; cremation of the body and return of the remains to the next of kin for a memorial service or other disposition.

It is my understanding that these services, except for cremation, would be provided by a licensed funeral director under contract with the crematorium.

By statutory definition cremation of the human dead constitutes the practice of funeral services. See § 54-260.67 of the Code of Virginia (1950), as amended. The operation of a crematorium, however, is regulated by the State Board of Health pursuant to § 32.1-306. Therefore, the operation of a crematorium is not governed by the Board of Funeral Directors and Embalmers pursuant to § 54-260.67(2), et seq.

In the circumstances outlined above, the corporation operating the crematorium would be engaged in activities other than cremation, albeit through the services of a
licensed funeral director under contract. This funeral director is selected by the crematorium, not by the family of the deceased. Such an arrangement would be contrary to the established law and policy regarding freedom of choice among funeral service professionals, to wit:

"No person licensed for the practice of funeral service or anyone acting for him or her shall have any part in any transaction or business which in any way interferes with the freedom of choice of the general public to choose a person licensed for the practice of funeral service or to choose a funeral establishment except where the body or a part thereof is given for anatomical purposes...." Section 54-260.74.

Unless the crematorium were also licensed by the Board of Funeral Directors and Embalmers as a funeral service establishment and directly employed a licensed funeral director, it could not lawfully hold itself out as providing the above-described services. See § 54-260.73:1. Further, any funeral director contracting to perform services under these circumstances would be considered in violation of § 54-260.74(h) by aiding or abetting an unlicensed person to practice within the funeral service profession.

In view of the foregoing, I am of the opinion that should the corporation hold itself out to the public, through advertisement or otherwise, as being able to afford funeral services incidental to cremation, it would be in violation of § 54-260.73:1 unless it were properly licensed by the Board of Funeral Directors and Embalmers and by the Board of Health. Any funeral directors who agree to provide services at the direction of the unlicensed crematorium would also be in violation of certain provisions of the Code. See § 54-260.74.

CEMETERIES. SPRINKLING OF CREMATED HUMAN ASH UPON MEMORIAL GARDEN OF CHURCH CONSTITUTES ESTABLISHMENT OF CEMETERY.

January 12, 1981

The Honorable Franklin P. Hall
Member, House of Delegates

You have asked whether the placing of cremated ashes in certain areas on the grounds of the Church of the Holy Comforter in the City of Richmond constitutes the establishment of a cemetery for purposes of § 57-26 of the Code of Virginia (1950), as amended. The Reverend Fletcher J. Lowe, Jr., in his letter to you, specified that the church is considering the following options:

1. placing cremated ashes in the ground along a memorial walk;
2. placing biodegradable or non-biodegradable urns containing cremated human ash in the ground within a memorial garden; or

3. sprinkling cremated human ash upon a memorial garden.

Cemeteries are regulated under Ch. 3 of Title 57. Although the word "cemetery" is not defined in the general provisions of Ch. 3, it is defined in Art. 3.1 of Ch. 3 as "any land or structure used or intended to be used for the interment of human remains." "Interment" is defined in the same section as "all forms of final disposal of human remains including, but not limited to, earth burial, mausoleum entombment, and niche or columbarium inurnment." (Emphasis added.) See § 57-35.1. Columbarium inurnment refers to placement of urns containing human ash in a vault or similar structure. Thus, the term "interment" would include final disposition of human ash.

Under rules guiding the construction of statutes in Virginia, § 1-10, et seq., the Code is to be construed as a whole and provisions dealing with the same subject should be construed together and reconciled whenever possible. In the absence of any indication that the General Assembly intended that the words "cemetery" or "interment" be defined differently for different articles of Ch. 3, Title 57, it is my opinion that these definitions apply to all articles in the chapter.

I conclude that any of the three proposals for disposition of ashes by the Church of the Holy Comforter will constitute final disposition of human remains or interment. Accordingly, a memorial walk or garden containing cremated human ash must be considered a cemetery and thus subject to the restrictions articulated in § 57-26.

CHARTERS. PUBLIC OFFICERS. INCOMPATIBILITY. CONSTITUTION. UNDER PROPOSED CHARTER CHANGE, MAYOR'S OFFICE MAY NOT BE COMBINED WITH SECOND VOTING OFFICE AS REGULAR MEMBER OF GOVERNING BODY.

March 23, 1981

The Honorable S. Wallace Stieffen
Member, House of Delegates

You ask two questions under the "revised" charter of the City of Hampton, about the consequences of a councilman being popularly elected as mayor while two years remain on the individual's four-year term as councilman.

Mayor's Office May Not Be Combined
With Second Voting Office As
Regular Member of Governing Body
Your first question is whether the office of mayor may be combined with the office of regular councilman.

Article VII, § 6 (Multiple offices) of the Virginia Constitution (1971) provides that no person shall at the same time hold more than one office mentioned in Art. VII. Membership on the governing body of a city is an office mentioned in Art. VII, § 5 (County, city, and town governing bodies).

Unlike Art. VIII (Organization and Government of Cities and Towns) of the 1902 Constitution, the present Constitution does not mention the office of mayor. The post of mayor may therefore vary from city to city, and the post is largely defined by the charter for each municipality.

Under § 3.06 of the revised charter, the mayor of Hampton has a number of the office's traditional executive functions. For example, the mayor is recognized as the head of the city government for all ceremonial purposes, the purposes of military law and the service of civil process.

Under § 3.06, however, the mayor also presides over the meetings of council and has the same right to vote and speak therein as other members. And under § 3.01, the council consists of seven members, a mayor and six councilmen, who are elected at large from the qualified voters of the city.

Therefore, under the revised charter of the City of Hampton, the mayor is a regular member of the governing body for purposes of Art. VII, § 6 of the Constitution.

Accordingly, I am of the opinion that under the "revised" charter of the City of Hampton, (a) the office of mayor may not be combined with the office of regular councilman, and (b) a councilman popularly elected as mayor, while two years remain on the individual's four-year term as councilman, must vacate the office of councilman to qualify as mayor.

Vacancy To Be Filled Under Charter § 3.02 and Code § 24.1-76

Your second question is about the method for filling the vacancy in the office of councilman, when a councilman popularly elected as mayor, with two years remaining on the individual's four-year term as councilman, vacates the office of councilman to qualify as mayor.

Under § 3.02 of the revised charter, vacancies in the office of councilman are to be filled by a majority vote of the remaining members of council. The person so appointed to fill the vacancy shall hold office until the qualified voters fill the same by election and the person so elected has qualified. Such election is to be held and conducted in accordance with the general laws of the Commonwealth relating
to the filling of vacancies in the office of mayor and city councilman.

The filling of the vacancy by majority vote of the remaining members of council is therefore merely an interim appointment made by the council per the charter. In such event, § 24.1-76 of the Code of Virginia (1950), as amended, provides that the circuit court of the city shall issue a writ of election to fill such vacancy as set forth in § 24.1-163. Ordinarily, such election is to be held at the next ensuing general election to be held in the city, but when a vacancy has been filled by an appointment by a city council, such election is to be held at the next ensuing regularly scheduled general election for that office.

However, in the present situation, the next ensuing regularly scheduled general election for that office will be the general election scheduled in the year in which the term expires. In such event, § 24.1-76 provides that no election shall be held when a vacancy in the governing body has been filled by the remaining members thereof. As noted above in connection with § 3.02, any vacancy in the governing body is to be filled by the remaining members thereof.

Accordingly, I am of the opinion that the individual receiving the interim appointment made by the council will hold office until expiration of the four-year term of the councilman who vacates the office to qualify as mayor.

1For purposes of this Opinion, the "revised" charter means Ch. 167 [1979] Acts of Assembly, as amended by House Bill 1144 as passed by the 1981 General Assembly (at its regular Session). I am advised that the Governor has not yet signed House Bill 1144 into law. Further, the "revisions" in House Bill 1144 providing for election of the mayor by the people are subject to approval in a referendum.

2Under § 120 of the 1902 Constitution, there was to be elected in every city, a mayor for a term of four years, who was the chief executive officer of such city.

3See Opinion to the Honorable Hunter B. Andrews, Member, Senate of Virginia, dated January 9, 1981 (copy attached).

4Compare Opinion to the Honorable Irva L. Pearson, Secretary, Westmoreland County Electoral Board, dated March 4, 1974, found in Report of the Attorney General (1973-1974) at 141.

5See Opinion to the Honorable J. Edgar Pointer, Jr., County Attorney for the County of Gloucester, dated October 31, 1980 (copy attached).


7See § 24.1-76 (second para.-- fourth sentence).

8See § 24.1-76 (third para.-- third sentence at beginning); see, also, Opinion to the Honorable William T. Parker,

See § 24.1-76 (third para.-- third sentence at end); also, compare, 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.

CHARTERS. TOWNS. "COMMON" TOWNS VERSUS INCORPORATED TOWNS.
1769 ACTS OF ASSEMBLY DEEMED TO CREATE "COMMON" TOWN, NOT INCORPORATED TOWN.

December 30, 1980

The Honorable Harvey B. Morgan
Member, House of Delegates

You ask whether the community adjoining Gloucester Courthouse is in possession of a valid charter as Botetourt town under Ch. LX of the acts of the colonial General Assembly held at Williamsburg in November 1769.1

Chapter LX first notes that establishment of a town on the lands of John Fox, adjoining the lands whereon the courthouse of the County of Gloucester is erected would be advantageous to the inhabitants of said county. It then provides that it shall be lawful for the said John Fox to lay off sixty acres of his lands, at the place aforesaid, into lots and streets for a town, to be known by the name of Botetourt town.

Further, Ch. LX enacts that the purchasers of lots in the town, so soon as they shall have built upon and saved the same, according to the conditions of their deeds of conveyance, shall then have and enjoy all the rights, privileges, and immunities, which the freeholders and inhabitants of other towns, erected by act of assembly, in the colony hold and enjoy.

So far as is known, no elections have been held, and none of the rights, privileges and immunities granted by Ch. LX have been exercised. Further, Ch. LX, by its terms, does not confer these rights, privileges and immunities immediately upon its passage. Instead, they are dependent upon the happening of certain specified events, such as 1) the laying off of lands by John Fox into lots and streets for a town and 2) the building upon and saving of said lots by purchasers thereof according to the conditions of their deeds of conveyance.

I am advised that there is no evidence that these conditions were complied with. There are, of course, lots and streets for a town near the present site of the courthouse of Gloucester County, but those lots and streets may not have been laid off by "the said John Fox." If the conditions specified in Ch. LX were not complied with, I am
of the opinion that the rights, privileges and immunities mentioned therein never became effective.

Furthermore, I am of the opinion that Ch. LX did not establish Botetourt town as a body corporate and politic. In the 1700's, the law recognized two kinds of towns in Virginia: 1) corporate towns and 2) common towns. As stated by St. Georg Tucker in his 1803 annotations to Blackstone's Commentaries (Tucker's footnotes omitted):

"There are a great many towns, or more properly speaking sites for towns established by act of Assembly in Virginia. Scarce a Session of the Assembly passes, in which, to use the emphatical expression of Mr. Jefferson the law does not say 'there shall be towns where Nature hath said there shall not.'...These towns have no other privileges that I know of, except conferring upon the freehold possessor of a lot therein, with a house thereon of twelve feet square, the right of suffrage.

There are also several corporate towns, which possess the privilege of making bye-laws for the regulation of their own police, with the further privilege of holding courts, but no other privilege, beyond the common towns above mentioned. Of these Fredericksburg, Alexandria, Petersburg, Winchester, Staunton, and York, are either the whole, or the most considerable...Norfolk is a corporate borough and is by the constitution entitled to a representative in the Assembly. Williamsburg and Richmond are cities, a title which they seem to have derived from having been respectively the seat of government...Both are entitled to a representative in the General Assembly; the former by the Constitution, and the latter by an act passed in the year 1788. In all the corporate towns, as well as in Richmond, Williamsburg and Norfolk the jurisdiction of the courts is somewhat more limited than that of the county courts."

I have compared Ch. LX with a number of Acts of Assembly establishing towns during the 1700's. There are a number of acts which expressly provide that a particular town (or certain named officers) shall constitute a body corporate with perpetual succession. There are other acts which provide for succession of the original trustees and directors until the town shall be incorporated. Still other acts provide for the freeholders and inhabitants of the town to have all the rights, privileges and immunities granted to, or enjoyed by, the freeholders and inhabitants of other towns not incorporated.

Chapter LX, of course, merely refers to other towns, rather than to "other towns not incorporated." In all other respects, however, Ch. LX compares most closely with the acts establishing towns expressly not incorporated, and Ch. LX
contains no provision constituting Botetourt town as a body corporate and politic.

Accordingly, I find that, even if its conditions were complied with, Ch. LX establishes only a common town, and the community in question is not an incorporated town.

1See 8 Hening's Statutes 421—An act for establishing towns at Rocky Ridge, Gloucester Courthouse, and Layton's Warehouse, and for other purposes therein mentioned—Ch. LX [November 1769] Acts of Assembly.

2Blackstone's Commentaries with Notes of Reference to The Constitution and Laws...of the Commonwealth of Virginia by St. George Tucker, in Five Volumes (1803), vol. I, p. 120, note 3 (Rothman-Kelley Reprint 1969).

3See, for example, 3 Hening's Statutes 404—An act for establishing ports and towns—Ch. XLII [October 1705] Acts of Assembly (Hampton and others).

4Hening's Statutes 234—An act for erecting a town, in each of the counties of Spotsylvania and King George—Ch. XIV [February 1727] Acts of Assembly (Fredericksburg and Falmouth).

5See, for example, 5 Hening's Statutes 199—An act for erecting a town at Constance's warehouse, in the county of Napsemond—Ch. XXIII [May 1742] Acts of Assembly (Suffolk).

6See, for example, 10 Hening's Statutes 293—An act for establishing the town of Louisville at the falls of Ohio, and one other town in the county of Rockingham—Ch. XXVI [May 1780] Acts of Assembly (Harrisonburg).

CITIES. AUTHORITY TO REQUIRE DISCONNECTION OF ROOF AND SUMP DRAINS FROM SEWERAGE SYSTEM IMPLIED FROM § 15.1-876.

March 20, 1981

Mr. Robert V. Davis, Executive Secretary
State Water Control Board

This is in reply to your request for my advice on authority of political subdivisions to require disconnection of drains from their sewer systems.

More particularly, you have asked whether cities, incorporated towns, counties, sanitary districts, sanitation districts, the Hampton Roads Sanitation District, and water and sewer authorities may require owners of individual buildings to disconnect roof drains and basement sump drains from their sewer systems and whether the State Water Control Board may require such disconnections. It is my understanding that the connection of such drains to public sewers may result in serious treatment plant overload conditions during rainstorms, which would cause the plant to discharge untreated or inadequately treated sewage into State waters.
In responding, I will consider separately the authority of each of the governmental entities to regulate roof and sump drains.

State Water Control Board

The State Water Control Board (the "Board") may regulate, either directly or indirectly, any discharge into a sewerage system or treatment works. See §§ 62.1-44.18:2 and 62.1-44.15(5) of the Code of Virginia (1950), as amended. The Board issues permits to each publicly-owned sewage treatment works in the State, and may impose any reasonable conditions necessary to assure proper performance of the plant. Id. If rainwater from roof drains and sump discharges causes the sewage treatment plant to discharge untreated or inadequately treated sewage, or creates the potential for such a discharge, the Board can order the owner of the plant to require the disconnection of those drains or discharges. Id.

The Board may also directly regulate the discharge of sewage into any sewerage system. See § 62.1-44.18:2. Sewage is defined to include water-carried human wastes from residences and other places together with such underground, surface, storm, or other water as may be present. See § 62.1-44.3(7). Under this authority, the Board can proceed directly against owners of buildings to require them to disconnect roof and sump drains.

Local Governments Generally

Local governments in Virginia have only those powers specifically granted by the General Assembly, and therefore have no power to operate a sewerage system or sewage treatment works unless specifically granted that authority. Once granted the authority to operate such a system, however, local governments have additional powers necessarily or fairly implied from the power expressly granted. See Commonwealth v. County Board of Arlington County, 217 Va. 558, 573-574, 232 S.E.2d 30, 39-40 (1977). Necessarily implied powers are those essential to the exercise of express powers. Thus, if local governments have no express authority to require the disconnection of roof and sump drains, that power may be implied from express authority to operate the sewerage system.

Cities and Incorporated Towns

A city or incorporated town derives its powers from its charter. The Uniform Charter Powers Act, which is codified as Ch. 18 of Title 15.1, lists those powers which cities and towns are usually granted. Among those powers is the authority to operate public sewers and sewage treatment works. See § 15.1-876. A municipal corporation may regulate such sewers to prevent pollution and the spread of infectious, contagious and dangerous diseases through the discharge or disposal of sewage. See § 15.1-855.
There is no express authority in the Uniform Charter Powers Act, or in general statutes from which municipal corporations derive authority, to require the disconnection of roof and sump drains to control the volumes of sewage which must be treated. Nonetheless, the power to prohibit the connection, or require the disconnection, of roof and sump drains may be implied necessarily from the express power to operate the sewerage system in compliance with the regulations and permits issued by the Board.

Counties

Counties are authorized to establish, operate, and maintain sewerage systems and sewage treatment plants, subject to the approval of the Board. See §§ 15.1-320 and 15.1-300. Connections may be made on such terms as the governing body prescribes. Counties have the general power to adopt regulations for the prevention of water pollution whereby the water would be rendered dangerous to the health or lives of county residents. See § 15.1-510. As with municipal corporations, the power of any county to prohibit the connection of roof and sump drains, or require their disconnection, may be implied necessarily from the power to operate the system and treatment plant within requirements specified by the Board.

Sanitary Districts

Sanitary districts are granted the power to operate and maintain sewerage systems and sewage treatment plants. See § 21-118(1). The sanitary district has the power to require owners or tenants of any property to connect with the system and contract for such connection. See § 21-118(4). Authority to prohibit the connection, or require the disconnection, of roof and sump drains, may be implied necessarily from the power to operate the works within State requirements.

Sanitation Districts

Sanitation districts created under the Sanitation Districts Law of 1938, § 21-141, et seq., and the Sanitation District Law of 1946, § 21-224, et seq., have the authority to operate sewerage systems and sewage treatment works. See §§ 21-170, 21-171, 21-172, 21-250, 21-251, and 21-252. Further, any sanitation district has authority to make rules and regulations regarding the use and operation of its facilities and properties. See §§ 21-168(9) and 21-248(9).

Comparable authority is granted the Hampton Roads Sanitation District Commission in Ch. 66 [1960] Acts of Assembly, § 10. I refer you also to Report of the Attorney General (1971-1972) at 475, which held that the Hampton Roads Sanitation District Commission has the necessary authority to prevent the overloading of its sewage treatment plants and also has "a legal obligation to operate its sewer lines and
sewage treatment works in accordance with applicable laws and regulations."

Again, while there is no express statutory authority for prohibiting the connection, or requiring the disconnection, of roof and sump drains, such authority may necessarily be implied from the express authority to operate the system and plant within State requirements.

Water and Sewer Authorities

The Virginia Water and Sewer Authorities Act authorizes any such authority to construct, operate and maintain any sewer system or sewage disposal system, subject to the authority of the Board. See §§ 15.1-1250(f) and 15.1-1268. Further, the authority is authorized to compel the connection of buildings which may be served by its sewers, and all connections made must be in accordance with regulations adopted from time to time by the authority. See § 15.1-1261. From these statutes, I conclude that any water and sewer authority has the implied power to prohibit the connection, or require the disconnection, of roof and sump drains to its sewerage system.

CIVIL PROCEDURE. PROCEDURES TO EXECUTE LEVIES, DISTRESS WARRANTS AND PICK-UP ORDERS BY MEANS OF FORCIBLE ENTRY.

July 21, 1980

The Honorable W. Alvin Hudson, Sheriff
City of Roanoke

You have asked related questions concerning the proper procedures for executing levies, pick-up orders and distress warrants. You ask whether the landlord has the right to let the deputies into the tenant's residence to execute such writs when no one is home. You also ask what procedures the deputies may follow in gaining entry to execute these writs when neither the tenant, owner nor landlord is present.

Pursuant to § 1-10 of the Code of Virginia (1950), as amended, Virginia is a common law State except where modified by statute. The common law, careful to prevent intrusions upon domestic peace and security and recognizing certain dangers inherent in unannounced entries in civil cases, generally disapproved of any forcible entry into a dwelling to execute civil writs except in certain instances and with certain restrictions.

The General Assembly has provided some guidance on when a sheriff may make entries to execute certain civil writs. Section 8.01-470 (formerly § 8-402) provides that in executing a writ of possession for specific property, an officer may in the daytime break and enter a locked or fastened building where he has reasonable cause to believe that the specific property is located therein after giving
notice to the defendant, his agent or bailee.\(^2\) Section 8.01-491 (formerly § 8-422) provides that in order to levy, an officer "may, if need be, break open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant...."\(^3\) Section 55-235 provides that in executing a distress warrant, an officer may in the daytime, if there be need for it, break open and enter into any house in which there may be goods liable to the distress.\(^4\) These provisions require varying degrees of notice to the occupant or owner by the officer before the actual breaking-in can take place. In view of the reluctance at common law to allow officers to break into dwellings to execute civil writs, what constitutes "notice" under these statutory provisions should be delineated. This Office has previously construed these sections to require that the sheriff "must signify the cause of his coming and request that the doors be opened before resorting to forcible entry...."\(^5\) This would not seem to mean that the owner or occupant be actually present or that the sheriff need to receive a response to his request. This interpretation would coincide with other aspects of execution as required in Virginia. For example, in determining the type of notice of a levy that need be given to the owner, the court in Palais v. DeJarnette, 145 F.2d 953 (4th Cir. 1944) held that the owner's absence and lack of formal notice at time of levy on household goods does not invalidate the levy.

One of your inquiries dealt with whether a landlord may let a sheriff into a tenant's residence in the tenant's absence. Inasmuch as this could constitute a "breaking," I am of the opinion that a sheriff acting under one of the above-mentioned provisions must declare the cause of his coming and demand that the doors be opened before a landlord can let him in. Where nobody, including a landlord, tenant or private homeowner, is present to let the sheriff or his deputies in, this same requirement must also be followed before any forcible entry allowed under the Code can be carried out.

This Office has previously construed these provisions to be constitutional and enforceable.\(^6\) Therefore, it is my opinion that a sheriff or his deputies in executing a civil writ under these provisions should first signify the cause of his coming and demand that the doors be opened before resorting to any type of forcible entry.

\(^1\) Halsbury's Laws of England 280 (4th ed., 1976); 33 C.J.S. Executions §§ 95, 96 (1942); Burks' Pleading and Practice § 363 (4th ed., 1952); 57 A.L.R. 210 (1928). An example of a permissible forcible entry would have been an execution at the instance of the King but the sheriff would still have been required to advise as to the cause of his coming and request that the doors be opened before any force could have been used. 14 Halsbury's Laws of England 47-48 (2nd ed., 1934).
Section 8.01-470 provides in part: "On a judgment for the recovery of specific property, real or personal, a writ of possession may issue for the specific property, which shall conform to the judgment as to the description of the property and the estate, title and interest recovered, and there may also be issued a writ of fieri facias for the damages or profits and costs...And an officer having a writ of possession for specific personal property, if he find locked or fastened the building or place wherein he has reasonable cause to believe the property specified in the writ is located, may in the daytime, after notice to the defendant, his agent or bailee, break and enter such building or place for the purpose of executing such writ."

Section 8.01-491 provides: "An officer into whose hands an execution is placed to be levied, may, if need be, break open the outer doors of a dwelling house in the daytime, after having first demanded admittance of the occupant, in order to make a levy, and may also levy on property in the personal possession of the debtor if the same be open to observation."

Section 55-235 provides: "The officer having such distress warrant, or an attachment for rent, if there be need for it, may, in the daytime, break open and enter into any house or close in which there may be goods liable to the distress or attachment, and may, either in the day or night, break open and enter any house or close wherein there may be any goods so liable which have been fraudulently or clandestinely removed from the demised premises. He may also levy such distress warrant or attachment on property liable for the rent found in the personal possession of the party liable therefor."


CLERKS. ABSTRACTS OF JUDGMENTS. CIRCUIT COURT CLERK MAY ISSUE ABSTRACTS OF JUDGMENT RENDERED BY DISTRICT COURT ONLY AFTER PAPERS HAVE BEEN RETURNED TO HIM PURSUANT TO § 16.1-115.

April 17, 1981

The Honorable Michael M. Foreman, Clerk
Circuit Court of the City of Winchester

You have asked several questions relating to the authority of a circuit court clerk to issue abstracts of judgments rendered in courts not of record under §§ 16.1-115 and 16.1-116 of the Code of Virginia (1950), as amended:

(1) Whether § 16.1-116 prevents the clerk of a circuit court from issuing an abstract of a docketed judgment of a district court prior to the original papers in the case being returned to the circuit court for indexing, filing and preservation;
(2) Whether a circuit court clerk, other than the clerk of the circuit court which indexes, files and preserves the district court papers, can issue an abstract of the district court judgment where the judgment has been docketed in his court; and

(3) Whether the district court, after returning the original papers to the circuit court for indexing, filing and preservation under § 16.1-115, can issue abstracts without having the original suit papers?

Under § 16.1-115 all papers connected with any civil action or proceeding in a district court, with certain exceptions not relevant here, are to be returned to the clerk of the circuit court six months after the action or proceeding is concluded for proper filing, indexing and preservation. District courts having jurisdiction within or adjoining densely populated areas are required to preserve their own records and may not return civil papers to the circuit court. Section 16.1-116 provides:

"When a judgment has been rendered in a civil action in a court not of record and the papers in the action have been returned to the clerk of the circuit or corporation court for filing and preserving, executions upon and abstracts of the judgment may be issued by the clerk of such circuit or corporation court within the periods permitted under...[§ 8.01-251], provided, that such judgment has been duly entered in the judgment lien docket book of such court. However, for a period of two years from the date of any such judgment, the judge or clerk of the court not of record may also issue executions upon and abstracts of the judgment."

Thus, the clerk of the circuit court to whom papers have been delivered for preservation may issue abstracts of a judgment rendered by a district court only after the papers in the action have been returned to him in accordance with § 16.1-115 and only after the judgment for which an abstract is requested has been entered in the judgment lien docket book of his court.

Under the terms of § 16.1-116 only the court not of record which rendered the judgment or the clerk of the circuit court to whom the papers in civil action have been returned may issue an abstract, although the abstract, once obtained, may be used to docket the judgment with a clerk of any circuit court in the Commonwealth. See § 8.01-446; Reports of the Attorney General (1968-1969) at 125 and (1967-1968) at 131 (relating to issuance of execution and docketed abstracts of judgment).

Once the papers are returned to the clerk of the circuit court for preservation and, until two years after judgment has been rendered, both the circuit court to which the papers have been returned and the court not of record which rendered the judgment have concurrent authority to issue abstracts of
judgment. See Report of the Attorney General (1977-1978) at 102. District courts are required to maintain a civil docket as well as other records and books which may be prescribed by the Committee on District Courts. See §§ 16.1-87 and 16.1-69.51. Section 16.1-96 requires that an abstract contain only information necessary for docketing the judgment under § 8.01-449. If the district court properly maintains its civil docket, it should have adequate records from which to issue an abstract of judgment after the papers in an action have been returned to the circuit court.

1 The procedure for docketing judgments rendered in district courts is contained in § 8.01-446.

CLERKS. COMPLIANCE WITH § 8.01-217 REQUIRED WHEN NAME CHANGE AUTHORIZED IN DIVORCE DEGREE.

April 15, 1981

The Honorable Michael M. Foreman, Clerk
Circuit Court of the City of Winchester

You have asked whether a clerk of court must comply with § 8.01-217 of the Code of Virginia (1950), as amended, regarding the reporting of name changes to the Registrar of Vital Records and Health Statistics when a name change is authorized in a divorce decree. In my opinion, compliance with § 8.01-217 is required.

Section 20-121.4 provides that a party to a divorce action may obtain restoration of his or her former name "either as part of the final decree or, upon request of such party, by separate order meeting the requirements of § 8.01-217."

The purposes served by the requirement of § 8.01-217 that name changes be reported to the Registrar of Vital Records and Health Statistics are of equal importance whether a divorced person's name change is accomplished by the final divorce decree or by separate court order. I am of the opinion that the provision of § 20-121.4 concerning the requirements of § 8.01-217 refers to a name change accomplished either by incorporation in the final divorce decree or by separate order requested by a divorced person.1

1 Section 8.01-217 prescribes the required steps for effecting name changes generally and applies to a variety of situations in which name changes may be sought other than name changes resulting from divorces. It requires, generally, that a person seeking a name change apply to the court of the jurisdiction in which he or she resides. In divorce actions, current residency within the jurisdiction of
the circuit court is not a prerequisite to the court's jurisdiction. See § 20-96(B). Thus, where a party to a divorce action seeks a name change as part of the final divorce decree or thereafter, by separate order of the court in which the divorce was obtained, the residency requirements of § 8.01-217 would not apply.

CLERKS. JUDGMENTS. UNDER § 8.01-446 CIRCUIT COURT CLERK MAY NOT DOCKET JUDGMENT RENDERED IN COURT NOT OF RECORD UNLESS REQUESTED BY INTERESTED PERSON WHO DELIVERS AUTHENTICATED ABSTRACT TO CLERK.

May 15, 1981

The Honorable J. H. Wood, Jr., Clerk
Clarke County Circuit Court

You have asked whether a clerk of a circuit court to whom papers in a civil action have been returned pursuant to § 16.1-115 of the Code of Virginia (1950), as amended, may docket on his own authority a judgment rendered by a court not of record in the judgment lien docket book of the circuit court.

The procedure for docketing judgments is contained in § 8.01-446 which states, in part:

"The clerk of each court of every circuit...shall docket, without delay, any judgment for money rendered in his court, and shall likewise docket without delay any judgment for money rendered in this Commonwealth by any other court of this Commonwealth or federal court, when he shall be required so to do by any person interested, on such person delivering to him an authenticated abstract of it...."

Section 8.01-446 does not permit a clerk of the circuit court to docket a judgment rendered in a court not of record unless docketing is requested by an interested person delivering to the clerk an authenticated abstract. Your first inquiry is, therefore, answered in the negative.

Under § 16.1-116 a clerk of a circuit court may issue an abstract of judgment rendered by a court not of record only after papers in the action have been returned for preservation and filing and the judgment has been docketed in the judgment lien book of the circuit court. The clerk of a court not of record may also issue an abstract of judgment for a period of two years after the date judgment was entered in his court, after which only the circuit court clerk is authorized to issue the abstract. See Opinion to the Honorable Michael M. Foreman, Clerk, Circuit Court of the City of Winchester, dated April 17, 1981 (copy enclosed).
You ask how an abstract of judgment of a court not of record can be obtained from the clerk of the circuit court after the two-year period has expired.

Section 16.1-116 requires the clerk of the circuit court to enter judgment in the judgment lien docket before issuing the abstract. Docketing a judgment of a court not of record in the circuit court records under § 8.01-446 requires presentation of an abstract of judgment to the clerk of the circuit court. After two years only the circuit court can issue the abstract. This apparent conflict between the requirements of § 8.01-446 and § 16.1-116 is resolved by examining the manifest purpose of the legislature in enacting these sections. See 17 M.J. Statutes § 38. As stated in Report of the Attorney General (1978-1979) at 155-156:

"[T]he manifest purpose of the legislature in enacting § 16.1-116 was to enable judgment creditors to obtain abstracts of judgments, as well as executions...."

Accordingly, if an abstract of a judgment rendered by a court not of record is requested in a case where the papers have been returned to the circuit court for preservation and filing under § 16.1-115 and the judgment has not been docketed at the date of such request, I am of the opinion that the clerk of the circuit court has a mandatory duty to issue the abstract, treating the request first as a request to docket the judgment under § 8.01-446 and, after the judgment has been duly docketed, as a request for issuance of an abstract under § 16.1-116.

CLERKS. OBSERVANCE OF STATE HOLIDAYS DISCRETIONARY FOR CIRCUIT COURT CLERKS' OFFICES.

January 8, 1981

The Honorable Michael M. Foreman, Clerk
Circuit Court of the City of Winchester

You have asked whether days designated by the Governor of Virginia as holidays for State employees pursuant to § 2.1-21 of the Code of Virginia (1950), as amended, are required holidays for the offices of the clerks of the circuit courts. You have noted correctly, the Opinion to the Honorable Linwood Holton, Governor of Virginia, dated January 30, 1973, and found in Report of the Attorney General (1972-1973) at 249, which said that § 2.1-21 does not apply to the local court clerks' offices and local courts would not be required to close. It is my opinion that the designation by the Governor of State holidays pursuant to § 2.1-21 does not mandate that those holidays be observed by the clerks of the circuit courts and that compliance is purely discretionary.
January 26, 1981

The Honorable J. Wade Gilley
Secretary of Education

You ask several questions regarding the application of § 23-7 of the Code of Virginia (1950), as amended, to students whose spouse or parents are members of the armed forces. I will answer your questions in the order raised.

1. Is it consistent with § 23-7 for a fully employed taxpaying spouse of a military employee to be denied reduced tuition charges under subsection C, while the child of the spouse be granted such benefits under subsection E?

Eligibility for reduced tuition charges at Virginia's institutions of higher education is governed by § 23-7. Subsection C generally requires a student demonstrate that he or she was a domiciliary of Virginia for the entire one-year period immediately commencing prior to the school term.

Subsection E of § 23-7 makes an exception to the domiciliary requirement in the case of students whose spouse or parents are members of the armed forces. A student need not demonstrate the requisite domiciliary intent required by subsection C if one parent is employed full time and pays income taxes to Virginia.

The mere fact that a student is a member of the armed forces, or resides on a military base, does not conclusively render the student incapable of establishing Virginia domicile. See Reports of the Attorney General (1970-1971) at 346; (1957-1958) at 46. See, also, Vlandis v. Kline, 412 U.S. 441 (1973); Elkins v. Moreno, 435 U.S. 647 (1978). Similarly, the fully employed taxpaying spouse of a military employee also would be eligible to show compliance with § 23-7(C) and entitlement to reduced tuition charges. The spouse of a military employee would also be entitled to reduced tuition under § 23-7(E) if the military employee pays income taxes to Virginia.

2. If the spouse of a military employee becomes part-time employed or unemployed and the child is claiming this parent for reduced tuition, does this child lose the right to reduced tuition charges even though the parent may still be voting, paying income taxes, and assuming other responsibilities of residence?

Section 23-7(E) expressly provides that entitlement shall exist "so long as such parent [through whom the student claims]...continues to reside in Virginia, to be employed
full time and to pay personal income taxes to Virginia." Accordingly, assuming the student is not otherwise eligible for reduced tuition under § 23-7(C), your question is answered affirmatively.

3. If it is found that an institution has applied § 23-7 inappropriately does a student whose status is subsequently changed due to a revised interpretation have any recourse or right to retroactive consideration for the reimbursement of previous (out-of-state) tuition?

The facts and circumstances of each case would have to be considered in determining whether a subsequent interpretation of § 23-7 should be applied prospectively only, and if not, the right of the student to a refund of tuition. Under common law principles, a payor generally may not recover funds paid under a mistake of law absent some tortious conduct of the payee. See, e.g., Newton v. Newton, 202 Va. 515, 118 S.E.2d 656 (1961); Hughes v. Foley, 203 Va. 904, 128 S.E.2d 261 (1962); Richmond v. Judah, 32 Va. (5 Leigh) 331 (1834).

If the circumstances of a given case clearly indicate that the student was required to pay tuition as a non-resident due to the fault of the institution in applying § 23-7, then the student should be immediately reclassified by the institution. However, the institution may not on its own refund the student any tuition differential. Section 2.1-180 requires an institution to deposit into the State treasury all received tuition proceeds without set off for refunds or claims of any nature whatsoever.

The procedures for disbursing money from the State treasury is controlled by Art. X, § 7 of the Constitution of Virginia (1971), and § 2.1-224. Once funds are paid into the State treasury, refunds may not be disbursed except pursuant to an appropriation regardless of the Commonwealth's entitlement to such money. See Report of the Attorney General (1978-1979) at 172. Section 3-2.01 of Ch. 760 [1980] Acts of Assembly 1427, is a general appropriation permitting the refund of moneys collected by the institution to which the Commonwealth is not entitled. See Report of the Attorney General (1977-1978) at 27. Upon application for a refund, the procedures prescribed for allowances of any pecuniary claims against the Commonwealth must be followed. Stuart v. Smith-Courtney Co., 123 Va. 231, 96 S.E. 241 (1918). Before payment of a refund, the Comptroller must allow the pecuniary claim. See §§ 2.1-223 and 2.1-223.3. At present, the Comptroller has prescribed procedures for this, whereby the college desiring to make a refund requests a revenue refund.

4(a). Is there any conflict between §§ 23-7(G) and 23-9.6:1(b) and 23-9.6:1(d)?

Section 23-7(G) provides:
"The State Council of Higher Education for Virginia shall, in conjunction with the office of the Attorney General, seek to ensure that all State institutions of higher education will apply uniform criteria in determining eligibility for reduced tuition charges."

Sections 23-9.6:1(b) and 23-9.6:1(d) provide, inter alia, that admissions policies shall remain the sole responsibility of the individual governing board. See, also, § 23-9.2:3 which vests such boards with the power to establish rules and regulations for the admission of students.

Although the governing boards have the authority to establish admissions policies, including tuition rates, such authority is necessarily constrained by § 23-7. It is a common rule of statutory construction that general statutory powers are restrained by specific enactments. School Board of City of Harrisonburg v. Alexander, 126 Va. 407, 101 S.E. 349 (1919); Southern Railway Co. v. Commonwealth, 124 Va. 36, 97 S.E. 343 (1918); Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935). Once an institution establishes a tuition differential, eligibility for the lower rate must be in accordance with § 23-7; and the institution must apply the uniform criteria established pursuant to § 23-7(G) for determining eligibility for reduced tuition charges.

4(b). Can the State Council of Higher Education (with reference to Opinions from the Attorney General's Office) establish policies or regulations which the individual institutions would need to apply in determining who is entitled to reduced tuition charges?

Section § 23-7(G) vests the State Council of Higher Education and this Office with the responsibility to ensure the application of uniform criteria by the respective institutions. Accordingly, your question is answered in the affirmative provided such policy or regulation is in furtherance of § 23-7(G). As you may know, guidelines were issued in 1977 setting forth the criteria to be followed by the institutions in applying § 23-7. Institutions are obliged to apply the criteria noted, until revised or enlarged.

Uniform criteria, however, will not always ensure that institutions will reach the same conclusion as to a student's domicile. For example, the facts presented to the institutions by the student may differ or have changed. Even with similar facts, in a close case, an institutional decision may be contrary to a previous institutional decision. Such a situation is difficult to avoid in view of the fact that the weight to be given to the evidentiary factors governing one's subjective intent is necessarily, and quite properly, left to the institution. The important consideration is that such determination be a result of the application of uniform criteria.
4(c). May the State Council of Higher Education act as the arbiter with respect to interpretation and actions regarding these policies by the different institutions?

The application of criteria to a student is made an institutional responsibility under § 23-7(C).

1Sections 23-7(C) and 23-7(E) are relevant to your inquiry and provide:

"C. A person who enrolls in any such institution while not domiciled in Virginia does not become entitled to reduced tuition charges by mere presence or residence in Virginia. In order to become so entitled, any such person must establish that, one year before the date of alleged entitlement, he or she was at least eighteen years of age or, if under the age of eighteen, was an emancipated minor, and had abandoned his or her old domicile and was present in Virginia with the unqualified intention of remaining in Virginia for the period immediately after leaving such institution and indefinitely thereafter.

E. A student who is not a member of the armed forces and who is not otherwise eligible for reduced tuition charges and whose spouse or parent is a member of the armed forces stationed in this State pursuant to military orders shall be entitled to reduced tuition charges if such spouse or either parent, for a period of at least one year immediately prior to and at the time of the commencement of the term, semester, or quarter for which reduced tuition charges are sought, has resided in Virginia, been employed full time and paid personal income taxes to Virginia. Such student shall be eligible for reduced tuition through such parent under this section only if he or she is claimed as a dependent for Virginia and federal income tax purposes. Such student shall be entitled to reduced tuition charges so long as such parent or spouse continues to reside in Virginia, to be employed full time and to pay personal income taxes to Virginia."

2This section provides, "There is hereby appropriated from the affected funds in the State Treasury, for refunds of taxes and fees, and the interest thereon, in accordance with law, a sum suffered."

COLLEGES AND UNIVERSITIES. FREEDOM OF INFORMATION ACT. PERMITS PRESENCE OF COLLEGE FACULTY MEMBER AT CLOSED MEETING TO DISCUSS THAT MEMBER'S DISCIPLINARY ACTION.

May 29, 1981

Dr. James H. Hinson, Jr., Chancellor
Virginia Community College System

amended) applies to faculty members in institutions of higher education.

Section 2.1-344(a) presently provides, *inter alia*, for executive meetings in the following circumstances:

"(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 amendment contained in H.B. 899 adds the following language to the end of the above section:

"provided, however, that any teacher shall be permitted to be present at an executive session or closed meeting where discussion or consideration of discipline of the teacher will take place and the student involved in such disciplinary matter is permitted to be present, provided such teacher requests to be present in writing to the presiding officer of the appropriate board." (Emphasis added.)

Your question requires a determination of whether the term "teacher" in H.B. 899 includes teachers at the postsecondary level as well as primary and secondary levels.

The amendatory language must be interpreted consistently with the policy of the Act.

"[The Act] 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...." Section 2.1-340.1

The amendment contained in H.B. 899 contains no words of limitation upon the term "teacher." It does not confine the term to teachers in the public schools. Nor does H.B. 899 tie the term "teacher" to any limited definition of the term set forth in other provisions of the Code.

Thus, within the amendment itself there is no clear expression of a legislative intent to limit the amendment only to teachers in elementary and secondary schools.

As a general rule, words in a statute should be given their usual, commonly understood meaning. *The Covington Virginian v. Woods*, 182 Va. 538, 29 S.E.2d 406 (1944). The
term "teacher" is defined generally as "one that teaches or instructs; esp: one whose occupation is to instruct." Webster's Third New International Dictionary (1968) at 2346. The ordinary meaning of "teacher" is not limited to those who instruct at a particular institutional level.2

Accordingly, I am of the opinion that H.B. 899 applies to faculty who teach at institutions of higher education, and not just teachers at the primary and secondary levels.

I note that the impact of the amendment will be limited because it applies only to cases where a teacher is accused of charges brought by or involving a student who is allowed to be present at the closed hearing or executive session.

1For instance, the Act does not adopt by reference the definition of teacher used in the Virginia Supplemental Retirement Act. See § 51-111.10(4) which limits by definition the term "teacher" to distinguish it from "employees of institutions of higher education" who are defined in § 51-111.28. Further, it does not limit the use of the term "teacher" only to those who are required to be certified to teach in the public schools under § 22.1-299.

2The General Assembly itself has not confined its use of the term "teacher" only to legislation dealing with elementary and secondary public schools. Legislation concerning the powers of the various Boards of Visitors at State institutions of higher learning refer to "teachers" at these institutions. See, e.g., §§ 23-1; 23-50.10; 23-91.29; 23-91.40; 23-155.7; 23-164.6; 23-165.6; 23-174.5; 23-185.

COLLEGES AND UNIVERSITIES. REGULATIONS GOVERNING STUDENT ELECTIONS ARE REASONABLE.

February 12, 1981

The Honorable John S. Buckley
Member, House of Delegates

You ask if rules setting time and spending limits for campaigning in student elections at the University of Virginia are violative of the First Amendment to the Constitution of the United States. You also ask if a valid legal challenge could be made to a student election where discrepancies exist between the number of ballots cast and registered student voters.

Rules Regulating Student Elections

You have provided me with a copy of Election Committee Rules; Fall 1980. They are included in the University of Virginia Student Council Elections Committee Candidates' Handbook. The rules limit public campaigning for student office to ten days when there are two days of balloting. The
rules also set spending limits dependent upon the number of candidates running, and whether the election is university-wide or within a particular college. For example, an individual candidate for university-wide office would be limited to a $150 campaign expenditure.

I understand that these rules were neither established nor mandated by the University of Virginia. They were adopted and promulgated solely by the students themselves through their representative process. As you may know, the existence of "state action" is critical to activating constitutional analysis. Such action necessarily turns on the pertinent facts of each case. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). For purposes of this Opinion, I will assume that the student election rules in controversy constitute "state action." See e.g., Sellman v. Baruch College of City University of New York, 482 F.Supp. 475 (N.Y. 1979), holding that student body actions constituted "state action" under the circumstances.

In the case of national election campaigns for federal office, it has been held that regulations which impose direct and substantial burdens on political speech must be narrowly tailored in order to avoid unnecessary abridgements of associational freedoms. Buckley v. Valeo, 824 U.S. 1 (1976). See, also, Wright v. Mahan, 478 F.Supp. 468 (E.D. Va. 1979).

It is now indisputable that students in state universities enjoy the protections of the First Amendment. Healy v. James, 408 U.S. 169 (1972). However, their constitutional rights of free speech and association are not absolute, but must be balanced against the special interests of the academic community. Tinker v. Des Moines Independent School District, 393 U.S. 503 (1960). See, also, Pickering v. Board of Education, 391 U.S. 563 (1968).

The general right to participate in student activities, as well as the specific right to participate in student elections for student office, are not fundamental rights guaranteed by the United States Constitution. Sellman v. Baruch College, supra; Siegel v. Regents of the University of California, 308 F.Supp. 832 (N.D. Cal. 1970). Absent any invidious discriminatory application of academic rules, such rules need only be reasonable in order to comport with First Amendment freedoms. Sellman, supra; Maryland Public Interest Research Group v. Elkins, 565 F.2d 864 (4th Cir. 1977); 58 Virginia Law Review (1972), Students' Constitutional Rights on Public Campuses, at 574.

The rules prescribing time and spending limitations at the University of Virginia do not on their face discriminate on the basis of message or political view. In fact, it appears that student ideas are unregulated, but their speech-related activities are subject to rules equally applicable to all candidates for student elective office. The ten days allowed for campaigning appears reasonable in view of the fact that the candidate may resort to the public
media, displays and bulletins, as well as campaign twenty-four hours per day. The time limitation only affects public campaigning, and apparently would not restrict private conversations with a student who was interested in knowing a candidate's views or seeking an answer to a question.

Furthermore, I am of the opinion that the expenditure limitations are reasonable on their face. The spending limitations apply only to bulk materials or materials used to expose a candidate for the purpose of soliciting votes. Specifically not included are such items as layout supplies and photograph development expenses.

It must be kept in mind that the academic setting is principally geared to imparting an education to students. Though the electoral process would certainly be educative of civic responsibilities, campaigns on campus unrestrained in duration and expense would likely divert the attention of students from their studies, encourage disorder, and allow for the possibility of an election being a product of finances. It would certainly be permissible to impose spending limits that would avoid even the appearance of unfair play in student elections. Accordingly, it is my view that these rules on their face reasonably regulate the manner of student election campaigns, taking into account the special interests of the academic community. Conduct that would fall within the penumbra of the First Amendment is nevertheless subject to reasonable regulations relating to the time and manner of its exercise. Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971); Papish v. Board of Curators, 410 U.S. 667 (1973).

Could A Valid Legal Challenge Be Made To A Student Election Where Discrepancies Exist Between The Number Of Ballots Cast And The Registered Student Voters?

Election contests in such circumstances are politically based, and therefore generally beyond the jurisdiction of the courts absent a statute granting judicial review. Sanders v. County School Board of Prince William County, 158 Va. 303, 163 S.E. 394 (1932); Cundiff v. Jeter, 172 Va. 470, 2 S.E.2d 436 (1939). I know of no such statute which would grant a court in Virginia the right to hear a contest to a student election because of a discrepancy in the count. However, it is a general principle of common law that courts are open to redress provable and identifiable fraud. Lloyd v. Smith, 150 Va. 132, 142 S.E. 363 (1928). The mere fact that a discrepancy exists between the ballots cast and the number of registered voters does not equate to fraud. For example, such discrepancy could be due to a student casting a ballot and forgetting to register his name as a voter. I understand that this has been a problem in past elections at the University of Virginia.

I also understand that the University of Virginia does not continuously man ballot boxes, but that the integrity of the student electoral system is dependent upon its honor
system. This is a policy judgment that has been established by the students, and as a result, any challenges to the electoral system on account of such discrepancies should be addressed either to the Honor Court or an appeal filed with student representatives pursuant to the election rules.

COLLEGES AND UNIVERSITIES. VIRGINIA ANTIQUITIES ACT. COLLEGE OF WILLIAM AND MARY NOT REQUIRED TO GAIN HISTORIC LANDMARKS COMMISSION'S APPROVAL PRIOR TO CONSTRUCTING WASTE TREATMENT FACILITY ON STATE-OWNED LAND CONTAINING ARTIFACTS.

December 11, 1980

Dr. Thomas A. Graves, Jr., President
The College of William and Mary

You ask whether §§ 10-150.10(A) and 10-150.10(B) of the Code of Virginia (1950), as amended,1 require the consent of the Virginia Historic Landmarks Commission (the "Commission") as a precedent to construction of the waste treatment facility at the Virginia Institute of Marine Science ("VIMS") at Gloucester Point. You have indicated that this capital outlay project was approved by the Governor, and that the General Assembly has specifically appropriated public funds therefor. You also advise that the State owned construction site is the apparent location of old Gloucester Towne.

Section 10-150.5 provides, inter alia, that field investigations on State land be conducted only under the aegis of the Commission.

You have advised that the construction site was acquired by VIMS pursuant to an express appropriation of the General Assembly in order to alleviate a hazardous health situation at Gloucester Point resulting from seriously inadequate sewage treatment facilities.

As a general rule, the Commonwealth and its agencies are not subject to statutory provisions unless the General Assembly has expressly provided. See Report of the Attorney General (1976-1977) at 122; 199. The definitional portion of the Act, § 10-150.3, does not expressly include the Commonwealth and its agents. State agencies are required only to cooperate with the Commission. See § 10-150.2.

Since §§ 10-150.10(A) and 10-150.10(B) are penal statutes, any attempt to apply them must be strictly construed. See Report of the Attorney General (1974-1975) at 275, Commonwealth v. Ellett, 174 Va. 403, 4 S.E.2d 762 (1939). Since the penal statutes do not expressly apply to the Commonwealth and its agents, I am of the opinion that they would be inapplicable to the present construction authorized by the General Assembly.

I am also of the opinion that the general terms of the Act would not operate to bar the needed construction of this
project specifically approved by the General Assembly. See Ch. 779 [1976] Acts of Assembly, § 145, Item C-109; Ch. 850 [1978] Acts of Assembly, § 3-10, Item C-49 at 1813. I do understand, however, that the construction will be undertaken in a manner, with the Commission's cooperation and approval, so as best to preserve historic artifacts that may be uncovered.

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The cited statute is a portion of the Virginia Antiquities Act (the "Act"), and provides as follows:

"A. It shall be unlawful to intentionally deface, damage, destroy, displace, disturb or remove any object of antiquity on any designated State archaeological site or state-controlled land, and shall constitute a Class 1 misdemeanor.
B. Any person who violates § 10-150.5 of this chapter shall be guilty of a Class 1 misdemeanor."

COMMISSIONERS OF REVENUE. ERRONEOUSLY ASSESSED MERCHANTS' CAPITAL TAX MUST BE REFUNDED UPON APPLICATION FOR PAST THREE YEARS WITH INTEREST IF PROVIDED BY ORDINANCE.

April 21, 1981

The Honorable Shirley L. Wheeler
Commissioner of the Revenue for Giles County

You have asked whether Giles County is required to refund the difference by which the merchants' capital tax rate for the years 1978, 1979 and 1980 exceeds the merchants' capital tax rate in effect on February 1, 1977, and, if a refund is required, whether the refund must be paid with interest. You indicate that Giles County is among a number of counties which have imposed a merchants' capital tax but failed to observe the restriction contained in § 58-266.1(F) of the Code of Virginia (1950), as amended.

The 1978 General Assembly amended and reenacted § 58-266.1 relating to local license taxes imposed by counties, cities and towns, and added subsection F which reads:

"No tax rate on or assessment ratio for merchants' capital shall be greater than such rate and ratio as in effect on January one, nineteen hundred seventy-eight."

Though codified, the Act by which subparagraph F was added contains a second clause which reads:

"2. That this act shall be effective for tax years beginning on and after January one, nineteen hundred seventy-nine; provided that if any county, city or town increases the...rate or ratio of merchants' capital tax levied under authority of this section or similar
provisions of law after February one, nineteen hundred seventy-seven, to a level greater than that effective as of such date, it shall reduce such tax on July one, nineteen hundred seventy-eight to the February one, nineteen hundred seventy-seven rate and refund any amount in excess thereof." (Emphasis added.) Ch. 817 [1978] Acts of Assembly 1403, 1407.

The latter clause of the Act, when read in combination with subparagraph F, imposes a ceiling on the merchants' capital tax rate or assessment ratio for taxable years 1978 and subsequent years not to exceed the tax rate in effect on February 1, 1977. If the tax rate or assessment ratio for merchants' capital tax for taxable years 1977 and subsequent years exceeded the tax rate in effect on February 1, 1977, Giles County is required to make a refund of such excess.

You indicate that Giles County has adopted an ordinance under the authority of § 58-1152.1 to provide for the refund of any local levies erroneously paid. Under § 58-1152.1, if you are satisfied that you have erroneously assessed any refund applicant, you shall certify to the tax-collecting officer the amount erroneously assessed. If the erroneous levies have been paid, the tax-collecting officer shall refund to the applicant the amount erroneously paid, together with any penalties and interest paid thereon. Section 58-1152.1 refers to the refund procedures set forth in §§ 58-1141 and 58-1142, which statutes provide for refunds upon application by the taxpayer. If the taxpayer does not make such application, there does not appear to be any requirement that the refund be made.

There is an additional limitation upon the requirement to refund imposed by §§ 58-1141, 58-1142 and 58-1152.1. All three of these statutes impose a limitations period of "three years after the last day of the tax year for which such taxes were assessed..." upon the filing of an application for refund. Thus, refund applications for the taxable year 1977 are barred by the limitation period.

Your last question is answered by reading together §§ 58-1142, 58-1152.1 and 58-1152.2. From these sections, it is clear that the obligation to pay interest on such refunds depends on whether Giles County has enacted an ordinance providing that refunds be repaid with interest. If no such ordinance has been enacted, there is no obligation to pay interest on any refund for which application is made.
You have asked two questions concerning the fees payable to a Commonwealth's attorney in escheat proceedings, under § 55-192 of the Code of Virginia (1950), as amended. This statute provides:

"The escheator shall have a commission of ten percent on all proceeds of sales made by him of escheated lands which are paid to him or into the State treasury. For the inquest of each parcel taken by him the escheator shall be paid ten dollars, out of any money in the State treasury belonging to the Literary Fund. The attorney for the Commonwealth of the county or city, for attending such inquest, shall also be paid a fee of ten dollars out of the same fund."

First, you ask whether a Commonwealth's attorney is entitled to receive the $10 fee personally if he serves in a county where the post of Commonwealth's attorney is a full-time office. In my opinion, the disposition of the fee is governed by § 14.1-54, which provides in part: "One half of all fees to which attorneys for the Commonwealth are entitled for the performance of official duties or functions, shall be paid by them or such official as may collect the same, not later than the tenth day of the month following their receipt, into the treasuries of their respective counties and cities, and the remaining one half of all such fees shall be paid by such official as may collect the same into the State treasury, not later than the tenth day of the month following their receipt."

In order to qualify for the fee, the Commonwealth's attorney must attend the escheator's inquest in his official capacity. Consequently, the fee he receives does not accrue to him personally but must be divided between local and State treasurers in accordance with § 14.1-54. It makes no difference whether the Commonwealth's attorney is required by law to serve full-time in that capacity or whether he is permitted to practice law privately. This analysis is in agreement with a previous Opinion of this Office in which it was held that the predecessor of § 14.1-54 (§ 14-67) governed the disposition of fees received by a Commonwealth's attorney in condemnation proceedings against forfeited vehicles. See Opinion to the Honorable A. A. Rucker, Commonwealth's Attorney for Bedford County, dated May 24, 1957, found in Report of the Attorney General (1956-1957) at 60.

Second, you ask whether a $10 fee is to be awarded for each date on which the Commonwealth's attorney attends one or more inquests, or whether it is to be awarded for each parcel on which an inquest is held. The statute provides that the Commonwealth's attorney shall be paid his fee "for attending such inquests." (Emphasis added.) This use of the term "such" is intended to refer to the particular type of inquest noted in the preceding sentence, "the inquest of each parcel." Therefore, it is my opinion that a Commonwealth's attorney is entitled to a $10 fee on each parcel for which he attends the escheator's inquest.
COMMONWEALTH'S ATTORNEYS. PART-TIME INCUMBENTS NOT REQUIRED TO RELINQUISH PRIVATE PRACTICE UNTIL END OF CURRENT TERM OF OFFICE.

December 9, 1980

The Honorable Stuart W. Connock
Assistant Secretary for Financial Policy

You have asked how the provisions of §§ 15.1-50.1 and 15.1-821 of the Code of Virginia (1950), as amended, apply to the office of a Commonwealth's attorney whose most recent election to office occurred at a time prior to the release of 1980 decennial census data. These statutes require that in counties and cities "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." See § 15.1-50.1. Specifically, you inquire about Commonwealth's attorneys who at the time of their election served jurisdictions which had a population less than or equal to thirty-five thousand, according to 1970 decennial census data, but which have a population of more than thirty-five thousand inhabitants according to 1980 census data.

Neither §§ 15.1-50.1 nor 15.1-821 makes specific provision for the circumstances you describe. In adopting the provisions of the above-mentioned statutes in 1977, the General Assembly did not permanently exempt part-time incumbents then serving jurisdictions whose 1970 decennial census population exceeded thirty-five thousand. See Ch. 623 [1977] Acts of Assembly 1209. Thus, it is apparent that the General Assembly intended that all Commonwealth's attorneys serving jurisdictions of more than thirty-five thousand be required to devote full time to their official duties. I, therefore, conclude that in jurisdictions where the population increases to exceed thirty-five thousand as a result of the 1980 decennial census, the Commonwealth's attorney is required to devote full time to his official duties.

The critical question is one of timing. When the 1977 General Assembly enacted Ch. 623 [1977] Acts of Assembly (now §§ 15.1-50.1 and 15.1-821) to require Commonwealth's attorneys to serve full time in populous localities, it recognized the necessity to afford a transitional period for such attorneys to discontinue their private practices. Indeed, the General Assembly delayed the implementation date for three years, thus allowing each incumbent to decide in the interim whether he wished to seek re-election under the new statutory restrictions.

An examination of the legislative history accompanying the introduction of 1977 H.B. 1734, referred to above as Ch. 623 [1977] Acts of Assembly 1209, reveals the following recommendation:
"Therefore, the Council recommends that upon commencement of a new term for any Commonwealth's Attorney, that he and all assistants devote full time to their duties in cities and counties of 35,000 or more."

(Emphasis added.)

This expression of legislative intent is relevant to the question at hand. I, therefore, conclude that an incumbent Commonwealth's attorney who served a jurisdiction of less than thirty-five thousand when elected but whose jurisdiction exceeds thirty-five thousand population after the 1980 census is not required to devote full time to his duties until the first day of January immediately following his first re-election to office after the 1980 census data establishes a population of more than thirty-five thousand. I am of the opinion that the same result should follow whenever an official interim population estimate establishes that the population of any Commonwealth's attorney's jurisdiction exceeds thirty-five thousand between successive decennial censuses. Official population estimates would, for example, include sources such as the Tayloe-Murphy Institute figures. See Opinion to the Honorable Clifton A. Woodrum, Member, House of Delegates, dated June 18, 1980 (copy enclosed).


COMMONWEALTH'S ATTORNEYS. REQUIREMENT TO DEVOTE FULL TIME TO DUTIES. COMMONWEALTH'S ATTORNEY MAY SERVE AS SUPERVISING ATTORNEY UNDER THIRD-YEAR STUDENT PRACTICE RULE AND RECEIVE LECTURESHIP STIPEND.

March 23, 1981

The Honorable Richard H. Barrick
Commonwealth's Attorney for the City of Charlottesville

You make two inquiries about a Commonwealth's attorney serving as a supervising attorney under the Third Year Student Practice Rule (the "Rule"), and receiving a Lectureship stipend of $1,000 per student per semester.¹

Requirement, Under § 15.1-821,
To Devote Full Time to Duties

Your first inquiry is whether a Commonwealth's attorney may serve as a supervising attorney under the Rule, and receive a Lectureship stipend, without violating the requirements of § 15.1-821 of the Code of Virginia (1950), as amended, that certain Commonwealth's attorneys devote full time to their duties.²
Section (a)(ii) of the Rule provides that an eligible law student may, in the presence of a supervising lawyer, appear in any criminal matter on behalf of the Commonwealth with the written approval of the prosecuting attorney. Section (b)(v) provides that the Rule shall not prevent any charges by a lawyer for such services as may otherwise be proper.

Section (d)(i) of the Rule provides that the service of the supervising attorney shall be approved by each court in which the eligible law student engages in limited practice. Section (d)(ii) of the Rule provides that the supervising attorney shall assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work. Section (d)(iii) of the Rule provides that the supervising attorney assist the student in his preparation to the extent the supervising attorney deems it necessary.

You advise that you have served in the past as a supervising attorney, but without the Lectureship stipend, and such service did not prevent you, as a practical matter, from devoting full time to your duties.

Service of a Commonwealth's attorney as a supervising attorney under the Rule involves 1) express authorization for the supervisory role, 2) court supervision and control, 3) additional duties and responsibilities, and 4) express authorization for such charges as may otherwise be proper. Under such circumstances, additional compensation does not violate § 15.1-821. At the same time, your inquiry does raise questions under the Virginia Conflict of Interests Act (Ch. 22 of Title 2.1).

However, under § 15.1-821, I am of the opinion that a Commonwealth's attorney may serve as a supervising attorney under the Rule, and receive a Lectureship stipend, without violating the requirement that certain Commonwealth's attorneys devote full time to their duties.

Prohibition, Under § 2.1-351(a), Against Receiving Money In Consideration Of Obtaining Appointment Or Privilege With Any Governmental Agency

Your second inquiry is whether a Commonwealth's attorney may serve as a supervising attorney under the Rule, and receive a Lectureship stipend, without violating § 2.1-351(a), which is part of the Virginia Conflict of Interests Act.

Section 2.1-351(a) provides that no officer of any governmental agency shall accept money in consideration of obtaining an appointment or privilege with any governmental agency.

If the consideration for the stipend is your grant, in your official capacity, of access to the Commonwealth's
attorney's office for qualified students, then I am of the opinion that the stipend violates § 2.1-351(a).\textsuperscript{5}

However, if access to the Commonwealth's attorney's office is merely incidental to other substantial supervisory and educational services performed by you, in your individual capacity, as the consideration for the stipend, then I am of the opinion that the Lectureship stipend does not violate § 2.1-351(a).\textsuperscript{6}

\textsuperscript{1}The Third Year Student Practice Rule is Rule 6:IV:15 of the Supreme Court of Virginia, appearing in 216 Va. at 1168-1170.

The Lectureship stipend is from the Virginia Criminal Practice Clinic recently established by the University of Virginia School of Law. You have not submitted the terms and conditions for the Lectureship stipend, so I must assume they contain no provision inconsistent with this Opinion.

\textsuperscript{2}Section 15.1-821 also provides that certain Commonwealth's attorneys not engage in the private practice of law. I find no problem under this provision.

\textsuperscript{3}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.


\textsuperscript{5}See Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated September 22, 1976, found in Report of the Attorney General (1976-1977) at 229.


COMPENSATION BOARD. ITEM 665 OF 1980 APPROPRIATIONS ACT DOES NOT CONSTITUTE UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

April 15, 1981

The Honorable Frank M. Morton, III
County Attorney for James City County

You have raised several questions involving Ch. 83 [1979] Acts of Assembly 83 (hereinafter referred to as "H.B. 599"), the 1980 Appropriations Act (§ 1-153 Implementation of 1979 Acts of Assembly Resulting from H.B. 599 and H.B. 602), and the powers and duties of the State Compensation Board (the "Board"). H.B. 599 deals
generally with the areas of law enforcement, judicial administration, health, and welfare. In particular, H.B. 599 provided for State disbursements to cities, counties, and towns which operated police departments. No appropriation was made, however, to fund this H.B. 599 "revenue sharing" concept in the 1979 Session. The General Assembly conditioned the implementation of H.B. 599, and the other annexation immunity provisions, upon funding of the H.B. 599 programs in the 1980-1982 biennial budget. See Clause 4, Ch. 85 [1979] Acts of Assembly 93, 122.

Item 665 ($1-153 of the 1980 Appropriations Act) expressly funded H.B. 599. Subitem A of Item 665 involves the appropriation for the increased amounts to be paid for the salaries, expense allowances, and other costs of sheriffs' offices, as well as for regional jails and jail farms. Subitem A states that localities which receive funding for the salaries and other costs of law enforcement deputy sheriffs may be subject to a twenty-five percent reduction in the funding of such costs in fiscal year 1980-1981 if they also receive State funds for operating a police department. Moreover, Subitem B provides that police departments established after May 8, 1980, shall not receive any portion of the $44,000,000 allocated to localities operating police departments. Subitem B permits a locality to decline to receive Subitem B funding (State aid to police departments) in order to qualify for a full portion of its combined appropriation for law enforcement deputies.

1. May the General Assembly effect amendments in bills previously enacted through later appropriations acts?

It is clear that the General Assembly has the plenary power to enact, amend, and repeal legislation. The appropriation of State funds is a legislative function entrusted to the General Assembly. Appropriations acts may contain conditions, restrictions, or provisos, so long as these restrictions are germane to the purpose of the act. Commonwealth v. Dodson, 176 Va. 281, 305, 11 S.E.2d 120, 131 (1940). Therefore, I am of the opinion that the General Assembly may amend previously enacted legislation through provisions of the appropriations act provided that the amendment is germane to the prior legislative enactment.

Item 665 of the 1980 Appropriations Act, however, did not amend H.B. 599. H.B. 599 provided that it would not become effective unless the programs provided for were funded in the 1980-1982 biennial budget. The presence of this precondition demonstrates that the H.B. 599 programs were not funded in the 1979 Session and that this function was left for the 1980 Session. The General Assembly in appropriating the monies to fund H.B. 599 declared that it had complied with the 1979 condition and that H.B. 599 was thereby made effective. Thus, rather than changing or amending H.B. 599, the 1980 Appropriations Act (Item 665) merely provided the funding required by the 1979 legislation.
2. Subitem A of Item 665 states that the Board "may" reduce the portion of State funds disbursed for salaries and other costs of law enforcement deputy sheriffs in localities receiving Subitem B funds for the operation of police departments. You suggest that this authority to reduce funding may constitute an illegal delegation of power by the General Assembly because it is not accompanied by legislative standards.

The origin of the apportionment language in Subitems A and B is found in the legislative history of H.B. 599. Prior to the 1979 acts, an inequity in State funding of law enforcement activities in local jurisdictions was perceived. Sheriffs' departments in counties where the sheriffs' departments comprised the primary local law enforcement agency received State funding. In cities and counties with police departments performing the primary law enforcement functions sheriffs served largely as officers of the courts and local jailers. In such jurisdictions, no State subsidies were provided. The legislative approach suggested to alleviate this perceived inequity was to provide for State funding to localities with police departments. See Report of the Commission on State Aid to Localities and the Joint Subcommittee on Annexation, House Document No. 26, 6-7 (1978); Report of the Commission on State Aid to Localities and the Joint Subcommittee on Annexation, House Document No. 40, 4-5 (1979).

The amount of the appropriation and its purpose is clearly provided in Item 665. The General Assembly has, thus, exercised its legislative power to appropriate State funds. See Commonwealth v. Dodson, supra. The authority granted to the Board by Item 665 is an administrative power to allot money previously appropriated. Setting salaries and other expense allowances is the very function for which the Board was created. See §§ 14.1-50 and 14.1-51 of the Code of Virginia (1950), as amended; Rosenthal v. McGoldrick, 19 N.E.2d 660 (N.Y. 1939). Moreover, the Board's authority to allot Item 665 monies is "subject to the provisions of this item and of Title 14.1," standards by which the Board is normally guided. Thus, standards are provided. A "definite standard and intelligible principle to which the Board must conform..." exists. See Dickerson, et al. v. Commonwealth, 181 Va. 313, 322, 24 S.E.2d 550, 555 (1943). I, therefore, conclude that Item 665 does not constitute an unlawful delegation of legislative authority.

Section 14.1-52 provides for an appeal of the Board's determination to a specially constituted three-judge panel. This avenue of judicial review, expressly provided by the statutory scheme, assures that the standards provided will not be arbitrarily applied. Ours Properties, Inc. v. Ley, 198 Va. 848, 96 S.E.2d 754 (1957). In a similar matter considered last year, such a three-judge panel considered the appeals of the Sheriff and Board of Supervisors of Montgomery County from the determination of the Board to apply the
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twenty-five percent reduction to the expense allowance request of the sheriff's office. The determination of the Board was affirmed. Barber v. Compensation Board, No. V-2897, November 7, 1980; Board of Supervisors v. Compensation Board, No. V-2898, November 7, 1980 (copy enclosed).

3. May the Board, under Item 665, reduce the apportionment of funds to a jurisdiction without explaining the reasons for such a decision?

I am advised that the Board orally conveyed the rationale for its decision to the appropriate officials in James City County, although no written explanation was furnished. James City County apparently did not seek judicial review of the decision. Section 14.1-51 charges the Board with fixing "fair and reasonable" salaries and expense allowances but there is no statutory requirement that such decisions be expressly explained.

COMPENSATION BOARD. SALARIES. DEPUTY SHERIFFS MAY BE "GRANDFATHERED" INTO NEW STATUTORY SCHEME.

July 31, 1980

The Honorable George F. Barnes, Chairman
Compensation Board

You have asked whether the Compensation Board (the "Board") must reduce the aggregate salary for nonsupervisory, full-time deputy sheriffs who, prior to June 30, 1980, have been receiving a salary in excess of the salary range established by statute effective July 1, 1980.

Section 14.1-73.1:2 establishes the same salary range for these deputy sheriffs as is used for State correctional officers. Prior to July 1, 1980, the Board set salaries for such deputy sheriffs under § 14.1-73.2, which permitted it to fix any salary in excess of the minimum amounts stated therein. This authority was deleted in 1980, and no language of similar import was added in its place. Therefore, the Board no longer has express authority to fix the salary of nonsupervisory, full-time deputy sheriffs in excess of the salary range for State correctional officers.

Your question thus becomes whether the Board would be permitted, in the absence of express authority, to fix such salaries in excess of the salary range. This would be permitted if regulations promulgated by the Department of Personnel and Training provided for "grandfathering" employees of the State when their job position first becomes subject to the classification and pay system. Under such a regulation, an employee would suffer no loss of income on account of his classification, even though his preclassification salary level was in excess of the salary
scale. However, I am advised that no such regulation has been promulgated.

We must next examine whether § 14.1-73.1:2 may be construed to authorize the Board to fix salaries in excess of the salary scale. Ordinarily, statutes granting compensation to public officers must be given a strict interpretation, notwithstanding the fact that in most cases the expenditure of public funds is made in return for value received. This construction would result in a reduction in salary for certain deputy sheriffs and would be completely contrary to the general purpose of the statute, i.e., to raise salaries of certain deputy sheriffs to a scale equal to that of State correctional officers. I am advised that less than one percent of all deputy sheriffs have been paid more than the new maximum. I am constrained to believe that had the General Assembly foreseen this adverse effect, it would have made provision to "grandfather" those deputy sheriffs.

When the literal language of the statute would produce an absurd, futile, or even an unreasonable result "plainly at variance with the policy of the legislation as a whole," the courts will follow the purpose of the legislation, rather than the literal words. United States v. American Trucking Associations, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940). The general purpose of the statute was to raise salaries of certain deputy sheriffs to that of State correctional officers. The General Assembly evidenced no intent to reduce the salaries of certain deputy sheriffs. Accordingly, it is my opinion that deputy sheriffs whose salary on June 30, 1980, approved by the Board, was in excess of the classification and pay system for State correctional officers may continue to receive such higher salaries until the classification and pay system catches up with those salaries.

1"The salary range of any full-time deputy sheriff who is primarily a courtroom security officer, a correctional officer or a law-enforcement officer...shall be equivalent at all times to that of a correctional officer within the classification and pay system for State employees and shall be administered in accordance with regulations for that system administered by the Department of Personnel and Training...." (Emphasis added.)

2"Section 14.1-73.2. Salaries of deputies who meet standards established by Criminal Justice Services Commission.--

(c) Nothing in this section shall be construed as preventing the Compensation Board from fixing any salary in excess of the minimum amounts stated herein.

(f) Provided, further that the salary of any full-time deputy sheriff, who is primarily a courtroom security officer...shall not be less than eight thousand and forty
dollars per annum nor more than twelve thousand dollars per annum..."

The 1980 amendment deleted virtually all of this statute, including the authority of the Board to fix any salary over the minimum.

33 Sutherland Statutory Construction Public Grants, § 63.05 (C.D. Sands, 4th ed. 1974).

"See, e.g., § 14.1-73.2(a) which was repealed in 1980, but which grandfathered deputy sheriffs employed prior to July 1, 1974, from education and training standards effective that date.

CONDEMNATION. COUNTY MAY NOT CONDEMN LANDS OF CHESAPEAKE BAY BRIDGE AND TUNNEL DISTRICT.

September 12, 1980

The Honorable Robert S. Bloxom
Member, House of Delegates

You state that the Chesapeake Bay Bridge and Tunnel Commission (hereinafter the "Commission") has acquired a parcel of real property near Wise Point in Northampton County from the United States government. With regard to that acquisition, you post four questions relating generally to the Commission’s authority to acquire and use real property. I shall answer those questions seriatim.

1. "May the Chesapeake Bay Bridge and Tunnel Commission acquire real property which is not required for it to carry out the purposes for which it was created?"

Section 33.1-253 of the Code of Virginia (1950), as amended, incorporates by reference certain Acts of the General Assembly which created the Chesapeake Bay Ferry District and the Chesapeake Bay Bridge and Tunnel District, its successor, for the purpose of acquiring and operating a ferry and, subsequently, a bridge and tunnel facility across the Chesapeake Bay. The Ferry District and Ferry District Commission, established by Ch. 693 [1954] Acts of Assembly 883, became the Bridge and Tunnel District and Bridge and Tunnel Commission by virtue of Ch. 605 [1962] Acts of Assembly 925. Relevant to your inquiry is Ch. 714 [1956] Acts of Assembly 1063, the Chesapeake Bay Revenue Bond Act (hereinafter the "Act") which delineates the authority and duties of the present Commission. This Act authorizes the Commission to construct a "project" consisting of a bridge and/or tunnel facility within the boundaries of the Ferry (now Tunnel) District which comprises several political subdivisions, including the County of Northampton. Section 2(c) of the Act defines "project" to include, in addition to highways and related facilities, the following: "service stations, garages, restaurants, and administration, storage and other buildings and facilities which the Commission may deem necessary for the operation of such project, together
with all property, rights, franchises, easements and interests which may be acquired by the Commission for the construction or the operation of such project..." (Emphasis added.) Section 4(b) permits the Commission to determine the "location, character, size and capacity of the project..." and § 5 authorizes it to purchase "such lands, structures, rights of way, property...as it may deem necessary or convenient for the construction and operation of the project...." (Emphasis added.) Further, under § 4(r), the Commission is authorized to "do all acts and things necessary or incidental to the performance of its duties..." and, finally, in § 17 it is provided that the Act, "being necessary for the welfare of the State and its inhabitants, shall be liberally construed to effect the purposes thereof."

The foregoing grant of authority does not, in my opinion, restrict the Commission's acquisition of property to that "required" for its purposes as your question states, for that word imports compulsion, contrary to the permissive language, "necessary or convenient," as used in the Act. See Black's Law Dictionary 1468 (4th ed. rev. 1968). The Act confers broad discretion on the Commission in this regard, and the acquisition of property reasonably necessary or convenient to the construction or operation of the project is, in my opinion, legally permissible.

2. "May the Chesapeake Bay Bridge and Tunnel Commission acquire real property with the long range plan of selling the same as development property?"

I must answer this question in the negative, for none of the legislation encompassed by § 33.1-253 reflects powers or duties of the Commission other than the construction and operation of the bridge-tunnel project. Notwithstanding the Commission's broad discretion in acquiring property for that purpose, it cannot be inferred that the goal of real estate development bears any reasonable relationship to the project.

3. "May the Chesapeake Bay Bridge and Tunnel Commission use real property acquired through the General Services Administration as a private beach to promote development of adjoining privately held real estate?"

Again, I answer your question in the negative because promoting the development of privately owned lands is unrelated to the Commission's statutory purpose and authority.

4. "Is there any procedure by which Northampton County can acquire from the Chesapeake Bay Bridge and Tunnel Commission, without consent of the Commission, real estate owned by the Commission which is not being used for the purposes which the Commission was created?"
I presume that the property which is the subject of your inquiry was acquired from the General Services Administration, in which event the county, not being a party to the conveyance, would not have standing to set it aside. Even if the conveyance were set aside on the theory that the Commission exceeded its authority in acquiring the land, this would not operate to transfer title to Northampton County. The issue, therefore, is whether the county can forcibly acquire real property of the Commission, and the only procedure for such an acquisition is by condemnation.

It should be noted that § 25-233 provides that no corporation can take by condemnation proceedings the property of another corporation having the power of eminent domain without obtaining the permission of the State Corporation Commission, and "in no event shall one corporation take...property owned by and essential to the purposes of another corporation possessing the power of eminent domain." Title 15.1, Ch. 7, Art. 1, relating generally to condemnation by counties, applies § 25-233 to counties where the lands of public service companies are sought to be condemned. However, the Commission, though vested with the power of eminent domain, does not constitute a "public service company" as is defined by § 56-1. Therefore, it is necessary to examine the relative authority of the county and the Commission with regard to condemnation of real property for public uses.

Section 5 of the Act authorizes the Commission to acquire by condemnation "any lands, property, rights, rights of way, franchises, easements and other property, including public lands...of any person, co-partnership, association, railroad, public service, public utility or other corporation, municipality or political subdivision deemed necessary...." (Emphasis added.) This section further provides that condemnation proceedings "shall be in accordance with and subject to the provisions of any and all laws applicable to condemnation of property in the name of the State Highway Commissioner under the laws of the State of Virginia." By enabling the Commission to condemn the property of political subdivisions, and by conferring upon it the legal status of the State Highway Commissioner in doing so, I am of the opinion that the General Assembly delegated to the Commission the status and authority of a condemnor tantamount to that of a State agency. Although the Act elsewhere designates the Commission a political subdivision of the Commonwealth, in this single attribute of its authority, the General Assembly has equated the Commission with the sovereign State. The Supreme Court of Virginia expressed the general rule in Hylton v. Prince William Co., 220 Va. 435, 440 (1979), that as a "corollary to Dillon's Rule, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication." Since Title 15.1 confers no specific or implied authority for a county to condemn property clothed with the sovereignty of the Commonwealth, Northampton County lacks the authority to condemn the lands of the Commission.
As indicated above, the Act delegates broad authority to the Commission to determine what lands are necessary and convenient for the construction and operation of the bridge-tunnel project, and absent an express delegation of authority enabling counties to condemn lands acquired pursuant to the exercise of that discretion, I am of the opinion that Northampton County cannot legally condemn real property of the Commission.

1This is the settled rule across the United States. Absent express authority, a political subdivision of a state does not have the authority to condemn the property of the state itself. 26 Am.Jur.2d Eminent Domain § 74 (1966). Even if the Commission were not clothed with the cloak of the sovereign, it is also the general rule, as applied to political subdivisions of the Commonwealth, that the "power to condemn property devoted to a public use must be manifested either by express legislative authority or by necessary implication." Bailey v. Anderson, 182 Va. 70, 72, 27 S.E.2d 914, 915 (1943), cert. denied, 321 U.S. 799 (1944); see, also, Nichols on Eminent Domain § 2.2 (1979); 26 Am.Jur.2d Eminent Domain, supra, § 88; Annot., 35 A.L.R.3d 1293, 1334 (1971).

CONDOMINIUMS. LOCALITIES DO NOT POSSESS AUTHORITY TO MANDATE THAT DEVELOPERS PAY FOR RELOCATION ASSISTANCE PROGRAM FOR FORMER TENANTS AS PREREQUISITE TO SPECIAL USE PERMIT UNDER § 55-79.43.

June 24, 1981

The Honorable David G. Speck
Member, House of Delegates

You have asked whether the provisions of § 55-79.43 of the Code of Virginia (1950), as amended,1 would allow a locality to establish a relocation assistance program for tenants whose building is being converted to a condominium, and charge the costs of that relocation program back to the developer through the costs of a special use permit.

Section 55-79.43 allows a locality to impose on a conversion condominium only those fees which are lawfully imposed on new construction, to the extent that such fees may be reasonably related to additional services furnished by the locality as a result of the conversion. While fees covering the cost of a relocation program would be related to a service the locality is providing as a result of the conversion, such a service is not a result of the construction of new structures.2 The powers of localities are fixed by statute and are limited to those conferred expressly or by necessary implication. See Hylton v. Prince William Co., 220 Va. 435, 258 S.E.2d 577 (1979). Therefore a
fee to cover the cost of relocation would not properly come within § 55-79.43.

Accordingly, I find that localities do not now possess the authority to mandate that developers pay for relocation assistance as a prerequisite to a special use permit under § 55-79.43.

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1Section 55-79.43 states: "No zoning or other land use ordinance shall prohibit condominiums as such by reason of the form of ownership inherent therein. Neither shall any condominium be treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership. No subdivision ordinance in any county, city or town in the Commonwealth shall apply to any condominium or to any subdivision of any convertible land, convertible space, or unit unless such ordinance is by its express terms made applicable thereto. Nevertheless, counties, cities and towns may provide by ordinance that proposed conversion condominiums and the use thereof, which do not conform to the zoning, land use and site plan regulations of the respective county or city in which the property is located, shall secure a special use permit, a special exception, or variance, as the case may be, prior to such property becoming a conversion condominium. In the event of an approved conversion to condominium, counties, cities, towns, sanitary districts, or other political subdivisions may impose such charges and fees as are lawfully imposed by such political subdivisions as a result of construction of new structures to the extent that such charges and fees, or portions of such charges and fees, imposed upon property subject to such conversions may be reasonably related to greater or additional services provided by the political subdivision as a result of the conversion. Nothing in this section shall be construed to permit application of any provision of the Uniform Statewide Building Code which is not expressly applicable to condominiums by reason of the form of ownership inherent therein to a condominium in a manner different from the manner in which such provision is applied to other buildings of similar physical form and nature of occupancy."

2While some new construction may involve the demolition of existing structures and the relocation of current tenants, I am not aware of requirements that mandate that developers fund relocation programs for such tenants.

CONSTITUTION. ART. VIII. BASIC SCHOOL AID FORMULA COMPLIES.

April 15, 1981

The Honorable L. Cleaves Manning
Member, House of Delegates
You ask if the "Basic School Aid Formula" used by the Virginia General Assembly in allocating State funds to localities for elementary and secondary schools violates either the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or Art. VIII of the Constitution of Virginia (1971).

Basic School Aid Formula (the "Formula")

The goal of education in Virginia is set forth in Art. VIII, § 1. It requires that the General Assembly "seek to ensure that an educational program of high quality is established and continually maintained."

The requirement for funding is set forth in Art. VIII, § 2, which provides:

"Standards of quality for the several school divisions shall be determined and prescribed from time to time by the Board of Education, subject to revision only by the General Assembly."

The General Assembly shall determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions. Each unit of local government shall provide its portion of such cost by local taxes or from other available funds."

Therefore, the process is begun by the establishment of Standards of Quality which are applicable to the several school divisions. The General Assembly then apportions the cost of establishing and maintaining the Standards of Quality between the Commonwealth and localities. See Report of the Attorney General (1972-1973) at 351. In order to achieve this equitable apportionment of funds, the General Assembly uses the Formula which is the subject of your questions.

The Formula itself, with definitions of its components, is set forth by the General Assembly in the Appropriation Act for each biennium. It is expressed currently in this way:

"The State share for a locality shall be equal to the Basic Operation Cost for that locality less the locality's revenues from the State sales and use tax returned (on the basis of school age population) for sales in the calendar year in which the school year begins and less the required local expenditure."

The Formula is complex, but the essential components are the "Basic Operation Cost," the locality's returned tax revenues, and the "required local expenditure."
The "Basic Operation Cost" is the Statewide cost per pupil. It translates the Standards of Quality into monetary terms. It reflects the actual costs of providing personnel at a ratio of 48 professionals for each 1,000 pupils and the actual costs for driver education, library materials and other teaching materials, teacher sick leave, general administration, free textbooks, operation and maintenance of the school plant, transportation of pupils, instructional television, professional and staff improvement, summer school instructional costs other than personnel, school food services, remedial work, teacher education and staff improvement, fixed charges and other costs in programs not funded by the State or through federal categorical aid. See, Id., at para. A3. It does not include allocations for capital outlay and/or debt service. See Report of the Attorney General (1972-1973) at 336.

In a prior Opinion to the Honorable W. Roy Smith, Member, House of Delegates, dated February 7, 1973, and found in Report of the Attorney General (1972-1973) at 351, it was ruled that:

"[T]he Standards cannot be prescribed in a vacuum but must be realistic in relation to the Commonwealth's current educational needs and practices. Similarly, in estimating the cost of implementing the Standards, the General Assembly must take into account the actual cost of education rather than developing cost estimates based on arbitrary figures bearing no reasonable relationship to the actual expense of education prevailing in the Commonwealth. Finally, in apportioning the cost of the Standards between the Commonwealth and the several school divisions, the General Assembly must take into account the local ability to pay...."

The Standards of Quality are not mathematically precise, but they should reflect educational needs and certain fiscal realities. See Report of the Attorney General (1975-1976) at 312.

The "required local expenditure" reflects the extent to which local resources must pay for the operating costs remaining after State revenues and revenues from the sales and use taxes are applied to the Basic Operation Cost. See Ch. 760 [1980] Acts of Assembly, para. A4, A5, at 1258, 1259. The General Assembly attempts to recognize the actual ability of localities to pay their share of required educational costs by factoring in the Formula a "Composite Index of Local Ability to Pay." Id., at para. A4. This is an index figure computed for each locality which reflects the taxable wealth of the locality. Constituent index items are the true values of real estate and public service corporations, individual income levels, and sales and use tax revenues. Thus, the Formula is designed to reflect each district's relative taxing ability.
Section 22.1-95 of the Code of Virginia (1950), as amended, provides:

"Each county, city and town is authorized, directed and required to raise money by a tax on all property subject to local taxation at such rate as will insure a sum which, together with other available funds, will provide that portion of the cost apportioned to such county, city or town by law for maintaining an educational program meeting the standards of quality for the several school divisions prescribed as provided by law."

Therefore, a locality cannot determine that its educational program will be funded only by State funds. When a locality receives State funds, it must contribute, under the Formula, enough from its local funds at least to meet the Statewide Standards of Quality. See Report of the Commission on Constitutional Revision (1969) at 261-263; II Howard, Commentaries on the Constitution of Virginia (1974) at 897-907.

If the locality determines to provide educational services or facilities beyond those for which allowance is made in the Standards of Quality and the Formula, it may meet the cost of those additional items by levying increased property taxes. Section 22.1-88 provides:

"The funds available to the school board of a school division for the establishment, support and maintenance of the public schools in the school division shall consist of State funds appropriated for public school purposes and apportioned to the school board, local funds appropriated to the school board by a local governing body or such funds as shall be raised by local levy as authorized by law, donations or the income arising therefrom, and any other funds that may be set apart for public school purposes."

The Equal Protection Clause

You have questioned the constitutionality of the Formula under the Equal Protection Clause because it results in the payment of varied percentages of State aid among the local school systems in Virginia and provides aid in proportion to a locality's tax resources while failing to account for additional local financial burdens of many of the school divisions.

Education is not among those rights afforded explicit or implicit protection under the Constitution of the United States. San Antonio School District v. Rodriguez, 411 U.S. 1, at 35 (1973). It is not a "fundamental" right, the legislative limitation of which warrants strict scrutiny by courts under the Equal Protection Clause. Id., 411 U.S. at 41. Therefore, the constitutional standard under the Equal Protection Clause is whether the challenged State system for
the provision of education funding rationally furthers a legitimate State purpose or interest. McGinnis v. Royster, 410 U.S. 263, at 270 (1973). The mere existence of disparities in school expenditures or in the actual share of State financing received by various school districts does not violate the Equal Protection Clause. Id., 411 U.S. at 41.

The Texas system for school financing, which is analogous to the system used now by Virginia, has been found by the Supreme Court to be consistent with the Equal Protection Clause. Id., 411 U.S. 1. Under the Texas system a statutory standard, setting forth minimum attributes for educational opportunity, was adopted. The State of Texas then devised a "Local Fund Assignment" for the purpose of apportioning State funds among the localities. The "Local Fund Assignment" resulted from the application of the following complex formula:

"The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State. Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county. The district, in turn, finances its share of the Assignment out of revenues from local property taxation." Id., 411 U.S. at 10.

The Supreme Court noted in reviewing the Texas system that:

"The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children but that would not itself exhaust any district's resources." Id.

The court found that for these reasons, and because the whole thrust of the Texas system was to extend public education and to improve its quality, the system, despite the fact that it was based on localities' tax resources and despite its resulting disparities, was rationally based and consistent with the Equal Protection Clause.

The Virginia Formula now used is substantially similar to the Texas system of apportioning educational costs which was upheld in Rodriguez. The Virginia Formula is based upon established Standards of Quality which are then translated into Statewide average costs on a per pupil basis, as was the
Texas system. See, Id., 411 U.S. at 9-12. It calls for State and local contributions to fund basic operation costs, such as teacher salaries and transportation costs, as did the Texas system. The basic operation costs which are recognized in the Formula do not include capital outlay or debt retirement. These factors were not considered in the Texas system either. Id., 411 U.S. at 45. The Formula in Virginia results in local disparities in the actual amount of State aid made available to school districts in Virginia, as did the Texas system. Id., 411 U.S. at 10-16, 46. The Formula reflects the taxpaying ability of localities by factoring into its weighing process items such as real estate values and sales taxes, just as the Texas system based its assessment of local taxpaying ability upon the market value of taxable property. Supra, 411 U.S. at 15-16. Generally, the Virginia Formula is comparable to the Texas system which was upheld by the court.

This does not mean that under no circumstances could such a formula be found in violation of the Equal Protection Clause. In Rodriguez, supra, 411 U.S. at 50, n.107, the Supreme Court recognized that, despite the presumption in favor of the Texas system, its use could pose an issue under the Equal Protection Clause if it were coupled with a statutory scheme which imposed a ceiling preventing local boards from financing the education of the children in their localities, particularly in those localities where the tax base is low and the State statute limits the amount or rate of tax which can be levied. See Hargrave v. Kirk, 313 F.Supp. 944, 949 (M.D. Fla. 1970), vacated, 401 U.S. 476 (1971). Virginia, however, does not so impermissibly limit the power of localities to finance the education of their children. Moreover, Virginia in 1979 contributed 30.6% of the total statewide current costs, the federal government contributed 10.6% and the local districts 48%. The remaining 10.8% is supplied by funds from the State sales tax. Thus, under the current Virginia Formula, less than half the cost of meeting educational standards is met by localities. This scheme of local participation is not analogous to that existing in some states where heavy reliance on local real estate taxes makes the educational funding system inefficient. See Robinson v. Cahill, 303 A.2d 273 (1973) where the New Jersey system depended on local real estate taxes for 67% of its funding.

Therefore, it is my conclusion that the Virginia Formula does not impermissibly lock localities into the method or extent of financing they can use for supplying local education revenues and that it complies with the Equal Protection Clause.

Is The Formula Valid Under Article VIII Of The Virginia Constitution?

Somes states have construed their own constitutions as providing a right to education which goes further than Rodriguez. See Serrano v. Priest, 557 P.2d 929 (Cal. 1977);
Milliken v. Green, 212 N.W.2d 711 (Mich. 1973); Robinson v. Cahill, supra. The Virginia Constitution, as in Rodriguez, is not violated by the funding formula now in use. This Office has considered those requirements in previously rendered Opinions. See Reports of the Attorney General (1972-1973) at 351; (1975-1976) at 312; (1979-1980) at 304, 305. Essentially the Virginia Constitution requires that the General Assembly apportion State funds on a basis which relates to the actual costs of the Standards of Quality components, and that the apportionment be equitable.

Moreover, the provision in Art. VIII, § 1, that the General Assembly "seek to ensure that an educational program of high quality is established..." does not require that all costs experienced by school districts be included and met in the Standards of Quality. This language is precatory and represents the goal to be sought by the General Assembly. It is significant that attempts to amend this Constitutional language at the time of the 1971 Constitutional revision, to remove the words "seek to" and, thereby, establish an equal protection right to education in the State Constitution, failed. See Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, 209-211 (comments on amendment offered by Senator Turk). The language of Art. VIII, § 1 is purely aspirational in nature and establishes no self-executing constitutional right to a "high quality" education. It is "the idea of a progressively higher statewide standard, achievable under present conditions, but to be advanced as resources and circumstances permit." Report of the Commission on Constitutional Revision (1969) at 260. Therefore, the language of Art. VIII, § 1 does not constitutionally mandate the General Assembly to provide State funding for all actual educational costs.

Finally, the General Assembly may determine, consistent with Art. VIII, § 2, that various budgetary constraints warrant that the Standards of Quality be defined commensurate with available funds. See Report of the Attorney General (1975-1976) at 312. Alternatively, it may apportion the cost of meeting the statewide standards in such a fashion as to require localities to provide the funding necessary to maintain the Standards of Quality. Id.

I conclude, therefore, that the mere fact that all actual educational costs are not subject to State funding under the Formula is not sufficient to invalidate the Formula under Art. VIII of the Constitution of Virginia.

1 The formula for apportionment of State aid used by the General Assembly, prior to the current Formula, was attacked on the basis of the Equal Protection Clause upon the points you now have raised. See Burruss v. Wilkerson, 310 F.Supp. 572 (W.D. Va. 1969), aff'd, 397 U.S. 44 (1970). The former formula was based on a fixed percentage and pupil allowance system, unlike the current Formula which has the "Basic
Operation Cost" and "Composite Index of Local Ability to Pay" components. See Ch. 806 [1968] Acts of Assembly, Item 564. Thus, the previously used formula was less reflective of actual local costs and resources than the present formula. It was argued that the prior formula violated the Equal Protection Clause because its use created and perpetuated substantial disparities in the educational opportunities available in the different localities. Further, it failed to account for differences in the levels of school construction costs and it failed to apply any equalizing factors in responding to differing education needs among the localities. The particularly acute needs of Bath County, which was unable to obtain locally moneys from taxation to supplement the State contribution for education, were noted in these arguments. Nevertheless, the court held that this previously used formula did not violate the Equal Protection Clause of the Fourteenth Amendment.

CONSTITUTION. CHARTERS. BONDS. REFERENDUM. INVALID PROVISION REQUIRING SEPARATE APPROVAL OF VOTERS OWNING REAL ESTATE IS SEVERABLE. BONDS REQUIRE APPROVAL ONLY OF VOTERS GENERALLY.

September 22, 1980

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

You ask whether the City of Martinsville may under its charter issue revenue bonds without obtaining approval of a majority of qualified voters owning real estate in the city voting in the bond referendum, provided the city does obtain approval of a majority of the qualified voters voting in the referendum.

The charter has a provision requiring approval of a majority of both classes of voters voting in the referendum. As you indicate, the provision as to voters owning real estate does not comply with Art. II, § 1 or Art. VII, § 10 of the Virginia Constitution (1971). See, also, Carlisle v. Hassan, 199 Va. 771, 102 S.E.2d 273 (1958).

The charter provision as to voters owning real estate in the city is clearly severable, even though I do not find a severability clause in the city charter. Severance will not affect the validity of the remaining provisions, or destroy the legislative purpose. The charter requires approval by two classes of voters. The unconstitutional class lies wholly within the valid one. Severance will merely eliminate the veto power of the unconstitutional class. Members of that class are still entitled to vote as members of the larger and constitutional class.

Accordingly, I am of the opinion that the City of Martinsville may under its charter issue revenue bonds without obtaining approval of a majority of qualified voters
owning real estate in the city voting in the bond referendum, provided the city does obtain approval of a majority of the qualified voters voting in the referendum.\(^4\)

\(^1\)Likewise the charter provision as to voters owning real estate does not comply with the equal protection clause of the U. S. Constitution. See Cipriano v. City of Houma, 395 U.S. 701 (1969), and later U. S. Supreme Court cases applying Cipriano in related fact situations.


CONSTITUTION. CHARTERS. PUBLIC OFFICERS. COMPATIBILITY. PROVISION FOR TOWN COUNCIL TO ELECT MEMBER AS CLERK OR TREASURER OF TOWN SUPERSEDED BY ART. VII, § 6 OF CONSTITUTION.

September 15, 1980

The Honorable Floyd C. Bagley
Member, House of Delegates

You ask two questions about the offices of clerk and treasurer in the Town of Quantico.

Constitutional Prohibition

Your first question is whether the town council may elect a member of council as town clerk or treasurer.

Section 6 of the town charter provides that the officers of the town shall include a clerk and a treasurer.\(^1\) Section 6 also provides that the office of clerk and treasurer may be filled by the same person, who may by a vote of two-thirds of all the members of council, be a member of council.

Article VII, § 6 of the Virginia Constitution (1971) (multiple offices) provides that no member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the
governing body by election or appointment. Compare § 15.1-800 of the Code of Virginia (1950), as amended.

Section 6 of the charter of the Town of Quantico, insofar as it purports to allow a member of the town council to serve as clerk or treasurer of the town, is in conflict with Art. VII, § 6 of the Constitution. The constitutional provision controls, and I find accordingly that the council of the Town of Quantico may not elect a member of council as town clerk or treasurer.²

Separate Governmental Agencies

Your second question is whether, under § 2.1-349, the spouse of a member of council may be elected as town clerk or treasurer.

Section 2.1-349(a)(1) provides that no officer of any governmental agency shall have a material financial interest in any contract with the governmental agency of which he is an officer. Section 2.1-348(f) provides that a material financial interest shall include a personal and pecuniary interest accruing to an officer or the officer’s spouse who resides in the same household.³

However, if the offices of clerk and treasurer are separate governmental agencies from the town council, the absolute prohibition of § 2.1-349(a)(1) does not apply. Instead, § 2.1-349(a)(2) applies, and the contract is permissible upon certain conditions.

This Office has ruled, for example, that § 2.1-349(a)(2) applies to a teacher’s employment contract with a town school board where the teacher’s spouse is a member of the town governing body. See Opinion to the Honorable G. R. C. Stuart, Member, House of Delegates, dated March 31, 1971, found in Report of the Attorney General (1970-1971) at 444. See, also, Opinion to the Honorable J. M. H. Willis, Jr., Commonwealth’s Attorney for City of Fredericksburg, dated September 17, 1970, Ibid, at 409 (each department of local government to be deemed a separate governmental agency—city council, regional jail and local welfare department all separate).

The town charter is the basic source for determining whether the offices of clerk and treasurer are separate governmental agencies from the town council. The town treasurer is clearly a separate governmental agency, much as county and city treasurers are.⁴ The principal difference between the town treasurer and the treasurers of counties and cities, who are constitutional officers, is that the town treasurer is elected by the council, and not by the people. Election by the governing body, however, does not keep school boards from being separate governmental agencies under the Virginia Conflict of Interests Act.
The post of town clerk is different. Under § 11 of the charter, the clerk is not only town clerk but also clerk of the governing body. To the extent the town clerk serves as clerk of the governing body, the spouse of the council member is prohibited under § 2.1-349(a)(1) from serving as town clerk.3

Accordingly, I find the spouse of a member of the Quantico town council may serve as treasurer of the town under § 2.1-349(a)(2), but that § 2.1-349(a)(1) prohibits the spouse from serving as clerk, to the extent that the town clerk also serves as clerk of the governing body.

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1You advise that the charter of the Town of Quantico is found in Ch. 206 [1934] Acts of Assembly.


3Section 2.1-349(b)(6) provides an exemption for contracts between the government of a town with a population of less than 10,000 and an officer of that town when a total of such contracts does not exceed $10,000 per year ($25,000 for contracts arising from awards made on a sealed bid basis). You advise the salary of the clerk-treasurer is $12,250 a year, so the scope of the exemption is inadequate.

It has also been suggested that the member of council and the clerk-treasurer are indeed employed by the same governmental agency, but no material financial interest exists by reason of § 2.1-348(f)(4). Under that section, spouses residing in the same household may be employed by the same governmental agency, except when one spouse is employed in a direct supervisory or administrative position, or both, with respect to the other spouse. It has been suggested that since the council is a collegial body there is no direct supervisory or administrative relationship between spouses. But, see, Opinion to the Honorable Teddy Bailey, Clerk, Circuit Court of Dickenson County, dated November 22, 1971, found in Report of the Attorney General (1971-1972) at 457 (member of local board of welfare is in a supervisory capacity over individuals employed by the local department of public welfare).

4See § 10 of town charter (town treasurer vested with any and all powers vested in county and State treasurers, and to perform such duties as are usually incident to the office of commissioner of revenue).

5See § 11 of town charter (town clerk shall be the clerk of the council, but otherwise shall perform such other duties as are required by general law or by the council by ordinance or resolution--the requirement of an ordinance or resolution.
indicates the town clerk's status as a separate governmental agency). Compare Opinion to the Honorable Charles J. Ross, Clerk, Circuit Court of Madison County, dated October 12, 1973, found in Report of the Attorney General (1973-1974) at 429 (clerk of circuit court as officer of the county as well as constitutional officer—the offices are severable, and in counties with a county administrator, the county administrator serves as clerk of the governing body. See § 15.1-117 (powers and duties of county administrators).

CONSTITUTION. CITIES AND TOWNS. PUBLIC OFFICERS. ART. VII, § 6 DOES NOT PROHIBIT COUNCIL, DURING TEMPORARY ABSENCE OF MAYOR, FROM ASSIGNING MAYOR'S DUTIES TO COUNCIL MEMBER AS PRESIDENT PRO TEMPORE.

October 6, 1980

The Honorable Joseph P. Crouch
Member, House of Delegates

You ask whether Art. VII, § 6 of the Constitution of Virginia (1971) prohibits a town council, during the temporary absence of the mayor, from assigning the mayor's duties to one of the council members as a president pro tempore.

Article VII, § 6 provides that no member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment. Compare § 15.1-800 of the Code of Virginia (1950), as amended (members of council ineligible for certain offices during tenure or one year thereafter). See, also, Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated September 15, 1980 (notwithstanding charter provision, town council may not elect member of council as town clerk or treasurer) (copy enclosed).

The assignment of mayoral duties to council members during the temporary absence of the mayor is not the same as filling an office. I am advised that making temporary assignments of the mayor's duties is a common practice, and the practice is statutorily authorized by § 15.1-827 which allows the appointment of a president pro tempore in the absence of the mayor. So long as the absence of the mayor does not amount to a vacancy, the practice of appointing a president pro tempore does not violate Art. VII, § 6, because the president pro tempore cannot be said to hold the office of mayor.

The determination of whether a councilman is acting merely during the absence of the mayor or actually filling a vacant office is a question of fact, to be determined on a case-by-case basis. I understand in the present situation that there is no question of the president pro tempore filling the office of mayor. See Opinion to the Honorable
Accordingly, during the temporary absence of the mayor, I find that Art. VII, § 6 does not prohibit a town council from assigning the mayor's duties to one of the council members as a president pro tempore.

CONSTITUTION. COUNTIES, CITIES AND TOWNS. ASSESSMENTS. PUBLIC IMPROVEMENTS. DEFINITION OF ABUTTING PROPERTY.

September 2, 1980

The Honorable Joe H. Ryals
Commissioner of the Revenue for the City of Emporia


Definition of Abutting Property

Your first request is to define the term "abutting property."

The term abutting property is derived from Art. X, § 3 of the Virginia Constitution (1971). As such, the term serves as a limitation on the legislative power to make assessments for local public improvements. See generally, II A.E. Howard Commentaries on the Constitution of Virginia (Univ. Press of Va. 1974) at 1060-1061.

The term means property touching, contacting or bordering on the public improvement, or the public way in which the improvement is placed. See, for example, Webster's New Collegiate Dictionary (G. & C. Merriam 1979) at 5.

The evident purpose of the term is to limit assessments to improvements located immediately next to a given parcel of property, as opposed to nearby improvements in the same neighborhood. One might argue that all public improvements in the neighborhood benefit a particular parcel of property. The term abutting requires an immediate physical connection between the improvement and the property assessed.

Definition of Peculiar Benefits

You next inquire as to the definition of "peculiar benefits."

The term peculiar benefits, like abutting property, is derived from Art. X, § 3. Again, the term serves as a limitation on the legislative power to make assessments for
local public improvements. See, again, Commentaries on the Constitution of Virginia, supra.

The term has been defined by the Virginia Supreme Court as "the difference in the value of the lot with and without available sewers." Southern Railway Co. v. City of Richmond, 175 Va. 308, 316, 8 S.E.2d 271 (1940) (also as "the full amount of the enhanced value"). See, also, City of Richmond v. Eubank, 179 Va. 70, 75, 18 S.E.2d 397 (1942) ("the maximum amount which may be charged or taxed is measured by the value of the sewer to the abutting lots. The term, 'the peculiar benefits,' clearly means the enhanced value of each lot resulting from the construction of the sewer.").

As so defined, the term peculiar benefit is very different from apportioned cost (see below). Under some circumstances, apportioned cost can exceed peculiar benefits. Under other circumstances, peculiar benefits can exceed apportioned cost.

Methods of Ordering Improvements--
Apportionment of Costs v. Assessment of Peculiar Benefits

Your third request is to describe the different methods of ordering improvements under § 15.1-240, and the distinction between apportionment of costs versus the assessment of peculiar benefits.

The first method of ordering improvements is where there is an agreement between the governing body and the abutting landowners as to the apportionment of costs. Where there is such an agreement, the assessment of peculiar benefits is not an issue.

In the absence of agreement between the governing body and the abutting landowners, the improvements may be ordered either (a) on the petition of a certain fraction of the landowners to be affected thereby, or (b) by a two-thirds vote of all the members elected to the governing body. In either event, notice must be given to the abutting landowners, so they may be heard in favor of or against the improvements. In this case there is no agreement with the abutting landowners as to apportionment of cost, and the contribution of those landowners toward defraying the cost of the improvements is restricted to the assessment of peculiar benefits.

Therefore, there are two basic methods of ordering improvements. Under one method, there is agreement with the abutting landowners as to the apportionment of costs. Under the other method, there is no such agreement, and the abutting landowners' contribution toward defraying the cost is restricted to the assessment of peculiar benefits. Compare Opinion to the Honorable Bernard G. Barrow, Member, House of Delegates, dated August 18, 1977, found in Report of the Attorney General (1977-1978) at 504.
Cost Limitation on Assessment of Peculiar Benefits

Your fourth question is whether under § 15.1-241, in cities having a population not exceeding 12,000, the amount assessed against abutting property owners may exceed three fourths of the total cost of such improvement.

Section 15.1-241 has a number of provisions, several of which are additional limitations on the legislative power of the local governing body to make assessments for local public improvements. Depending on the size of the population of various cities and towns, except when it is otherwise agreed, the portion assessed against abutting property owners shall not exceed a specified part of the total cost of the improvement. In the case of cities having a population not exceeding 12,000, the amount assessed shall not exceed three fourths of the total cost. This limitation is in addition to the limitation that the assessment is not to exceed the peculiar benefits to the abutting property owners.

Therefore, in a city having a population not exceeding 12,000, the entire project cost may not be assessed, regardless of the magnitude of the peculiar benefits to the abutting property owners. The amount assessed may not exceed three fourths of the total cost of such improvement.

CONSTITUTION. DELEGATION OF POWER TO REGULATE STATE BANKS OR SAVINGS AND LOAN ASSOCIATIONS TO FEDERAL GOVERNMENT IS UNCONSTITUTIONAL.

January 23, 1981

The Honorable Norman Sisisky
Member, House of Delegates

You have asked whether the General Assembly may amend the Virginia Savings and Loan Act and the Virginia Banking Act to provide that upon the enactment of federal laws or regulations granting powers to federally chartered savings and loan associations or banks, such powers shall be automatically granted to State chartered savings and loan associations or banks. You have also asked whether, alternatively, the General Assembly could enact the above-stated legislation with the additional provision that such powers be automatically granted unless within 30 days from the enactment of such federal law or regulation, the State Corporation Commission or the Commissioner of Financial Institutions issues an order suspending the grant of such power.

The effect of the legislation which you describe is to delegate to the federal government the State’s power to regulate State chartered savings and loan associations and banks. The general rule, as established by a majority of states, is that the adoption by state statute of prospective
federal legislation or regulation is an unconstitutional delegation of legislative power to the federal government. See 16 Am.Jur.2d Constitutional Law § 343 (1979), and 16 C.J.S. Constitutional Law § 133b (1956), and cases cited therein. This Office has previously stated that there is no reason to believe that Virginia would not follow the majority view, and concluded that such delegations of legislative authority are unconstitutional. See Report of the Attorney General (1969-1970) at 65 (the delegation of the power to determine interest rates to the federal government).

Accordingly, I am of the opinion that legislation that delegates power to regulate state banks or savings and loan associations to the federal government would not be lawful.

Furthermore, although the alternative option which you have suggested allows the State to retain some veto control over the regulation of State savings and loan associations or banks, the essence of the legislation is the delegation of legislative power to the federal government. Even under your first proposal, the State retains the right to repeal any legislation or regulation which is adopted. Your second proposal merely delegates this power to the State Corporation Commission if it acts within the first thirty days. The State's power to repeal is not an antidote to the unlawful delegation of its legislative power. Therefore, it is my opinion that both versions of your proposal would be unlawful.

The existing authority of the State Corporation Commission to adopt regulations under both the Savings and Loan Act and the Banking Act, however, would allow for adjustment of the powers of State chartered institutions necessary to maintain parity with federally chartered institutions. See §§ 6.1-195.5:1 and 6.1-5.1 of the Code of Virginia (1950), as amended.

CONSTITUTION. ELECTIONS. BALLOTS. WRITE-IN VOTES. PRESIDENTIAL ELECTIONS. ART. II, § 3 DOES NOT REQUIRE SPECIAL PROVISION FOR WRITE-IN VOTES OF PRESIDENTIAL VOTING MACHINE BALLOT UNDER § 24.1-205.

October 22, 1980

The Honorable C. Alton Lindsay, Sr., Secretary Hampton City Electoral Board


Article II, § 3 provides that, in elections other than primary elections, provision shall be made whereby votes may be cast for persons other than listed candidates or nominees.
Prior to 1971, the constitution provided that all ballots were to contain the names of the candidates, and the offices to be filled, but any voter might erase any name and insert another.1

In 1968, this Office ruled that there was no requirement that electoral boards provide a place for one or more write-in votes on the presidential voting-machine ballot. See Opinion to the Honorable James M. Young, Chairman, City of Salem Electoral Board, dated October 21, 1968, found in Report of the Attorney General (1968-1969) at 94. The Young Opinion was based in part upon the rationale that presidential electors are not voted upon individually, but as a unit previously nominated or selected by a political party or party group, and that a voter's choice of electors is indicated by his marking the ballot for the electors of a party or party group.

Your present inquiry is whether the Young Opinion remains valid 1) in view of the new language in the 1971 Constitution, and 2) in the event a voter wishes to write-in the names of an appropriate number of electors from across the State.

Article II, § 3 is not self-executing as to write-in votes.2 The constitutional requirement is that provision shall be made for write-in votes. At the time of the Young Opinion in 1968, § 24-234 on the construction of voting machines (compare present § 24.1-205) provided that means were to be furnished whereby the voter could cast his vote for presidential electors in part or in whole for persons not nominated by any party. Even with this language in § 24-234, the Young Opinion found there was no requirement that electoral boards provide a place for one or more write-in votes on the presidential voting-machine ballot.

The present § 24.1-205 provides merely that the voting machine shall be provided with a) one device for voting for all presidential electors of each party by one operation, and b) a ballot identifying such electors collectively and c) a device to register votes cast for such electors collectively. Section 24.1-205 omits the language in § 24-294 about providing means whereby the voter can cast his vote in part or in whole for presidential electors not nominated by any party or party group.3

Further, in the 1969 Study Commission Report on revision of the election laws,4 I note the Study Commission comment under § 24.1-205 that a "strange" provision on presidential electors in old § 24-294 had been deleted as clearly conflicting with old § 24-290.5 (now § 24.1-161). Section 24.1-161 provides for a collective vote for the individual electors nominated or selected by political parties and party groups.

I have also consulted the comprehensive Code Commission Report on revision of the 1950 Code to conform with the new
In the Code Commission Report, I find no mention of a need to amend § 24.1-205 to conform to the 1971 Constitution, and I note that § 24.1-205 has not been amended since Ch. 462 [1970] Acts of Assembly. Section 24.1-205 therefore clearly represents what the General Assembly regards as the discharge of its constitutional duty under Art. II, § 3 of the 1971 Constitution. In discharge of that constitutional duty, the General Assembly has seen fit to leave out of § 24.1-205 the language as to presidential write-in votes that once appeared in § 24-294.

Accordingly, I find that no special provision need be made for write-in votes, under Art. II, § 3 on the presidential voting-machine ballot presently in use pursuant to § 24.1-205.

1See § 28 of the Virginia Constitution (1902).
2A positive constitutional provision is not self-executing, when the provision merely indicates principles, without laying down rules whereby the principles may be given force of law. See, for example, County School Board of Prince Edward County v. Griffin, 204 Va. 650, 133 S.E.2d 565 (1963) (establishment and maintenance of system of free public schools); Newport News v. Elizabeth City County, 189 Va. 825, 55 S.E.2d 56 (1949) (provision by general laws for extension and contraction of cities and towns).
3Section 24.1-129 also contains a provision for write-in ballots, but this provision is superseded by § 24.1-205 as to voting-machine ballots, pursuant to § 24.1-225. Section 24.1-217 relates the mechanics of casting write-in votes on the ordinary non-presidential voting-machine ballot.
6The General Assembly may determine what is compliance with a positive constitutional provision that is not self-executing, so long as the Assembly does not disregard constitutional requirements. See, again, County School Board v. Griffin, supra. The General Assembly remains free, of course, to make some other provision for write-in votes on the presidential voting-machine ballot.

Any such other provision may be fraught with difficulties, however, if write-in votes are to be counted as valid. The write-ins for electors must be qualified, willing to serve, and intending to vote in the electoral college for a president and vice-president who must also be qualified and willing to serve, and all of these matters must be worked out after the election. Compare Opinion to the Honorable Frank A. Hoss, Jr., Secretary, Prince William County Electoral Board, dated June 25, 1976, found in Report of the Attorney General (1975-1976) at 115 (qualification of town
officer elected by write-in vote). The combinations and permutations are almost infinite.

In contrast to the individual write-in approach, the General Assembly has made liberal provision under § 24.1-159 whereby non-party groups can work these matters out in advance of the presidential election, and place the name of independent electors on the regular presidential voting-machine ballot.

CONSTITUTION. GENERAL ASSEMBLY. LIEUTENANT GOVERNOR. LIEUTENANT GOVERNOR NOT MEMBER OF SENATE UNDER ART. IV, § 11 OF CONSTITUTION OF VIRGINIA REQUIRING AFFIRMATIVE VOTE OF ALL ELECTED MEMBERS.

December 24, 1980

The Honorable Eva F. Scott
Member, Senate of Virginia

You ask whether the Lieutenant Governor is a member of the Senate for purposes of Art. IV, § 11 of the Virginia Constitution (1971), which provides that no bills dealing with certain subject matter (largely financial) shall be passed except by affirmative vote of a majority of all the members elected to each house.¹ Article V, § 14 provides that the Lieutenant Governor shall be President of the Senate, but shall have no vote except in case of an equal division.²

Article IV, § 2 provides that the Senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts.³ The Lieutenant Governor is elected by the qualified voters of the Commonwealth, rather than by the voters of a senatorial district. Article V, §§ 13 and 2.⁴

The qualifications for members of the Senate are different, therefore, from the qualifications for Lieutenant Governor, particularly with respect to the constituency or district represented. Further, to treat the Lieutenant Governor as a member of the Senate would at the present time give the Senate 41 members, something prohibited by Art. IV, § 2.

 Accordingly, I am of the opinion that the Lieutenant Governor is not a member of the Senate for purposes of Art. IV, § 11.⁵

This is the only provision that suggests the Lieutenant Governor might be a member of the Senate. For all other purposes, the Constitution treats the Lieutenant Governor as part of the Executive Branch. Furthermore, Art. V, § 7 provides that in the absence of the Lieutenant Governor, the Senate shall choose a president pro tempore from its own body, clearly indicating that the Lieutenant Governor is not from the body of the Senate.

There are presently forty senatorial districts. See § 24.1-14.1 of the Code of Virginia (1950), as amended.

Compare, also, the qualifications for Lieutenant Governor, in the provisions just cited, with the qualifications for the Senate in Art. IV, § 4, which provides in part that any person may be elected to the Senate who is a resident of the senatorial district which he is seeking to represent. Further, a senator who moves his residence from the district for which he is elected shall thereby vacate his office.


The Senate, for purposes of its own rules, may treat the Lieutenant Governor as a member, so long as such provision is not in conflict with the Virginia Constitution. See Caton Opinion just cited. This Office does not give opinions on questions restricted to the rules of the Senate. See Opinion to the Honorable Clive L. DuVal, 2d, Member, Senate of Virginia, dated February 8, 1980, found in Report of the Attorney General (1979-1980) at 178.

You ask what day during the present Session is the last day for the General Assembly to act on gubernatorial appointments, under the last paragraph of Art. V, § 7, of the Virginia Constitution (1971), prior to expiration of those appointments.

The last paragraph of Art. V, § 7 provides that certain gubernatorial appointments, made during the recess of the General Assembly, shall expire at the end of thirty days after the commencement of the next Session of the General Assembly.

Pursuant to Art. IV, § 6, the present Session of the General Assembly commenced on the second Wednesday in January, which was January 14, 1981.
When time is to be computed from a particular day, or when an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day and to include the last day of the specified period.

The wording of Art. V, § 7 is consistent with the rule. The thirty days is to start after commencement of the Session. The day of commencement of the Session, January 14, is therefore to be excluded. The appointments are to expire at the end of the thirty days. The thirtieth day, February 13, is therefore to be included as the last day during the term of the appointments. The gubernatorial appointments will expire at the end of February 13.

Accordingly, I find that February 13, 1981, is the last day during the present session for the General Assembly to act on gubernatorial appointments, under the last paragraph of Art. V, § 7, prior to expiration of those appointments.

1See, also, Art. V, § 11 (Effect of refusal of General Assembly to confirm an appointment by the Governor).
2Compare Art. VI, § 7 (Selection and qualification of judges) ("the Governor may appoint a successor to serve until thirty days after the commencement of the next session of the General Assembly.") See 74 Am.Jur.2d Time § 23 at 608 (1974) ("To;" "until;" "till.") (rule that, where time is limited by an enactment "until" a certain day, the day is included).
3Compare, also, Art. IX, § 1 (State Corporation Commission) ("the Governor shall forthwith appoint pro tempore a qualified person to fill the vacancy for a term ending thirty days after the commencement of the next regular session of the General Assembly....").
4See Opinion to the Honorable John N. Dalton, Governor of Virginia, dated February 22, 1979, found in Report of the Attorney General (1978-1979) at 113 (computation of time for veto under Art. V, § 6--"If any bill shall not be returned by the Governor within seven days after it shall have been presented to him....").
5Compare Annotation, 98 A.L.R.2d 1331 (1964 & Supps. 1976 & 1980) (Inclusion or exclusion of first and last days in computing the time for...a certain number of days before a known future date), citing Dickerson v. McNulty, 142 Va. 559, 129 S.E. 242 (1925) (day of notice excluded, last day included--notice of sale under deed of trust).
6Rule that time "after" an act is computed by excluding the day on which the event took place. See 74 Am.Jur.2d Time § 25 at 609-610 (1974) ("After;" "From and after;" "since.").
January 9, 1981

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask several questions about proposed charter amendments for the City of Hampton, and their status under the Virginia Constitution.

Direct Election of One Person As Both Mayor and Member of Council

Your first question is whether a charter amendment to provide for direct election by the voters of one person as both mayor and member of council violates Art. VII, § 6 of the Virginia Constitution (1971) relating to multiple offices.

The first sentence of § 6 provides that, under most circumstances, no person shall at the same time hold more than one office mentioned in Art. VII. The post or office of mayor is not mentioned in Art. VII.

The second sentence of § 6 provides that no member of a governing body shall be eligible, under most circumstances, to hold any office filled by the governing body by election or appointment. The charter amendment provides for the post or office of mayor to be filled by the voters by election, rather than by the governing body.

Accordingly, I find that a charter amendment to provide for direct election by the voters of one person as both mayor and member of council does not violate Art. VII, § 6.

Initiative, Recall and Referendum

Your second question is whether the charter amendments to provide for initiative, recall, and referendums are constitutional.

I find no immediate constitutional questions in the charter amendment on recall elections. Article 1.1 (Removal of Public Officers from Office) of Ch. 6 of Title 24.1 of the Code of Virginia (1950), as amended, already provides procedures to remove city officers for certain causes.

With respect to initiatives and referendums, § 24.1-165 provides that they shall not be allowed except in certain cities. If the charter amendments are to be made, then Hampton should be added to the list of exceptions in § 24.1-165. Otherwise, the amendments would be constitutional as written.

There are some subjects, however, not identified in the proposed charter amendments, upon which initiatives and referendums could not be held. The failure to enumerate all instances in which referendums and initiatives cannot be
implemented is more a problem of application than of facial validity. Whether the amendments should be more specific is purely a legislative decision.

1The first sentence of § 6 is derived, with changes, from § 121 of the 1902 Constitution. The mayor is mentioned several times in Art. VIII (Organization and Government of Cities and Towns) of the 1902 Constitution, and is expressly designated as the chief executive officer of 'every' city. See § 120 Virginia Constitution (1902).

2In the last paragraph of the amendment as to direct election, there is a provision that "in all other cases" the council members shall choose one of their number to serve as mayor and vice-mayor. If the post of mayor is an office under the charter, the back-up provision violates the second sentence of § 6. Mayors have varying powers, so whether any one mayor is an officer would turn on the facts of a particular case.

The charter amendment provides that the mayor shall preside over the meetings of council, and be recognized as the head of the city government for all ceremonial purposes, for purposes of military law, and for service of civil process.

I do not view the presidency of the council as necessarily an office. I have not located satisfactory authority as to the mayor's role as head of the city government for purposes of military law, but I anticipate that military law gives the post of mayor full status as a public office.

Finally, if the post of mayor is not a public office, it is unclear why the charter amendment provides for the mayor's direct election by the voters. It is unusual to provide for direct election of a non-officer by the voters. By reason of the foregoing, I view the post of mayor under the charter amendment as a public office. Accordingly, the back-up provision violates the second sentence of § 6. See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated April 29, 1976, found in Report of the Attorney General (1975-1976) at 219.

3For instance, Art. VII, § 7 of the Constitution provides that most ordinances or resolutions appropriating money, imposing taxes, and authorizing the borrowing of money shall not be passed except by affirmative vote of the governing body. Whether a referendum imposing tax ceilings can be authorized by the General Assembly is presently before the Virginia Supreme Court in Wright v. Norfolk Electoral Board. Both parties have filed briefs on the subject. Likewise, Art. IV, § 14 prohibits the General Assembly from enacting special legislation on a variety of subjects. The charter amendments also at issue in Wright could not be interpreted to allow initiative and referendum on these subjects.
January 23, 1981

The Honorable Glenn B. McClanan
Member, House of Delegates

You ask several questions about a proposed charter amendment for the City of Virginia Beach, and its status under the Virginia Constitution.

Direct Election of One Person As
Both Mayor and Member of Council

Your first question is whether a charter provision for direct election by the voters of one person as both mayor and member of council violates Art. VII, § 6 of the Virginia Constitution (1971) relating to multiple offices.

The first sentence of § 6 provides that, under most circumstances, no person shall at the same time hold more than one office mentioned in Art. VII. The post or office of mayor is not mentioned in Art. VII.1

The second sentence of § 6 provides that no member of a governing body shall be eligible, under most circumstances, to hold any office filled by the governing body by election or appointment. The charter amendment provides for the post or office of mayor to be filled by the voters by election, rather than by the governing body.

Accordingly, I find that a charter provision for direct election by the voters of one person as both mayor and member of council does not violate Art. VII, § 6. See Opinion to the Honorable Hunter B. Andrews, Member, Senate of Virginia, dated January 9, 1981 (copy enclosed).

Back-Up Charter Provision For
Election of Mayor By Council

Your second question is whether a charter back-up provision for election of the mayor, in certain circumstances, by the council violates the second sentence of Art. VII, § 6, cited above.

The charter back-up provision states that in the event no person who is a candidate for mayor is elected to council, the council shall appoint one of its members to mayor. As noted above, the second sentence of § 6 provides that no member of a governing body shall be eligible, under most circumstances, to hold any office filled by the governing body by election or appointment.

If the post of mayor is an office under the charter, the back-up provision violates the second sentence of § 6.
Mayors have varying powers, so whether any one mayor is an officer would turn on the facts of a particular case. The charter amendment provides that the mayor shall preside over the meetings of council, and be recognized as the head of the city government for ceremonial purposes.

I do not view the presidency of the council as necessarily an office, but if the post of mayor is not a public office, it is unclear why the charter amendment provides for the mayor's direct election by the voters. It is unusual to provide for direct election of a non-officer by the voters. By reason of the foregoing, I view the post of mayor under the charter amendment as a public office.

Accordingly, I find that the charter back-up provision violates the second sentence of § 6. See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated April 29, 1976, found in Report of the Attorney General (1975-1976) at 219.3

1The first sentence of § 6 is derived, with changes, from § 121 of the 1902 Constitution. It is implemented in § 15.1-800 of the Code of Virginia (1950), as amended. The mayor is mentioned several times in Art. VIII (Organization and Government of Cities and Towns) of the 1902 Constitution, and is expressly designated as the chief executive officer of "every" city. See § 120 Virginia Constitution (1902).

2Compare Lambert v. Barrett, 115 Va. 136, 140, 78 S.E. 586 (1913) which seems to rule that mayors and members of council are not "municipal officers." The case involved a supposed conflict between two laws for filling vacancies. The Supreme Court found no conflict, treating mayors and members of council as State officers, rather than municipal officers, in order to reconcile the supposed conflict. The case does not stand for the proposition that mayors cannot be officers.

3Compare Davis v. Dusch, 205 Va. 676, 139 S.E.2d 25 (1964) which seems to rule that the General Assembly's power to provide by special act for the organization and government of cities and towns under Art. VII, § 2 is unaffected by the other provisions of Art. VII, in particular § 6.

Davis v. Dusch was decided under § 117 of the 1902 Constitution which stated expressly that the power of the General Assembly to provide by special act for the organization and government of cities and towns was "unaffected by any of the provisions of this article." (Art. VIII, entitled "Organization and Government of Cities and Towns"). See 205 Va. at 683.

Article VII, § 2 does not contain the quoted language from § 117. Further, Art. VII, § 6 expressly provides that members of governing bodies may be members of other boards, commissions and bodies, as allowed by general law, clearly indicating that the General Assembly is not to permit such dual officeholding by special act.

The General Assembly may in time want to provide, by general law, for the appointment of mayors by the council.
have looked in Title 15.1 at Ch. 16 (Government of Cities and Towns), and find no general law presently in effect that takes care of the charter amendment under Art. VII, § 6. Section 15.1-809 or 15.1-816 might be the Code section to amend for cities. Section 15.1-827 or 15.1-830 might be the Code section to amend for towns.

CONSTITUTIONAL LAW. POLICE POWER. ZONING. VESTED RIGHTS NOT CREATED BY COUNTY PERMIT.

July 14, 1980

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County

You ask two questions about a permit granted by King George County in July 1975 to utilize 400 acres for the mining of sand and gravel, prior to the county's adoption of a zoning ordinance pursuant to § 15.1-486 of the Code of Virginia (1950), as amended.

No Grant of Vested Rights Placing Land Beyond County's Police Powers

Your first question is whether the permit of July 1975 confers vested rights that place the 400 acres beyond the reach of the county's police powers, as exemplified by its zoning ordinance that became effective in July 1979.

The permit was executed by the county administrator pursuant to authorization of the board of supervisors. Neither the permit nor the board minutes refer to any statutory authority for the permit. The minutes suggest that the landowner was seeking only whatever permission the county might require. In July 1975 the county did not have a zoning ordinance, although it did have a comprehensive plan. The 400 acres were in an area designated "industrial" on the plan.

The minutes further suggest that the landowner in 1975 was already mining sand and gravel on the 400 acres, but no details of the operation are given. The minutes indicate, however, that the landowner contemplated development of an industrial park on the 400 acres, and the permit lists six types of land use, in addition to mining sand and gravel (and other minerals).

Under the permit the landowner agrees to maintain an industrial dock facility at the site, and to allow the county to use a proposed landfill operation upon such terms and conditions as mutually may be agreed upon. The permit is further subject to the landowner receiving all necessary State and federal approvals.

The permit states it shall remain valid so long as the landowner complies with all applicable State and federal
regulations pertaining thereto. Also, the permit is not to be revoked until the landowner is given written notice by the county of non-compliance, and a reasonable time to correct deficiencies. The permit provides that it may be assigned, and since July 1975 it has been assigned.

The county's zoning ordinance became effective July 1979, and the present owner of the 400 acres subsequently applied for a conditional use permit and for a change of zoning district classification. Both applications were later withdrawn. Only the mining of sand and gravel is presently at issue, and the landowner claims "grandfather" status for the 400 acres by reason of (a) prior use, and (b) the permit of July 1975.

You have not asked about the exemption of pre-existing, nonconforming uses, either pursuant to an express grandfather clause in the zoning ordinance, or pursuant to other legal requirements. See, for example, § 15.1-492 (vested rights not impaired; nonconforming uses). Your first question merely is whether the permit of July 1975 confers vested rights that place the 400 acres beyond the reach of the county's police powers.

The permit of July 1975, whatever its validity and effect, was presumably granted under the police power of the Commonwealth, as delegated to the county, in respect of planning, subdivision of land and zoning. See, generally, Ch. 11 of Title 15.1; also, Byrum v. Orange County, 217 Va. 37, 225 S.E.2d 369 (1976) (authorization to local governing body to enact zoning ordinances, and reserve unto itself the right to issue special exceptions or use permits).

In Virginia, the regulation of land use for most purposes is vested in local government. As a result, even State agencies with special jurisdiction are to refrain from considering land use questions, except as those questions relate directly to the special jurisdiction of the State agency. See Opinion to the Honorable James E. Douglas, Jr., Commissioner, Marine Resources Commission, dated May 10, 1973, found in Report of the Attorney General (1972-1973) at 188 (limited authority of Marine Resources Commission to consider land use questions in connection with regulation of State-owned subaqueous bottoms).

Article IX, § 6 of the Virginia Constitution (1971), provides that the police power of the Commonwealth to regulate the affairs of corporations, the same as individuals, shall never be abridged. See, also, II Howard Commentaries on the Constitution of Virginia 1001 (University Press of Virginia 1974).

The regulation of land use by local governments is an exercise of the Commonwealth's police power, and no private party can acquire a vested interest in the exercise of that power. Likewise, a local governing body cannot make its ordinances irrepealable. In the exercise of its governmental
power and discretion, a governing body may modify its ordinances whenever in its judgment the public welfare demands. Nusbaum v. City of Norfolk, 151 Va. 801, 145 S.E. 257 (1928) (building line ordinance).

Even where the ordinance under which a permit is issued states that the permit shall be perpetual, the local governing body may by amendment or later ordinance provide for the revocation of the permit. Thompson v. Smith, 155 Va. 367, 154 S.E. 579 (1930) (issuance and revocation of local permits to drive automobiles as exercise of State's delegated police power). Compare, also, Davis v. Marr, 200 Va. 479, 106 S.E.2d 722 (1959) (alleged contract that highway officials were to permit turns for indefinite period through median crossover).

Accordingly, I find that the permit of July 1975 does not confer vested rights that place the 400 acres beyond the reach of the county's police power.

There is a preliminary question, however, as to which I make no finding. The text of the permit, and the circumstances surrounding its issuance, may raise a question as to whether the permit was ever intended to place the 400 acres beyond the county's police power. As a general rule, this Office refrains from interpreting local ordinances and permits. See, for example, Opinion to the Honorable Nathan H. Miller, Member, Senate of Virginia, dated March 17, 1977, found in Report of the Attorney General (1976-1977) at 17.

Permit Not Issued in Conformity With County's Zoning Powers

The permit of July 1975 was authorized by motion or resolution of the board of supervisors, rather than by ordinance. Your second question is whether the permit was validly issued in conformity with the county's zoning powers. See, generally, Art. 8 of Ch. 11 of Title 15.1 (§§ 15.1-486 to 15.1-498).

Section 15.1-486 provides that the governing body of any county may, by ordinance, classify the territory under its jurisdiction into districts, and in each district it may regulate, permit and determine the use of land, including the excavation or mining of soil or other natural resources. See, especially, § 15.1-486(d). Similarly, upon the resolution, motion or petition of various parties, the governing body may by ordinance, amend, supplement, or change the regulations, district boundaries, or classifications of property. See § 15.1-491(g).

At the same time, the zoning ordinance may include reasonable regulations and provisions for the issuance of special exceptions or use permits, and the governing body may reserve unto itself the right to issue such exceptions or permits. See § 15.1-491(c). However, when granting exceptions and permits, the governing body must consider good
zoning practices, and the purposes and objectives of its zoning ordinances. An ordinance which does not require such consideration is invalid on its face, and it is unnecessary to consider whether the governing body acted in an unreasonable, arbitrary or capricious manner as to any particular exception or permit. See Cole v. City Council of the City of Waynesboro, 218 Va. 827, 241 S.E.2d 765 (1978) (consideration of "public necessity and convenience, general welfare or good zoning practice" not sufficient).

A local governing body may take action in connection with zoning matters only if it has been expressly granted the power to do so, or if the power can be implied necessarily from powers expressly granted. Any doubt as to the exercise of a power must be resolved against the locality. See Opinion to the Honorable C. Richard Cranwell, Member, House of Delegates, dated October 18, 1978, found in Report of the Attorney General (1978-1979) at 196 (local governing body does not have authority to enact moratorium on zoning changes).

The permit of July 1975 fails in at least three ways to conform with the county's zoning powers. First, § 15.1-486 requires the adoption of an ordinance as the first step toward exercise of the county's zoning powers. Second, § 15.1-491(c) requires that the right of the governing body to issue special exceptions or use permits must be reserved and exercised pursuant to a zoning ordinance. Third, under the Cole decision, supra, the zoning action of a governing body is invalid on its face, and it is not necessary to consider whether the action is unreasonable, arbitrary or capricious, if the action does not consider the purposes and objectives of the county's zoning ordinances.

To conform with these requirements, a county must have a zoning ordinance, and in July 1975, when the permit was issued, the county did not have a zoning ordinance. See Opinion to the Honorable Ray L. Garland, Member, House of Delegates, dated January 9, 1978, found in Report of the Attorney General (1977-1978) at 248 (group homes for mentally retarded--no statute authorizes different procedural requirements than for other types of land use activities).

Accordingly, I find that the permit of July 1975 was not validly issued in conformity with the county's zoning powers.

CONSTITUTIONAL LAW. VIRGINIA CONSTITUTION'S GRANT OF FREE PUBLIC EDUCATION NOT WITHOUT LIMITS. APPLIES TO BONA FIDE RESIDENTS AND CERTAIN STATUTORY CLASSES.

January 15, 1981

The Honorable Adelard L. Brault
Member, Senate of Virginia
You have inquired whether it would be constitutional, in light of the Virginia guarantees of a free public education, to deny that privilege to personnel residing on military or naval reservations. Section 22.1-3 of the Code of Virginia (1950), as amended, defines the classes of persons to whom the public schools shall be free. This section currently permits children residing with parents on a military or naval reservation located wholly or in part within a school division to attend school without charge.

You state in your letter that the United States Congress is considering ending the Federal Impact Aid funds which are designed to assist school systems to meet the expenses caused by the location of non-tax paying military facilities in counties. Without the blanket presumption of eligibility provided in § 22.1-3, such nonresident children would be eligible to receive free tuition only if they fell within one of the other categories in § 22.1-3.

Article VIII, § 1 of the Virginia Constitution (1971), provides:

"The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained."

Although this constitutional language appears quite broad at first glance, it does have limitations. These limitations are found in Title 22.1 which implement the provisions of Art. VIII. Allen v. County School Board, 207 F.Supp. 349 (E.D. Va. 1962).

Section 22.1-3 grants free public elementary and secondary school tuition to children who are residents of the school division. The children of military personnel living on military and naval reservations are specifically mentioned as being entitled to the free tuition.

This specific provision is important in light of the interpretation accorded this statute and its predecessors throughout the years. An Opinion to the Honorable John D. Eure, Jr., Commonwealth's Attorney for the City of Nansemond, dated November 9, 1972, and found in Report of the Attorney General (1972-1973) at 348, concluded that "residence" is synonomous with domicile. A later Opinion found in Report of the Attorney General (1974-1975) at 378, expanded upon this somewhat by holding that the residence "must be a bona fide residence and not merely a superficial residence established solely for the purpose of attending school." And a recent Opinion found in Report of the Attorney General (1979-1980) at 292, reiterated that a child must be a bona fide resident to qualify for free tuition. Under this standard many children of military personnel would continue to qualify for free school attendance, since their parents may be Virginia residents as defined by law.
In my opinion, a decision by the General Assembly to remove children of parents living on military reservations from the list of those presumed eligible to receive free tuition, in response to a Congressional abolition of Federal Impact Aid, would not be unconstitutional. Similarly, the General Assembly could go further and require that the parents be domiciled in Virginia. As noted earlier, the language of Art. VIII, § 1, has traditionally been viewed in terms of domicile. It is within the discretion of a State to treat different classes of people differently as long as the State action furthers a legitimate State purpose or action. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); McGinnis v. Royster, 410 U.S. 263 (1973).

The Supreme Court has held it to be a legitimate State purpose to accord free public school tuition to its bona fide residents, since the residents fund those schools with their tax dollars. Vlandis v. Kline, 412 U.S. 441 (1973).

A note of caution is in order, however. The school divisions must afford the military parents a method of proving that they are in fact bona fide residents of the Commonwealth. The mere fact that a family resides on a military installation does not preclude a showing of Virginia residence. To change the current blanket presumption of residence into an irrebuttable presumption of nonresidence would be improper. See Elkins v. Moreno, 435 U.S. 647 (1978).

Section 22.1-3 provides as follows: "The public schools in each school division shall be free to each person of school age who resides within the school division; provided, however, that a school board may withdraw a child from kindergarten until the following school year upon the recommendation of the principal of the school the child attends and with the consent of the child's parent or guardian. Every person of school age shall be deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption or, when the parents of such person are dead, a person in loco parentis, who actually resides within the school division including a military or naval reservation located wholly or partly within the geographical boundaries of such school division, or when the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who (i) resides in the county, city or town and (ii) is the court-appointed guardian, or has legal custody, of the person, or when the person is living in the county, city, or town, not solely for school purposes, as an emancipated minor or self-supporting person."

This is analogous to the similarly broad language found in the First Amendment to the United States Constitution which, although it guarantees freedom of speech in absolute terms, has been held not to extend to such situations as shouting.

CORPORATIONS. § 13.1-101 DOES NOT AUTHORIZE CONVEYANCE OF PROPERTY BY DISSOLVED CORPORATION.

August 20, 1980

The Honorable Peter K. Babalas
Member, Senate of Virginia

You have asked whether the stockholders of a dissolved corporation, acting through the directors, may convey real property which was owned by the corporation during its existence and was never liquidated upon dissolution. You further ask whether a corporate tax return would have to be filed. I understand from additional information which you submitted after your letter requesting my opinion that the corporation in question was a stock corporation organized under Ch. 1 of Title 13.1 of the Code of Virginia (1950), as amended, and was dissolved by operation of law under § 13.1-91, rather than by court order or voluntary procedures.

Conveyance of Land

After a corporation has ceased to exist or has abandoned its business, the assets pass to its directors, as trustees in dissolution subject to the payment of the corporate debts and the residuary claims of its stockholders. Section 13.1-91 provides that upon the automatic dissolution of the corporation, "its properties and affairs shall pass automatically to its directors as trustees in dissolution. Thereupon, the trustees shall proceed to collect the assets of the corporations, sell, convey and dispose of such of its properties as are not to be distributed in kind to its stockholders, pay, satisfy and discharge its liabilities and obligations and do all other acts required to liquidate its business and affairs, and, after paying or adequately providing for the payment of all its obligations, distribute the remainder of its assets, either in cash or in kind, among its stockholders according to their respective rights and interests." The corporation cannot continue its business or embark on new ventures. The directors, however, may perform those actions necessary to liquidate or "wind up" the activities of the corporation, including the conveyance of property in the corporate name. Money which they receive from this conveyance they receive in the name of the corporation and hold as trustees for the payment of creditors first, and then stockholders. Accordingly, I am of the opinion that the provisions of § 13.1-91 may empower the directors to effectuate such a sale, subject to any claims of creditors.

Tax Return
The tax effects and tax reporting obligations incident to the income from the sale of property by the directors will depend upon the particular circumstances of the sale. Ordinarily, the fact that a corporation is dissolved does not prevent income received by the directors in the name of that dissolved corporation from being taxable. See Ashburn v. Commonwealth, 199 Va. 747, 102 S.E.2d 281 (1958), which was decided under the formerly existing § 58-128 and which held income received by the corporation twelve years after its dissolution to be taxable.

CORRECTIONS. DEPARTMENT OF CORRECTIONS MAY ONLY REIMBURSE LOCALITIES IN AMOUNT APPROPRIATED BY LEGISLATURE FOR THAT PURPOSE AND MUST REDUCE LEVEL OF REIMBURSEMENT TO MEET GOVERNOR'S TARGET BUDGET.

February 12, 1981

The Honorable James F. Almand
Member, House of Delegates

You have asked whether under § 16.1-313 of the Code of Virginia (1950), as amended, juvenile detention facilities must be reimbursed for the full percentage of construction, operation, and salaries submitted to the Department of Corrections (the "Department") in accordance with instructions promulgated by the Department, or whether the level of reimbursement may be reduced by the Department without a showing that the expenditures are unreasonable.

Section 2.1-394 provides that each State agency shall supply to the Governor biennially, through the appropriate cabinet secretary, an itemized estimate of the amount of funds needed for each year of the ensuing biennial period. This section further provides that the Governor may prescribe targets which each individual agency cannot exceed in its estimate. Because the requests for funding made by the localities to the Department pursuant to § 16.1-313 for the fiscal year ending June 30, 1981, were for amounts substantially in excess of the targeted amounts, I am advised that the Department applied an across the board reduction of approximately five percent in the amount in which localities were to be reimbursed in order to come within its target budget. I am further informed that the Department plans to request additional funds in the amount of approximately $9 million for reimbursement to localities in the 1981 legislative mini-budget Session.

Article X, § 7 of the Constitution of Virginia (1971) states that "[n]o money shall be paid out of the State treasury except in pursuance of appropriations made by law...." This language is also found in § 2.1-224. Therefore, the Department can only reimburse localities in the amount appropriated by the legislature for that purpose. The amount appropriated by the General Assembly was less than that requested by the localities. I am of the opinion,
therefore, that the Department cannot honor the request, § 16.1-313 notwithstanding.3

1This section provides, in pertinent part, that the Commonwealth shall reimburse the city or county for up to one-half the cost of construction and the entire reasonable cost, as determined by the Board of Corrections for necessary equipment, operating and transportation expenses and two-thirds of the salaries of officers and employees engaged in the operation and maintenance of detention houses, group homes or other residential care facilities for juveniles in need of services.

2The amount contained in the Department target budget was, for the most part, the amount appropriated by the legislature. See Ch. 760 [1980] Acts of Assembly 1203, Appropriation Item No. 549 (at 1346-1347).


CORRECTIONS. JAILS. REIMBURSEMENT. PRISONERS. SHERIFFS. LOCALITIES NOT ENTITLED TO REIMBURSEMENT PURSUANT TO § 53-185 WHERE EXPENSES ARISE AFTER AN INDIVIDUAL HAS BEEN RELEASED FROM CUSTODY.

May 6, 1981

The Honorable Danny R. Lowe
Commonwealth's Attorney for Smyth County

You have asked whether the county should be reimbursed pursuant to §§ 53-179 and 53-185 of the Code of Virginia (1950), as amended, for the medical expenses incurred by an individual who was admitted to a local hospital due to injuries received as a result of an assault by a prisoner. You advise that the injured person had been arrested and placed in jail, but was released from custody the same day as his admission to the hospital.

Section 53-185 provides that any unusual medical, hospital or dental services for a prisoner may be arranged for by the sheriff, and the expense of such service shall be borne by the Commonwealth and the county in the same proportion as other costs are borne under § 53-179. As the term is used in § 53-185, prisoner means "any person held in confinement in jail for any reason." See § 53-178.

In my opinion after the individual was released from custody he was not a prisoner within the contemplation of § 53-185, and the county would not be entitled to reimbursement from the Commonwealth.

Additionally, § 53-19.36:1 provides specific authority for the Board of Corrections to authorize the payment of medical expenses incurred by a prisoner after his release
from the Department of Corrections, when such expenses are
the result of an injury suffered while incarcerated. I find
no similar authority for the payment of medical expenses of
jail inmates. It is a well established principle of
statutory construction that where a statute specifies certain
things, an intention to exclude that which is not specified
may be inferred. See Report of the Attorney General
(1978-1979) at 243. It would appear, therefore, that the
legislature did not intend to provide reimbursement to the
various localities under these circumstances.

CORRECTIONS. LEGALLY COMPETENT INMATES CANNOT BE FORCED TO
SUBMIT TO MEDICAL TREATMENT WITHOUT COURT INTERVENTION.

August 5, 1980

Mr. Terrell Don Hutto, Director
Department of Corrections

You have asked whether a legally competent inmate under
the control of the Department of Corrections (the
"Department") can be forced to submit to medical treatment
deemed necessary to preserve his life or health. I assume
for purposes of this opinion that the determination of
necessity of treatment has been made by a physician and that
both the nature of the treatment and the risks of refusing it
have been explained to the inmate.

In Virginia, an inmate is not deemed incompetent solely
because of his or her status as an inmate; an inmate is
competent to execute contracts and deeds. Dunn v. Terry,
Administratrix, 216 Va. 234, 217 S.E.2d 849 (1975). Only
certain civil rights are lost by reason of a felony
conviction, none of which are pertinent to your inquiry.

Under § 54-325.2 of the Code of Virginia (1950), as
amended, the Director of the Department has specific
authority to consent to surgical and medical treatment of
minors committed to the Department or to the Board of
Corrections. Section 37.1-128.1 provides a means of
obtaining court ordered medical treatment for any person
deemed by the court incapable of giving consent to that
treatment. The limitations upon involuntary treatment of
these and other provisions indicate that the Department does
not have unqualified authority to force an unwilling
competent inmate to undergo treatment.

Section 8.01-225 provides immunity from civil suit for
public officials, among others, who render emergency care in
good faith to injured persons under certain circumstances.
The legislative intent evidenced by that section leads me to
conclude that in an emergency situation where an inmate faces
an imminent threat to his life, emergency medical care can
be provided without requiring consent from the inmate.
In situations where there is no imminent threat to life, there may be factors which would warrant forced treatment. However, in such cases, the competing interests of the inmate and the State present complex issues of fact and law which should be determined by a court of law. Accordingly, I am of the opinion that in the absence of specific statutory authority or judicial intervention treatment may not be forced upon a competent inmate unless there is an imminent threat of death. See Runnels v. Rosendale, 499 F.2d 733 (9th Cir. 1974). I suggest that thorough records be maintained to document any inmate's refusal to consent to treatment deemed necessary to preserve health.

This Opinion does not address the situation where an inmate has been civilly committed by court order to a mental institution. Legal issues involving forced treatment and medication of civilly committed persons involve factors outside of the scope of your inquiry. It is my understanding that inmates assigned to the new Marion Correctional Center will not be committed by court order; accordingly, their refusal to consent to treatment should be honored except as discussed above.

COSTS. COURT COSTS IN CRIMINAL CASES MAY BE DISCHARGEABLE IN BANKRUPTCY.

October 6, 1980

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

You ask whether court costs imposed against a criminal defendant are generally dischargeable in bankruptcy and, further, whether such costs are dischargeable in the event that the defendant receives a suspended sentence conditioned in part on his promise that he will pay back to the Commonwealth all of its costs incurred in the prosecution.

Under the former Bankruptcy Act, only those debts that were "provable" could be discharged in bankruptcy. The Bankruptcy Code (the "Code"), enacted in 1978, abolished the concept of provability and broadened the possible relief to be afforded a debtor in a bankruptcy case.1 Under the Code, "claims" against an individual debtor are generally dischargeable regardless of whether such rights to payment are reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.2 Thus, the Code "contemplates that all legal obligations, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case."3 Consequently, all "claims" are dischargeable except for those specifically excepted by § 523.4 A review of this section discloses no provision which would render court costs in criminal cases non-dischargeable. It is true that certain
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fines, penalties and forfeitures payable to and for the benefit of a governmental unit are not dischargeable. It is my view, however, that neither this nor any of the other exceptions in § 523 are applicable to costs, and that they therefore are dischargeable in bankruptcy. In this regard, it is important to bear in mind the distinction between a fine and court costs.

"[T]he payment of the costs of the prosecution is no part of the punishment prescribed by law for the commission of felony. It stands on a different footing from a pecuniary fine that may be imposed...Payment of costs is no part of the sentence of the court, and constitutes no part of the penalty or punishment prescribed for the offence...The right to enforce payment of them is...vested in the commonwealth for the sole purpose of replacing in the treasury the amount...to be withdrawn from it."6

With respect to your second question, it must be remembered that a discharge in bankruptcy applies only to "debts." Several courts considering questions comparable to the one you pose have concluded that a promise of repayment by a defendant given as a suspended sentence is not the equivalent of a debt within the meaning of the bankruptcy laws. For example, in People v. Mosesson,7 the issue was whether a criminal defendant, who was placed on probation conditioned in part on his promise to make restitution and who later had his debts discharged in bankruptcy, was now obligated to make further restitution. In concluding that his condition of sentence was still in force, the court stated:

"A discharge in bankruptcy has no effect whatsoever upon a condition of restitution of a criminal sentence. A bankruptcy proceeding is civil in nature and is intended to relieve an honest and unfortunate debtor of his debts and to permit him to begin his financial life anew. A condition of restitution in a sentence of probation is a part of the judgment of conviction. It does not create a debt nor a debtor/creditor relationship between the persons making and receiving restitution. As with any other condition of a probationary sentence it is intended as a means to insure the defendant will lead a law-abiding life thereafter.

It would thus be against...public policy to permit a defendant who has received illegal gains and who is ordered to make restitution as a condition of his sentence to vacate such a condition by a discharge in bankruptcy."8

This reasoning is sound. When a criminal defendant, as one of the terms of his suspended sentence, agrees to reimburse the Commonwealth for the expenses it incurs in prosecution, then the court costs can no longer be viewed as a "debt" for purposes of bankruptcy. Thus, a discharge in
bankruptcy would have no effect upon his promise to pay back such costs.

13 Collier on Bankruptcy ¶ 523.02 (15th ed. 1980).
3Collier, supra, at ¶ 523.02.
7The conclusion that court costs are dischargeable in bankruptcy is in accord with pre-Code case law. See Rathbone v. Mion, 221 N.Y.S.2d 783 (1961); In re Abelove, 245 N.Y.S. 442 (1930). In re Abramson, 210 F. 878 (2d Cir. 1914); Olds v. Forrester, 102 N.w. 419 (Iowa, 1905). See, also, Report of the Attorney General (1962-1963) at 125 and 256.
9Id. at 484-485. See, also, People v. Washburn, 97 Cal.App.3d 621, 158 Cal. Rptr. 822 (1979); People on Inf. of Auerbach v. Topping Bros., 359 N.Y.S.2d 985 (1974).

COSTS. PAYMENT OF COURT COSTS MAY BE MADE CONDITION OF SUSPENSION OF SENTENCE.

February 17, 1981

The Honorable J. R. Zepkin, Judge
General District Court
Ninth Judicial District

You have asked whether the payment of court costs may be imposed as a condition of a suspended jail sentence.

In Wright v. Matthews, 209 Va. 246, 163 S.E.2d 158 (1968), the Virginia Supreme Court held that costs assessed against a person who has been convicted of a crime are not a part of his punishment for the crime, and a person may not be imprisoned solely for the nonpayment of costs. It has been recognized in this State, however, that a person convicted of a crime may be assessed costs incident to his prosecution for the purpose of reimbursing to the public treasury the amount which the conduct of the defendant has rendered it necessary should be expended for the vindication of the public justice of the State and its violated laws. Wicks v. Charlottesville, 215 Va. 274, 208 S.E.2d 752 (1974).

In Fuller v. Oregon, 417 U.S. 40 (1974), the Supreme Court considered a statutory scheme of taxing a convicted defendant for the costs of appointed counsel. The court approved the Oregon statute, observing that it was designed to ensure that only those who actually became capable of repaying the state will ever be obliged to do so.
In view of these authorities, it is clear that costs are a legitimate part of a criminal prosecution, and the only prohibition is that a person may not be imprisoned solely for the nonpayment of costs. Persons who are indigent are not automatically exempt from the payment of court costs. Section 19.2-354 of the Code of Virginia (1950), as amended, authorizes a court to order a person to pay any fine and costs in installments when such payment is not made forthwith, and such person may be held in contempt for the failure to make such payments. See § 19.2-358.

The authority of a court to suspend a sentence is found in § 53-272. Under this section a court may suspend the execution of a sentence if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest. Section 19.2-306 authorizes the revocation of the suspension of sentence for any cause deemed sufficient by the court. These statutes have long been held to invest the court with wide discretion in its authority to impose suspension of a sentence with conditions. In Dyke v. Commonwealth, 193 Va. 478, 69 S.E.2d 483 (1952), the court stated that "[i]nherent in that optional authority is the power of the court to attach such reasonable terms and conditions to the suspension as it may deem proper." 193 Va., supra, at 484. Furthermore, "[a] court which has ordered a suspension of sentence undoubtedly has the power to revoke it when the defendant has failed to comply with the conditions of the suspension." Griffin v. Cunningham, 205 Va. 349, 354, 136 S.E.2d 840, 844 (1964). Conditions of suspension must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances.

In the cases of Marshall v. Commonwealth, 202 Va. 217, 116 S.E.2d 270 (1960), and Richardson v. Commonwealth, 131 Va. 802, 109 S.E. 460 (1921), sentences were suspended on the condition of the payment of fines and costs. While the issue in these cases did not deal with the question of conditioning a suspension of sentence upon the payment of costs, the Supreme Court did not question such procedure. In a recent Opinion to the Honorable M. Frederick King, Commonwealth's Attorney for the City of Salem, dated October 6, 1980 (a copy of which is enclosed), it was concluded that court costs which a defendant agrees to pay as one of the conditions of his suspended sentence are not dischargeable in bankruptcy. Implicit in such a conclusion is the premise that a suspended sentence can be conditioned on a promise to pay back the court costs.

As you point out § 19.2-356 authorizes a court to make the payment of a fine a condition of suspension of sentence, but is silent with respect to court costs. In my opinion this section was not intended to limit a trial court's otherwise inherent and wide discretion to condition a suspended sentence. I would note that § 19.2-305 provides that while on probation a defendant may be required to pay in one or several sums any fine and costs imposed at the time of
being placed on probation as a condition of such probation. In view of the broad discretion imposed in courts to suspend sentences, it is my opinion that a court may make the payment of costs a condition of the suspension of the sentence.

COUNTIES. AUTHORITY. REGULATION OF DEALERS IN GEMS AND PRECIOUS METALS. AUTHORITY UNDER § 15.1-510 TO DEAL WITH OLD THREAT IN NEW FORM.

December 15, 1980

The Honorable C. Jefferson Stafford
Member, House of Delegates

You ask whether a county has the authority to enact an ordinance regulating itinerant dealers in gems and precious metals.

Section 15.1-510 of the Code of Virginia (1950), as amended, provides that any county may adopt such measures as it may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of such county not inconsistent with the general laws of this State.

By way of contrast, § 15.1-866 (part of the so-called Charter Powers Act) specifically authorizes municipal corporations to regulate the conduct of dealers in secondhand goods, wares and merchandise.

Specific authority for municipalities, however, does not preclude the pre-existence of that authority—for municipalities and counties alike. The maxim that mention of authority in one case implies its absence in another is merely an aid to statutory construction, not a rule of law.¹

Economic developments and new business methods have given rise to a new type of enterprise dealing in gems and precious metals. Inherent in this new enterprise is the same potential threat to public safety and welfare that has given rise to the detailed regulation of pawnbrokers, junk dealers, and dealers in secondhand goods prescribed by the General Assembly.²

Canvassing for gems and precious metals has grown in scope and magnitude just recently. Faced with such change, the counties are not without authority to deal with an old threat in a new form.

Accordingly, I am of the opinion that a county has authority under § 15.1-510 to enact an ordinance regulating itinerant dealers in gems and precious metals.³

You ask whether, under § 14.1-46.01 of the Code of Virginia (1950), as amended, a board of supervisors may, during an incumbent supervisor's term in office, place into effect an increase in the supervisor's reimbursement for actual expenses, so long as maximum compensation limits are observed.

Section 14.1-46.01 provides that the annual compensation to be allowed each member of the board of supervisors shall be determined by the board, but such compensation shall be not more than the maximum annual compensation specified for each county by name. The statute also specifies that a member of the board of supervisors may accept, in lieu of salary, reimbursement for certain expenses incurred in performance of the member's duties. Such reimbursement shall be subtracted from the amount of salary due such official, and the remaining sum shall be paid to the member at the member's option; provided, however, such expense shall not exceed the salary. Further, no increase in the salary of a member of the board of supervisors shall take effect during the incumbent supervisor's term of office.

The reimbursement for actual expenses is stated (1) to be in lieu of salary, (2) to be subtracted from the amount of salary due a supervisor, and (3) not to exceed the salary. The salary then is the sole source for amounts in reimbursement of the described expenses.

This means that reimbursement for expenses can be increased only if salary is reduced by the same amount. For example, a mixture of $900 in salary and $100 in reimbursement for expenses may be changed to a mixture of $400 and $600. A mixture of $900 and $100 may not, however, be changed to a mixture of $700 and $600 if the maximum compensation for that county is $1,000.

Accordingly, I find that reimbursements for expenses allowed pursuant to § 14.1-46.01 may be increased during an incumbent supervisor's term in office provided the salary is...
reduced by the same amount. To the extent a salary increase is required, the reimbursements may not be increased during an incumbent supervisor's term in office.


2Further, § 14.1-46.01 provides that the selection of the mixture between salary and reimbursement for expenses is at the option of the individual supervisor, rather than the board.

COUNTIES. INDUSTRIAL DEVELOPMENT. COUNTY APPROPRIATIONS LIMITED TO $10,000 PER YEAR FOR EMPLOYMENT OF PERSON TO PROMOTE INDUSTRIAL DEVELOPMENT.

September 26, 1980

The Honorable William H. Harris
County Attorney for Stafford County

You have asked whether § 15.1-10.1 of the Code of Virginia (1950), as amended, limits to $10,000 per year the amount that Stafford County may expend to employ a Director of Industrial Development. Section 15.1-10.1 provides that:

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

It is my opinion that § 15.1-10.1 does limit the salary at which Stafford County could employ a person to secure and promote industrial development to $10,000 per year. In a previous Opinion to the Honorable Frank D. Harris, Commonwealth's Attorney for Mecklenburg County, dated October 20, 1969, and found in Report of the Attorney General (1969-1970) at 78, we determined that § 15.1-10.1 limited the amount which the county could appropriate to promote industrial development to one percent of annual revenues, as stated in the statutory provision. Similarly, I conclude
that § 15.1-10.1 places a $10,000 limit on the annual salary of a Director of Industrial Development.

COUNTIES. TOWNS. NO AUTHORITY FOR COUNTY TO LEND MONEY TO TOWN, EVEN TO ASSIST TOWN IN RAISING MATCHING FUNDS FOR FEDERAL GRANT.

April 13, 1981

The Honorable Robert B. Fox
Commonwealth's Attorney for Westmoreland County

You ask whether a county has authority to lend money to an incorporated town, to assist the town in raising matching funds for a federal grant to erect a seawall under § 15.1-31(a) of the Code of Virginia (1950), as amended.

I find only limited authority for a county to lend money. For example, under § 15.1-511.1, the governing body of a county may lend money to any authority created by such governing body pursuant to law. As another example, a county may lend money to a fire district under § 27-23.2. And under § 15.1-26.1, the governing body of a county may advance funds to a sanitary district to assist the district to initiate the project for which it was created.

By way of contrast, I find a number of statutes that authorize a county to appropriate moneys outright to a variety of local organizations, including towns. Under § 15.1-544, a board of supervisors may appropriate money to any incorporated town within the boundaries of the county. Counties may also appropriate money to certain charitable institutions located within their limits, and to certain organizations such as hospitals, rescue squads, nonprofit recreation and historical associations, and chambers of commerce.

The power to appropriate moneys to a local organization does not include the power to lend money. The two powers are separate and distinct. A loan indicates a temporary investment, but collection risks can destroy a loan as a temporary investment. An outright appropriation makes it clear that the advance is permanent, and the county has not retained a financial asset.

A county may act only to the extent it has been expressly granted the power to do so, or the power can be implied necessarily from other powers expressly granted. Any doubt as to the existence of the power must be resolved against the county. Despite all the legislative activity noted above, I find no statutes authorizing a county to lend money to a town.

Accordingly, I am of the opinion that a county does not have the authority to lend money to a town, even to assist
the town in raising matching funds for a federal grant to erect a seawall under § 15.1-31.10

1The town is located within the boundaries of the county. Section 15.1-31(a) provides that any county or town may construct a seawall or other structure, the purpose of which is to prevent tidal erosion. The construction of any such work is also declared to be a proper governmental function for a public purpose. See § 15.1-31(b).

2See, for example, Opinion to the Honorable Duncan C. Gibb, Member, House of Delegates, dated March 25, 1971, found in Report of the Attorney General (1970-1971) at 399 (industrial development authority).

3See opinion to the Honorable George R. St.John, County Attorney for Albemarle County, dated June 25, 1979, found in Report of the Attorney General (1978-1979) at 102 (may loan to fire district, but not to fire company).

4See Opinion to the Honorable Catesby Graham Jones, Jr., Commonwealth's Attorney for Gloucester County, dated November 2, 1972, found in Report of the Attorney General (1972-1973) at 330 (limited to initiation of project, not expansion).


8See, also, for example, §§ 15.1-10.1 (organizations to promote industrial development), 15.1-20.1 (certain regional organizations), 15.1-22 (in connection with State-supported college or university).

9See St.John Opinion, cited above.

Further, political subdivisions entering into joint agreements may, under § 15.1-21(f), appropriate funds to a joint board or entity, but as noted, the power to appropriate to another entity does not include the power to lend.

Section 15.1-21(c)(4) does not confer additional powers but merely specifies what subjects must be covered in a joint agreement.

10See, for example, Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977); Opinion to the Honorable Jerry K. Emrich, County Attorney for Arlington County, dated July 30, 1974, found in Report of the Attorney General
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(1974-1975) at 23 (appropriation authority for essential social services does not include vocational rehabilitation services).

You have also asked for counsel as to alternatives that might allow the county to assist with the seawall project. A member of my staff has been in touch with you to discuss certain possibilities. See, for example, Opinion to the Honorable Eugene T. Jensen, Executive Director, State Water Control Board, dated January 10, 1973, found in Report of the Attorney General (1972-1973) at 122 (joint acquisition of property, under § 15.1-21, without creation of separate legal entity).

Compare Opinion to the Honorable Carrington Williams, Member, House of Delegates, dated March 18, 1975, found in Report of the Attorney General (1974-1975) at 91 (difficulties facing school boards which desire to incur capital expenditures on property owned by other entities).

COUNTIES. WASTE DISPOSAL. NOT AUTHORIZED TO ESTABLISH MANDATORY GARBAGE PICKUP AND DISPOSAL SERVICE.

October 8, 1980

The Honorable A. Dow Owens
County Attorney for Pulaski County

You ask whether a county is authorized to establish a mandatory garbage pickup and disposal service.

Section 15.1-11(1) of the Code of Virginia (1950), as amended, authorizes counties, by ordinance, to provide that the owners of property therein shall, at such times as the governing body may prescribe, remove therefrom any and all trash, garbage, refuse, litter and other substances which might endanger the health or safety of other residents of such county.1

Section 15.1-11(1) merely establishes the power of a county to require removal of garbage. The section does not specify how the garbage is to be removed, and it does not require that the county provide means for removal.2 However, failing removal by the property owner, the county may take the initiative and have the garbage removed at the property owner's expense.

This Office has previously ruled that §§ 15.1-282 and 15.1-510 constitute authority for counties to establish and operate a system of collection and disposal of solid waste and to determine the type of such disposal, but neither section mentions a mandatory system. See Opinion to you dated January 30, 1975, found in Report of the Attorney General (1974-1975) at 25.3

I do not find any other statutory provision that might authorize a county to establish a mandatory garbage service. For example, § 15.1-28.1 merely authorizes counties to
regulate the services rendered by any business engaged in the pickup and disposal of garbage, trash or refuse, wherein service will be provided to the residents of the county. 4

Section 15.1-857 is part of the Charter Powers Act (Ch. 18 of Title 15.1), and therefore not applicable to counties. 5 I note, however, that while § 15.1-857 authorizes municipal corporations to collect and dispose of garbage and other refuse, there is no mention of authorization to make the service mandatory. 6

Similarly, water and sewer authorities are authorized, under § 15.1-1250(f), to operate and maintain garbage and refuse collection and disposal systems, but they are not authorized to make the use of the authority's garbage service mandatory. See § 15.1-1261 (mandatory connection with water main or sanitary sewer only). 7

By way of contrast, sanitary districts are authorized under § 21-118(1), to maintain and operate garbage removal and disposal systems, and under § 21-118(4), sanitary districts are also authorized to require owners or tenants of property in the district to connect with any such system or systems. Compare §§ 21-118.4(c) and 21-118.4(d). 8

I find no other statutory provisions that relate expressly to the operation and maintenance of garbage removal and disposal service or systems. I also understand you have found no authority for counties to establish a mandatory garbage pickup and disposal service. 9

Accordingly, I conclude that a county is not authorized to establish a mandatory garbage pickup and disposal service.

Section 15.1-11(1) also provides that the governing body may, when it deems it necessary, after reasonable notice, have such substances removed by its own agents or employees, in which event the costs or expenses thereof shall be chargeable to and paid by the owners of such property, and may be collected by the county as taxes and levies are collected.

Compare Opinion to the Honorable Thomas R. Nelson, County Attorney for Augusta County, dated April 25, 1972, found in Report of the Attorney General (1971-1972) at 259 ($ 15.1-11 permits county to cut grass and weeds on certain property if owner fails to do so, and assess owner for cost).

Also § 15.1-282 (authority of counties to establish dumps for solid waste material—prohibition against dumping elsewhere recently deleted per Ch. 719 [1979] Acts of Assembly).

Also § 15.1-510.5 which provides that any county may regulate the sanitation of buildings, and the sanitation of premises surrounding the same.
I am advised that your county is not subject to a regional solid waste management plan. In that event, the county is responsible for implementation of a local solid waste management plan which meets such standards as may be prescribed by the State Board of Health by regulation. See § 32.1-183 (also former § 32-9.1). I am advised that the State Board of Health has not prescribed a standard requiring mandatory garbage pickup and disposal service.

For a survey of local variations in refuse pickup service, see Opinion to the Honorable William R. Meyer, Executive Director, State Air Pollution Control Board, dated September 11, 1972, found in Report of the Attorney General (1972-1973) at 365, and Opinion to the Honorable Harry W. Garrett, Jr., Commonwealth's Attorney for Bedford County, dated July 7, 1972, Ibid at 113.

It appears that in the early 1970's few counties, even in metropolitan areas, were offering much in the way of county-operated garbage pickup and disposal service.

But, see, Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated April 22, 1975, found in Report of the Attorney General (1974-1975) at 304 (citing provisions of town charter as well as §§ 15.1-839 and 15.1-857). Compare §§ 15.1-875 and 15.1-876, also part of the Charter Powers Act, which specifically authorize municipalities to provide mandatory municipal water and sewer service.

Also §§ 15.1-300 (counties may establish sewers and water mains--express connection option for adjacent landowners) and 15.1-301 (right of landowners when county does not act to permit connection).

Also 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 (survey of mandatory water and sewer connection requirements applicable to a) municipal water and sewage departments, b) water and sewer authorities, and c) private companies rendering water and sewer service as regulated public utilities).

See, also, Opinion to the Honorable Robert L. Powell, Commonwealth's Attorney for Giles County, dated March 23, 1972, found in Report of the Attorney General (1971-1972) at 316 (where authority's solid waste pickup service is refused, mandatory charges cannot be assessed).

Counties, cities and towns. City council may not make prospective appointment to fill office where appointees term does not begin until after terms of outgoing councilmen have expired.

October 9, 1980

The Honorable Paul B. Ebert
Commonwealth's Attorney for the County of Prince William

This is in reply to your questions concerning the powers and membership of the city council for the City of Manassas Park.

Your first question was whether an outgoing mayor and city council, a majority of whose member's terms expire on June 30, 1980, can make appointments to city boards, commissions, authorities and other posts the terms of which begin on July 1, 1980.

A similar question was decided by the Supreme Court of Virginia in Kirkham v. Russell, 76 Va. 956 (1882), a case involving the City Council of Petersburg. Like Manassas Park, that city elected its council members to four year terms and staggered the elections so that one-half of the council was chosen every two years. Elections had been held in May 1980, and the incoming councilmen were scheduled to take office on July 1 of that year. During the interim,
however, the council adopted an ordinance by which it attempted to designate those city officers whose two-year terms would begin on July 1—the day after the terms of outgoing councilmen would expire. The court held such an ordinance to be invalid as an unreasonable exercise of the powers conveyed by the city charter.

To quote at length from the Opinion, the Supreme Court said:

"[The ordinance was] in derogation of the rights of the qualified voters of the city, and in contravention of the spirit of the charter. It is obvious that the intention—indeed, the paramount object—of the legislature in granting the charter was to provide for the inhabitants of Petersburg not only a local but a representative government; a government intended to rest in large measure upon the consent of the governed; and in the administration of which, therefore, a controlling influence is secured to the qualified voters of the city. To that end, frequent opportunities for the expression of popular sentiment and the election of officers are afforded, and the means provided for promptly carrying into effect the will of the people when it has been formally expressed at the ballot box...." Kirkham v. Russell, supra, at 966.

Accordingly, the Kirkham case appears to align Virginia with those jurisdictions that have adopted the rule noted in 75 A.L.R.2d 1281: "[A] public officer, or a public body, clothed with a power of appointment cannot forestall the rights and prerogatives of his, or its, successor by making a prospective appointment to fill an office where the appointee's term is not to begin until the appointing power's own term has expired."

I am therefore of the opinion that the outgoing city mayor and city council had no power to fill appointive posts where the terms of office began on July 1, 1980. The exercise of such power was—and is—the prerogative of the mayor and/or city council as newly constituted on that date. Of course, any occupant of an office who was improperly appointed would nevertheless be a de facto officer; and thus, any actions performed by him under color of office, until such time as he may be removed, must be considered valid. See Griffin's Executor v. Cunningham, 61 Va. (20 Gratt.) 31 (1870), Owen v. Reynolds, 172 Va. 304, 1 S.E.2d 316 (1939), 15 M. J. Public Officers §§ 56-58.

A different result would obtain, however, in the case of the city school board, should this be one of the boards to which you refer. Section 22.1-50 of the Code of Virginia (1950), as amended, provides that, within thirty days prior to July 1 of each year, the governing body shall appoint a successor for each member whose term expires on June 30 of that year. Thus, the outgoing council was authorized to
appoint a new school board member for any term that began July 1, 1980.

Your second question was whether the mayor of Manassas Park is considered a member of city council, so as to be ineligible for appointment to certain posts for one year following his tenure. The prohibition to which you refer is found in § 15.1-800: "No member of any council shall be eligible during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment."

There is no universal rule as to whether a mayor is a member of city council. It depends entirely upon the terms of the particular charter by which such offices are created. Under the charter originally granted to Manassas Park by the General Assembly, the mayor was clearly a council member. Section 3.1 of the charter then provided that "[t]he government of the city of Manassas Park shall be vested in a city council, which shall be composed of a mayor and six councilmen, all of whom shall have one vote each." See Ch. 722 [1976] Acts of Assembly (emphasis added). In 1977, however, the Assembly amended the charter removing the office of mayor from membership on council. See Ch. 425 [1977] Acts of Assembly. Section 3.2 now provides that "[t]he council shall be composed of six members." (Emphasis added.) Furthermore, it is clear that the mayor is not to be considered as one of the six since § 3.1 now includes the statement "[t]he officers of the city shall be a mayor [and] six councilmen [and other officers]." (Emphasis added.) The distinction between the office of mayor and membership on council was completed by new language in § 3.3 that explicitly denies the mayor any right to vote in the council except in cases of a tie.

These 1977 charter amendments have not been subsequently altered. Consequently, I am of the opinion that, even though the mayor presides at council meetings, he is not a member of council and is not subject to the limitations of § 15.1-800.

COUNTIES, CITIES AND TOWNS. FEDERAL FINANCIAL ASSISTANCE. COMMONWEALTH MUST ASSURE TO FEDERAL GOVERNMENT THAT LOCALITIES COMPLY WITH FEDERAL REHABILITATION ACT REQUIREMENTS.

February 3, 1981

The Honorable Robert E. Washington
Member, House of Delegates

You have asked whether the Commonwealth of Virginia must assure, under § 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 794, hereafter referred to as the "Act"), that political subdivisions receiving federal financial assistance through State departments comply with federal regulations promulgated to implement that Act.
The Department of Health and Human Services has promulgated regulations which are applicable to programs funded by it and which have served as a basis for similar regulations issued by all federal departments and agencies which make federal assistance grants. According to these regulations:

"An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department." 45 C.F.R. § 84.5(a)

Therefore, when the Commonwealth is an applicant for federal financial assistance, which is to be made available to a political subdivision or other entity, the Commonwealth must, in order to receive and continue receiving that assistance, assure that the program will be operated in compliance with the regulations implementing § 504.

It must be noted, however, that such assurance may not relate to all federal funds spent by localities. "Federal financial assistance" is defined in the regulations and has been interpreted to mean the form of federal grant assistance made primarily to public entities or to support activities deemed to be in the public interest, and not the mere funding of governmental procurement contracts, Rogers v. Frito-Lay, Inc., 433 F.Supp. 200 (N.D. Tex. 1977); or the provision of employment, Trageser v. Libbie Rehabilitation Center, Inc., 462 F.Supp. 424, aff'd 590 F.2d 87 (4th Cir. 1978), cert. den. 442 U.S. 947 (1979). Further, it has been held that receipt of payments by providers of services rendered under medicare, medicaid and Veteran's Administration programs does not constitute the receipt of "federal assistance" within the meaning of the Act or these regulations. Trageser, supra.

It should also be pointed out that the federal regulations do not require by their terms that a recipient of federal financial assistance guarantee the absence of discrimination on the basis of handicap. Rather, these regulations provide for a continuing plan of self-evaluation and voluntary action on the part of the recipient of federal financial assistance. 45 C.F.R. § 84.6. The self-evaluation must be conducted to identify those practices and policies which do not meet the requirements of the regulations accompanying § 504. Voluntary action may then be undertaken to modify or eliminate practices which result in discrimination.

Additionally, if a finding is made by the Director of the Department of Health and Human Services that a recipient has violated the § 504 implementing regulations, remedial action to overcome the effects of the discrimination can be required. If such a finding is made and if the offending
recipient is controlled by another non-offending recipient, the Director may require remedial action by both. 45 C.F.R. § 84.6(a).

Accordingly, although the Commonwealth is not required to enforce generally § 504 at the local level, when it applies for and receives federal financial assistance, it must provide assurance to the federal government that federal funds are being spent in compliance with § 504.

1 The Act provides in pertinent part: "No otherwise qualified handicapped individual in the United States...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978...."

COUNTIES, CITIES AND TOWNS. ORDINANCES. NO AUTHORITY TO PROHIBIT TRANSPORTATION OR DISPOSAL OF RADIOACTIVE MATERIALS REGULATED BY FEDERAL LAW.

September 25, 1980

The Honorable Virgil H. Goode, Jr.
Member, Senate of Virginia

This is in response to your request for my opinion with respect to "whether a locality can adopt a valid ordinance prohibiting the dumping of radioactive waste in that county." The question you have raised involves several complex issues of law, and requires assumptions as to the activities to be prohibited by such an ordinance and the purposes to be accomplished by the prohibition. Accordingly, it is my opinion that localities do not have authority to prohibit establishment of sites for the disposal of high level or low level radioactive waste materials regulated by federal law. Nor may localities prohibit the disposal of any radioactive materials on State-owned sites.

As I stated above, several assumptions are necessary in order to respond to your question. First, I have assumed that by "dumping" your question contemplates the establishment of either a site for land burial of low level radioactive wastes such as the one at Barnwell, South Carolina, or a repository for the disposal of high level radioactive wastes. Second, the reason the locality wishes to prohibit the establishment of such sites is assumed to be to protect its citizens from radiation hazards. It is
difficult to postulate any other reasons for an ordinance prohibiting the "dumping" of radioactive waste. Third, I have assumed that your letter refers to the disposal of materials generated by medical treatment, nuclear power plants and other nuclear industry activities conducted within the Commonwealth. Apparently the bulk of such materials are source, by-product and special nuclear materials regulated under the Atomic Energy Act of 1954 (the "Act").

I am advised that small quantities of radioactive materials not falling within these categories are used within the Commonwealth but that their disposal does not require the establishment of separate sites for land disposal as discussed in this Opinion. Localities may regulate the land disposal, if any, of these materials under the authorities by which they regulate the collection and disposal of refuse by private parties. See §§ 15.1-28.1, 15.1-522, 15.1-857, 15.1-867, 32.1-177 to 32.1-186 of the Code of Virginia (1950), as amended. Such regulation would not apply to State-owned disposal sites, however. See Reports of the Attorney General (1938-1939) at 180; (1967-1968) at 254.

The basic question raised by your inquiry is whether a local prohibition of nuclear waste disposal sites is preempted by federal law under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2). The Act is the basis of the existing federal regulatory scheme with respect to radiation hazards. 42 U.S.C. § 2011, et seq. The Act defines several categories of materials which are to be regulated called by-product, source and special nuclear materials. 42 U.S.C. § 2014. Although, as noted above, there are other nuclear materials not regulated under the Act, a blanket prohibition on radioactive waste disposal within a county would prohibit disposal of by-product, source or special nuclear material.

Section 274 of the Act, 42 U.S.C. § 2021, provides that, by agreement with federal authorities, states may undertake limited regulatory jurisdiction over the disposal of by-product materials, source materials, and special nuclear materials in quantities not sufficient to form a critical mass. The legislative history of that section indicates that, absent a state-federal agreement, the federal government retains exclusive jurisdiction to regulate the disposal of source, by-product and special nuclear materials with respect to radiation hazards. See Sen. Rep. No. 86-870, 86th Cong., 1st Sess. 9 (1959); Hearings Before the Joint Committee on Atomic Energy on Federal - State Relationships in the Atomic Energy Field, 86th Cong., 1st Session. 488 (1959).

The Commonwealth does not now have an agreement with the federal government pursuant to § 274 of the Act. Accordingly, exclusive jurisdiction to regulate disposal of by-product, source, and special nuclear materials in Virginia now resides in the federal government. An agreement between the United States Nuclear Regulatory Commission ("NRC") and the Commonwealth could provide a basis of state jurisdiction to regulate disposal sites for low level radioactive waste. However, § 274 requires that the NRC approve the regulatory program proposed by the State and authorizes the NRC to limit the jurisdiction conferred on the State. I am advised that various agencies of the Commonwealth are in the process of preparing the necessary regulations in order to obtain an agreement with the NRC. Until such an agreement is concluded, however, it is my opinion that State regulation of burial sites for nuclear wastes is prohibited by the Supremacy Clause of the United States Constitution.

Localities have only those powers expressly granted by State law or necessarily implied from powers expressly granted. See, e.g., Commonwealth v. Arlington County Bd., 217 Va. 558, 232 S.E.2d 30 (1977). In this instance, however, the Commonwealth has no authority to delegate to the localities. Accordingly, local regulation of burial sites for wastes containing by-product, source or special nuclear materials is also prohibited by the Supremacy Clause of the United States Constitution.

Although an agreement with the NRC could provide jurisdiction to the Commonwealth to regulate by-product, source and special nuclear materials, such jurisdiction would be limited. Under existing NRC policy, disposal of high level radioactive waste will be permitted only on federal land. 10 C.F.R. Part 50, App. F, para. 3. As a practical matter, this limitation probably prevents the Commonwealth from assuming jurisdiction over sites for the disposal of high level radioactive wastes. Any jurisdiction given the Commonwealth over disposal sites would be limited to low level wastes.

In addition, it is unclear whether such an agreement would permit concurrent jurisdiction in local and State...
agencies or would be limited to State jurisdiction. In any event, local ordinances would be required to be consistent with any State regulation of source, by-product and special nuclear material. See § 32.1-237. Even upon conclusion of an agreement between the Commonwealth and the NRC, a prohibition of all waste disposal in a particular locality may be inconsistent with, and, therefore, prohibited by, State law or the terms of the State-federal agreement.

It should be noted that § 274 (subsection k) of the Act reserves to State and local jurisdiction, regulation of various nuclear activities for purposes unrelated to radiation hazards. 42 U.S.C. § 2021(k); Missouri ex rel. Utility Consumers Council v. Public Service Commission, 562 S.W.2d 688 (Mo. App. 1978), cert. denied 439 U.S. 866 (1978).

However, even where the stated purpose of a local prohibition of nuclear waste disposal sites is not regulation of radiation hazards, its obvious effect is to intrude greatly on the federal scheme regulating those matters. Accordingly, I have assumed that it would be difficult to convince the courts that such an ordinance has a purpose other than to regulate radiation hazards, although a non-radiological purpose might make the ordinance permissible. See United States v. City of New York, supra, at 614. Moreover, in the unlikely event that a non-radiological purpose for such a prohibition could be proved in court, the application of the prohibition to a particular situation could be preempted if it conflicted with, or impaired, the federal regulation of nuclear waste disposal sites. See, Florida Avocado Growers v. Paul, 373 U.S. 132, 142, reh. denied, 374 U.S. 858 (1963); State of New Jersey, Department of Environmental Protection v. Jersey Central Power and Light Co., supra. In addition, a prohibition of waste disposal for non-radiological purposes could be invalid under the Commerce Clause of the United States Constitution. See City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

In my judgment, localities should place little or no reliance on subsection k to support an ordinance prohibiting nuclear waste disposal sites.

A second major obstacle to local prohibition of nuclear waste disposal sites arises from the structure of the existing NRC regulatory program with respect to such sites. Under current federal regulations, ultimate disposal of high level radioactive waste must be conducted on federally-owned property. 10 C.F.R. Part 50, App. F. In addition, the NRC will approve licenses for disposal of low level radioactive waste only on land owned by the federal or state government. 10 C.F.R. § 20.302(b); see, also, § 32.1-230. As a practical matter under these regulations, all radioactive waste disposal of the type which your inquiry seems to contemplate must take place on federal or state land if it involves disposal of materials regulated under the Act.

If waste disposal sites were established pursuant to federal law and on federal land, the supremacy clause would prevent local prohibition of the waste disposal activities
permitted by federal law. See Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). Furthermore, a locality lacks the power to apply its local ordinances to the Commonwealth or its agencies unless the General Assembly has expressly granted that power to the local government. See Reports of the Attorney General (1938-1939) at 180; (1957-1968) at 254. A local prohibition with respect to the establishment of nuclear waste disposal sites would likely impinge on sites owned by state and federal governments. Thus, a prohibition of nuclear waste disposal sites would likely be invalid with respect to a majority, if not all, waste disposal sites.

For all of these reasons, I am of the opinion that a locality may not prohibit the establishment of sites for disposal of high level or low level radioactive waste materials regulated by federal law. Disposal of such materials is extensively regulated by laws and regulations which would take precedence over, and invalidate, such a prohibition. Nor may a locality prohibit the establishment of such a site on State-owned land, whether the materials to be disposed are regulated by federal law or not. Localities may regulate the disposal of nonregulated nuclear wastes in accord with existing authority to regulate waste disposal.

CRIMES. TRESPASSING. WHEN PROHIBITIVE SIGNS ARE POSTED, PERSONS DISTRIBUTING HANDBILLS IN SHOPPING CENTER CAN BE PROSECUTED FOR TRESPASSING.

November 13, 1980

The Honorable John H. Chichester
Member, Senate of Virginia

You ask whether a sign\(^1\) posted at a local shopping center is sufficient to enable prosecutions under the trespassing statute.\(^2\)

In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court considered whether a large shopping center could prohibit the distribution of handbills on its premises. The persons distributing the handbills were informed by security guards that they were trespassing\(^3\) and would be arrested unless they stopped distributing the handbills within the shopping center. The persons left the premises and sought an injunction against the shopping center.

The lower federal courts held that the shopping center was the functional equivalent of a public business district, and that the refusal to allow the distribution of the handbills violated the First Amendment. In reversing this decision the Supreme Court found that property does not lose its private character merely because the public is generally invited to use it for designated purposes. The Supreme Court noted that the invitation extended to the public was to come to the shopping center to do business with the tenants, and was not an open-ended invitation to the public to use the
shopping center for any and all purposes, however incompatible with the interest of both the stores and the shoppers whom they serve.

Although the decision in *Lloyd Corp.* dealt with distribution of handbills, I believe this decision is applicable to conduct which is incompatible with the invitation to the public to do business with the tenants of a shopping center. In my opinion persons may be prosecuted for trespassing if they come upon the property of a shopping center for purposes other than transacting business with the tenants.4

In the *Lloyd Corp.* case the shopping center displayed a sign which read:

> Notice - areas in Lloyd Center used by the public are not public ways but are for the use of Lloyd Center tenants and the public transacting business with them. Permission to use said areas may be revoked at any time. Lloyd Corporation, Ltd.

The sign to which you have referred is very similar to that in *Lloyd Corp.* The sign might be improved by the addition of language showing that the shopping center areas are provided for the transaction of business. For example, the sign could read as follows:

> This parking lot and common area are provided for the employees, suppliers, and customers of the merchants of XYZ Shopping Center for the transacting of business. Trespassing for other purposes at any time is prohibited.

1The sign in question reads substantially as follows:

> This parking lot and common area is provided for the employees, suppliers, and customers of the merchants of XYZ Shopping Center. Trespassing for other purposes at any time is prohibited.

2Section 18.2-119 of the Code of Virginia (1950), as amended, provides in part that if any person shall without authority of law go upon or remain upon the premises of another, after having been forbidden to do so by a sign posted on such premises, the person shall be guilty of a Class I misdemeanor.

3A local ordinance made it unlawful to trespass on private property.

4In *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Supreme Court held that striking employees whose picketing was not directly related in its purpose to the use to which the shopping center property was being put had no First Amendment right to enter the shopping center to advertise their strike against their employer. The propriety of picketing is to be determined by the National Labor Relations Act. See *Amalgamated Food Employees Union v. Logan Valley Plaza*, 397
U.S. 308 (1968), where the Supreme Court upheld the picketing of a store within a shopping center.

CRIMINAL LAW. IMPROPER USE OF "ACCESS CODE" TO MAKE PERSONAL LONG DISTANCE TELEPHONE CALLS VIOLATES § 18.2-187.1(B).

October 16, 1980

The Honorable Lindsay G. Dorrier, Jr.
Commonwealth's Attorney for the County of Albemarle

You ask whether § 18.2-187.1(B) of the Code of Virginia (1950), as amended, is applicable to persons who make unauthorized long distance telephone calls by use of an organization's access code which has been wrongfully obtained. You advise that the organization authorizes its employees to make long distance telephone calls for business purposes. The employees are able to place such calls by use of a five or seven digit "access code" which allows the calls to be made without going through an operator. An employee has given the "access code" to a person who is using the code number to make personal telephone calls which are being charged to the organization.

Section 18.2-187.1(B) provides, in part, as follows:

"It shall be unlawful for any person to obtain or attempt to obtain...telephone...service by the use of any scheme, device, means or method, or by a false application for service with intent to avoid payment of lawful charges therefor."

In my opinion, a person who uses the "access code" in order to make an unauthorized personal call can reasonably be said to have used a scheme, device, means or method, to obtain telephone service with intent to avoid payment of lawful charges therefor. While the organization may be billed for the telephone call and while the bill may be mistakenly honored by the organization, such payment is immaterial inasmuch as the person clearly had the intent to avoid payment by him of lawful charges for the call. The statute does not require that there be a material misrepresentation in order to obtain the service but only that a scheme, device, means or method, be utilized. I am of the opinion that § 18.2-187.1(B) is applicable to the situation you have described.

CRIMINAL LAW. MURDER OF PREGNANT WOMAN NOT CAPITAL OFFENSE UNDER PROPOSED § 18.2-31(g).

April 15, 1981

The Honorable George W. Grayson
Member, House of Delegates
You ask whether the murder of a pregnant woman would be capital murder under proposed S.B. 693. This Bill would establish as an additional capital offense "[t]he willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction." For purposes of this Opinion, I will assume that a fetus is not born alive subsequent to the defendant's criminal act.

The initial question is whether a fetus is a "person" within the meaning of § 18.2-31 of the Code of Virginia (1950), as amended. It is of course axiomatic that a penal statute be construed strictly in favor of a criminal defendant.

In Virginia, the common law of England, insofar as it does not contravene the principles of the Commonwealth's Bill of Rights and Constitution, shall continue in full force except as legislatively altered. Common law principles would appear generally applicable in Virginia's homicide statutes. In Biddle v. Commonwealth, the Supreme Court of Virginia noted that the predecessor statute of § 18.2-32, while classifying the degrees of murder, did not define murder itself. Consequently, the court in Biddle relied upon the common law definition of murder in reversing a conviction for first degree murder.

My review of the Code discloses no "feticide" statute—that is, the destruction of the life of a fetus. The only references in the Code to those who may be victims of homicidal acts are found in § 18.2-31 ("any person" and "a person"), § 18.2-33 ("one") and § 18.2-37 ("any person"). It thus appears that the General Assembly in passing S.B. 693 has not departed from common law principles and that such principles must be looked to in order to construe the term "person."

The well-settled rule at common law was that there could be no homicide unless the deceased had been born alive. The crime of murder does not proscribe "conduct which causes the death of a fetus not born alive due to an assault on the mother, in the absence of a statute expressly changing the common law definition of the crime." Thus, it has been held that in the absence of statutory modification of the common law, "the terms 'person', 'human being', 'another' (in the context of 'person') do not include an unborn fetus for purposes of the crime of homicide." It has further been held that an unborn fetus cannot be the victim of a vehicular homicide.

Virginia seems fully in accord with the above principles. In the recent case of Lane v. Commonwealth, the Supreme Court of Virginia reversed an involuntary manslaughter conviction against the mother of the deceased. The court held that the evidence was insufficient to satisfy the traditional requirement "that in a prosecution for killing a newly born baby, it is incumbent upon the State to prove that the child was born alive and had an independent
and separate existence apart from its mother, and that the accused was the criminal agent causing the infant's death._similarly, the court has held that an action will not lie in Virginia for the wrongful death of a viable fetus since the fetus could not be deemed a "person" under the State's wrongful death statute.

In adherence to the above authorities, it is my opinion that the murder of a pregnant woman would not be capital murder under S.B. 693.

1 This section currently defines six different acts as capital offenses. S.B. 693 would add multiple murder as a seventh.
3 See § 1-10 of the Code.
6 State v. Larsen, supra, 578 P.2d at 1282.
9 219 Va. at 514.

Criminal Law. Witness may not be impeached on basis of prior conviction for prostitution.

October 9, 1980

The Honorable Donald S. Caldwell
Commonwealth's Attorney for the City of Roanoke

You ask whether a witness may be impeached on cross-examination by proof that such person has a prior conviction for prostitution.1

Section 18.2-346 makes it a Class I misdemeanor for an individual to engage in an act of prostitution. In Virginia, whether evidence of a prior misdemeanor conviction may be used to impeach the credibility of a witness depends upon whether the conviction is one involving moral turpitude. A misdemeanor conviction is admissible only if it does involve moral turpitude.2

The Supreme Court of Virginia has not expressly considered whether a prostitution conviction is one
encompassing moral turpitude. The court has on occasion seemed to indicate that only those crimes directly relating to the honesty of the witness may be used for impeachment purposes. Thus, it has been held that moral turpitude was present in cases of making a false statement in order to obtain unemployment benefits and larceny. Conversely, assault and battery, drunkenness and illegal possession of liquor, and the operation of a "numbers game" have been held not to involve moral turpitude. Similarly, the court has ruled that the unauthorized use of a motor vehicle and contributing to the delinquency of a minor do not, as a matter of law, include moral turpitude.

It should also be noted, however, that at times the Supreme Court has seemingly suggested that prior convictions may be used to impeach irrespective of whether they involve dishonesty or fraud. Thus, in Parr v. Commonwealth, the court defined a crime involving moral turpitude as "an act of baseness, depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary right and duty between man and man."

While there is no Virginia decision expressly ruling on the issue you pose, I note that a number of federal courts have considered the effect of a prostitution or related conviction. One court using the same standard as that in Virginia held that convictions for operating disorderly houses and loitering around a disorderly house did not encompass moral turpitude. Similarly, under the Federal Rules of Evidence, which in part permits the impeachment of a witness by proof that he was convicted of a crime involving "dishonesty or false statement, regardless of the punishment..." references to prostitution convictions have been held inadmissible. The rationale underlying these decisions is that the veracity of a witness is unduly weakened by such overly collateral issues. As stated in United States v. Cox, where a defendant was tried on several drug charges, "Evidence of illicit sexual activities is totally immaterial to the credibility or character traits involved in most criminal cases, and to the substantive issues in this case."

Significantly, the Supreme Court of Virginia has employed comparable reasoning in analogous circumstances. For example, in Taylor v. Commonwealth, the court reversed a conviction where the prosecutor had cross-examined two witnesses as to whether they had had illegitimate children. It was held that a witness cannot be cross-examined as to sexual morality. Also, in Cutchin v. Roanoke, the court affirmed the trial court's refusal to permit testimony regarding a female witness's chastity. The court stated: "[A] party seeking to impeach a witness will not be allowed to ask what the general character of the witness is in relation to other matters, as well as to his veracity. Any other rule would involve the court in an endless investigation of matters wholly collateral to the issue under
Similarly, restrictions exist in rape cases upon evidence concerning the sexual history of the prosecutrix.20

Finally, I note that the court has held in Parr v. Commonwealth,21 that the operation of a "numbers game" does not comprise moral turpitude. The court referred to the fact that several jurisdictions had legalized various forms of gaming houses and lotteries in concluding: "[W]hile the conduct of a 'numbers game' is contrary to the public policy of this State and our standard of morals, it is not per se immoral or inherently evil and does not involve moral turpitude."22 In this respect, it is significant that prostitution is not absolutely prohibited in other states.23

It is my conclusion that a prior prostitution conviction does not fall within the "narrowly limited" right of a party to cross-examine a witness regarding a prior conviction of a misdemeanor involving moral turpitude.24 As expressly held by federal courts and implicitly recognized by the Supreme Court of Virginia, such an offense is insufficiently related to the veracity of the witness and too collateral to the issues in most criminal prosecutions.

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1 See § 18.2-346 of the Code of Virginia (1950), as amended.
3 For example, in Harold v. Commonwealth, 147 Va. 617, 622, 136 S.E. 658 (1927), it was stated: "[I]t is well settled in this State that the character of a witness for veracity cannot be impeached by proof of a prior conviction of crime, unless the crime be one which involved the character of the witness for veracity...."
13 See Federal Rules of Evidence § 609(a).
In Cox, while stating that a conviction of vagrancy for prostitution was not per se inadmissible for impeachment purposes under "the extremely broad moral turpitude standard" used in the Fifth Circuit, the court held that the conviction was too remote in time and too potentially inflammatory to be admissible.

For example, Nevada licenses and regulates brothels, which may be operated in certain counties. For a description of this method of licensing, see Richards, Commercial Sex and the Rights of the Person, 127 U.Pa.L.Rev. 1195, 1284 (1979).

There is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Moore v. Illinois, 408 U.S. 786, 795 (1972). It is now settled that there is no general constitutional right to discovery in a criminal case. Weatherford v. Bursey, 429 U.S. 545, 559 (1977); Lowe v. Commonwealth, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977), cert. denied, 435 U.S. 390 (1977). The United States Supreme Court has "rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel." United States v. Agurs, 427 U.S. 97, 111 (1976).

In Abdell v. Commonwealth, 173 Va. 458, 472, 2 S.E.2d 293, 298-299 (1939), the Supreme Court of Virginia indicated the public policy of this State regarding discovery in criminal cases. The court stated:
'As a general rule the accused is not, as a matter of right, entitled to have evidence which is in possession of the prosecution for inspection before trial.' This, in our opinion, is the proper rule. A different rule would tend to subject the attorney for the Commonwealth to great annoyance, to the probable destruction or loss of material evidence, and to compel the Commonwealth not only to furnish the accused with a full bill of particulars, but to supply the accused with the physical evidence it intends to introduce upon the trial. Such a rule as is urged by accused would, in our opinion, subvert the whole system of criminal law.'


"In conducting his own investigation, defendant's counsel has the same right as the Commonwealth to interview witnesses and to obtain their statements. In addition, the same policy of fundamental fairness in protecting the ability of the Commonwealth to prosecute, which we recognized in our earlier cases and led to the adoption of Rule 3A:14, is applicable to what would have been a fishing expedition into the Commonwealth's files at trial.

* * *

While we are vigilant to protect the defendant's right to a fair trial, we must likewise be vigilant in maintaining the confidence of our citizens in the police and prosecuting officers. It is only through the testimony of victims of crime and other public-spirited citizens that the criminal laws of the Commonwealth may be fairly and uniformly enforced."

The Virginia Freedom of Information Act specifically excludes from its disclosure requirements "memoranda, correspondence, evidence and complaints related to criminal investigations...." See § 2.1-342(b)(1) of the Code of Virginia (1950), as amended. Furthermore, in 1978 the Supreme Court of Virginia reaffirmed the confidentiality of police investigative reports in Virginia. Disclosure of certain criminal investigative files of the State Police had been sought by a party to a civil lawsuit, and disclosure had been ordered by a circuit court. On application of the State Police the Virginia Supreme Court issued a Writ of Prohibition directing the circuit court judge to refrain and desist from enforcing any order requiring the State Police to disclose its investigative files concerning one particular individual or any other person. In Re: Commonwealth of Virginia, Department of State Police, Petitioner, Record No. 781249, October 4, 1978.

Rule 3A:14 of the Rules of the Supreme Court of Virginia, which regulates discovery, is expressly applicable only to a prosecution for a felony in a court of record. It is significant that as regards certain materials and evidence
in the possession of the prosecutor, the Rule "does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except..." written reports of scientific tests or of certain physical or mental examinations of the accused or victim. See Rule 3A:14(b)(2).

I am of the opinion that it would be contrary to public policy and the sound administration of justice for any court routinely to order the prosecution in criminal cases to turn over its files to defense attorneys. Also, inasmuch as the restrictions imposed by Rule 3A:14(b)(2) on the authority of a circuit court to grant discovery of the Commonwealth’s files are grounded in public policy, in my opinion the authority of courts not of record is at least equally circumscribed. Any other conclusion would be incongruous.

I do not find, however, that courts not of record have no jurisdiction whatsoever to order some disclosure in an appropriate case. Such courts are empowered to issue subpoenas duces tecum or other process in criminal cases within the scope of their general jurisdiction. See § 16.1-69.25. Additionally, they may direct the filing of a bill of particulars in a criminal case. See § 16.1-69.25:1.

1Suppression by the prosecution of exculpatory evidence, however, which is material either to guilt or punishment, upon request for such evidence violates due process, irrespective of good or bad faith of the prosecution. Stover v. Commonwealth, 211 Va. 789, 795, 180 S.E.2d 504, 509 (1971), cert. denied, 412 U.S. 953 (1973). Even in the absence of a request from the defendant, suppression of exculpatory evidence violates due process if the omitted evidence creates a reasonable doubt that did not otherwise exist. United States v. Agurs, 427 U.S. 97, 112 (1976); Dozier v. Commonwealth, 219 Va. 1113, 1116, 253 S.E.2d 655, 657 (1979).

2Of course, any such order by a circuit court is expressly unauthorized under Rule 3A:14(b)(2).

CRIMINAL PROCEDURE. INVESTIGATIVE STOP OF MOTOR VEHICLE OPERATOR BY OFFICER ON BASIS OF REPORT THAT OPERATOR WAS "DRUNK".

July 31, 1980

The Honorable Lawrence R. Burton
Commonwealth’s Attorney for Patrick County

You ask whether an officer's stop and subsequent arrest of a person for 'driving while under the influence' would be
proper under the following circumstances. At about 8:15 p.m. a deputy sheriff receives a call from his dispatcher telling him that the dispatcher has received a telephone message that the defendant was operating a certain automobile and was "drunk." On the basis of the message, the deputy was advised to be on the lookout for the defendant's car. Shortly thereafter, the officer spotted defendant's car but did not observe any indication that defendant was driving under the influence. Based on the report from the dispatcher, however, the deputy stopped defendant's vehicle and at that point noticed alcohol on defendant's breath and other evidence that defendant was intoxicated. At that point, defendant was arrested for drunk driving.

In a telephone conversation with this Office, you indicated that the person calling the dispatcher identified himself and said he was a friend of defendant, who had been drinking alcoholic beverages at the friend's home and then left in an obviously intoxicated state and drove away very erratically. These circumstances relating to the description of defendant as "drunk" were not conveyed to the deputy. The officer stopped defendant about 30-40 minutes after the call to the dispatcher and did so for purposes of investigation rather than arrest.

Under the facts as outlined, it seems apparent that at the time of defendant's arrest, there was probable cause to conclude that he had been driving while intoxicated. The issue, however, is whether the deputy was justified in making the initial investigatory stop. If he was not, then the subsequent arrest would be struck down under the fruits of the poisonous tree doctrine. If, on the other hand, the intrusion was initially permissible, the officer's later actions would be proper.

The United States Supreme Court has clearly indicated that an officer's stopping of a person for purposes of investigation rather than arrest may be done on the basis of a showing of something less than probable cause. This is true whether the individual is on foot or in a motor vehicle. The United States Supreme Court has clearly recognized that a stop based on "reasonable suspicion" may be constitutional.

"The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape...[I]t may be the essence of good police work to adopt an intermediate response...A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." The United States Supreme Court has also indicated that whether a police officer may act on the basis of a directive
received from his dispatcher depends on whether the dispatcher had sufficient facts adding up to probable cause or reasonable suspicion, as the case may be.\(^5\) There is, however, no requirement that the arresting or investigating officer be informed of the facts and circumstances underlying the dispatcher’s information.\(^6\) Thus, the ultimate question you pose is whether the telephone call made by defendant’s friend to the dispatcher was such to comprise reasonable suspicion for the stopping of defendant.

In my opinion, under the facts you posit the dispatcher and, through him, the officer did have such reasonable suspicion. First, this was not a purely conclusory allegation made by an anonymous telephone tipster. On the contrary, the caller identified himself and described facts tending to corroborate the accuracy of his statement.\(^7\) Further, the stopping of defendant related to an alleged crime posing immediate dangers to the general public and which, if not investigated immediately, might also result in the dissipation of the proof of the crime. In this regard, as has been noted, "stoppings for investigation are not all of one kind and...in some instances the need for immediate action may be so great that substantial doubts about the reliability of the informant or his information cannot be permitted to stand in the way of prompt police action."\(^8\) Considering these facts, along with the further fact that the officer stopped defendant soon after receiving the report that he was intoxicated, I believe that the detaining of defendant was proper.\(^9\)

I note this conclusion is consistent with the United States Supreme Court’s recent decision in Delaware v. Prouse.\(^10\) In Prouse, the court held that the Fourth Amendment prohibits the purely random stopping of a motorist for a check of his driver’s license and vehicle registration where the investigating officer has no "articulable and reasonable suspicion"\(^11\) that the driver is unlicensed or his vehicle unregistered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of the law. In the factual set of circumstances you set forth, for the reasons previously set forth, I believe that the police did possess an articulable, reasonable suspicion that defendant was driving his car while intoxicated. Since the stopping of defendant was not an arbitrary, random action, Prouse would not invalidate his subsequent arrest.

\(^1\)See § 18.2-266 of the Code of Virginia (1950), as amended.
6 See, e.g., United States v. Ashley, 569 F.2d 975 (5th Cir. 1978).
83 La Fave on Search and Seizure § 9.3(e) (1978).
9 See United States v. Gorin, 564 F.2d 159 (4th Cir. 1977); United States v. Nunn, 525 F.2d 958 (5th Cir. 1976); United States v. Hernandez, 486 F.2d 614 (7th Cir. 1973).
11 Id. at 663.

CRIMINAL PROCEDURE. JURISDICTION OF COURT TO REDUCE OR TERMINATE SUSPENSION OF IMPOSITION OF SENTENCE. COURT MAY REDUCE OR TERMINATE AT ANY TIME PRIOR TO TWENTY-ONE DAYS AFTER DATE OF ENTRY OF FINAL JUDGMENT ORDER OR PRIOR TO DEFENDANT'S COMMITMENT AND DELIVERY TO PENITENTIARY.

March 23, 1981

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You have asked whether a circuit court which suspends the imposition of sentence retains jurisdiction to reduce the period of suspension or to terminate the sentence.

All final judgments remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after date of entry, and no longer. See Rule 1:1, Rules of the Supreme Court of Virginia. During this twenty-one day period the trial court may reduce the period of suspension or terminate the sentence as it deems appropriate.

The provisions of § 53-272 of the Code of Virginia (1950), as amended, which authorizes a court to suspend the imposition of sentence, allows the court to fix the period of suspension for a reasonable time. In the case of felonies, this section also authorizes the court at any time before the defendant is committed and delivered to the penitentiary to suspend or otherwise modify and alter the unserved portion of any sentence.1 To the extent there is a conflict between Rule 1:1 and § 53-272, the provisions of § 53-272 take precedence. See § 8.01-3. This means that as long as a felon has not been committed and delivered to the penitentiary the court may alter the sentence even though twenty-one days has elapsed since entry of final judgment. See Report of the Attorney General (1975-1976) at 92.

However, once a defendant has been committed and delivered to the penitentiary and twenty-one days have passed since entry of the final judgment order, the courts have no
authority to reduce or terminate the suspension of imposition of sentence.2

1In Richardson v. Commonwealth, 131 Va. 802, 808-809, 109 S.E.460 (1921), the Supreme Court of Virginia recognized that under common law courts do not possess the inherent power to suspend sentences, and such authority is regulated by statute.

2Section 19.2-304 authorizes courts to increase or decrease the probation period, but there is no similar authority to change the suspension of sentence.

CRIMINAL PROCEDURE. PERSON MAY NOT BE SENTENCED TO JAIL UNLESS REPRESENTED BY COUNSEL OR THERE IS VALID WAIVER OF COUNSEL.

June 9, 1981

The Honorable Robert L. Simpson, Sr., Judge
Virginia Beach General District Court

You ask whether a person who fails to appear for trial may be sentenced to jail.

In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court held 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. Subsequently, in Scott v. Illinois, 440 U.S. 367 (1979), the Supreme Court held that actual, rather than authorized, imprisonment alone requires the assistance of counsel.

Inasmuch as the appearance of counsel on behalf of an accused person is considered an essential element of a fair hearing,1 a finding of waiver will not be lightly made.2 Nor will waiver of the defendant's rights in this regard be presumed,3 and the record must show that he was offered the assistance of counsel and that the offer was rejected.4

Section 19.2-160 of the Code of Virginia (1950), as amended, implements these decisions. This section provides that an accused be advised of his right to counsel, and if he desires to waive his right to counsel, the court must ascertain that such waiver is voluntarily and intelligently made. The court may, however, either upon its own motion or upon motion by the Commonwealth's attorney, state in writing that a jail sentence will not be imposed if the defendant is convicted and then proceed to try the case without appointment of counsel.

Section 19.2-237 provides that in any misdemeanor case where the accused fails to appear and plead, the court may either award a capias or proceed to trial as if the accused
had appeared, pleaded not guilty and waived trial by jury, provided that the court shall not in any such case enforce a jail sentence.

Based upon these authorities, it is my opinion that a person may not be sentenced to jail unless the record shows either that he was assisted by counsel or knowingly and intelligently waived his right to counsel.


CRIMINAL PROCEDURE. § 18.2-268(b) DOES NOT PERMIT ANALYSIS OF DRIVER'S BLOOD TO DETERMINE DRUG CONTENT.

December 24, 1980

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

You ask whether a sample of a driver's blood may be analyzed by the Division of Consolidated Laboratory Services to determine its drug content.

Section 18.2-268(b) of the Code of Virginia (1950), as amended, is a part of the Virginia Implied Consent Law and provides that any person who operates a vehicle on the public highways of the Commonwealth "shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood..." if the driver is arrested for drunk driving in violation of § 18.2-266. (Emphasis added.) Section 18.2-268 sets forth a detailed procedure regulating the sampling and analysis of a motor vehicle operator's blood or breath and their subsequent use in judicial proceedings. The section repeatedly and without exception refers to a chemical test being undertaken in order "to determine the alcoholic content of his blood..." At no point does the statute refer in any way to an analysis being conducted in order to determine the presence in the blood of any other drug. This is in distinct contrast to § 18.2-266 which prohibits the driving of a motor vehicle not only while the operator is under the influence of alcohol but also "while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature."

For both statutory and constitutional reasons, I am of the opinion that § 18.2-268(b), as it is currently phrased, permits the analysis of a blood sample solely for the purpose of determining its alcoholic content. It is, of course, axiomatic that a penal statute must be construed strictly in
One of the aids in statutory construction is the maxim that the express inclusion of one subject or thing in a statute is the implied exclusion of other subjects or things.\(^1\) Under this principle the absence in § 18.2-268 of any reference to a chemical analysis for the determination of drugs in the blood of a driver would evince a legislative intent not to permit such an analysis.

Constitutional considerations support this conclusion. The United States Supreme Court has stated that the administration of a blood test "plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment."\(^3\) Similarly, subjecting a person to a breath test has been held a search since in such an instance "the material seized comes from within the suspect's body."\(^4\) I do not question the legislature's right pursuant to § 18.2-268(b) to imply a driver's consent to a breath or blood test as a condition of his operating a motor vehicle on the State's public highways.\(^5\) The fact remains, however, that when "police are relying upon consent as the basis for their warrantless search, they have no more authority than they have been given by the consent."\(^6\) I think that this principle is particularly applicable in the case of consent that is constructive rather than actual. Accordingly, it is my conclusion that a driver can be deemed to have consented to a blood test to determine the alcoholic content in his blood, but not to a similar determination as to other drugs that may be present.

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\(^1\) See e.g., Commonwealth v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953).
\(^2\) See, e.g., Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).
\(^5\) See 2 LaFave on Search and Seizure § 8.2(1) (1978).
\(^6\) Id. at § 8.1(c).

CRIMINAL PROCEDURE. SPEEDY TRIAL. DISMISSAL OF PREVIOUS INDICTMENTS BASED ON SPEEDY TRIAL PROVISIONS OF § 19.2-243 DOES NOT PRECLUDE COMMONWEALTH FROM PROSECUTING INDICTMENT ON NEW CHARGE FOR SEPARATE AND DISTINCT OFFENSE ARISING OUT OF SAME INCIDENT. TIME CONTEMPLATED BY STATUTE RUNS FROM TIME OF ARREST ON NEW INDICTMENT.

April 24, 1981

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You have asked whether the Commonwealth is precluded from prosecuting an indictment on a new charge where the defendant has previously been indicted for separate and distinct offenses arising out of the same incident, and such
previous indictments have been dismissed based upon the speedy trial provisions of § 19.2-243 of the Code of Virginia (1950), as amended.

In my opinion § 19.2-243 would not bar the Commonwealth from proceeding under the new indictment. Section 19.2-243 provides that when a person is indicted and there has been no preliminary hearing, the time limitations under the statute commence to run from the date of the arrest on the indictment. In construing the speedy trial provisions under former § 19.2-191 (now § 19.2-243), the court in Miller v. Commonwealth, 217 Va. 929, 234 S.E.2d 269 (1977), held that when an indictment is supplanted by a second indictment, the time contemplated by the statute is to be counted from the time of the second indictment. See Brooks v. Peyton, 210 Va. 318, 171 S.E.2d 243 (1969). Therefore, to determine whether § 19.2-243 bars the new indictment only the time which has elapsed after the arrest on the new indictment should be considered. The time which has elapsed prior to the new indictment, and which resulted in the original indictments being dismissed should not be considered.

The Sixth Amendment right to a speedy trial attaches upon a formal indictment or by an arrest and holding to answer a criminal charge. Dillingham v. United States, 423 U.S. 64 (1975); Fowlkes v. Commonwealth, 218 Va. 763, 240 S.E.2d 662 (1978). Any preindictment delay which has not been caused by the prosecution to gain some tactical advantage over the defendant or to harass him is irrelevant for constitutional purposes. United States v. Marion, 404 U.S. 307 (1971). The factors to be considered when determining whether a particular defendant has been deprived of his right to a speedy trial under the Sixth Amendment are length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Barker v. Wingo, 407 U.S. 514 (1972). Such factors will vary in each case and must be assessed in light of the facts of a given case.

In United States v. Lovasco, 431 U.S. 783 (1977), the Supreme Court considered the circumstances in which the Constitution requires that an indictment be dismissed because of delay between the commission of an offense and the initiation of prosecution. The court held that proof of prejudice to the defendant is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for delay as well as the prejudice to the accused. The court observed that prosecutors do not deviate from the fundamental concepts of justice required by the due process clause when they defer seeking indictments until they have probable cause to believe an accused is guilty, nor are prosecutors under a duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. In conclusion, the court found that an eighteen month delay between the date of the commission of the offense and the initiation of prosecution,
in which time the investigation was conducted, did not deprive the defendant of his due process rights.

     Just as with determining whether a defendant that has been denied a speedy trial, any decision on whether due process has been violated by the delay between the commission of the offense and the initiation of prosecution must be determined on a case by case basis.

     I am also of the opinion that there would be no violation of the double jeopardy provisions of the federal and state constitutions by proceeding upon the new indictment as long as it charges a separate and distinct offense from those which were dismissed. The constitutional provisions provide that no person shall be put in jeopardy twice for the same offense. In Jones v. Commonwealth, 218 Va. 18, 235 S.E.2d 313 (1977), the Virginia Supreme Court held that the "same evidence" test is the standard for determining whether different offenses are deemed the same for double jeopardy purposes. The test is whether one offense requires proof of an additional fact which the other does not, even though each offense may have arisen from the same transaction and some of the same acts may be necessary to prove both. If proof of an additional fact is required, an acquittal or conviction under either is not a bar to prosecution and conviction under the other. Therefore, as long as the offense charged in the new indictment requires the proof of an additional fact which is not required in the offenses which were dismissed, the double jeopardy provisions would not be violated.

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1Section 19.2-243 provides in part: "Where a general district court has found that there is probable cause to believe that the accused has committed a felony, the accused, if he is held continuously in custody thereafter, shall be forever discharged from prosecution for such offense if there be no trial commenced in the circuit court within five months from the date such probable cause was found by the district court...."

CRIMINAL PROCEDURE. WHETHER MONEY SEIZE IN CONNECTION WITH ILLEGAL DRUG OPERATIONS AND FORFEITED TO COMMONWEALTH MAY BE USED BY LAW ENFORCEMENT AUTHORITIES FOR DRUG INVESTIGATIONS.

April 3, 1981

The Honorable William F. Parkerson, Jr. Member, Senate of Virginia

You ask whether money which is seized in connection with illegal drug operations and forfeited to the Commonwealth may be used by law enforcement authorities for narcotic investigations.
Section 18.2-249 of the Code of Virginia (1950), as amended, presently provides in part that money used in connection with various drug-related offenses shall be forfeited to the Commonwealth and may be seized by an officer to be disposed of in the same way as motor vehicles confiscated for illegally transporting alcoholic beverages under § 4-56.

Article VIII, § 8, of the Constitution of Virginia (1971), which establishes the Literary Fund (the "Fund"), states in part that the proceeds "of all property accruing to the Commonwealth by forfeiture..." shall be credited to the Fund. I note that this Office has consistently and strictly adhered to the terms of Art. VIII, § 8. For example, it has been opined that money forfeited to the Commonwealth in connection with an illegal lottery is "required" to be credited to the Fund. Similarly, I have concluded that certain expenditures may not be made from the Fund. Therefore, in accord with past Opinions of this Office, it is my opinion that Art. VIII, § 8 requires that all money forfeited pursuant to § 18.2-249 be credited to the Fund.

Statutory reasons support this conclusion as well. As indicated above, the forfeiture and disposition of money seized pursuant to § 18.2-249 is generally governed by the procedure set forth in § 4-56. Section 4-56(j), which deals with the sale of forfeited property used in connection with the illegal transportation of alcoholic beverages, states that out of the proceeds of each sale shall be paid the cost, "and the residue shall be paid into the Literary Fund."

I also note that Art. VIII, § 8 provides one qualification to the requirement that the various specified sources of revenue be credited to the Fund. As long as the principal of the Fund is at least $80 million, the General Assembly has the power to set aside any or all additional such revenues received for public school purposes such as the teachers retirement fund. Under the familiar rule of statutory construction that the express inclusion of one subject or thing in a statute normally is the implied exclusion of other subjects or things, I would thus construe Art. VIII, § 8 not to permit the diverting of funds from the Fund for other purposes.

1Section 22.1-142 contains a similar provision.
4See, e.g., Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).

DEFINITIONS. "GROSS NEGLIGENCE" AS IT RELATES TO OPERATION OF STATE OWNED VEHICLE.
This is in reply to your request for a definition of the term "gross negligence" as it relates to the operation of a State-owned vehicle.

There are three degrees of civil negligence: slight negligence, ordinary negligence and gross negligence. In each case, the negligence is failure to bestow the care and skill which is demanded by the situation. 13B M.J. Negligence § 4 (1978). Even though gross negligence is substantially higher in magnitude than ordinary negligence, it falls short of being such reckless disregard as to be equivalent to a willful, intentional wrong. Black's Law Dictionary (Rev. 4th Ed. 1968).

It is generally accepted that there is no specific rule as to what constitutes gross negligence on the part of a driver of an automobile, but rather each case depends on the particular facts and circumstances present. 2B M.J. Automobiles § 44 (1970). Therefore, an act which would be gross under one set of circumstances would not be in another. The term, however, has frequently been defined as that "degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of others." Rigney v. Neauman, 203 Va. 822, 127 S.E.2d 403 (1962). It must be such a degree of negligence as would shock fair minded men although something less than willful recklessness. Clark v. Clark, 216 Va. 539, 221 S.E.2d 123 (1976).

Mere inattention, inadvertence, or a lack of alertness, without more, is not gross negligence. Wright v. Swain, 168 Va. 315, 191 S.E. 671 (1937). On the other hand, if the evidence discloses that a person's acts amount to more than failure to operate his car skillfully under the conditions then existing, measured by what an ordinarily prudent person would have done under the same circumstances, a person may reasonably be held guilty of gross negligence. As examples, it has been held that driving a car around a curve on the wrong side of the road, Collins v. Robinson, 160 Va. 520, 169 S.E. 609 (1933); rounding a curve at a terrific rate of speed, Sturman v. Johnson, 209 Va. 227, 163 S.E.2d 170 (1968); failing to avoid a collision when it could have been easily accomplished; Thomas v. Snow, 162 Va. 654, 174 S.E. 837 (1934); and the violation of a statute regarding intersections, Baise v. Hollifield, 158 Va. 498, 164 S.E. 657 (1932) constituted gross negligence in the particular situation.

In view of these generally accepted principles, it is my opinion that gross negligence is more than a mere failure to exercise ordinary care. It is that degree of negligence which shows an utter disregard for the safety of others.
DEFINITIONS. "ITINERANT VENDORS" AS SET FORTH IN § 54-809.

December 5, 1980

The Honorable Harry O. Tinsley, Sheriff
Madison County Sheriff's Department

You have asked whether § 54-809, et seq., of the Code of Virginia (1950), as amended, which regulates itinerant vendors applies to door-to-door salespeople selling goods such as magazines or services such as roof painting. You further asked whether such salespeople must obtain the license and pay the fee required by § 58-381.

The definition of itinerant vendor, as set forth in § 54-809, states that an itinerant vendor is one who "shall engage in, do or transact any temporary or transient business in this State... in the sale of goods, wares and merchandise..." and who shall set up a temporary shop for a period of less than one year. This definition does not include the seller of a service. Nor does it include persons establishing a place of business for a year.

Accordingly, salespeople who offer a service, such as roof painting, are not itinerant vendors under § 54-809. Although they sell goods, the magazine salespeople in your county apparently do not set up shops for a year or more. Therefore, they are itinerant vendors within the meaning of § 54-809.

Section 58-340 imposes a license tax on peddlers, but defines a peddler as one who carries his merchandise with him.

DISTRICT COURT. EXECUTION OF JUDGMENT FOR UNLAWFUL DETAINER DURING TEN DAY PERIOD WHICH DEFENDANT MAY TAKE APPEAL.

March 30, 1981

The Honorable James P. Brice, Judge
City of Roanoke General District Court

You have asked whether a judgment rendered in General District Court on a warrant for unlawful detainer may be executed immediately through a writ of possession or whether such execution must be stayed until the expiration of the ten day period in which the defendant may take an appeal.

The execution of a judgment for unlawful detainer is subject to the ten day period in which the defendant may take an appeal. The appeal period runs from the date of the entry of judgment to the expiration of ten days thereafter.

Section 16.1-106 of the Code of Virginia (1950), as amended, provides in part:

"From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty
dollars...there shall be an appeal of right, if taken within ten days after such order or judgment, to a court of record...."

Section 8.01-129 provides further that, when a defendant takes an appeal from a judgment for unlawful detainer, he shall be required to give security for rent and damages which have accrued or may accrue upon the premises. Section 16.1-98 provides for issuance of a writ of possession upon request of the judgement creditor. I am unable to find any Virginia statute or case law requiring an immediate stay of execution during the ten day period in which the losing party is entitled to take an appeal. The power to order such a stay is well within the discretion of the General District Court judge to "enter such orders as may be necessary...and promote substantial justice to all parties...." See § 16.1-93.1

1It is clear that, once the defendant has perfected his appeal, the judgment rendered against him in district court is completely annulled and not thereafter effective for any purpose. Nationwide Mutual v. Tuttle, 208 Va. 28, 32, 155 S.E.2d 358, 361 (1967), Addison v. Salver, 185 Va. 644, 650, 40 S.E.2d 260, 263 (1946). Accordingly, the plaintiff's right to obtain an execution of his judgment would also be annulled. If a writ of possession had been issued for the enforcement of the judgment, it would be rendered void and any subsequent action to put the defendant out of possession, on the basis of the invalid writ, would be unlawful.

DISTRICT COURTS. JURISDICTION IS REDUCED TO IN PERSONAM LIMIT OF $7,000 IF ATTACHMENT IS DISMISSED.

June 12, 1981

The Honorable Fred E. Martin, Jr., Judge
Norfolk General District Court

You have asked whether a district court would have jurisdiction to enter a judgment in excess of $7,000, but not above $20,000, under two particularly described sets of circumstances.

As you note, § 16.1-77(1) of the Code of Virginia (1950), as amended, was amended in 1981 to give district courts a civil jurisdictional limit of $7,000 in ordinary cases, while § 16.1-77(2) was amended to establish a limit of $20,000 in attachment cases. Your questions stem from the fact that the two limits are now set at different figures whereas they had previously been the same.

You first ask about cases in which the plaintiff's claim exceeds the amount attached and in which the defendant has been served personally. Such a situation calls attention to
the important distinction between in rem jurisdiction, which
the court exercises over the res by virtue of the attachment,
and in personam jurisdiction, which the court exercises over
the individual defendant by virtue of personal service upon
him. The distinction is important because in rem
jurisdiction only empowers the court to subject the attached
property to its judgment—not the individual defendant. 2A
M.J. Attachment and Garnishment § 52 at 422 (1981); O'Brien v. Stephens, 52 Va. (11 Gratt.) 610 (1854); see,
also, Bernard v. McClanahan, 115 Va. 453, 79 S.E. 1059
(1913).

Where the amount claimed is $7,000 or less, this
distinction has no significant consequences since the
court may enter a judgment for the entire sum based on its in
personam jurisdiction under § 16.1-77(1). But where the
amount claimed exceeds $7,000, there is a serious question as
to what the court may do. Bearing in mind the distinction
between the two kinds of jurisdiction, the question may be
phrased as follows:

Is § 16.1-77(2) only intended to provide district courts
in rem jurisdiction in cases where there has been an
attachment or is this statute also intended to set a
higher than ordinary limit for in personam jurisdiction
where the attachment has been supplemented by personal
service?

In my opinion, the answer is found in the legislative
history of this statute. Prior to the 1981 amendments, the
dollar limits under §§ 16.1-77(1) and 16.1-77(2) were
identical—each establishing a $5,000 limit. Since
§ 16.1-77(1) already provided in personam jurisdiction, it
would have been redundant for § 16.1-77(2) to have also
provided in personam jurisdiction where personal service had
been obtained in addition to an attachment. Since statutory
construction should avoid redundancies, it may be inferred
that the purpose of § 16.1-77(2) was limited to providing in
rem jurisdiction in attachment cases.

This situation has not changed. Although the 1981
amendment enlarged the in rem jurisdiction of district
courts, there is no new language to suggest that any in
personam jurisdiction is now conveyed by § 16.1-77(2). Thus,
regardless of any attachment, a district court has no
authority to enter a personal judgment against the defendant
if the plaintiff's claim is in excess of the $7,000 limit set
by § 16.1-77(1). This conclusion also seems to square with a
"common sense" view of the matter since a contrary
interpretation would allow the most minimal attachment to
expand the court's in personam jurisdiction far beyond that
which it ordinarily exercises. Absent express language to
the contrary, such an extreme result ought not to be
favored.

You also ask whether a judgment could exceed $7,000 in
cases governed by § 8.01-569 which provides as follows:
"If the principal defendant has not appeared generally, nor been served with process, and the sole ground of jurisdiction of the court is the right to sue out the attachment, and this right be decided against the plaintiff, the petition shall be dismissed at the cost of the plaintiff; but if the plaintiff's claim be due at the hearing, and the court would otherwise have jurisdiction of an action against such defendant for the cause set forth in the petition and such defendant has appeared generally, or been served with process, it shall retain the cause and proceed to final judgment as in other actions at law."

This section is to be applied in cases where the right to sue out the attachment is decided against the plaintiff. In my opinion, when such a decision is made, the case ceases to be an "attachment case" and the court loses its jurisdiction under § 16.1-77(2). As the Supreme Court decided in Maryland Casualty Co. v. Parrish, 150 Va. 473, 482, 143 S.E. 750 (1928), "the power of the court to act under this section presupposes the prior death of the attachment." Accordingly, the court must proceed instead under § 16.1-77(1). If the amount claimed exceeds the $7,000 jurisdictional limit, the court must dismiss the case unless the plaintiff is willing to reduce his claim to $7,000 or less.

DISTRIC T COURTS. MAY ENTER ORDER AUTHORIZING DEFENDANT TO BRING IN THIRD PARTY.

July 28, 1980

The Honorable William R. Shelton, Judge
Twelfth General District Court

You have asked whether the Virginia Rules of Court permit third-party joinder in the General District Courts. Rule 3:10 is entitled "Third-Party Practice" and establishes a procedure by which a plaintiff or defendant may bring in a third-party. The application of this rule is limited, however, to those cases described by Rule 3:1, which governs the application Part Three of the Rules of Court. Rule 3:1 provides in part:

"These Rules apply to all civil actions at law in a court of record...In matters not covered by these Rules, the established practices and procedures are continued."

(Emphasis added.)

Since a General District Court is not a court of record, Rule 3:10 does not apply to the proceedings therein. Thus, if authority exists for third-party joinder in a General District Court, it must be found elsewhere.
Section 16.1-93 of the Code of Virginia (1950), as amended, sets forth the principles governing the trial of cases in courts not of record and provides in part:

"The court may direct such proceedings and enter such orders as may be necessary...to bring about a trial of the merits of the controversy and promote substantial justice to all parties." (Emphasis added.)

In civil disputes, a defendant will often allege that some third person not a party to the action is or may be liable to him for all or part of the plaintiff's claim. If the defendant is required to suffer judgment before proceeding against such third person, the resulting multiplicity of suits would leave open the possibility of inconsistent adjudications. Consequently, promoting substantial justice to the original defendant may require that the original action and the claim against the third person be heard in the same proceeding.

However, §§ 16.1-79 and 16.1-80 require civil action to be brought by warrant or motion for judgment naming the person against whom the claim is to be asserted. There is no provision of law which gives a court not of record the authority to join a party by motion.

In my opinion, § 16.1-93 authorizes a General District Court to enter an order providing for a simultaneous hearing by allowing a party time to file a separate action and hearing it at the same time as the original.

DISTRICT COURTS. SUBPOENAS DUCES TECUM.

October 6, 1980

The Honorable Frank B. Perry, III, Judge
Fairfax County General District Court

You have asked two questions concerning the issuance of subpoenas duces tecum under the provisions of § 16.1-89 of the Code of Virginia (1950), as amended. Section 16.1-89 provides:

"A judge or clerk of a district court may issue a subpoena duces tecum requiring the production of any relevant book, writing or document. In order to procure a subpoena duces tecum the person applying thereof must present an affidavit of himself or some other person describing the desired book, writing or document with reasonable certainty and naming the person who is desired to produce the same, and stating that to the best of affiant's belief the papers or other writings are relevant to the trial of the case. Any person failing to appear or failing to produce the papers or other writings may be punished for contempt." (Emphasis supplied.)
Pretrial Use of Subpoena Duces Tecum

Your first inquiry is whether documents can be subpoenaed under the above statute for pre-trial discovery and copying. The Rules of the Supreme Court of Virginia governing civil cases in the circuit courts do provide for various pre-trial discovery procedures. See Rules of the Supreme Court of Virginia, Part IV. Under Rule 4:9(c) a party in a civil suit may subpoena relevant documents in the possession of persons not parties to the cause for pre-trial inspection and copying. The Supreme Court Rules providing for pre-trial discovery do not, however, apply in the general district courts. See Rule 4:0. Rule 4:9(c) requires, however, that the subpoena state the time, place and period for such inspection and copying. It further provides that the documents shall be made returnable only to the court or to the office of the clerk of court. Express provision is also made allowing written request for withdrawal of the documents from the clerk's office for inspection and copying by the party at whose instance the subpoena was issued. The materials subpoenaed for pre-trial discovery need not be admissible evidence at trial. See Rule 4:1(b)(1).

Section 16.1-89 makes no provisions similar to those found in Rule 4:9. There is no reference to inspection and copying of subpoenaed documents. Had § 16.1-89 been intended to provide pre-trial discovery such provisions would, in my view, have necessarily been expressly set forth in the statute. There is no express designation of the place where subpoenaed documents are to be returnable. Section 16.1-89 permits a subpoena for documents relevant to the trial of the case. Accordingly, I conclude that § 16.1-89 was intended to provide access to relevant documents for the trial of a case, but is not intended to provide pre-trial discovery.

Subpoena To Parties

Your second question is whether § 16.1-89 permits a party to a case to subpoena documents in the possession of other parties in the case. Section 16.1-89 permits a subpoena for "any relevant book, writing or document." (Emphasis supplied.) I find nothing in the provisions of § 16.1-89 which indicates that documents in the possession of parties are to be treated differently from documents held by witnesses or other third parties. I am, therefore, of the opinion that § 16.1-89 does permit a party in a suit pending in the district courts to subpoena for trial documents in the possession of another party to the proceeding.

DISTRICT COURTS. NO MANDATORY REQUIREMENT THAT SUMMONS BE TRIED IN TOWN WHERE ISSUED.

November 24, 1980

The Honorable J. C. Snidow, Jr., Chief Judge
Twenty-Seventh Judicial District
This is in response to your inquiry whether there is any mandatory requirement that summonses for traffic and other ordinance violations be tried in the town where they are issued.

Section 16.1-123 of the Code of Virginia (1950), as amended, provides for each county court to have (1) exclusive original jurisdiction over all offenses against the ordinances, laws and bylaws of the county for which it is established and, except as otherwise provided, of the towns therein, and (2) except as otherwise provided, exclusive original jurisdiction within the county and the towns therein for the trial of all other misdemeanors arising there. With the advent of Virginia's unified court structure in 1973, the county court was continued as the general district court in each county with the same powers and territorial jurisdiction. See § 16.1-69.8(a). The municipal courts of any towns and any other courts of any towns having general civil or criminal jurisdiction were abolished and the jurisdiction and power conferred upon such courts was passed to the district courts having jurisdiction over the counties wherein the towns were located. See § 16.1-69.8(d). In addition, § 16.1-70.1 abolished all town courts the jurisdiction of which was limited to cases involving violations of town ordinances or cases instituted for the collection of town taxes, assessments or other obligations, except that where a municipal court having jurisdiction as provided in §§ 16.1-124 and 16.1-125 is within the Town of Herndon, the chief judge of the district shall designate a place within such town to hold court and thereafter so long as such town has a police department, it shall be designated by the chief judge as a place to hold court.

In criminal cases, venue is generally in the county or city where the crime was committed. See § 19.2-244; Rule 3A:17 of the Rules of the Virginia Supreme Court; Pollard v. Commonwealth, 220 Va. 723, 267 S.E.2d 328 (1980). Consistent with this principle, § 16.1-69.35(c) provides that the chief judge of each district shall determine whether, in the case of district courts in counties, the court shall be held at any place or places in addition to the county seat. Any town having a population of over 15,000 as of July 1, 1972, having court facilities and a court with both general criminal and civil jurisdiction prior to that date, shall be designated by the chief judge as a place to hold court. See § 16.1-69.35(c). Any matter may, however, in the discretion of the judge, or by direction of the chief district judge, be removed from any one of such designated places to another, or to or from the county seat, in order to serve the convenience of the parties or to expedite the administration of justice. Id. In addition, § 16.1-69.35:1, Ch. 508 [1974] Acts of Assembly 978, provides that the General District Court for Carroll County shall sit at the Carroll County Courthouse in Hillsville.

Thus, it is my opinion that the only mandatory provisions for the holding of general district courts are
that they be held at the various county seats, the Towns of Herndon and Hillsville and as provided in § 16.1-69.35(c) in any town having a population over 15,000 as of July 1, 1972. It is my further opinion, however, that these requirements are subject to the provision in § 16.1-69.35(c) that any matter may, in the discretion of the judge, or by direction of the chief district judge, be removed from any one of the places designated for holding court in order to serve the convenience of the parties or to expedite the administration of justice.

1Section 16.1-124 pertains to the jurisdiction of municipal courts having jurisdiction in criminal matters.  
2Section 16.1-125 pertains to the jurisdiction of each municipal court which is constituted with a separate traffic court.

DIVORCE. SERVICEMEN STATIONED AT AND RESIDENT OF FORT MEYER MILITARY RESERVATION MAY MAINTAIN DIVORCE SUITS.

January 26, 1981

The Honorable James F. Almand  
Member, House of Delegates

You ask several questions concerning proper venue, residence, and domicile for soliders living at Fort Meyer, a military reservation, who seek a divorce. These questions relate to §§ 20-96 and 20-97 of the Code of Virginia (1950), as amended, which generally establish venue, domicile and residential requirements for divorce suits.1

The background information provided with your inquiry indicates that, prior to its conveyance to the United States Government, Fort Meyer formerly was a part of what is now Arlington County. The information also indicated that, when the conveyance was approved by the Virginia General Assembly, concurrent jurisdiction was maintained for certain purposes.2

You first ask whether the Circuit Court of Arlington County has jurisdiction over a divorce suit brought by a soldier stationed at and a resident of Fort Meyer. In conjunction with your first inquiry, you also ask whether a soldier stationed at Fort Meyer pursuant to military orders is a resident and a domiciliary of Arlington County within the meaning of § 20-97. If the requirements found in § 20-97 are met, a soldier is then "presumed to be domiciled in and to have been a bona fide resident of this State during such period of time." This would be true even if the soldier is stationed at and a resident upon the grounds of Fort Meyer. Also, Arlington County could have jurisdiction of this matter if the above-stated requirements are met. See Report of the
You then ask whether proper venue for such a divorce action would lie in Arlington County if the place of last marital cohabitation was without the State. Section 20-97 requires that members of the armed services must have been stationed in this State and been living in this State with his or her spouse for a period of six months or more and such service person or spouse continue to live in this State until the divorce suit is commenced. From the facts presented in your inquiry, the domicile and residential requirements of § 20-97 would not be met and the matter could not be brought in Arlington County.

You then ask if the Circuit Court of Arlington County would be the proper venue if the requisite jurisdiction, residence and domicile exist and the parties last cohabited within the Fort Meyer military reservation. I am of the opinion that the Circuit Court of Arlington County would be a court with proper venue pursuant to the provisions of § 20-96(B).

Section 20-96(B) provides: "The suit, in either case, shall be brought in the county or corporation in which the parties last cohabitated, or at the option of the plaintiff, in the county or corporation in which the defendant resides, if a resident of this State, and in cases in which an order of publication may be issued against the defendant under § 8.01-316, venue may also be in the county or city in which the plaintiff resides."

Section 20-97 provides in pertinent part: "For the purposes of this section only, if a member of the armed forces of the United States has been stationed in this State and has lived with his or her spouse for a period of six months or more in this State next preceding a separation between such parties, and such service person or spouse continue to live in this State until and at the time a suit for divorce or legal separation is commenced, then such person and his or her spouse shall be presumed to be domiciled in and to have been a bona fide resident of this State during such period of time...."

Ch. 151 [1883-1884] Acts of Assembly, effective February 23, 1884 states in part: "But this consent is given subject to the following terms and conditions, to wit: That this State retains concurrent jurisdiction with the United States over the said tract of land, so that courts, magistrates and officers of this State may take such cognizance, execute such process, and discharge such other legal functions within the same, as may not be incompatible with the consent hereby given."

DOG LAWS. CLAIMANT'S BURDEN OF PROOF.
September 29, 1980

The Honorable John H. Tate, Jr.
County Attorney for Smyth County

You have asked three questions concerning the interpretation of § 29-213.251 of the Code of Virginia (1950), as amended, which provides for the owner of livestock (in this case a cow) injured by dogs to receive the fair market value of the livestock from the dog fund.

1) "Must there be evidence of injury by a dog before any payment can be made under 29-213.25?"

2) "Is there a burden on the landowner to show that the damage was caused by a dog or is his simple statement that it was caused by a dog sufficient to permit the County to make payment under 29-213.25?"

3) "Absent any physical evidence that the cow was injured by a dog, is it permissible for the County to make payment simply on the statement of a landowner that he observed dogs chasing his cattle and their injuries, therefore, are related to a dog not his own?"

You state that the county has been presented with a claim by a citizen for alleged damage to livestock by a dog. The landowner reports that he observed two dogs chasing his cattle. The game warden was called and responded promptly. The game warden's report indicates that he could detect some injury on one cow but could not relate that injury to a dog.

The statute requires that the claimant furnish evidence of the quantity and value of the dead or injured livestock and the reasons the claimant believes that death or injury was caused by a dog. The requirement that the landowner provide the quantity and the value of the livestock injured and the reasons he believes the livestock was injured by a dog cannot be waived.

In response to questions 1) and 2), the injury must be shown by a preponderance of the evidence through the landowner's evidence to have been made by a dog, and the landowner needs to demonstrate those reasons which lead to his conclusion that his cow was injured by that dog. The injury, in some way, must be shown to be related to the dog's chasing the cows, and the landowner has the burden to show this.

Question 3) is answered in part above. The landowner must furnish evidence of damage to his livestock. I do not see how a landowner could give anything else but physical evidence to prove an injury. If the injuries shown can be reasonably related back to the dogs chasing the cows, then the landowner should be compensated. Otherwise, it would be improper to make the payment.
You further ask whether the county attorney has a duty under § 15.1-550 when he believes the board of supervisors does not have proper proof to pay the claim, to note an appeal from the allowance of the claim. The statute requires the Commonwealth's attorney to resist the allowance of any claim which ought not to be allowed. Thus he should so note an appeal in such a case. See Opinion to the Honorable Jerry K. Emrich, County Attorney for Arlington County, dated December 6, 1976, and found in Report of Attorney General (1976-1977) at 211.

1"Any person who has any livestock or poultry killed or injured by any dog not his own shall be entitled to receive as compensation the fair market value of such livestock or poultry provided that: (i) the claimant has furnished evidence within sixty days of discovery of the quantity and value of the dead or injured livestock and the reasons the claimant believes that death or injury was caused by a dog; (ii) the animal warden or other officer shall have been notified of the incident within seventy-two hours of its discovery; and (iii) the claimant first has exhausted his legal remedies against the owner, if known, of the dog doing the damage for which compensation under this section is sought. Exhaustion shall mean a judgment against the owner of the dog upon which an execution has been returned unsatisfied.

Local jurisdictions may by ordinance waive the requirements of (ii) or (iii) or both provided that the ordinance adopted requires that the animal warden has conducted an investigation and that his investigation supports the claim. If there are not sufficient moneys in the dog fund to pay these claims, they shall be paid in the order they are received when moneys become available. Upon payment under this section the local governing body shall be subrogated to the extent of compensation paid to the right of action to the owner of the livestock or poultry against the owner of the dog and may enforce the same in an appropriate action at law."

DOG LAWS, TAXATION, PERSONAL PROPERTY TAX, EXEMPTION OF FARM ANIMALS FROM PERSONAL PROPERTY TAX DOES NOT EXEMPT OWNERSHIP OF DOGS FROM DOG LICENSE TAX.

December 15, 1980

The Honorable Ellis D. Meredith, Treasurer
County of Montgomery

You ask whether an ordinance under § 58-829.1:1(B) of the Code of Virginia (1950), as amended, exempting farm animals from the personal property tax, also exempts the ownership of dogs from the license tax imposed by § 29-213.11.
As you point out, dogs are deemed personal property. See § 29-213.7. Dogs, however, are not normally considered farm animals, and § 58-829.1:1(A) specifies horses, mules, cattle, sheep, goats, hogs and poultry as the only classes of farm animals to be exempted from taxation.¹

Further, the tax mentioned in § 29-213.11 is on the ownership of the dog, not upon the dog's value. The personal property tax, from which livestock may be exempted by local ordinance, is an ad valorem tax on the actual fair market value of the personal property. Compare § 58-829. The two taxes are therefore imposed on different subject matter, and the amounts are determined in different ways.

Finally, the language of § 29-213.11 is mandatory.² The governing body of each county or city is required to impose the tax. The locality has no authority not to impose the tax.³

Accordingly, I find that an ordinance under § 58-829.1:1(B), exempting farm animals from the personal property tax, does not exempt the ownership of dogs from the license tax imposed by § 29-213.11.

¹Compare Opinion to the Honorable Frederick T. Gray, Member, Senate of Virginia, dated August 8, 1979, found in Report of the Attorney General (1979-1980) at 405.
³See, for example, Opinion to the Honorable Emmett W. Hanger, Commissioner of the Revenue for Augusta County, dated May 12, 1980, found in Report of the Attorney General (1979-1980) at 354.
years. Section 24.1-88(b) provides for staggered four-year terms, with an election every two years.

The Opinion of March 13, 1981, finds that the county governing body has authority to return to elections every four years under § 24.1-88(a). The Opinion also notes that the mechanics would be the reverse of the statutory process for conversion to elections every two years. Footnote 4 outlines three steps which make up the reverse process.

The first step is a board resolution. The second step is election of all supervisors for regular four-year terms in November 1983. The third step is an election in November 1981 for the two-year interim term necessitated by the transition back to elections every four years under § 24.1-88(a).

You ask whether Prince Edward County may dispense with this third step, substituting instead a resolution of the governing body rescinding its prior resolution under § 24.1-88(b), and declaring the 1979 election to have been under § 24.1-88(a). In the 1979 election, all candidates were candidates for inchoate four-year terms, inasmuch as the assignment of individual terms was determined by lot after the election, upon certification of the election results.

Therefore, under the procedure followed in Prince Edward County only the governing body has acted. There has been no referendum, and in view of the procedure used to assign individual terms after the election, the electorate necessarily elected each of the present members of the governing body to an inchoate four-year term.\(^1\)

As the Opinion of March 13 recognizes, resolutions and ordinances are legislative acts, and ordinarily the legislative power of a local governing body is not limited or exhausted by one exercise, and a resolution or ordinance once adopted ordinarily may be amended or repealed. Further, in the present situation, the return to elections every four years under § 24.1-88(a) would not be inconsistent with any action of the electorate.\(^2\)

Accordingly, I am of the opinion that Prince Edward County may, under § 24.1-88, dispense with a transition election in November 1981, substituting instead a resolution of the governing body rescinding its prior resolution under § 24.1-88(b), and declaring the 1979 election to have been an election under § 24.1-88(a).\(^3\)

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\(^2\)If there had been an assignment of individual terms by election district prior to the election, a return to concurrent four-year terms (in the manner you suggest) would be inconsistent with the action of the electorate. The fact
that the ballot might not specify the terms is irrelevant. See Miller v. Ayres, 211 Va. 69, 175 S.E.2d 253 (1970).

Implementation of the change is subject to § 5 of the Voting Rights Act of 1965.

ELECTIONS. COUNTIES. BOARDS OF SUPERVISORS. BOARD HAS AUTHORITY TO RESCIND ACTION UNDER § 24.1-88(b) AND RETURN TO ELECTION OF BOARD FOR FOUR-YEAR TERMS EVERY FOUR YEARS UNDER § 24.1-88(a).

March 13, 1981

The Honorable William F. Watkins, Jr.
County Attorney for Prince Edward County

You ask whether a county governing body has authority to rescind its action under § 24.1-88(b) of the Code of Virginia (1950), as amended, that the board of supervisors be elected biennially for four-year terms, and return to election of the board of supervisors for four-year terms every four years under § 24.1-88(a).

Section 24.1-88(a) provides that in each magisterial or election district there shall be chosen at the general election in November 1971, and every four years thereafter, one or more supervisors who shall hold office for the term of four years, except as thereafter provided. Section 24.1-88(b)(i) provides that notwithstanding subsection (a), the governing body of any county may by resolution provide that the board of supervisors be elected biennially for four-year terms.

Section 24.1-88(b)(ii) provides that if the governing body shall have so provided by resolution, then at the next general election, about half of the successful candidates shall be elected for terms of four years, and all other successful candidates shall be elected for terms of two years. Two procedures are provided for assignment of the individual terms of members. In all elections thereafter, all successful candidates shall be elected for terms of four years.

Section 24.1-88 contains no provision authorizing the governing body to reverse the foregoing process. Further, the mechanics of the reverse process would necessarily be somewhat different, and § 24.1-88 is silent as to such mechanics. At the same time, I am aware of no provision, in § 24.1-88 or elsewhere, that prohibits the governing body of counties from returning to election of the board of supervisors every four years under § 24.1-88(a).

Resolutions and ordinances are legislative acts, and ordinarily the legislative power of a local governing body is not limited or exhausted by one exercise, and a resolution or ordinance once adopted ordinarily may be amended or repealed. The mechanics of the reverse process would be the
same, as the process for conversion to biennial elections in the first place.

Accordingly, in the absence of any express prohibition to the contrary, I am of the opinion that a county governing body has authority to rescind its action under § 24.1-88(b), and return to election of the board of supervisors for four-year terms every four years under § 24.1-88(a).

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1 If the number of supervisors is an even number, then exactly half of the successful candidates shall be elected for terms of four years. If the number of supervisors is an odd number, then the smallest number of candidates which creates a majority shall be elected for terms of four years.


3 See Opinion to the Honorable Daniel M. Stuck, County Attorney for New Kent County, dated February 9, 1981 (copy enclosed).

4 See, also, Opinion to the Honorable R. Baird Cabell, Judge, Juvenile and Domestic Relations District Court, Fifth District of Virginia, dated August 8, 1977, and found in Report of the Attorney General (1977-1978) at 222.

5 The essential steps would be 1) a board resolution; 2) election of all supervisors for four-year terms in November 1983, which is the November general election next preceding expiration of the terms of the supervisors elected in 1979 for four-year terms, see Opinion to the Honorable John N. Lampros, Commonwealth's Attorney for Roanoke County, dated October 26, 1977, and found in Report of the Attorney General (1977-1978) at 141; and 3) an election in November 1981 for the two-year interim term necessitated by the transition back to elections every four years under § 24.1-88(a). Compare Opinion to the Honorable Robert C. Oliver, Jr., Commonwealth's Attorney for Northampton County, dated January 22, 1976, and found in Report of the Attorney General (1975-1976) at 23.

6 You also inquired about the effect of § 24.1-88(b)(iii) upon the board of supervisors as now constituted. Section 24.1-88(b)(iii) has been substantially amended by Ch. 12 [1981] Acts of Assembly, which I am enclosing for your review. I will be pleased to address any further questions you may have. Also enclosed is a copy of an Opinion to the Honorable Joan S. Mahan, Executive Secretary, State Board of Elections, dated December 12, 1975, and found in Report of the Attorney General (1975-1976) at 119, which seems relevant to your inquiry.

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ELECTIONS. FAIR ELECTION PRACTICES ACT. "POLITICAL ACTION COMMITTEE" WHICH ACTS SOLELY TO COLLECT FUNDS WHICH ARE THEN PAID OVER TO CANDIDATES IN STATEWIDE ELECTION. UNDER PRESENT § 24.1-255, COMMITTEE REQUIRED TO REPORT TO CANDIDATES' TREASURER. UNDER NEW TEXT OF § 24.1-255, COMMITTEE REQUIRED TO FILE WITH STATE BOARD OF ELECTIONS.
June 4, 1981

The Honorable Franklin P. Hall
Member, House of Delegates

You ask about the applicability of the reporting requirements under § 24.1-255 of the Code of Virginia (1950), as amended, to a "political action committee" which acts solely to collect funds which are then paid over to candidates in a statewide election. Section 24.1-255 is part of the Fair Election Practices Act (the "Act").

The third paragraph of § 24.1-255 provides that any committee, other than a candidate's campaign committee, which receives or disburses over $100 in any election, not paid, delivered or reported to a candidate, his treasurer or a political party committee shall maintain records, and report such receipts and disbursements, under the Act, to the State Board of Elections.

The first paragraph of § 24.1-255 provides that all moneys over $100 received by or on behalf of any candidate or in relation to his candidacy from every source shall be paid over to the candidate's treasurer or shall be reported to such candidate's treasurer in such detail and form as to allow the treasurer to comply fully with the Act.

Political action committees, for purposes of § 24.1-255, are committees other than a candidate's campaign committee. Your inquiry is about a committee that pays moneys solely to candidates or their treasurers. Section 24.1-255 presently does not require a report of receipts and disbursements to the State Board of Elections by the committee in such circumstances.

However, under the first paragraph of § 24.1-255, as noted above, a candidate must presently report to the State Board of Elections all money receipts on behalf of the candidate or in relation to his candidacy from every source. Accordingly, a political action committee must report to the candidate in such detail and form as to allow the treasurer to comply fully with the Act. These requirements will change, however, as of July 1, 1981.¹

However, under the present text of § 24.1-255, it is my opinion that a "political action committee" which pays moneys solely to candidates in a statewide election, is required only to report such receipts and payments to the candidates' treasurer in such detail and form as to allow the treasurers to comply fully with the Act.

¹See Ch. 425 [1981] Acts of Assembly, which deletes from the third paragraph of § 24.1-255 the words "not paid, delivered or reported to a candidate, his treasurer or a political party committee." Under the new text of
§ 24.1-255, the political action committee will be required to file with the State Board of Elections.

ELECTIONS. PRESIDENTIAL ELECTIONS. BALLOT. WITHDRAWAL OR DEATH OF INDEPENDENT CANDIDATE. ELECTORS ENTITLED TO FURNISH NAME OF NEW INDEPENDENT CANDIDATE.

August 18, 1980

Mrs. Joan S. Mahan, Secretary
State Board of Elections

You ask about placing the name of a new candidate for President or Vice-President on the November ballot, in the event a prior candidate dies or withdraws after the prior candidate's name has been furnished to the State Board of Elections, pursuant to §§ 24.1-158 and 24.1-159 of the Code of Virginia (1950), as amended.

Elector versus Candidates

The statutory terminology relating to "presidential elections" requires close attention. A number of different offices, elections and candidates are involved.

For example, on at least one occasion, the statutes speak of elections for President and Vice-President of the United States. See § 24.1-158. In the same section, there is also mention of candidates for President and Vice-President. Nevertheless, in the same section again, there is mention of an election of electors ("at least by noon of the sixtieth day before any election for the electors"). See also, § 24.1-159 ("the official ballot to be used in the election of electors"). And in § 24.1-161 there is mention of candidates for electors ("shall designate their preference for candidates for electors").

It is important then to determine which names on the Virginia ballot are names of direct candidates in the Virginia election, and which names may be merely identifying designations.

The election in question is held pursuant to § 24.1-8, which provides that at the election held every four years in November there shall be chosen by the qualified voters of the Commonwealth a certain number of electors for President and Vice-President of the United States.

The basic statutes on furnishing names for the ballot are §§ 24.1-158 and 24.1-159. They provide that the names of the electors selected by the different political parties and party groups are to be furnished to the State Board of Elections no later than noon on the sixtieth day before any election for the electors, together with the names of the candidates for President and Vice-President for whom such electors are expected to vote in the Electoral College.
Once the names have been furnished, it is the duty of the State Board of Elections under § 24.1-160 to certify to the electoral boards for printing the form of official ballot which is to be uniform throughout the Commonwealth. The form of uniform ballot is to contain the party name, if any, and below the party name in parenthesis the words "Electors for .......... President and .......... Vice-President" with the blanks filled in with the names of the candidates for whom said electors are expected to vote in the Electoral College. See § 24.1-160.

Under § 24.1-161, the voters shall designate their preference for candidates for electors by marking the square preceding the party name of their choice, and the ballots so marked shall be counted as if squares preceding the names of the individual electors had been so marked. See, also, § 24.1-205 (candidates for electors described as a class on voting machine ballots). Under § 24.1-162, the electors selected by the different political parties and party groups shall be expected to vote in the Electoral College (1) in the case of a political party, for the nominee of the national convention, and (2) in the case of a party group, for such persons as may be named in its petition.

Under § 24.1-9, in December after their election, the electors are to convene at the capitol building of the Commonwealth. If there is a vacancy in the office of electors, for any cause, the electors present are to immediately fill such vacancy. Thereafter, the electors shall proceed to perform the duties required of such electors by the Constitution and laws of the United States. Further, § 24.1-9 provides that if Congress shall determine on a different time for choosing electors, or for their meeting to give their votes, then the election shall be held and the meeting of the electors take place as prescribed by authority of the United States.

Clearly then there are two elections in connection with the selection of the President and Vice-President of the United States. One of those elections is the selection of the President and Vice-President by the Electoral College. That election takes place ordinarily in December after the election of the electors. See § 24.1-9. The other election is the choosing of electors by the qualified voters of the Commonwealth. That election takes place in November. See § 24.1-8.3

The ballot in question is for the November election for the choosing of electors. Despite short-hand usage to the contrary, the candidates for President and Vice-President of the United States are not the direct candidates on the November ballot. The direct candidates on that ballot are the "candidates for electors," in the language of § 24.1-161. Accordingly, the names of the candidates for President and Vice-President on the November ballot are merely identifying designations, similar in principle to the party name authorized by § 24.1-160.
Death or Withdrawal of Candidate of A Political Party or Party Group

Your first question is whether, after furnishing the names required under §§ 24.1-158 and 24.1-159, a political party or party group may have placed on the November ballot the name of a new candidate for President or Vice-President, in the event a prior candidate dies or withdraws.

There is nothing in §§ 24.1-158 and 24.1-159 that prevents an amendment to an identifying designation, so long as the amendment is consistent with the facts. Subject to time limitations, once such an amendment is submitted and verified, it is the duty of the State Board of Elections to forward the amended designation to the electoral boards pursuant to § 24.1-160.4

Accordingly, subject to the limitations just noted, I find that, after furnishing the names required under §§ 24.1-158 and 24.1-159, a political party or party group may have placed on the November ballot the name of a new candidate for President or Vice-President, in the event a prior candidate dies or withdraws.

Death or Withdrawal of Independent Candidate

Your second question is whether, after furnishing of names required by § 24.1-159, the name of a new independent candidate for President or Vice-President may be placed on the November ballot in the event a prior candidate dies or withdraws. If the name of a new independent candidate is allowed, your third question asks who is entitled to make the designation. The two questions will be answered together.

Once again, the names of the candidates for President and Vice-President are merely identifying designations on the November ballot. The candidates for electors are the direct candidates on that ballot. The same principles apply.

The only difference is the lack of a central organization recognized by statute, as with the party group. Normally, however, there will be some continuing affiliation between the candidates for electors and the remaining candidate for President or Vice-President. Even though a group of voters supporting independent candidates for President and Vice-President may not be recognized as a political group under the Virginia statutes, that group may have for certain purposes an organization fully comparable to a party group.5

As with the party groups, it need not be an immediate concern of the State Board of Elections how an independent group of voters arrives at the name of a new candidate for President or Vice-President for whom the electors are expected to vote in the Electoral College. Subject to time limitations, once the name is submitted and verified, it is
again the duty of the State Board of Elections to forward the amended identifying designation to the electoral boards pursuant to § 24.1-160.

Accordingly, subject to the limitations just noted, I find that, after the furnishing of names required by § 24.1-159, the candidates for electors are entitled to furnish the name of a new independent candidate for President or Vice-President to be placed on the November ballot, in the event a prior candidate dies or withdraws.

Deadline for Furnishing Name of New Candidate For Ballot

Your fourth question asks about the deadline under §§ 24.1-158 and 24.1-159 for furnishing to the State Board of Elections the name of a new candidate for President or Vice-President for whom electors are expected to vote in the Electoral College, in the event a prior candidate dies or withdraws.

Both sections provide that the names of candidates for President and Vice-President shall be furnished to the State Board of Elections at least by noon of the sixtieth day before any election for the electors. Section 24.1-160 further provides that it shall thereupon be the duty of the State Board of Elections immediately to so notify the electoral boards for printing the form of official ballot to be uniform throughout the Commonwealth.

I am aware of no reason why this deadline does not apply with equal force to furnishing the name of a new candidate for President or Vice-President. Under certain circumstances, a later date might become applicable under the rationale of this Office's Opinion to you dated July 2, 1973, found in Report of the Attorney General (1973-1974) at 143, but no special circumstances have been suggested.6

Accordingly, I find that, absent special circumstances, the deadline under §§ 24.1-158 and 24.1-159 for furnishing to the State Board of Elections the name for a new candidate for President or Vice-President, in the event a prior candidate dies or withdraws, is noon of the sixtieth day before any election of electors.

1See, also, § 24.1-238 which provides that the proceedings for certain election contests shall be in the Circuit Court of the City of Richmond before a special court, including contest proceedings in the case of an election of electors for President and Vice-President.
2The Electoral College can involve questions of federal as well as State law, but your present inquiries can be answered under State law. Compare 3 U.S.C. §§ 1-21 (presidential elections and vacancies).
There is much commentary on the two-step process of the Electoral College. The commentary questions the desirability of the two-step process, but not its existence. The Virginia statutes are consistent with the two-step process that the Electoral College requires.

Section 24.1-110 might seem to apply in the event of the death or withdrawal of a political party's candidate for President or Vice-President, but that candidate is not the direct candidate in the Virginia election.

Under these circumstances, independent candidates for President or Vice-President are not fully independent. They are instead part of a voluntary association or common enterprise.

However, in the event of dispute or a change of heart, any participant is free to withdraw, at least from the standpoint of the statutes. For example, the voters do not commit their votes when they sign a petition. Likewise, the candidates for electors are not committed as to their votes in the Electoral College. And any candidate for President or Vice-President may, upon timely notice to the State Board of Elections, withdraw his name from the ballot. See Opinion to the Honorable L. Stanley Hardaway, Executive Secretary, State Board of Elections, dated August 9, 1968, found in Report of the Attorney General (1968-1969) at 81. Accordingly, to avoid confusion, the persons furnishing the name of the new candidate for President or Vice-President should be asked to represent that they speak not only for the candidates for electors but also with the consent of the remaining candidate for President or Vice-President.

One key question would be the leeway, if any, between the 60-day deadline for furnishing names to the State Board of Elections, and the practical deadline imposed upon the board by the requirements for printing the form of official ballot which is to be uniform throughout the Commonwealth (together with all the other ballots required for the November election). I understand Virginia's 60-day deadline is one of the latest among the States, and therefore one of the most generous in terms of ballot access. The 60-day deadline is also the same for political parties, party groups and independents.

ELECTIONS. REFERENDUMS. ALCOHOLIC BEVERAGE CONTROL LAWS. § 15.1-29.5(e) PROHIBITS SUNDAY CLOSING LAW REFERENDUMS MORE OFTEN THAN ONCE EVERY TWO CALENDAR YEARS IN EVEN CALENDAR YEAR.

September 2, 1980

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You ask whether a county may hold a referendum on the Sunday Closing Law on the day of the general election in November 1980, under § 15.1-29.5 of the Code of Virginia (1950), as amended, when the county held a prior referendum on the same issue in December 1978.
Section 15.1-29.5(e) provides that no referendum on the Sunday Closing Law shall be held more often than once every two years in the even calendar year.

Prior to the 1980 amendment to § 15.1-29.5, some latitude was allowed in scheduling referendums on the Sunday Closing Law. See Ch. 699 [1980] Acts of Assembly. Now, however, referendums are to be held only on the day of a general election. See § 15.1-29.5(b).¹

The term "year" can mean a period of 365 days (366 days in leap years) with no set day of beginning, for example, a year beginning November 4, 1979, and ending November 3, 1980. See Opinion to the Honorable Albert Teich, Jr., Member, House of Delegates, dated September 28, 1972, found in Report of the Attorney General (1972-1973) at 501. A year can also mean a calendar year, that is, a like period beginning on January 1 and ending December 31. See § 1-13.33 (unless otherwise expressed, the word "year" shall be construed to mean a calendar year).

In the present context, the term necessarily means a calendar year, inasmuch as the general election day in November is not set for a certain numbered day of the month, like November 4, but falls instead on the Tuesday after the first Monday, which can be any day between November 2 and November 8. See § 24.1-1(5)(a). This means that the November general election often falls on a day that is not 365 days (or 366 days in leap years) after the comparable election day in the immediately prior calendar years. A statutory limitation on the frequency of referendums is not to be construed as dependent on the number of days between successive Tuesdays after first Mondays in November.²

Your inquiry, of course, is not about the time span between successive November general elections. Your inquiry is instead about the transition from open to fixed scheduling for referendums on the Sunday Closing Law. The principles involved are the same, however. Section 15.1-29.5(e) prohibits referendums on the Sunday Closing Law more often than once every two calendar years in the even calendar year.³

Accordingly, I find that a county may hold a referendum on the Sunday Closing Law on the day of the general election in November 1980, under § 15.1-29.5, even though the county held a prior referendum on the same issue in December 1978.

¹Pursuant to § 24.1-1(5)(a), a general election "means any election held in the Commonwealth on the Tuesday after the first Monday in November or on the first Tuesday in May for the purpose of filling offices regularly scheduled by law to be filled at those times...."
There is regularly a general election in cities, towns and counties in November of even calendar years for members of the House of Representatives. See § 24.1-6.

There is also regularly a general election in cities and towns in May of even calendar years for mayors and members of council. See § 24.1-90.

In 1979 the general election day was November 6; in 1980 it will be November 4; in 1981 it will be November 3; in 1982 it will be November 2).

Compare § 22.1-46 (limitation on time of holding subsequent referendums on alternate method of selecting school boards--"following any referendum provided for in this article, no further such referendum shall be held within four years thereafter"--no limitation to the day of a general election). Compare § 22-79.6.

ELECTIONS. REFERENDUMS. SCHOOLS. CHANGE IN METHOD OF SCHOOL BOARD SELECTION. FREQUENCY LIMIT IN § 22.1-46 APPLIES WHETHER REFERENDUM BY BOARD RESOLUTION OR VOTER PETITION.

July 24, 1980

The Honorable James E. Buchholtz
County Attorney for the County of Roanoke

You ask whether the limit in § 22.1-46 of the Code of Virginia (1950), as amended, as to the frequency of school referendums applies after a referendum in Roanoke County pursuant to board resolution, as well as after a referendum pursuant to voter petition.

Section 22.1-42 provides that upon petition of a certain number of registered voters, the circuit court shall order that a referendum be held on the question of changing the method of selection of members of the school board. The same § 22.1-42 provides that such a referendum shall also be ordered upon resolution of the board of supervisors, in the case of Roanoke County.

Section 22.1-42 is one of the six sections in Art. 3 of Ch. 5 of Title 22.1 (§§ 22.1-41 to 22.1-46) relating to an alternate method of selecting county school boards, originally enacted pursuant to Ch. 126 [1970] Acts of Assembly as Art. 2.1 of Ch. 6 of Title 22 (§§ 22-79.1 to 22-79.6).

Section 22.1-46 provides that, regardless of the results, following any referendum provided for in Art. 3, no further such referendum shall be held within four years thereafter. The provision for Roanoke County in § 22.1-42 is part of Art. 3.1

As required by § 24.1-165, no referendum shall be placed upon the ballot unless specifically authorized by statute. See Opinion to the Honorable George W. Jones, Member, House
Accordingly, I find that the frequency limit in § 22.1-46 applies after a referendum in Roanoke County pursuant to board resolution, as well as after a referendum pursuant to voter petition.

1The provision for Roanoke County was not added until Ch. 10 [1979] Acts of Assembly. A later enacted specific statute is often construed to repeal an earlier enacted general statute, but only to the extent necessary to abrogate conflict, and no further. Opinion to the Honorable John P. Alderman, Commonwealth's Attorney for Carroll County, dated January 14, 1977, found in Report of the Attorney General (1976-1977) at 102. There is no conflict, however, between the provision for Roanoke County and § 22.1-46.

2The provision for Roanoke County speaks of the board resolution being in lieu of the petition, indicating a legislative intent to provide merely an alternative method of obtaining a referendum. Under the resolution method, the interests of the voters are given direct protection by the statutory requirement for a public hearing prior to passage of the resolution. Whichever method is used, there is occasion for obtaining a preliminary indication of the electorate's wishes. The two methods are not intended to serve separate and mutually exclusive interests within the community.

FEES. GUARDIAN AD LITEM. DETERMINED BY § 8.01-9.

December 2, 1980

The Honorable A. Burke Hertz, Judge
Juvenile and Domestic Relations District Court
Fauquier County

You have asked whether the fee of a guardian ad litem appointed by the court pursuant to § 16.1-266 of the Code of Virginia (1950), as amended, is subject to the maximum fee limitations for appointed counsel set forth in § 16.1-267. Your inquiry relates to a child custody case for which a guardian ad litem was appointed for the minor child pursuant to § 16.1-266(D).

I am of the opinion that the fee of a court-appointed guardian ad litem is to be determined under § 8.01-9 which states, in part:

"When, in any case, the court is satisfied that the guardian ad litem has rendered substantial service in representing the interest of the person under a disability, it may allow such guardian reasonable compensation therefor, and his actual expenses, if any,
to be paid out of the estate of such person; provided,
if such estate is inadequate for the purpose of paying
such compensation and expenses, all, or any part
thereof, may be taxed as costs in the proceeding...."

The Virginia Supreme Court noted in Patterson v. Old
Dominion Trust Co., 156 Va. 763, 159 S.E. 168 (1931), that
§ 8.01-9 controls the payment of guardian ad litem fees in
Virginia. The only exception to payment out of the estate of
the minor or, to taxing such fees as costs, as directed by
§ 8.01-9, is when the efforts of the guardian ad litem create
or add to a fund benefiting all parties concerned. Patterson v. Old Dominion Trust Co., supra. Accord,

Section 16.1-266 provides for appointment of a guardian
ad litem and/or counsel for a minor in varying circumstances.
When counsel is appointed, § 16.1-267 sets the maximum fee
which may be assessed as costs against the parent for legal
services rendered on behalf of the minor by court-appointed
counsel. The functions and duties of a guardian ad litem are
broader than those normally rendered by an attorney to his
The fee of a guardian ad litem, which must be determined
by the court, should be "reasonable" and include "actual
expenses" in accordance with the provisions of § 8.01-9.

FORFEITURES. CIRCUIT COURTS HAVE EXCLUSIVE JURISDICTION TO
ENFORCE FORFEITURES FOR VIOLATION OF GAME LAWS UNDER
§ 29-144.3.

March 20, 1981

The Honorable J. R. Zepkin, Judge
General District Court
Ninth Judicial District

You have inquired whether § 29-144.3 of the Code of
Virginia (1950), as amended, or any other section, permits a
general district court upon convicting a defendant of illegal
hunting under § 29-144.2 to order the forfeiture of any
property described in § 29-144.3.

Section 29-144.3 expressly provides that property seized
for forfeiture under § 29-144.2 be condemned in proceedings
under Ch. 15 of Title 19.1 (Re-codified in 1975 as Ch. 22
(§ 19.2-369, et seq.) of Title 19.2). Section 19.2-369
gives exclusive jurisdiction to enforce forfeitures to the
circuit courts. Under that statute, the Commonwealth's
attorney for the county where the seizure occurs "shall file
in the clerk's office of the circuit court of his county or
city an information in the name of the Commonwealth against
such property or money by name or general designation." The
contents of the information to be filed by the Commonwealth's
attorney must include the allegation of seizure of the
property and causes or grounds for forfeiture. See
§ 19.2-370. Conviction in general district court would be one such ground.

I am therefore of the opinion that § 29-144.3 grants exclusive jurisdiction to circuit courts to order the forfeiture of property described in § 29-144.3 upon a defendant's conviction under § 29-144.2.

FORFEITURES. MUST BE STRICTLY CONSTRUED.

July 23, 1980

The Honorable B. A. Davis, III, Judge
Twenty-Second Judicial Circuit

You have asked for my opinion interpreting § 55-66.31 of the Code of Virginia (1950), as amended, concerning forfeitures for failure to release recorded liens after payment has been made. Specifically, you have asked whether the forfeiture of twenty dollars is repeated "at the expiration of each five day period which passes without a release being made" or "would an additional notice of payment made to the Clerk have to be given the lien creditor at the expiration of each five day period that passes without the release being made" before an additional twenty dollars would be forfeited.

The statute provides such a forfeiture "for any failure" after notice. Forfeitures are disfavored in the law and, therefore, forfeiture statutes must be narrowly construed. See, generally, 14B M.J. Penalties and Forfeitures § 5 (1978) and cases cited therein. I conclude that successive forfeitures of twenty dollars may only be imposed following successive notices after each of which the lien creditor has been given five days to act. Nothing in § 55-66.3 would prevent such notices from being issued consecutively every five days for so long as the lien creditor fails to cause the deed of trust to be released after payment. There is, of course, the additional opportunity for the debtor to have the deed of trust released under the provisions of § 55-66.5.

1"When payment or satisfaction is made of a debt secured by mortgage, deed of trust, vendor's lien, or other lien...the lien creditor...shall cause such full payment or satisfaction...to be recorded on a certificate of satisfaction...in the clerk's office or be entered on the margin of the page of the book where such encumbrance is recorded; and for any failure so to do after five days' notice, if the obligation...secured by such lien, and fully paid as aforesaid, shall be left with...the clerk in whose office such encumbrance is recorded, until the lien is released as provided by this chapter, shall forfeit twenty dollars...."
GAMBLING. WHEN PERSON "CONDUCTS" AN ILLEGAL GAMBLING ENTERPRISE UNDER § 18.2-328.

April 3, 1981

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

You have asked when a person "conducts" an illegal gambling enterprise under § 18.2-328 of the Code of Virginia (1950), as amended, and further where the proper venue for such cases is.

Section 18.2-328 provides that an operator of an illegal gambling enterprise, activity or operation shall be guilty of a felony. An "operator" is defined in § 18.2-325(3) as "any person, firm or association of persons, who conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling enterprise, activity or operation." (Emphasis added.)

It has repeatedly been held in Virginia that penal statutes are to be construed strictly against the State. Johnson v. Commonwealth, 211 Va. 815, 180 S.E.2d 661 (1971). This rule also 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). Further, it is the rule in Virginia that "words of a statute must be given their ordinary meaning unless a contrary meaning is clearly intended." McCarron v. Commonwealth, 169 Va. 387, 394, 193 S.E. 509, 512 (1937).

"Conduct" is defined in Webster's New Collegiate Dictionary (1974 ed.) at 235, as "to show the way; to act as leader or director; to carry on or out...from a position of command...." See, also, State v. Mahfouz, 158 So. 609 (La. 1935); People v. Boyden, 129 N.E.2d 39 (Ill. 1955). I am of the opinion that it is this definition to which § 18.2-325(3) refers when it defines an "operator" as "any person...who conducts..." an illegal gambling activity. (Emphasis added.) This conclusion is reinforced by the fact that a separate penalty is provided for accessories to illegal gambling activities under § 18.2-330.2

I would note that the definition of "conduct" is given a much broader definition in the federal statutes. A person who performs virtually any function other than as a customer or bettor in the operation of illegal gambling "conducts" an illegal gambling activity under federal law. See United States v. Joseph, 591 F.2d 1068 (4th Cir. 1975). However, as discussed above, I am of the opinion that the use of such a broad and sweeping definition would be erroneous under the Virginia statutes.

Section 19.2-244 provides that except as otherwise provided by law, the prosecution of a criminal case shall be
had in the county or city in which the offense was committed. Further, the burden is on the Commonwealth to prove venue by evidence which is direct or circumstantial. Pollard v. Commonwealth, 220 Va. 723, 261 S.E.2d 328 (1980). While it is impossible to address every different factual situation, it is an "operator" who is guilty under § 18.2-328 and an "operator" includes anyone who conducts, finances, manages, supervises, directs or owns all or part of an illegal gambling activity. Thus, venue would lie where the actual conducting, financing, managing, supervising, directing or owning occurred. Furthermore, I am of the opinion that there cannot be an "operator" of an illegal gambling enterprise, activity or operation until some actual "illegal gambling" as defined under § 18.2-325(1) has been shown to have occurred somewhere in Virginia.

1 Generally, a violation of § 18.2-328 constitutes a Class 6 felony, but with the following proviso: "provided, however, that if any such operator shall engage in any illegal gambling operation which has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross income of two thousand dollars or more in any single day, he shall be fined not more than twenty thousand dollars and imprisoned not less than one nor more than ten years."

2 Section 18.2-330 provides: "Any person, firm or association of persons, other than those persons specified in other sections of this article, who knowingly aids, abets or assists in the operation of an illegal gambling activity, shall be guilty of a Class 2 misdemeanor."


GAME AND INLAND FISHERIES. DAMAGE STAMPS. EFFECTIVE JULY 1, 1981, NEW STATE STATUTE WILL GOVERN ADMINISTRATION OF EXISTING DAMAGE STAMP ORDINANCE.

May 15, 1981

The Honorable Edward M. Jasie
Commonwealth's Attorney for Craig County

You have asked whether after the effective date of newly-enacted § 29-92.2 of the Code of Virginia (1950), as amended, Craig County Board of Supervisors can implement an existing damage stamp ordinance during the period May 1, 1981, to April 30, 1982.

Section 29-92.2 is part of a general revision of the damage stamp laws which takes effect on July 1, 1981. Under the provisions of § 29-92.2 damage stamp ordinances shall not be effective during any annual period from May 1 to April 30 when the damage stamp special fund exceeds certain limits. As you point out, the first such full May 1 to April 30 annual period following the effective date of § 29-92.2 will
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commence on May 1, 1982. Subsection B of § 29-92.2, however, provides:

"Any locality which has adopted an ordinance prior to July 1, 1981, will not be required to adopt a new ordinance; however, any prior ordinance shall be administered pursuant to the provisions of this article."

I conclude that the requirement of subsection B that existing ordinances be administered under § 29-92.2 means that counties whose damage stamp fund exceeds the statutory amount limitation as of July 1, 1981, cannot after that date enforce such ordinances during the period from July 1, 1981, to April 30, 1982.¹

It is, therefore, my opinion that the current ordinance may remain in effect after July 1, 1981, but as of that date the limitations contained in § 29-92.2 will apply.

¹Section 29-92.2 limitations on enforcement of damage stamp ordinances do not apply the first three years following enactment of such ordinances. Thus, if Craig County's ordinance has existed less than three years on July 1, 1981, the limitations of § 29-92.2 would not prevent enforcement of the ordinance.

GAME AND INLAND FISHERIES. REGULATION PERMITTING KILLING OF FOXES WITHOUT CONDITION BY LANDOWNER OR TENANT IS PROPER EXERCISE OF AUTHORITY UNDER § 29-125.

October 16, 1980

The Honorable Cynthia D. Kinser
Commonwealth's Attorney for Lee County

You have asked whether an owner or tenant of land may kill foxes thereon at any time without regard to whether they are damaging domestic stock or fowl.

Section 29-138 of the Code of Virginia (1950), as amended, provides a continuous open season for hunting foxes with dogs, and also allows owners or tenants to kill foxes at any time on their own land when those animals are damaging domestic stock or fowl. No permit or permission is required for the latter activity and it need not be done with dogs.

Other statutes and regulations are also relevant to your question. Section 29-125 grants the Commission of Game and Inland Fisheries (the "Commission") broad authority to regulate the hunting and killing of all wild animals within the Commonwealth. Acting under that statute, the Commission has adopted Regulation R8-7(a), which establishes a continuous closed season for shooting foxes with guns in a
number of counties, including Lee County. The Commission has also adopted Regulation R8-9, prohibiting the trapping of foxes in Lee County. Notwithstanding those rules, however, the Commission has promulgated statewide Regulation R8-11, which allows an owner or tenant to kill or have killed foxes at any time on his own land. That regulation does not place any conditions upon such right to kill foxes.

In my opinion, Regulation R8-11 does not directly conflict with § 29-138. Regulation R8-11 would permit a landowner to kill foxes on his land before his stock or fowl have been damaged. Even assuming a conflict, however, it is my opinion that the Commission has authority under § 29-125 to promulgate regulations that alter statutory limits on hunting and killing wild animals. By amending §§ 29-127 and 29-128.1 at its 1979 Session, the General Assembly recognized that conflicts might arise between Commission regulations and statutes. Those statutes authorize legislative committees to review such conflicts and provide that any regulation may be overruled by joint legislative resolution. See § 29-127. The regulation to which you have referred, R8-11, is presently in effect.

In summary, therefore, I conclude that an owner or tenant of land may kill foxes thereon at any time, without regard to whether those animals are damaging domestic stock or fowl.

GAME AND INLAND FISHERIES. TRAPPING. OWNER OR BONA FIDE LESSEE OF LAND NOT REQUIRED TO MARK TRAPS SET ON HIS OWN LAND.

April 22, 1981

The Honorable Frederick H. Creekmore
Member, House of Delegates

You asked whether the Virginia Commission of Game and Inland Fisheries (the "Commission") has the authority to require a trapper to mark traps set on land owned or leased by him.

Section 29-143(h) of the Code of Virginia (1950), as amended, makes it unlawful to set a trap on the lands or waters of another without attaching thereto the name and address of the trapper. By implication this statutory requirement does not apply to the owner of the land who sets a trap on his own land.

To implement the requirement embodied in the foregoing statute, the Commission has adopted Regulation R2-9 which makes the owner of any trap responsible for marking it with his name. Because questions such as yours have arisen regarding the scope of that Regulation, the Commission presently has under consideration an amendment which would expressly exclude from its coverage traps stored on the
owner's property or in transit. Accordingly, I conclude that the requirement of § 29-143(h) does not apply to a landowner's use of traps on his own land.

Section 29-130.2(a) defines the term "landowner" for certain purposes stated therein as the legal title holder, lessee, occupant or other person in control of land or premises. Also, under § 29-52(2), the exemption for landowners from license requirements to hunt, trap or fish on their own lands extends to the tenants, renters and lessees of the landowner. It is my opinion that these statutes indicate that lessees and tenants are to be treated in the same manner as fee owners of the land for purposes of the requirements of § 29-143(h).

I, therefore, conclude that a tenant or lessee is not required by law to mark a trap set on the land which he rents or leases.

GARNISHMENTS. STATE EMPLOYEE'S CONTRIBUTION TO VSRS.

October 15, 1980

The Honorable J. R. Zepkin, Judge
General District Court
Ninth Judicial District

You have requested my opinion to a question based upon the following fact situation. A State employee has voluntarily terminated his employment prior to retirement and has elected, pursuant to § 51-111.58 of the Code of Virginia (1950), as amended, to receive a cash refund of his accumulated contributions to the Virginia Supplemental Retirement System, together with interest on those contributions as provided by law. The refund, however, has not yet been disbursed by the State. The legal issue which you then raise is whether or not these funds are subject to attachment or garnishment while in the custody of the State or are they exempt from attachment and garnishment by virtue of § 51-111.15?

Section 51-111.58(a) provides that:

"If a member has ceased to be an employee, otherwise than by death or by retirement under the provisions of this chapter, he shall be paid, on demand or as soon thereafter as practicable, the amount of his accumulated contributions reduced by the amount of any retirement allowances previously received by him under any of the provisions of this chapter or the abolished system."

Section 51-111.15 provides that:

"Retirement allowances and other benefits accrued or accruing to any person under the provisions of this chapter, and the assets of the retirement system created
under this chapter, are hereby exempted from any State, county, or municipal tax, and shall not be subject to execution, attachment, garnishment or any other process whatsoever, nor shall any assignment thereof be enforceable in any court."

The critical term in the above section is "the assets of the retirement system." Section 51-111.48 states that:

"All of the assets of the retirement system shall be credited, according to the purpose for which they are held, to one of two accounts, namely, the member's contribution account, and the retirement allowance account."

The member's contribution account is further defined in § 51-111.49(a) which states that:

"The members' contribution account shall be the account to which all members' contributions and interest allowances as provided in this chapter shall be credited; from this account shall be paid the accumulated contributions of a member required to be returned to him upon withdrawal, or paid in the event of his death before retirement."

Sections 51-111.48 and 51-111.49 make it clear that the assets of the retirement system include the member's contributions and interest allowances which are required to be returned to him upon his withdrawal from the system. Therefore, until they are returned to him, these funds are assets of the retirement system which § 51-111.15 makes exempt from execution, attachment, garnishment or other process. For this reason, I am of the opinion that the funds described in your situation are not subject to attachment or garnishment while in the custody of the Virginia Supplemental Retirement System.

GARNISHMENTS. SUMMONS TO BE MAILED TO JUDGMENT DEBTOR'S LAST KNOWN ADDRESS IF SHERIFF'S RETURN SHOWS "NOT FOUND."

June 3, 1981

The Honorable William R. Shelton, Judge
Chesterfield General District Court

You have asked whether the provisions of § 8.01-511 of the Code of Virginia (1950), as amended, are satisfied by the mailing of a garnishment summons by first class to the last known address of the judgment debtor when the original return of the garnishment summons by the sheriff showed the debtor to be "not found" at such address.

Section 8.01-511 provides, in part, as follows:
"The summons shall be served on the garnishee, and shall be served on the judgment debtor; provided, that if the serving officer is unable to serve the judgment debtor, pursuant to § 8.01-296(1) or (2), the judgment creditor shall file with the clerk a certificate setting forth the last known address of the judgment debtor, and furnish the clerk with an envelope with first-class postage attached, addressed to such address, whereupon a copy of the summons shall be sent by the clerk by first-class mail to the judgment debtor and his last known address...."

One of the circumstances in which the serving officer is "unable to serve the judgment debtor" is when he is "not found" at the address shown on the summons. Accordingly, the alternative procedure for attempting notification by first class mail becomes applicable. This result is not altered by the fact that a return of "not found" indicates the "last known address" of the debtor to be no longer his actual address. Actual notice to the judgment debtor is not necessary to give the court jurisdiction to garnish the property held by the garnishee.

I am therefore of the opinion that compliance with the aforementioned procedures of § 8.01-511 entitles the judgment creditor to judgment despite a previous return of "not found" at the address to which notice has been mailed.

GENERAL ASSEMBLY. AUTHORIZED TO ESTABLISH ETHICS COMMITTEE.

October 24, 1980

The Honorable J. Samuel Glasscock
Member, House of Delegates

You ask whether the General Assembly has authority to establish an ethics commission to investigate and report on complaints concerning the conduct of its members.

You advise that such a commission would be composed of four citizen appointees, one each appointed by the majority and minority leader of both legislative houses. The fifth member of the commission would be a retired judge appointed by the four citizen appointees and all five appointments would require ratification by vote of each legislative house.

It is my understanding that the commission would be authorized to investigate ethics complaints concerning General Assembly members, report factual findings and make advisory recommendations on appropriate disciplinary action, if any, to the General Assembly.

Article IV, § 7 of the Constitution of Virginia (1971) provides that each house of the legislature "shall judge...the election, qualification, and returns of its
members, may punish them for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member." The authority of the legislative branch to judge the qualifications of and discipline its members has, indeed, been viewed as the exclusive province of the legislature under the separation of powers doctrine.

The legislature may not constitutionally delegate to others its legislative functions, but it may make laws empowering others to determine facts and circumstances upon which it will act in performing its functions. Stuart v. Sinking Fund Comm'rs., 123 Va. 224, 96 S.E. 239 (1918); see, also, 4A M.J. Constitutional Law § 40 (1974). The citizen commission you describe would have only investigative and advisory authority, leaving the membership of the legislature complete authority to discipline its members. Accordingly, the proposed commission would not constitute an improper delegation of legislative authority.

I am, therefore, of the opinion that the General Assembly may legally establish the ethics commission described in your inquiry.

GOLD AND SILVER. REGULATION OF DEALERS IN PRECIOUS METALS.

August 21, 1980

The Honorable Sidney Barney
Commonwealth's Attorney for the City of Petersburg

You have asked whether § 54-832 of the Code of Virginia, (1950), as amended, which requires junk dealers to keep records of their purchases, can be applied to dealers in precious metals. Although I must conclude that this statute cannot be applied to dealers in precious metals. I am of the opinion that authority exists elsewhere in the Code to regulate the activity in question.

Section 54-825 defines a junk dealer as one who deals in "secondhand articles, junk, rags, rag cuttings, bones, bottles, puer, scrap, metals, metal drosses, steel, iron, old lead pipe, old bathroom fixtures, old rubber, old rubber articles, or other like commodities...." Although the section includes "metals," I believe that this reference must be seen within the context of what junk dealers habitually deal in. They do not ordinarily deal in precious metals. For this reason I believe that § 54-832 requires no record keeping by dealers in precious metals.

Recent increases in the price of gold and silver and the corresponding increase in thefts of these articles have underscored the need for adequate regulation of itinerant dealers. These dealers are regulated to a lesser extent than pawnbrokers who reside permanently in the community. See § 54-840.
Section 15.1-866<sup>2</sup> allows a municipal corporation to regulate "pawnshops and dealers in secondhand goods...." Accordingly, this section would allow the City of Petersburg to adopt ordinances regulating itinerant dealers in gold and silver.

Section 54-832 states: "Every junk dealer and every merchant and foundryman who deals in junk, bronze metals, bronze plaques, bronze statuaries, old metals and similar articles shall keep at his place of business, and every canvasser shall carry and keep with him a book in which shall be fairly written in English, at the time of each transaction in the course of his business, an accurate account of such transaction except as to the purchase of rags, bones, old iron, and paper, setting forth a description of the goods, articles, or anything purchased, the time of receiving the same, the name and residence of the person selling or delivering the same, the terms and conditions of purchase or receipt thereof, and all other facts and circumstances respecting such purchase or receipt; which book or books shall, at all times, be subject to the inspection of the judges of the criminal courts, the chief of police, the captains and sergeants of the police of the city, town or county wherein such business is being conducted, or any or either of them, sergeant and sheriff of such city, town or county, or other officer with police jurisdiction.

Any junk dealer, merchant, foundryman or canvasser who fails or refuses to keep the records of his purchases as herein provided shall be guilty of a Class 4 misdemeanor and punished accordingly."

Section 15.1-866 provides: "A municipal corporation may regulate the sale of property at auction; may regulate the conduct of and prescribe the number of pawnshops and dealers in secondhand goods, wares and merchandise; may regulate or prohibit peddling; may prevent fraud or deceit in the sale of property; may require weighing, measuring, gauging and inspection of goods, wares and merchandise offered for sale; and may provide for the sealing of weights and measures and the inspection and testing thereof."

HEALTH. NATIONAL HEALTH PLANNING AND RESOURCES DEVELOPMENT ACT OF 1974 IS CONSTITUTIONAL.

January 15, 1981

The Honorable Frederick C. Boucher
Member, Senate of Virginia

This is in reply to your letter concerning the constitutionality of that section of the National Health Planning and Resources Development Act of 1974 (the "Act") which permits the designation of an interstate health systems area. Specifically, you have referred to the fact that Scott and Washington Counties in Virginia are included in a
Tennessee health systems area rather than in the Southwest Virginia Health Systems Area.

No court has directly addressed the issue which you have raised; however, the courts have ruled upon the overall constitutionality of the Act. In 1977, a three judge federal court held that this federal legislation was constitutional despite a myriad of challenges to its constitutionality brought by the states of North Carolina, Nebraska, and by the American Medical Association and the North Carolina Medical Society. State of N.C., ex rel., Morrow v. Califano, 445 F.Supp. 532 (E.D.N.C. 1977). Significantly, this decision was summarily affirmed by the United States Supreme Court. North Carolina ex rel., Morrow v. Califano, 435 U.S. 962, 98 S.Ct. 1597, 56 L.Ed.2d 54 (1978). Such a summary affirmance is binding upon lower courts. Hicks v. Miranda, 422 U.S. 332, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223, 236 (1975).

I find nothing in 42 U.S.C. § 3001 which raises a substantial constitutional issue under either the Guaranty Clause or the Tenth Amendment to the United States Constitution, the two constitutional provisions which seem to have greatest relevance. With respect to the Guaranty Clause, alleged violations have generally been held to be political or nonjusticiable, see Montgomery County Md. v. Califano, 449 F.Supp. 1230 (D.Md. 1978) (citing Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 662 (1961)), and in the case of the Tenth Amendment, the courts have not found violations under the Act because the Act's requirements are not compulsory for states. See, e.g., State of N.C., ex rel. Morrow v. Califano, supra. Rather, the Act gives states the option to participate in the health planning process specified by the Congress or the state may decline to do so, thereby foregoing certain federal funds. Id.

In summary, although none of the court cases which I have cited specifically concerned the issue of interstate health systems areas, the courts have found the Act to withstand the constitutional attacks which the Commonwealth or other aggrieved parties might be expected to raise. Consequently, I am of the opinion that the courts would uphold the constitutionality of 42 U.S.C. § 3001.

HEALTH REGULATORY BOARDS, DEPARTMENT OF. REPORTING REQUIREMENT OF § 54-325.1(A)(1) NOT IN CONFLICT WITH PRIVACY PROTECTION ACT OR OTHER PATIENTS' RIGHTS STATUTES.

April 15, 1981

The Honorable John D. Gray
Member, House of Delegates

You have asked whether § 54-325.1(A)(1) of the Code of Virginia (1950), as amended, is in conflict with the Privacy Protection Act of 1976, § 2.1-377, et seq., and other statutes establishing patient rights.
Section 54-325.1(A) requires that:

"A. The chief administrative officer of every hospital or other health care institution in the Commonwealth shall, after consultation with the chief of staff of such institution, report to the appropriate board the following information regarding any person licensed under chapters 12 ($54-273 et seq.), 8 ($54-146 et seq.), 13.1 ($54-367.1 et seq.), 15.1 ($54-524.1 et seq.) or 28 ($54-923 et seq.) of this title unless exempted under subsection D hereof:

1. Any information of which he may become aware in his official capacity indicating that such a health professional is in need of treatment or has been committed or admitted as a patient, either at his institution or at any other health care institution, for the treatment of any of the following conditions:

a. Drug addiction;

b. Chronic Alcohol abuse; or

c. A psychiatric illness which may render the health professional a danger to himself, the public or his patients...."

The Privacy Protection Act

Section 2.1-382(3)(a) provides that an individual may inspect all personal information about himself which is in the possession of a government agency, except as otherwise provided in the Virginia Freedom of Information Act at § 2.1-342(b)(3). The Privacy Protection Act (the "Privacy Act"), however, contains no express prohibition against agency disclosure of medical records to persons other than the patient. Section 2.1-380(1) provides, generally, that records containing personal information shall be disseminated as permitted or required by law.

The Virginia Freedom of Information Act

Section 2.1-342(b)(3), like the Privacy Act, guarantees an individual access to his own medical and mental records with certain limited exceptions. Medical and mental records are exempt from public disclosure, thereby permitting confidentiality but not requiring it. Thus, the Virginia Freedom of Information Act does not prohibit public hospitals or other government agencies from releasing medical records to third parties.

Accordingly, publicly funded hospitals or other governmental agencies may report the information required by § 54-325.1(A)(1) without violating either the Virginia Freedom of Information Act or the Privacy Act.

Other Patient Records Laws
Section 8.01-413 governs access to medical records held by private hospitals and doctors. This statute does not prohibit disclosure of medical information to third parties. Rather, it leaves that matter to the discretion of the physician or hospital. Since a private hospital administrator is not prohibited from releasing information to a health regulatory board under § 8.01-413, that statute does not conflict with § 54-325.1(A)(1).

Section 37.1-84.1 provides that each person admitted to a hospital or other facility operated, funded or licensed by the Department of Mental Health and Mental Retardation shall have "access" to his medical and mental records consistent with his condition and sound therapeutic treatment and be "assured" of the confidentiality of those records. The statute further provides that the State Board of Mental Health and Mental Retardation shall "promulgate rules and regulations" guiding the implementation of this and other rights accorded the mentally ill. Regulations applying to § 37.1-84.1 are found in Reg. VI(I)(1), Rules and Regulations to Assure the Rights of Patients and Residents of Hospitals and Other Facilities Operated by the Department of Mental Health and Mental Retardation. These regulations provide that each patient or resident "shall be afforded protection against the indiscriminate disclosure of his identity and of personal information contained in his records" and restrict access to patient records to specified persons "except as otherwise provided by law or regulation...." (Emphasis added.) Reg. VI(I)(1)(a). The rules and regulations guiding psychiatric facilities licensed by the Department of Mental Health and Mental Retardation at Reg. 5(J) afford patients protection against "unnecessary disclosure."

Section 37.1-84.1 and the regulations applying to the statute do not, therefore, confer on psychiatric patients a right to the absolute confidentiality of medical and mental records. Reporting certain illnesses of health practitioners to the appropriate licensing board under § 54-325.1(A)(1) clearly does not constitute indiscriminate disclosure of patient records contrary to the regulations promulgated under § 37.1-84.1.

Federal Laws

Section 54-325.1(A)(1) does not conflict with federal laws. The General Assembly recognized potential conflict with federal non-disclosure laws and, therefore, exempted from the reporting requirements of § 54-325.1(A)(1) disclosure of information made confidential under § 21 U.S.C. 1175(a), 42 U.S.C. 4852(a) or regulations promulgated thereunder.

Accordingly, it is my opinion that disclosure of information required by § 54-325.1(A)(1) does not conflict with the provisions of the Privacy Act or other laws governing patient records mentioned above.
REPORT OF THE ATTORNEY GENERAL

HOSPITALS. HEALTH. HOSPITAL MAY NOT DENY PRIVILEGES TO
PODIATRISTS ON CLASSWIDE BASIS.

April 24, 1981

The Honorable Benjamin Lambert, III
Member, House of Delegates

You have asked me three questions about § 32.1-134.2 of
the Code of Virginia (1950), as amended, which concerns
hospital clinical privileges for licensed podiatrists.

You first ask whether a hospital may lawfully refuse to
grant applications for clinical privileges to podiatrists on
a classwide basis. Section 32.1-134.2 specifies that the
grant or denial of privileges to podiatrists and the scope of
privileges shall be based upon the "practitioner's
professional license, experience, competence, ability,
judgment and the reasonable objectives and regulations of the
hospital." Thus, privileges are to be granted or denied
on the basis of the individual podiatrist's qualifications.
Denial of privileges to podiatrists on a classwide basis is
not, therefore, permitted.

Your second question is whether a hospital can restrict
the scope of privileges for podiatrists on a classwide basis.
Since § 32.1-134.2 requires that the scope of podiatrists'
privileges be determined individually, I conclude that
classwide restrictions on podiatrists' privileges are not
permitted.

Your last question is whether a hospital may lawfully
exclude podiatrists on grounds that the hospital does not
have rules and regulations concerning clinical privileges for
podiatrists. Section 32.1-134.2 permits hospitals to take
into account reasonable hospital regulations when granting or
denying clinical privileges to podiatrists. The statute does
not, however, require that hospital regulations exist as a
prerequisite to granting podiatrists' privileges. Accordingly, I am of the opinion that privileges cannot be
denied because a hospital does not have such regulations.

HOUSING AND COMMUNITY DEVELOPMENT, DEPARTMENT OF. FARM
BUILDINGS EXEMPT FROM BUILDING PERMIT REGISTRATION AND
ASSESSMENT OF BUILDING PERMIT FEES.

August 21, 1980

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You have asked whether a local governing body of a
county or city can require building permit fees for new
construction of farm buildings not used for residential
purposes. Specifically, you have referred to §§ 36-97(12)
and 36-97(18) of the Code of Virginia (1950), as amended,
which exempt "farm buildings not used for residential purposes..." from the provisions of the Uniform Statewide Building Code (hereinafter "USBC").

The initial question to be addressed is whether a locality can require a building permit for construction of farm buildings. Sections 36-97(12) and 36-97(18) expressly mandate that the provisions of the USBC shall not apply to farm buildings. This Office has previously interpreted this section to exclude farm buildings from application of the Basic Plumbing and Electrical Codes, which are part of the USBC. See Report of the Attorney General (1974-1975) at 544. Likewise, the requirements set out in the USBC for building permit registration do not apply to construction of farm buildings, because building permits are an integral part of the Code from which farm buildings have been exempted. The General Assembly has exhibited the clear and unambiguous intent to free farm buildings from all building regulations, whether they apply to preconstruction conditions or not, with the exception of flood proofing regulations or mudslide regulations in certain instances. See §§ 36-97(12) and 36-97(18).

Therefore, it is my opinion that there is no authority for a county or municipality to require building permits for new construction of any farm buildings.

INDUSTRIAL COMMISSION. AGENT OF REAL ESTATE FIRM INCLUDED WITHIN DEFINITION OF "EMPLOYEES" OF VIRGINIA WORKMEN'S COMPENSATION ACT.

December 12, 1980

The Honorable C. Richard Cranwell
Member, House of Delegates

You have asked whether real estate firms are obligated to obtain workmen's compensation insurance on sales agents who are independent contractors.

This question has been previously addressed in an Opinion to the Honorable Alan A. Diamonstein, Member, House of Delegates, dated May 29, 1974, found in Report of the Attorney General (1973-1974) at 474, in which it was ruled that real estate salesmen are "employees" subject to the provisions of the Virginia Workmen's Compensation Act, rather than independent contractors. This was true despite an agreement between the parties to the contrary. This conclusion was reached by determining to what extent brokers controlled salesmen. Attorney General Miller looked to the statutory relationship created by the legislature between the parties. See Diamonstein Opinion, supra, at 476. Although the statutes cited in the Opinion of 1974 have been deleted from the Code of Virginia by Ch. 534 [1974] Acts of Assembly, the Virginia Real Estate Commission has substantially adopted those statutes in their rules and regulations. Therefore,
the relationship outlined in the Opinion remains the same between broker and salesman. Consequently, the reasoning and results of the Opinion are still valid today.

INDUSTRIAL DEVELOPMENT. AUTHORITIES. MAY NOT USE BOND PROCEEDS TO REFINANCE PREVIOUS FINANCIAL OBLIGATIONS OF BUSINESS.

September 29, 1980

The Honorable Harvey B. Morgan
Member, House of Delegates

You have inquired as to whether funds received through the sale of revenue bonds authorized by the Gloucester County Industrial Development Authority can be used to refinance previous financial obligations of Barnhardt Farms, Inc.1 The funds would not be used to refinance previous bonds issued by the authority, but to finance independent obligations of the corporation.

The purpose of the Virginia Industrial Development and Revenue Bond Act (hereinafter the "Act"), codified in the Code of Virginia (1950), as amended, at §§ 15.1-1373 to 15.1-1391, is to induce business and institutions of higher education to locate in or remain in the Commonwealth. In order to achieve this end, an industrial development authority ("authority") created by a local governing body under the Act has been granted broad powers in § 15.1-1378. An authority may finance certain costs of a facility with bond proceeds. These costs include: construction; acquisition of lands, structures, right-of-ways, franchises, etc.; demolition, removal, or relocation of buildings or structures; labor, materials, machinery, equipment; financing charges; and interest on bonds during the construction period.

The cost of refinancing a previous financial obligation of the facility is not included within this list. The question arises whether bond proceeds may be used for this purpose when the authority's enabling legislation is silent on the issue.

I direct your attention to § 15.1-1375 in which the legislature has stated the purposes of the Act. In referring to funding for medical facilities and homes for the care and residence of the aged, the legislature specifically allows authorities to assist such institutions with refinancing. From this proviso it can be inferred that other types of refinancing were not meant to be included as a power of an authority. It is a well established principle of statutory construction that when a statute limits action to a particular manner or by a prescribed person, then the legislature has implied that such action cannot be done otherwise. Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938). The fact that the legislature has specifically provided for
refinancing in certain instances indicates that refinancing previous financial obligations in this case is not an appropriate purpose under the Act.

This is not to say, however, that refinancing may never be permitted by the Act. Included in the definition of cost in § 15.1-1374 is the provision that "such other expenses as may be necessary or incident to the construction of the authority facilities..." may be funded through bond proceeds. The situation may arise in which refinancing of authority facilities under construction may be an appropriate cost. In any event this would not allow refinancing of an existing business in the circumstances you present.

1Barnhardt Farms is located in Middlesex County. The answer to your question makes it unnecessary to consider whether the Gloucester Authority can issue bonds for the benefit of a business in another county.

INDUSTRIAL DEVELOPMENT. AUTHORITIES. PUBLIC OFFICERS. COMPATIBILITY. RETIRED EMPLOYEE OF MUNICIPALITY NOT PROHIBITED UNDER § 15.1-1377 FROM SERVING AS DIRECTOR.

September 2, 1980

The Honorable Thomas J. Michie, Jr.
Member, House of Delegates

You ask whether a retired employee of a municipality who receives a pension from its retirement system is eligible to serve as a director of an industrial development authority, pursuant to § 15.1-1377 of the Code of Virginia (1950), as amended.

Section 15.1-1377 provides that no director of an industrial development authority shall be an officer or employee of the municipality with respect to which the authority may be organized and in which it is contemplated the authority will function. See, also, § 15.1-1374(b) (definition of municipality includes counties).

This Office has previously ruled that retired employees of State and local governments do not come within the ordinary statutory prohibition against dual officeholding or multiple employment. See Opinion to the Honorable Virgil Goode, Jr., Member, Senate of Virginia, dated March 24, 1975, found in Report of the Attorney General (1974-1975) at 166 (retired employees of State and local governments not prohibited from serving as officers of election under § 24.1-33). The wording of § 15.1-1377 does not require a different result.1

Accordingly, I find that a retired employee of a municipality who receives a pension from its retirement
Even though the retired employee is not prohibited from serving under § 15.1-1377, the retirement benefits of the employee may constitute a material financial interest under the Virginia Conflict of Interests Act (Ch. 22 of Title 2.1). See Opinion to Mr. E. B. Boynton, Chairman, Air Pollution Control Board, dated January 8, 1971, found in Report of the Attorney General (1970-1971) at 438 (retirement benefits over $5,000 from private firm can give rise to disqualifying interest under § 2.1-352).

Income from a second governmental agency can also give rise to a disqualifying interest under § 2.1-352. See Opinion to the Honorable J. Harry Michael, Jr., Member, Senate of Virginia, dated April 9, 1979, found in Report of the Attorney General (1978-1979) at 60 (member of school board employed as executive director of Opportunities Industrialization Center--contract between school board and Center).


June 16, 1981

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


The Industrial Development and Revenue Bond Act (the "Act"), Ch. 33 of Title 15.1 of the Code, requires an annual audit of each Industrial Development Authority (the "Authority"). Section 15.1-1377 of this Act specifically states that each Authority "shall keep suitable records of all its financial transactions and shall arrange to have the same audited annually...."

The audit requirement described above is separate and distinct from the filing procedures of the Auditor of Public Accounts set forth in Ch. 13 of Title 2.1. Section 2.1-164 requires each Authority to file a copy of its annual audit with the Auditor of Public Accounts. The Auditor, in turn, keeps this copy as a public record for a period of ten years.

This filing procedure, however, has been modified by recent legislation. House Bill 1779 states that a copy of an audit need not be filed "for any fiscal year during which such entity's financial transactions [do] not exceed the sum of five thousand dollars or during which all transactions in
excess of such sum were executed by a corporate trustee...."

In such cases, H.B. 1779 only requires that the Authority file a statement certifying these facts to the Auditor of Public Accounts.

This amendment only modifies the filing procedures, not the audit requirement of § 15.1-1377. For this reason, the Authority must continue to arrange annual audits and file them with the Auditor of Public Accounts. In cases where the financial transactions for any given fiscal year do not exceed five thousand dollars or if all transactions in excess of such sum are executed by a corporate trustee, the Authority may file a statement certifying such facts in lieu of a copy of its audit.

Accordingly, it is my opinion that the Authority must continue to arrange annual audits pursuant to § 15.1-1377. Section 2.1-164, as amended, only provides an alternate filing procedure; it does not nullify the audit requirements of the Act.

INDUSTRIAL DEVELOPMENT. OPERATION CENTER LOCATED IN VIRGINIA CANNOT BE FINANCED BY INDUSTRIAL DEVELOPMENT AUTHORITY UNDER § 15.1-1374(d)(ii) UNLESS IT IT "INCIDENTAL PART OR STRUCTURE OF, OR NECESSARY TO A FACILITY FOR THE RESIDENCE AND CARE OF THE AGED."

November 14, 1980

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You have asked whether an Industrial Development Authority (hereinafter "Authority") created pursuant to § 15.1-1374, et seq., of the Code of Virginia (1950), as amended, is empowered to issue bonds for the construction of an office building in the Commonwealth of Virginia. This office building would serve as the operations center for a company which owns and operates residential care facilities for the aged in North Carolina.

Authorities are permitted to issue bonds for the acquisition, ownership, lease and disposition of property for the purpose of promoting industry and development trade "by inducing manufacturing, industrial, governmental and commercial enterprises...to locate in or remain in this Commonwealth...." Section 15.1-1375. This section further specifies that the powers are to be exercised with respect to medical facilities and facilities for the residence and care of the aged.

Section 15.1-1374(d) enumerates several types of facilities which are contemplated under the law. You have asked specifically if the proposed office building would be included under § 15.1-1374(d)(ii) which includes facilities for the residence or care of the aged; or § 15.1-1374(d)(iii)
pertaining to multi-state regional or national headquarters offices or operations centers. The operations center is not a facility in its own right for the care of the aged under § 15.1-1374(d)(ii); office buildings may be included under this section if they are being constructed as an incidental part or structure of, or necessary to a facility for the residence and care of the aged. See § 15.1-1374(d). It is my opinion that the proposed central operations center cannot be included under § 15.1-1374(d)(ii), even when construing the Industrial Development and Revenue Bond Act (the "Act") broadly. My basis for this is found in § 15.1-1375 which states that the financing of these facilities is permissible "in order to provide modern and efficient medical services to the inhabitants of the Commonwealth and care of the aged of the Commonwealth...." I fail to see how the proposed operations center would provide care for the aged of the Commonwealth of Virginia, unless there were specific provisions for the care of the Commonwealth's residents in the corporation's charter.

You have also inquired whether the project could be financed under the rubric of § 15.1-1374(d)(iii), "multi-state regional or national headquarters offices or operation centers." I am of the opinion that this section is not applicable, simply because the multi-state character of the project must be assessed at the time the company presents the project to the Authority. By common definition, "multi" applies to two or more objects. There is no construction of this Code section which would qualify the proposed project as a multi-state regional operations center; the company is a corporation with a single situs, and placement of an office complex in a sister state should not qualify the project for multi-state status. Likewise, the project cannot be considered a national operation.

Although the Authority cannot finance the project under either § 15.1-1374(d)(ii) or 15.1-1374(d)(iii), this project could be financed under the Authority's general powers. One of the enumerated objectives of the Act is the promotion of commercial enterprises. Section 15.1-1375. An enterprise is defined as "any industry...for such other businesses as will be in the furtherance of the public purposes of this chapter." Section 15.1-1374(j). See Report of the Attorney General (1978-1979) at 139. A broad reading of this section would permit the Authority to finance the construction of any office building if the Authority finds the construction activity furthers a public purpose.

In making this determination the Authority acts in its legislative capacity. Industrial Development Authority of City of Richmond v. LaFrance Cleaners and Laundry Corp., 216 Va. 277, 217 S.E.2d 879 (1975). This discretionary power is limited by the language of the Act; it requires that the powers "shall be exercised for the benefit of the inhabitants of the Commonwealth, either through the increase of their commerce, or through the promotion of their safety, health, welfare, convenience or prosperity...." Section 15.1-1375.
It is important to note that all these elements do not have to be present: "[e]ach of the several 'elements'...is an indicium of a public purpose...." *Id.* at 280. See, also, *Chesapeake Development Authority v. Suthers*, 208 Va. 51, 155 S.E.2d 326 (1967). If the Authority should find that a proposed project meets the public purposes of the Act, then the financing of the project is within the discretionary power of the Authority.

**INDUSTRIAL DEVELOPMENT. PRACTICE OF CHIROPRACTIC DOES NOT MEET DEFINITION OF "FACILITY" OR "ENTERPRISE" UNDER ACT. WOULD QUALIFY AS SUCH OTHER BUSINESS AS WOULD FURTHER PUBLIC PURPOSE OF ACT.**

October 31, 1980

The Honorable Thomas B. Baird, Jr.
Commonwealth's Attorney for Wythe County

You have asked whether the practice of a doctor of chiropractic would qualify under the Industrial Development and Revenue Bond Act (the "Act") as a "facility" or "enterprise" as those terms are defined in that Act. For the reasons stated below, I am of the opinion that the office of a doctor of chiropractic would not qualify as a medical facility, nor would it qualify as an "enterprise" related to the practice of medicine. Nevertheless, in view of the liberal construction to be applied to this Act, I conclude that the practice of chiropractic would qualify as "such other business as would be in the furtherance of the public purposes of the chapter." See § 15.1-1374(j) of the Code of Virginia (1950), as amended.

The practice of medicine is defined by statute to be "the prevention, diagnosis and treatment of human physical or mental ailments, conditions, diseases, pain or infirmities by any means or method." See § 54-273(3). In contrast, the practice of chiropractic is defined as:

"the adjustment of the twenty-four movable vertebrae of the spinal column, and assisting nature for the purpose of normalizing the transmission of nerve energy. It does not include the use of surgery, obstetrics, osteopathy, nor the administration nor prescribing of any drugs, medicines, serums or vaccines." Section 54-273(6).

Because of the fundamental differences in training and theories of human physiology, the practice of chiropractic cannot be equated with the practice of medicine. Both practices, however, do fall within the definition of the healing arts. See § 54-273(2).

This distinction between physicians and other health care providers, including doctors of chiropractic, is reinforced by the statutory definitions in the statutes
dealing with medical malpractice. See § 8.01-581.1. A physician is defined therein as a person licensed to practice medicine or osteopathy in the Commonwealth in accordance with § 54-273. See § 8.01-581.1(2). Health care provider, however, is a generic term including a physician and a chiropractor, as well as other health care providers. See § 8.01-581.1(1). Therefore, I am of the opinion that the practice of medicine is not a generic definition which encompasses the practices of chiropractic and a "medical facility" under the Act does not include facilities for the practice of chiropractic.

Turning to the definition of "enterprise" found in the foregoing Act, reference is made to "scientific laboratories, including, but not limited to, the practice of medicine and all other activities related thereto...." See § 15.1-1374(j). For the reasons set forth above, the practice of chiropractic cannot be the legal equivalent of the practice of medicine, nor is it an activity related to the practice of medicine. Therefore, it does not fall within this definition of "enterprise."

As you have indicated, doctors of chiropractic are required to record their names in the Medical Register maintained in the circuit court clerk's office of each locality. See § 54-313. The latter section provides, however, that each certificate holder or licensee shall designate the school of practice to which the certificate holder or licensee professes to belong. Id. The statute does not equate their respective practices.

Notwithstanding the foregoing discussion, I am of the opinion that the practice of chiropractic would be such "other business as would be in the furtherance of public purposes of the Industrial Development and Revenue Bond Act." Clearly one licensed to practice chiropractic in the Commonwealth is a health care provider and is a practitioner of the healing arts under the Code. See §§ 8.01-581.1(1) and 54-273(2), respectively. Assisting in the establishment of a health care provider is clearly "for the benefit of the inhabitants of the Commonwealth and for the promotion of their health and welfare...." See § 15.1-1375. Therefore, I am of the opinion that actions taken pursuant to the Act with respect to the establishment of an office for the practice of chiropractic would be lawful where all other requirements of that Act are met.

INSURANCE. AGENTS. CONFLICTING INTERESTS.

January 23, 1981

The Honorable Johnny S. Joannou
Member, House of Delegates

This is in response to your request for my opinion as to whether an insurance agent or agency which administers the
terms of group life insurance policies for a labor union or State labor association may hold elective office in that union or association. You also inquired whether the agent or agency could act as a financial consultant to the union or association with respect to the benefits paid from the agency. There is nothing in Title 38.1 of the Code of Virginia (1950), as amended, which would absolutely preclude an insurance agent from engaging in the activities suggested by your inquiries. However, your questions imply that the agent would be acting on behalf of both the union or association and the insurance company with respect to the insurance. Accordingly, substantial questions of common law agency are raised.

An agent may not act for both parties in the same transaction without the consent of each of them. See Ferguson v. Gooch, 94 Va. 1, 26 S.E. 397 (1896); Bell v. Routh Robins Real Estate Corporation, 206 Va. 853, 147 S.E.2d 277 (1966); Price v. Martin, 207 Va. 86, 147 S.E.2d 716 (1966). The same is true with respect to insurance agents.

"As a general rule the same person cannot act as agent for the insurer and the insured without the knowledge and consent of both; but dual agency frequently is permitted where in so acting the agent does not represent conflicting interests." 44 C.J.S. Insurance § 141 at 802 (1945).

Application of this general rule is highly fact dependent, however. For example, the mere fact that an agent for the insurance company is an employee of the insured is not necessarily in contravention of the general rule if he is employed by the insured for purposes having no relation to the insurance. See Nertney v. National Fire Insurance Company, 199 Iowa 1358, 203 N.W. 826 (1925). In any event, assuming that he obtains consent from both the insured and the insurer, the agent may act for both of them.

Your questions also raise the possibility that the agent may be insured under the group policy as an officer of the union. If that is the case, an additional duty to disclose to the insurer and obtain its consent might be created because the agent would, in effect, insure himself. See Spring Garden Insurance Company of Philadelphia, Pa. v. Wood, 194 F. 669 (4th Cir. 1912), cert. denied, 242 U.S. 631 (1916).

Accordingly, it is my opinion that an agent of an insurance company may either become an officer of the insured union or act as the financial consultant to that union, if the agent obtains the consent of both the union and the insurance company with respect to his activities.

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1It should also be noted that the employment of the agent by the union or association either as an officer or
consultant might violate statutes such as § 18.2-444 or §§ 38.1-51 through 38.1-52.14, in certain circumstances. However, there are insufficient facts in your letter to suggest that any of these statutory prohibitions would be violated by the agent's activities.

INSURANCE. GROUP LIFE INSURANCE FOR STATE EMPLOYEES. EMPLOYEES WHO ARE OVER AGE 70 AND STILL WORKING MUST PAY PREMIUM BASED ON FULL COVERAGE AT AGE 70 EVEN THOUGH ACTUAL COVERAGE HAS BEEN REDUCED TO 25%.

June 24, 1981

The Honorable Frederick L. Hoback, Judge Twenty-Third Judicial Circuit

You ask several questions concerning the premiums charged State employees for group life insurance. You have indicated that when you attained age 65 on December 1, 1970, your coverage for life insurance was reduced at a rate of 2% per month until a balance of 25% of the coverage remained.1 Under the law in effect at that time, you were also no longer required to pay premiums.2 In 1980, however, the law was amended to delay the above reduction in coverage until the age of 70, and to require that members who are over age 70 and still working must continue to pay life insurance premiums.3 You note that you are now being required to pay a full premium based upon your salary at 70, even though your coverage has been reduced by 75%.

You first question whether you possessed vested rights to the coverage and exemption from further payment of premiums which you had under the Virginia Supplemental Retirement Act (the "Retirement Act") in 1970 when you reached age 65.

A "vested right" must normally be something more than a mere expectation based upon an anticipated continuance of existing law, it must become a title, legal or equitable, to present or future enjoyment of property. See Josie v. Josie, 78 Ill.App.3d 347, 347 N.E.2d 204 (Ill. App. 1979). The statutory provisions covering the State retirement system and group life insurance plan do not create such vested property rights, with the exception of past due payments and a member's contributions to the system. Nor is a private contractual agreement created since the rights granted are based entirely on statute. The pertinent statutory provisions merely set the policy to be followed until the legislature decides that the policy should be changed. See Opinion to the Honorable Glen D. Pond, Director, Virginia Supplemental Retirement System, dated October 12, 1977, found in Report of the Attorney General (1977-1978) at 341.

Accordingly, I am of the opinion that you did not have vested rights at age 65 to the coverage and exemption from
future life insurance premiums which you enjoyed at that
time.

You next ask whether you acquired such vested rights
when you reached age 70. For the reasons already stated, I
conclude that you did not.

Finally, you ask how you can be required to pay a
premium which is based on full coverage at age 70 when you
are entitled to receive only 25% of that coverage.

As mentioned above, in 1980 the Retirement Act was
amended so that employees in service who have reached normal
retirement age are no longer exempted from payment of
insurance premiums. Thus, employees who are over age 70 and
still working must now pay premiums for as long as they work.
The law further provides that such premiums will be based on
the member's annual compensation at age 70, even though the
member's coverage is reduced 2% a month until a balance of
25% is reached.

While it may not seem logical or equitable to be charged
premiums for full coverage when your actual coverage has been
reduced to 25%, the rationale is to cover the increased risk
involved in extending full life insurance coverage from age
65 to 70. The action would be within the General
Assembly's power to establish the terms of employment of
State employees. See Opinion to the Honorable Herbert H.
Bateman, Member, Senate of Virginia, dated May 27, 1970,

Accordingly, I find that you are required under present
law to pay a premium based on full coverage at age 70 even
though your actual coverage has been reduced to 25%.

1Former § 51-111.67:4(c) of the Code of Virginia (1950), as
amended, provided: "The amount of life insurance on each
employee who retires (i) for service on an immediate annuity
shall be reduced by two per centum of the amount of insurance
in force at such employee's age sixty-five, or other lesser
age if so retired prior to age sixty-five, at the end of each
full calendar month following the date the employee attains
age sixty-five or other lesser age if so retired prior to age
sixty-five or (ii) because of disability on an immediate
annuity shall be reduced at the end of each full calendar
month following the date such employee attains age sixty-five
by an amount equal to two per centum of the amount of
insurance in force on the date such retirement commenced,
except if the employee by statute or Board regulation has
pursuant to subsection (f) of this section, been construed to
be in service to the beginning of the next school year the
reduction, whether for age or retirement for service, or
because of disability on immediate annuity, shall not apply
until the beginning of such next school year. But such
reduction shall not decrease the amount of life insurance on
an employee to less than twenty-five per centum of the insurance in force immediately preceding the first reduction therein; provided, that the amounts of life insurance in force from time to time on an employee who becomes insured under this article after having attained the age of sixty-five and later so retires shall be the same as would be in force had he been insured and so retired at age sixty-five and shall be based on the lesser of his annual compensation (1) at the time he becomes so insured, or (2) at age sixty-five provided he was eligible at that time to be insured under this article; provided, that the Board may, in the case of a disabled retirant who returns to service in a position covered by this article, provide for the insuring of such person for an amount and in the same manner as if then originally employed but the insurance applicable to such person shall be deemed to have been issued as of the time such person was first insured under the group insurance provided for in this article."

Former § 51-111.67:5 provided in pertinent part that: "employees retired for service or disability and employees in service who have attained age sixty-five shall not be required to contribute to the cost of their life insurance...."

See §§ 51-111.67:4 and 51-111.67:5. Current § 51-111.67:5 provides in pertinent part: "employees retired for service or disability shall not be required to contribute to the cost of their life insurance...."

Also, this action appears to have been of some benefit to you by increasing the amount of your coverage as a result of being based on your annual salary at age 70 as opposed to age 65.

INSURANCE. NEW STATE PROCEDURE UNDER OFFICE OF RISK MANAGEMENT TO CONSOLIDATE ALL STATE INSURANCE IN CENTRALIZED BIDDING PROCEDURE.

January 13, 1981

The Honorable John H. Chichester
Member, Senate of Virginia

In your letter of October 22, 1980, you sought my Opinion regarding the legality of a proposal of the Independent Insurance Agents of Virginia, Inc. (hereinafter "IIAIV").

The factual background of your inquiry is as follows: in the past, the purchase of insurance by the Commonwealth of Virginia was handled on a piecemeal basis program with coverage being written by an independent insurance agency located near the State property or persons being insured. Under the new State procedures stemming from the creation of the Office of Risk Management, the purchase of insurance will be consolidated in a centralized bidding process. Bids will be taken on generic lines of insurance such as fire or workmen's compensation for all State agencies.
IIAV proposes to become a bidder for the Commonwealth's insurance coverages. IIAV would be responsible for the sales, underwriting, and administrative functions related to the insurance and for these services it would retain a portion of the commission. The balance of the commission would be paid out among some of the independent insurance agencies who are members of IIAV. The "servicing agents" would receive the balance of the commission as compensation for their performance of on-site services where the insured property is located. Further, if IIAV were the successful bidder on part or all of the coverage for the Commonwealth, it would limit the "servicing agents" to IIAV members. It is unclear whether members are actual or potential competitors for this business or could or would bid for it unilaterally.

To ascertain whether the proposal is legal under the antitrust laws, two questions must be answered. First, is the restriction a per se violation of the antitrust laws or, second, is it to be measured by the Rule of Reason?


If IIAV agents are actual or potential competitors and could bid alone, the conduct IIAV proposes with respect to bidding is in effect an agreement among its member independent insurance agents not to compete for the Commonwealth's insurance. This conduct is generally referred to as horizontal market allocation. The potential harm of such an agreement is obvious: competition among member independent insurance agents is still eliminated and one or more groups of insurance agents may achieve significant monopoly power in any given geographic market with respect to the business of insurance. Because of their almost universal adverse economic effect in most industries, horizontal market allocations are labelled as illegal per se. See, e.g., United States v. Topco Associates, Inc., 405 U.S. 596 (1972). By per se illegality we mean that neither the reasonableness of the conduct nor the competitive impact of the agreement are issues at trial, and the defendant is not permitted to argue that his activity was economically justified. "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railway Company v. United States, 356 U.S. 1, 5 (1958). It is no justification that a wider or better range of services may be made available through the bidding procedure. See United States v. American Smelting and Refining Co., 182 F.Supp. 834 (D.C.N.Y. 1960).
Finally, IIAV proposes to restrict the group of "servicing agents" to IIAV members only. Non-member independent insurance agents are to be excluded from participation. Such an arrangement by competitors against another competitor would be categorized as a group boycott or concerted refusal to deal. In most instances boycotts are considered to be per se illegal under the antitrust laws because the victim of the boycott will either be placed at a competitive disadvantage or be driven out of the market. See, generally, Klor's, Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959); Associated Press v. United States, 326 U.S. 1 (1945).

If competitors are not engaged in a concerted refusal to deal it would not be a per se violation of the antitrust laws, but rather subject to a "Rule of Reason" analysis. With this approach, the courts will weigh the competitive harm in the market place against the benefits of the restraint at issue in an effort to determine its reasonableness. See, generally, Chicago Board of Trade v. United States, 246 U.S. 231 (1918); National Society of Professional Engineers v. United States, 98 S.Ct. 1355 (1978).

Unfortunately, I have insufficient information to conduct the necessary Rule of Reason analysis. The most crucial "missing link" is the degree to which the agent members of IIAV actually compete with each other or could compete. My market information is limited too in that I do not know the universe size of the market, IIAV's market share and that of its competitors, and thus I cannot predict the long-run competitive impact on non-member agencies. In at least one case involving a boycott by independent insurance agents and their trade association, the court applied the Rule of Reason test and nonetheless found the restraints illegal as unreasonably restrictive. United States v. New Orleans Insurance Exchange, 148 F.Supp. 915 (E.D. La.), aff'd per curiam 355 U.S. 22 (1957).

Finally, the contemplated plan must be evaluated as a form of joint venture and if no single or even small segment of the IIAV could bid on insurance contracts and their united efforts would create a new competitive force in the State insurance market its pro-competitive effect might outweigh a potential risk to competition from restrictive action. United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

For the reasons stated, I am of the opinion that on the available information, the proposed plan would not violate the antitrust laws. Serious antitrust questions may still exist depending on a description of the market and the risk of antitrust violations would provide no safety as an insurance exemption.
November 6, 1980

The Honorable George W. Jones
Member, House of Delegates

You ask whether the Virginia Compensation Rating Bureau (the "Bureau") has authority to conduct an audit of the records of an employer insured by an insurance company which is a member of the Bureau. In addition, you ask whether the information gathered in the audit may be disseminated by the Bureau. You also ask if the Bureau may cause the current workmen's compensation policy to be cancelled if the employer does not cooperate in the audit. I will answer your questions in the order raised.

1. Does the Bureau have authority to conduct an audit of the records of an employer insured by an insurance company which is a member of the Bureau?

With your letter you enclosed a copy of the workmen's compensation and employer's liability insurance policy which is the subject of the inquiry. The second paragraph of Item No. 4, "Inspection and Audit" of the conditions of that policy reads as follows:

"The company and any rating authority having jurisdiction by law shall each be permitted to examine and audit the insured's payroll records, general ledger, disbursements, vouchers, contracts, tax reports and all other books, documents and records of any and every kind at any reasonable time during the policy period and any extension thereof and within three years after termination of this policy, as far as they show or tend to show or verify the amount of remuneration or other premium basis, or relate to the subject matter of this insurance."

The Bureau is the body designated by the State Corporation Commission as the licensed rate service organization with respect to workmen's compensation insurance. See § 38.1-242 of the Code of Virginia (1950), as amended. The records which the Bureau requested to examine fall within the categories described in the above language from the insurance policy, and the information sought appears to relate to the subject matter of workmen's compensation insurance rates. It is my opinion that the language quoted above permits the audit as a matter of contract.

Nothing in § 38.1-279.30 or in any other section prevents the agreement of the parties to the insurance contract to allow an audit by the Bureau. It is my opinion that the contract language controls the situation and that no statutory provision prevents the operation of the contract. I also note that § 38.1-277 provides that no person shall willfully withhold information from any rating organization if the information will affect the rates or premiums chargeable for workmen's compensation insurance. The type of
information in question would appear to affect workmen's compensation insurance rates in general and perhaps the premiums to be paid by this particular employer.

2. May the Bureau disseminate information obtained in the course of the audit?

There are no provisions in the insurance contract which address the confidentiality of information. Accordingly, there appears to be no contractual right on the part of the employer to prevent dissemination by the Bureau under the terms of this contract. Section 38.1-241 requires that information filed with the State Corporation Commission shall be deemed to be a matter of public record. I am advised that filings made by the Bureau with the State Corporation Commission are not in such form as would disclose information about the records of individual employers or employees.

3. May the Bureau force cancellation of the employer's insurance policy?

I am of the opinion that the Bureau has no right to cancel the policy as a matter of law. It is the insurance company, not the Bureau, which may decide whether to terminate coverage, but only as permitted by the terms of the insurance contract. I am advised that the Bureau's position is that it may report any employer resistance to the audit to the employer's insurance company. There is no statutory prohibition against the Bureau's making such a report to the employer's insurance company.

INVESTMENTS. GOLD COIN NOT LAWFUL UNDER LISTED SECURITIES OR STANDARD OF JUDGMENT AND CARE FOR FIDUCIARIES.

July 29, 1980

The Honorable Clifton A. Woodrum
Member, House of Delegates

You have asked whether a guardian's purchase of "100 Canadian Maple Leaf gold coins with a portion of the assets (approximately 10%) of his ward's estate...meet[s] the requirements pertaining to the investments of fiduciaries under Section 26-40 or Section 26-45.1 of the Code of Virginia, as amended."

I do not find that gold coins are listed among those investments deemed lawful by § 26-40. Section 26-45.1 does not list lawful investments but does provide standards against which one may measure the suitability of a particular investment and mentions a few broad classes of suitable investments. Gold coins are not among the classes listed. That portion of § 26-45.1 which articulates standards reads as follows:
"[A] fiduciary, both individual and corporate, shall exercise the judgment of care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital...." (Emphasis added.)

You have indicated in your letter that the gold coins are not income producing. Moreover, it is common knowledge that the market price of gold has fluctuated widely in the recent past. Such wide fluctuations in the price of gold, including Canadian Maple Leaf gold coins, emphasizes the speculative character of this investment. For these reasons, it is my opinion that Canadian Maple Leaf gold coins are not suitable investments within the meaning of either § 26-40 or § 26-45.1.

Although § 26-40 uses the word "lawful" in describing suitable investments, it does not mean that other investments are unlawful. These statutes furnish immunity to fiduciaries who invest according to their provisions. Parsons v. Wysor, 180 Va. 84, 21 S.E.2d 753 (1942); Koteen v. Bickers, 163 Va. 676, 177 S.E. 904 (1934). A fiduciary may make investments that do not come within the purview of either § 26-40 or § 26-45.1, but if he does so, he places himself at risk for personal liability for any loss which may result. However, if he exercises proper care and caution, he may escape liability for such a loss. Powers v. Powers, 174 Va. 164, 3 S.E.2d 162 (1939).

JAILS AND PRISONERS. CORRECTIONS. STATUTES. FUNDS HELD BY DIRECTOR PURSUANT TO § 53-223 MAY BE INVESTED ONLY IN BONDS BACKED BY FULL FAITH AND CREDIT OF COMMONWEALTH OR UNITED STATES.

March 13, 1981

The Honorable Terrell Don Hutto, Director
Department of Corrections

You have asked whether you may invest any portion of the funds held by you, or by any penal institution under your jurisdiction, and belonging to prisoners, in any security insured by a state or federal government agency and, in particular, any investments backed by the Federal Deposit Insurance Corporation Section.

Section 53-223 of the Code of Virginia (1950), as amended, authorizes you to invest any portion of such funds "in bonds of the Commonwealth of Virginia or of the United States."

It is a basic tenet of statutory construction that where a statute creates a specific grant of authority, that power
exists only to the extent plainly granted by the statute. See Opinion to the Honorable Edward E. Willey, Member, Senate of Virginia, dated April 23, 1979, and found in Report of the Attorney General (1978-1979) at 243. It is further an accepted principle of statutory interpretation that the mention of one thing implies the exclusion of another. A statute, limiting things to be done in a particular manner, implies that it shall not be done otherwise. See Opinion to the Honorable John Alderman, Commonwealth's Attorney for Carroll County, dated September 16, 1976, and found in Report of the Attorney General (1976-1977) at 199.

Furthermore, in holding these funds you act as a fiduciary and must "exercise the judgment of care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital...." See § 26-45.1.

Accordingly, it is my opinion that the funds held by you, or by penal institutions under your jurisdiction, belonging to prisoners, may be invested only in securities denominated as bonds of the Commonwealth of Virginia or of the United States.

Investments backed by the Federal Deposit Insurance Corporation would appear to be prudent investments by a fiduciary, but I believe the legislature must authorize such investments due to the specific language in § 53-223.

JAILS AND PRISONERS. CORRECTIONS. STATUTES. §§ 53-220.1, 53-222 AND 53-122.1 DO NOT AUTHORIZE DIRECTOR TO PAY WAGES FOR STATE INMATES ASSIGNED TO LOCAL JAILS.

March 13, 1981

The Honorable Terrell Don Hutto, Director
Department of Corrections

You have asked for my opinion concerning the legality of the practice by the Department of Corrections of paying wages to inmates who have been committed to the Department of Corrections and thereafter assigned to a local jail at the request of the sheriff. I understand from your letter that at least two jails to which such inmates are assigned do not pay inmates for their work.

Sections 53-220.1 and 53-222 of the Code of Virginia (1950), as amended, authorize the payment of wages for inmate labor. However, these sections are limited by their terms to inmates confined in correctional institutions under the control of the Board of Corrections. There is no specific grant of authority to the Director of the Department of Corrections (the "Director") or the Board of Corrections to
pay wages for inmate labor supplied to a jail operated by a locality.

Section 53-122.1 authorizes the Director to enter into agreements with localities whereby inmate labor is supplied to those localities, but only with the approval of the Governor and on the condition that the localities make payments to the Director for the costs of that labor.

It is a basic tenet of statutory construction that where a statute creates a specific grant of authority, that power exists only to the extent plainly granted by the statute. See Opinion to the Honorable Edward E. Willey, Member, Senate of Virginia, dated April 23, 1979, found in Report of the Attorney General (1978-1979) at 243. Accordingly, it is my opinion that the payment of wages to inmates assigned to local jails, being beyond the scope of the express statutory grant of authority, is invalid and should be discontinued.

JUDGES. RETIRED JUDGE MAY PRACTICE IN FEDERAL COURTS LOCATED IN VIRGINIA.

August 20, 1980

The Honorable Harold H. Purcell, Judge
Sixteenth Judicial Circuit

You have asked a question concerning the proper interpretation of § 51-179 of the Code of Virginia (1950), as amended, which provides that a retired judge of a court of record shall not "appear as counsel in any case in any court of the Commonwealth." Specifically, you have asked whether a retired judge can practice in the federal courts located within Virginia.

This Office has previously ruled upon the permissible scope of professional activities of a retired judge in an Opinion to you dated December 27, 1978. See Report of the Attorney General (1978-1979) at 147. In that Opinion, after reviewing the purpose of § 51-179, I ruled that a judge is not prohibited from practicing law once he is retired but simply cannot represent a client in a case "which warrants a State court appearance." Id. at 150. I concluded, therefore, that a retired judge "may examine titles, certify them, and also may represent clients in administrative hearings." Id. While I did not specifically address the question of a retired judge representing clients in the federal courts, in my opinion such a practice would not constitute an appearance as counsel in a court of the Commonwealth.

Accordingly, I am of the opinion that a retired judge may practice in the federal courts.
Section 51-179 provides: "Practice of law by certain retired judges and commissioners.--No former justice or judge of a court of record of the Commonwealth and no former full-time judge of a court not of record of the Commonwealth, who is retired and receiving retirement benefits under the provisions of chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia, shall appear as counsel in any case in any court of the Commonwealth.

No former commissioner of the State Corporation Commission or Industrial Commission, who is retired and receiving retirement benefits under the provisions of chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia, shall appear as counsel in any case before the Commission of which he was formerly a member."

JUDGES. RETIREMENT SYSTEM. JUDGES OF COURTS NOT OF RECORD WHO HAVE SERVED OUT THEIR TERM OR RESIGNED AND WHO ARE NOT RETIRED AND RECEIVING RETIREMENT BENEFITS ARE NOT PROHIBITED FROM PRACTICING BEFORE COURTS OF COMMONWEALTH.

April 22, 1981

The Honorable Constantine A. Spanoulis, Chief Judge
Virginia Beach General District Court

You have asked whether there exist under Virginia law or the Canons of Judicial or Legal Ethics any prohibitions or restrictions with regard to a judge returning to private practice and resuming a practice in any of the courts of the Commonwealth. You have indicated that you are aware of the restrictions on the practice of law by retired judges imposed by § 51-179 of the Code of Virginia (1950), as amended, but that in your inquiry retirement is not applicable.

Section 51-179 provides, in part, that "no former full-time judge of a court not of record of the Commonwealth, who is retired and receiving retirement benefits under the provisions of [the Judicial Retirement System]...shall appear as counsel in any case in any court of the Commonwealth." I have previously ruled that this prohibition on making court appearances is dependent upon retirement and receipt of retirement benefits and that a judge who has withdrawn from membership in the Judicial Retirement System or who has deferred his retirement benefits would be able to appear as counsel in a court of the Commonwealth. See Opinion to the Honorable Harold H. Purcell, Judge, Sixteenth Judicial Circuit, dated December 27, 1978, found in Report of the Attorney General (1978-1979) at 147. As a result, § 51-179 would not appear to prohibit a judge from resigning and resuming a practice in any of the courts of the Commonwealth under the circumstances you have described.3

Nor have I found any other provisions of Virginia law or provisions of the Code of Professional Responsibility or the
Canons of Judicial Conduct which would impose a blanket prohibition against a judge returning to private practice and resuming a practice in the courts of the Commonwealth including any court over which he may have previously presided as a judge.  

I am of the opinion, therefore, that a judge of a court not of record may serve out his term or resign prior to completion of his term and resume a practice before the courts of the Commonwealth so long as he acts in conformity with the Code of Professional Responsibility and has not retired and begun receiving retirement benefits.

1See § 51-172.  
2See § 51-167.  
3While § 51-179 was recently amended to apply to all former full-time judges of courts not of record rather than just to those judges who had served more than a single term, that amendment does not affect the conclusions reached in this Opinion. See Ch. 138 [1980] Acts of Assembly 160.  
4Any former judge should be careful, however, to fully adhere to the principles contained in Canon 9 of the Code of Professional Responsibility concerning the avoidance of even the appearance of professional impropriety. In particular, Ethical Consideration 9-2 and Disciplinary Rule 9-101 prescribe that after a lawyer leaves judicial office he should not accept employment concerning any matter in which he had substantial responsibility prior to his leaving such office or upon the merits of which he has acted in a judicial capacity.

JUDGMENTS. DELINQUENT TAXES. SHERIFFS' FEES COMPUTED AND COLLECTED DIRECTLY FROM PROCEEDS.  

February 17, 1981  

The Honorable George W. Titus  
Treasurer, Loudoun County  

This is in response to your inquiry as to whether fees collected by a sheriff on enforcing a judgment for delinquent taxes are deducted from or added to the amount of such judgment. The Opinion to the Honorable C. A. Rollins, Jr., Sheriff for the County of Prince William, dated January 8, 1981, to which you refer, holds that "§ 14.1-69 prohibits collection of commissions usually assessable under § 14.1-109 when process is issued for recovery of delinquent taxes for the Commonwealth or for the locality in which the sheriff or other collecting officer is elected or appointed." (Emphasis added.) An earlier opinion cited therein and found at Report of the Attorney General (1964-1965) at 323 holds that fees payable to a sheriff under § 14.1-105(8) also may not be
collected when levying an execution on a judgment for delinquent taxes.

In cases where a commission may be collected, § 14.1-109 empowers the sheriff to compute and collect directly from the proceeds the amount of commission due. An opinion found in Report of the Attorney General (1974-1975) at 118 states that the authority of a sheriff to compute commissions due under § 14.1-109 "...would not preclude any other officer of the court who has duties pertaining to the commissions authorized by § 14.1-109 from also computing such commissions. In the event of a dispute, the matter would have to be resolved by the court involved." Absent such a dispute between officials, a court order would not be required to deduct the commissions from proceeds.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. JUDGE MAY IMPOSE JAIL SENTENCE UP TO TEN DAYS FOR FINDING OF CONTEMPT. LIMITED TO § 16.1-69.24.

April 3, 1981

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You ask whether a juvenile and domestic relations district court has the authority to impose a twelve month jail sentence for contempt of a support order which was entered by the court or which was entered by a circuit court and then referred to the juvenile and domestic relations district court. I am of the opinion that the court does not have the authority to impose such a sentence.

The term "district courts" clearly includes within its statutory definition a juvenile and domestic relations district court. See § 16.1-69.5(d) of the Code of Virginia (1950), as amended. The contempt powers of a district court judge are found at § 16.1-69.24 which provides, in relevant part, that "in no case shall the fine exceed fifty dollars and imprisonment exceed ten days for the same contempt." (Emphasis added.)

Chapter 5 of Title 20 provides authority for a juvenile and domestic relations district court to criminally convict persons for nonsupport, a misdemeanor carrying a potential penalty of confinement in jail for twelve months. See § 20-61. The court's authority to impose such a sentence, however, would be founded upon a criminal conviction for nonsupport rather than civil contempt. Thus, it is my opinion that § 16.1-69.24 provides the only authority of juvenile and domestic relations district courts to punish contempt, and its limitations control in the cases of contempt of court ordered support.
JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. JUDGE MAY REQUIRE CHILD WHO HAS BEEN FOUND DELINQUENT TO WORK WITH REGULAR MAINTENANCE CREW OF CITY OR COUNTY WHEN HE HAS DESTROYED PUBLIC PROPERTY FOR RESTITUTION.

July 14, 1980

The Honorable R. Baird Cabell, Judge
Juvenile and Domestic Relations District Court

You have asked whether § 16.1-279(E)(7a) of the Code of Virginia (1950), as amended, that authorizes a judge of the juvenile and domestic relations court to require a delinquent child to participate in a public service project allows a judge to require the child to work in a regular maintenance crew of a city or county. Specifically, you refer to instances where the child has damaged or destroyed public property.

Section 16.1-279(E) provides that if a child is found to be delinquent the juvenile court or circuit court may make certain dispositions among which are:

"7a. Require the child to participate in a public service project under such conditions as the court prescribes."

The phrase "public service project" is not defined in § 16.1-279(E)(7a) nor does there seem to be any legislative guidance in interpreting this phrase. There is no judicial interpretation of "public service project" applicable in this jurisdiction. Therefore, in interpreting the statute, it is necessary to try to ascertain the intent of the legislature by considering the object of the statute and the purpose to be accomplished and by giving the words used their ordinary usual significance. Sherwood v. Atlantic & Danville Railway Co., 94 Va. 291, 26 S.E. 943 (1897).

"Public service" is a service rendered in the public interest and a "project" is a large government supported undertaking; therefore, work with a regular maintenance crew would fall within the ordinary and usual use of public service project.

The legislative intent of the juvenile statute can be seen in § 16.1-279 which calls for dispositions for the child's "supervision, care, and rehabilitation." This would limit the instances of when a child can be assigned to a city maintenance crew to those circumstances where it is part of a program for rehabilitation of the child. The objective of the participation in such a project must be rehabilitative rather than to further the municipality's efforts to repair vandalism damage.

It is therefore my opinion that § 16.1-279(E)(7a) authorizes a judge of the juvenile and domestic relations court to require a child who has been found delinquent to
work with a regular maintenance crew of the city or county for a stated number of hours when he has damaged or destroyed public property if said judge finds it to be in the child's best interest.

Secondly, you have asked whether a child assigned to such a crew could be construed to be participating in the proprietary function of the municipality for purposes of tort liability. Cities and other municipal corporations only have immunity for acts occurring in the performance of a "governmental" function. See Bryant v. Mullins, 347 F.Supp. 1282 (W.D. Va. 1972); Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939). Cities are subject to liability for tortious acts that occur during the performance of a "proprietary" function, that is, an activity frequently or likely to be carried out through private enterprises. Id.

I am of the opinion that a city or other municipal corporation in supervising a juvenile's public service work would be performing a governmental function. Accordingly, it would be immune from suit by the juvenile for negligence arising out of such supervision. On the other hand, if the public service work of the juvenile falls within the proprietary function of the city or municipal corporation, the city or municipal corporation will not be immune from suit by a third party for the tortious action of the juvenile while he is performing that work. For further elaboration on this and related questions, see the Attorney General's Opinion to you of July 18, 1977, found in Annual Report of the Attorney General (1977-78) at 214.

May 19, 1981

The Honorable Stephen L. Comfort, Substitute Judge
Juvenile and Domestic Relations-District Court

You have asked whether a court may order support to continue to be paid by a parent for a child over the age of 18 years where that parent has an arrearage for support payments due but not paid prior to the child reaching 18.

Jurisdiction in divorce suits is controlled entirely by statute. Jackson v. Jackson, 211 Va. 718, 719, 180 S.E.2d 500 (1971). Section 20-108 of the Code of Virginia (1950), as amended, authorizes a court to revise and alter a decree concerning child support. However, a "court's jurisdiction over the child is eliminated ipso facto when the child reaches his majority. Moreover, the same event terminates, by operation of law, the prospective effect of the judicial support decree." Eaton v. Eaton, 215 Va. 824, 827, 213 S.E.2d 789, 792 (1975). Therefore, an order for support
ceases to be effective at majority without a judicial act. Eaton, supra, 215 Va. at 828. As a result, I am of the opinion that a court cannot order a parent to continue to make support payments for a child over the age of 18 years when the parent has an arrearage for support payments due but not paid prior to the child reaching 18. A different conclusion could be reached if a divorce order incorporated an agreement between the parties which was construed to require support after the child reaches 18. See Paul v. Paul, 214 Va. 651, 203 S.E.2d 123 (1974).

Related to your question, however, is the issue of whether the parent would then be relieved of the responsibility for payment of the arrearage accumulated prior to the child reaching the age of 18. Payments due for support pursuant to a divorce decree in a support order become vested as they accrue and the court is without authority to make any change to past due installments. Cofer v. Cofer, 205 Va. 834, 838, 140 S.E.2d 663, 667 (1965). Section 20-108 does not authorize the court to relieve the delinquent husband of the payment of accrued installments for the support of his children due under the provisions of a former decree or order. Cofer, supra, 205 Va. at 839. Therefore, it is my opinion that the arrearage in support is vested in the payee when due and the fact that the child reaches the age of 18 does not relieve a parent of the responsibility for a support arrearage accumulated prior to the child reaching the age of 18. See generally, 27B C.J.S. Divorce § 322(1) (1959) and 24 Am.Jur.2d Divorce and Separation § 853 (1966). Section 16.1-279(I) provides the court with the dispositional authority to enter judgment in any amount for arrears of support.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. RIGHT TO PUBLIC HEARING IN CRIMINAL PROCEEDING IN JUVENILE COURT MAY BE ORALLY WAIVED.

January 23, 1981

The Honorable Lawrence Janow, Judge
Juvenile and Domestic Relations Court
Twenty-Fourth Judicial District

You have asked several questions regarding the interpretation of the provisions of § 16.1-302 of the Code of Virginia (1950), as amended, relating to the waiver of the right to a public hearing in a criminal proceeding in a juvenile court.

You first asked if the express waiver of the right to a public trial requires a written waiver. An "express waiver" is defined in Black's Law Dictionary 1752 (Rev. 4th ed. 1963) as "the voluntary, intentional relinquishment of a known right." Webster's New Collegiate Dictionary 404, 405 (1975) defines the term "express" as "directly, firmly, explicitly stated..." or "to represent in words...to make known the
opinions or feelings of oneself." These definitions contain no reference to a requirement that an "express" waiver must be in writing. In addition, it is significant that the legislature did not use the term "in writing" in § 16.1-302. In contrast, see § 19.2-218 regarding the waiver of a preliminary hearing which clearly states that the waiver of such a hearing must be "in writing by the accused." It is my opinion that had the legislature intended the statute to require a written waiver, it could have and would have so provided explicitly. The failure to use the phrase "in writing" is a clear expression of a legislative intent that the waiver need not be in writing to be express. Thus, an oral waiver voluntarily and knowingly given would be effective.

You next asked how a waiver of a public trial would affect or restrict the disclosure of information or facts concerning the testimony at the trial by witnesses, parties, lawyers or other officers of the court to the public either directly or through the news media. Section 16.1-302 contains no specific language regarding restrictions resulting from a hearing being closed. However, disclosure of identifying information concerning a juvenile who is the subject of a proceeding in a juvenile court, other than in accordance with enumerated exceptions, is proscribed by § 16.1-309. Disclosure is prohibited only if the information is obtained either directly or indirectly from the records of the court or in the course of official duties. This would apply to lawyers, court personnel and other officers of the court who gain their information from court records or in the course of official duties.

It is my opinion that this section seeks to control information which would specifically identify or describe a juvenile. Therefore, it appears that certain facts that merely describe the occurrence of an event and do not specifically identify a juvenile may be revealed without violating the provisions of § 16.1-309. Further, it is my opinion that this interpretation is in accord with the purpose and intent of the juvenile and domestic relations district court law as stated in § 16.1-227, that "the welfare of the child and the family is the paramount concern of the State..." and that parties be assured a fair hearing. As to witnesses and parties, it is my opinion that such persons are only prohibited from disclosing identifying information concerning the juvenile which is obtained from the court proceeding or records of the court. They would not, however, be subject to the sanction provided for in § 16.1-309 upon revealing nonidentifying information or any information gained from other sources.

It should be noted that the exceptions relating to the confidentiality of court records set forth in §§ 16.1-305 and 16.1-307 allow inspection of such records only by certain enumerated persons. They do permit any person, agency, or institution access to records of the court, by order of
court, if that person, agency or institution can show a legitimate interest in the case or in the work of the court.

Your next question concerns whether a closed proceeding has the effect of imposing a "gag order" on the participants in the proceedings or reporters and, if so, to what extent these individuals may be restricted from publishing information respecting such proceeding. Strictly speaking, I do not believe that a closed trial is equivalent to a "gag order" or that such an order is created merely by virtue of conducting a private trial. If a court in the exercise of its discretion or pursuant to a legislative mandate closes all or some portion of a judicial proceeding to the public, it simply means that during such time the proceedings will be private. If the court wishes to restrict information from reaching the public as to what transpired in court, then it must further issue an order (a "gag order") restraining individuals who in some way are cognizant of the proceedings from disclosing their information.3

If a gag order is imposed, it normally will at a minimum prohibit officers of the court, court personnel, and participants in the judicial proceedings from disclosing publicly various specified areas of information. As indicated above, it is my view that § 16.1-309 would prohibit, with or without any such order, the above individuals from identifying juveniles either to the public or members of the news media.4

If a judge imposes a gag order against these persons which prohibits them from communicating other information concerning a juvenile proceeding, it would appear to be a proper discharge of the court's duties to ensure a fair trial for the accused (or juvenile) and maintain adequate control over its proceedings. The United States Supreme Court has repeatedly indicated that a trial court has widespread and inherent authority over the conduct of courtroom proceedings. For example, in Sheppard v. Maxwell,5 the court granted a writ of habeas corpus after concluding that a defendant in a well-publicized murder trial had been denied a fair trial because of massive, prejudicial publicity attending his prosecution. In concluding that the trial judge had taken insufficient steps to ensure a non-prejudicial atmosphere, the court referred to additional measures that could and should have been taken. Many such steps involved individuals under the direct supervision of the trial court. As the court stated:

"The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."6
Accordingly, I think that a juvenile court may forbid the various individuals listed in § 16.1-309 from publicly discussing aspects of a juvenile proceeding other than the minor's identity and may cite them for contempt in the event they violate said order.7

If a judge imposes a gag order against the press which prohibits it from publishing information concerning a juvenile proceeding, it would seem to be both statutorily and constitutionally invalid. By its own terms, § 16.1-309 appears to have no reference to actions taken by the media respecting juvenile court proceedings. I am aware of no other statute that would prohibit a reporter from publishing information about a juvenile's trial. Thus, if a member of the press reveals information about a juvenile proceeding which has been obtained through investigations, interviews or the reporter's own observations outside the courtroom, then under Virginia law he has not acted unlawfully. This would be true irrespective of the nature of the information or whether another individual may have acted illegally by discussing the proceeding with the reporter.

This conclusion is clearly supported by two recent decisions of the Supreme Court. In Oklahoma Publishing Company v. District Court,8 several reporters attended a detention hearing without any objection being voiced about their presence. The reporters subsequently published a number of stories using the boy's name and a photograph taken of him as he left the courthouse. A later pre-trial gag order was invalidated by the court since the media had simply published information obtained at a court proceeding which was in fact open to the public. The court noted that there was no evidence showing that the press had unlawfully acquired the information.9

Similarly, in Smith v. Daily Mail Publishing Co.,10 the court held that a West Virginia statute, which made it a crime for a newspaper to publish without the written approval of the juvenile court a juvenile's name, could not penalize a newspaper which had published the name of a juvenile offender after monitoring a police band radio frequency, learning of a slaying at a junior high school, and interviewing witnesses at the scene of the crime. The court stated that previous holdings "all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."11 The court then held that the protection of the anonymity of the juvenile offender—the sole interest advanced by the state to justify the statute—was not such a state interest "of the highest order." Accordingly, since the statute had punished the truthful publication of lawfully obtained information, the conviction was unconstitutional.

Accordingly, since § 16.1-309 does not prohibit actions of the press, I believe that the media are free to publish
information regarding a juvenile proceeding so long as the information is truthful and otherwise lawfully acquired. I would point out that a contrary construction of § 16.1-309 to the effect that the media fall within its provisions would run afoul of the recent decision in *Landmark Communications, Inc. v. Virginia.* There, at issue was the constitutionality of a criminal statute which prohibited persons from divulging information about proceedings before the State judicial review commission, such proceedings having been declared confidential by the State constitution and statutes. The statute was held to prohibit not only disclosure by actual participants in the proceedings but also third parties who were strangers to the inquiry, including the news media. The Supreme Court concluded that the truthful publication by a newspaper of an article describing a pending commission inquiry was protected under the First Amendment despite the State's asserted interests that confidentiality would be undermined to the point that the reputation of judges and the institutional integrity of the courts would be harmed.

It is axiomatic that a statute should be construed in such a way to preserve its constitutionality. Any doubts regarding the scope of § 16.1-309 must be resolved, consistent with *Landmark Communications,* to preclude its application to communications of the news media.

It might be argued that if a gag order were imposed against the media regarding a juvenile proceeding, a violation of which would be punishable as contempt, then any subsequent publication would not be "lawful" and the media could not claim the protections afforded in *Oklahoma Publishing* and *Daily Mail Publishing.* It is my opinion, however, that such an order would be constitutional in few, if any, cases. First, in *Oklahoma Publishing* certain publications occurred after the entry of the gag order, yet were still held proper. In *Daily Mail Publishing,* the newspaper clearly violated an applicable statute, but its conduct was nevertheless upheld.

The general difficulty in permitting such a gag order is that it is a "prior restraint" upon freedom of speech. This kind of order tells the press in advance what it may or may not publish. A similar order was involved in *Nebraska Press Assn. v. Stuart,* which prohibited the media from publishing certain information tending to show the guilt of a defendant in a pending criminal trial. The order was struck down on the ground that it violated the First Amendment. The "heavy burden" of showing the need for such an order had not been met. The fact that it did not showed "the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied." Significantly, the court cited the measures described in *Sheppard,* which were almost entirely concerned with controlling the conduct of persons directly involved in judicial proceedings and not the press, as measures that should have been relied upon to avoid the use of a gag order.
Accordingly, I believe that in the absence of truly egregious circumstances that unambiguously threaten the court's ability to conduct an orderly and fair trial, a gag order would unconstitutionally abridge the First Amendment.

Finally, you inquire whether the media may be compelled to divulge their sources of information if they publish stories about juvenile proceedings. The major decision setting forth the circumstances under which a reporter may be required to disclose certain information regarding his news sources is *Branzburg v. Hayes.* In *Branzburg,* the court considered whether a reporter has a right under the First Amendment to refuse to respond to a grand jury's subpoena and answer questions relating to the identity of his sources and information derived therefrom. The court held that a reporter has no such privilege and is required to respond as other members of the public would. The court stressed the historic function of the grand jury in investigating possible criminal activity and stated that the public interest in law enforcement and effective grand jury proceedings offset any alleged burden on news gathering that might result from requiring reporters to respond to "relevant questions put to them in the course of a valid grand jury investigation." 18

In accord with *Branzburg,* I believe that in the event that information is published regarding a juvenile offender's identity, a grand jury would be authorized to require the reporter to supply it with the name of the individual divulging the identity of the minor. No privilege would exist since an investigation of a possible criminal violation of § 16.1-309 would be involved. 19

If a news reporter were to publish information about a judicial proceeding beyond the mere identity of the juvenile, then the grand jury could not question the reporter as to how the information was obtained on the basis of a possible violation of § 16.1-309. The other areas of inquiry would not concern disclosures violative of said statute. However, as indicated above, a gag order may appropriately prohibit various parties directly involved in a juvenile proceeding from discussing the case with the media or the general public. A violation of such an order may be punished as criminal contempt. Consequently, if in a particular case a gag order has been issued and a publication is then printed which contains information regarding the prohibited areas of discussion, I think that reporters would be obligated to appear before the grand jury in view of the possible criminal act. They could be asked whether any of the individuals specified in the order had supplied them with any information prohibited from disclosure under the order. However, they could not be questioned beyond the terms of the order—that is, they could not be compelled to discuss people other than those in the order or areas of inquiry not included in the order.
Section 16.1-309 provides in relevant part: "Except as provided in §§ 16.1-299, 16.1-300, 16.1-301, 16.1-305 and 16.1-307, any person who files a petition, receives a petition or has access to court records in an official capacity, participates in the investigation of allegations which form the basis of a petition, is interviewed concerning such allegations and whose information is derived solely from such interview or is present during any court proceeding who discloses or makes use of or knowingly permits the use of identifying information concerning a juvenile who is suspected of being or is the subject of a proceeding within the jurisdiction of the juvenile court...which information is directly or indirectly derived from the records or files of a law-enforcement agency, court or the Department of Corrections or acquired in the course of official duties, shall be guilty of a Class 3 misdemeanor."


There, the United States Supreme Court upheld an order excluding members of the press and public from a pre-trial suppression hearing. The order did not prevent the news media from publishing information in their possession. As Justice Powell noted in his concurrence, an exclusion order denies access to one source of information. Unlike a gag order, it does not tell the press what it may or may not publish. Id. at 399.

I would also point out the exclusion of the media and general public and the imposition of a "gag order" are not always done with the same purpose in mind. For example, a court has wide discretion to exclude spectators from its courtroom in order to ensure order. See Id. at 388, n.19. There is no reason to suppose that in such a case the trial court would wish to suppress publication as to what occurred during the period of exclusion.

I note that § 16.1-309.1 permits under certain circumstances a judge to divulge the name and address of a child and the nature of the offense for which he has been adjudicated delinquent.

3See § 18.2-456.

4Id. at 363. See, also, Nebraska Press Association v. Stuart, 427 U.S. 539 (1976). There, the court invalidated a gag order against the press in part because the measures cited in Sheppard had not been used as a less drastic alternative.

5See § 18.2-456.


8Id. at 103.


11The statute, § 2.1-37.13, prohibited disclosure "by any person to anyone" except the review commission. This language is obviously much broader than that in § 16.1-309 and is further indication of the limited scope of the latter statute.
The only measure directly concerning the press was the trial court's regulation of the media's conduct in the courtroom. Obviously, in a juvenile proceeding, which will normally be conducted privately, such a situation will not be presented. It is significant that despite the court's clear disregard in *Sheppard* for the actions of the press during the trial, the court nevertheless noted that it "has... been unwilling to place any direct limitations on the freedom exercised by the news media...." 384 U.S. at 350 (1966).

See also, *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, cert. den., 419 U.S. 665 (1972) (If information is "material," defendant's right to fair trial may override reporter's privilege of confidentiality and require him to divulge such information.).

JUVENILES. JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT. PARENT AND CHILD.

June 12, 1981

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

You ask whether the parents of a juvenile may be compelled to pay the costs of keeping the child in a detention home when the court has ordered such placement while awaiting further placement in a private group residential home.

When a juvenile and domestic relations district court finds a child to be delinquent, one of the dispositional alternatives is to transfer legal custody of the child to "a child welfare agency, private organization or facility which is licensed or otherwise authorized by law to receive and provide care for such child." See § 16.1-279(E)(9). This is the action which was taken by the court, however, in this case funds were not immediately available to accomplish this placement.

You advise that the child committed a violent act toward her mother and that the parents were unwilling to assume her custody for fear of their safety. For these reasons the court ordered the child to be placed in a detention home as the only facility available while awaiting placement in a private group residential home.

Under the provisions of § 16.1-227 the judge possesses all necessary and incidental powers and authority to carry out the purposes of the juvenile law. Since the court had the authority to transfer legal custody of the child to the State Board of Corrections, see § 16.1-279(E)(10), I believe
it was appropriate under the circumstances of this case to place the child in the detention home while awaiting placement in a private group residential home.

Section 16.1-290 provides that "[w]henever legal custody of a child is vested by the court in someone other than his parents...the court shall order and decree that the parent or other legally obligated person shall pay...a reasonable sum commensurate with the ability to pay, that will cover in whole or in part the support and treatment of the child after the decree is entered...." In my opinion, § 16.1-290 is applicable to this situation, and the parents may be compelled to pay the costs of the support and treatment of keeping the child in the detention home.

You also ask who is responsible for a hospital bill incurred by the child while in the detention home. Section 16.1-275 provides in part that whenever a child concerning whom a petition has been filed appears to be in need of medical or surgical care, the court may order the parent to provide such care in a hospital or otherwise to pay the expenses thereof. In my opinion, the court may proceed under § 16.1-275 to have the parents pay the expenses of the hospitalization.

LABOR AND INDUSTRY, DEPARTMENT OF. DISCLOSURE OF INFORMATION. ACTION BROUGHT UNDER § 40.1-49.4, DEPARTMENT SUBJECT TO DISCOVERY. OTHER ACTIONS, § 40.1-11 PROHIBITS DISCLOSURE UNLESS DISCOVERY RULES OF SUPREME COURT ARE DEEMED TO CONTROL. IF DISCOVERY IS PERMITTED, DEPARTMENT MAY FILE FOR PROTECTIVE ORDER TO PREVENT DISCLOSURE OF CONFIDENTIAL MATERIAL.

August 12, 1980

The Honorable Robert F. Beard, Jr., Commissioner
Department of Labor and Industry

You have asked whether the Department of Labor and Industry (the "Department") must comply with discovery requests filed pursuant to § 40.1-49.4(L) of the Code of Virginia (1950), as amended, or whether § 40.1-11 controls the production of material. Section 40.1-11 provides as follows: "[n]either the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title or of Title 45.1."

Your question is of two parts: (1) whether the Department is subject to discovery when it has initiated an enforcement action; and, (2) whether the Department is subject to discovery when it is not a party to a proceeding.

Comparing §§ 40.1-11 and 40.1-49.4(L), it is my opinion that the latter is an exception to the former when
§ 40.1-49.4 is operative. Section 40.1-49.4(L) clearly states that discovery shall be conducted in accordance with its terms. The principles of statutory construction require that, when two statutes in pari materia appear to conflict, they should be reasonably construed so as to give effect to both. Board of Supervisors of Albemarle County v. Marshall, 215 Va. 756, 214 S.E.2d 146 (1975). Section 40.1-11 was intended to prevent disclosure of confidential data except for the purposes "of this title." Section 40.1-49.4(L) is in conformity with this purpose. An enforcement action brought under the statute is meant to fulfill the purposes of Title 40, and it is only logical and right that the opposing party have access to necessary information which may be used against it.

A different situation is presented, however, when the Department is not a party to an action and has been requested to produce documents relating to a safety or health violation. By its terms § 40.1-49.4(L) does not apply in such a situation. The issue that must be resolved, therefore, is whether § 40.1-11 creates a privilege for information and documents which will exempt them from discovery under the Supreme Court Rules. Since no such privilege existed for government information at common law, courts have strictly construed any statutes granting such status. Annot., 165 A.L.R. 1302 (1946); Stratford Factors v. New York State Banking Department, 10 App. Div. 2d 66, 197 N.Y.S.2d 375 (1960).

The Virginia Supreme Court has likewise evidenced a reluctance to grant a privilege to government information protected from disclosure by legislation. In Maryland Casualty Company v. Clintwood Bank, 155 Va. 181, 154 S.E. 492 (1930), the court addressed the question of whether § 6.1-114 (then § 6-128) was sufficient reason to excuse a State banking official from producing certain documents in court. That section provided that bank records "shall be open only to such officers and employees of the State as may have occasion and authority to inspect them in the performance of their duties...and the imparting of such information by an employee or officer of the State may be sufficient cause for his removal from the position he occupies under the State government." The Virginia Supreme Court held that the lower court had committed error in not requiring the documents to be produced; in referring to § 6.1-114, it noted: "[t]hese statutory provisions should be construed to relate to information of a confidential nature affecting the business of a bank. They should be strictly construed, when invoked for the limitation of judicial inquiry, and are subject to the right of every litigant to call for and produce evidence affecting his substantial rights...[t]he latter part of this section prohibiting employees or officers of the State from imparting such information, clearly means the voluntary imparting of such information. It has no reference whatever to the duty of a witness, whether State officer or not, to testify when duly sworn and examined in court as a witness...." Maryland Casualty, supra, at 193.
The court looked to the purpose of the statute to ascertain what evil was meant to be avoided, determined that it was not at stake, and, therefore, held the documents and testimony were improperly excluded.

To the contrary, when dealing with the privilege created by the legislature as regards accident reports, §§ 46.1-407 to 46.1-410, the court has upheld the privilege because the statute specifically excludes use of the reports as "evidence in any trial, civil or criminal." *Willis v. Commonwealth*, 190 Va. 294, 56 S.E.2d 222 (1949).

In light of this precedent, I am of the opinion that the Department must reveal the information requested on a discovery motion. Section 40.1-11 more closely parallels the statute at issue in the Clintwood Bank case than the one in Willis; it generally prohibits disclosure as does § 6.1-114. While such a statute would seem to grant the broadest privilege to the information, its very breadth opens it to exceptions. Comment, *The Required Report Privileges*, 56 N.W.L.Rev. 283, 288 (1961).

When it is necessary to protect confidential sources of information, however, the Department may ask for a protective order under Rule 4:1(c) of the Rules of the Supreme Court of Virginia to limit the scope of discovery and delete the confidential matter. This also holds true for matters to be discovered under § 40.1-49.4(L).

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1 Section 40.1-49.4 sets out the enforcement provision of the State labor laws. If an action has been brought in State court under § 40.1-49.4, then § 40.1-49.4(L) must apply. It states in part: "[n]otwithstanding the provisions of any other law, or any rule or regulation, there shall be no civil discovery by any party to a hearing or civil proceeding held pursuant to this section except as provided in this section...." It allows parties in general district court to obtain discovery by the methods provided in the Rules of the Supreme Court of Virginia, Rule 4:1 and Rules 4:3 through 4:13, and further provides that the general district court may issue protective orders limiting discovery and setting deadlines. If the case reaches circuit court, the parties also may obtain discovery by the methods provided for in the Supreme Court Rules.

LIBRARIES, COUNTIES, CITIES AND TOWNS, ORDINANCES.
GOVERNING BODY HAS NO AUTHORITY OVER BOARD EMPLOYEES DESPITE ORDINANCE ESTABLISHING BOARD SOLELY AS AGENT OF GOVERNING BODY.

February 26, 1981

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County
You ask whether the governing body of King George County has authority to control the compensation of library board employees, in view of a 1973 ordinance which establishes the library board solely as an agent of the governing body.1

Section 42.1-33 of the Code of Virginia (1950), as amended, provides that the governing body of any county shall have the power to establish a free public library, and the governing body shall provide sufficient support for the operation of the library by levying a tax therefor.

Under § 42.1-33, the term "support" is defined to include, but not be limited to, compensation of library personnel. Funds appropriated or contributed for public library purposes constitute a separate fund, and are not to be used for any but public library purposes.

Section 42.1-35 provides that the management and control of a free library system shall be vested in a board of members or trustees. The members are to adopt such bylaws, rules and regulations for their own guidance and for the government of the free public library system as may be expedient.

Under § 42.1-35, the members have control of the expenditures of all moneys credited to the library fund, and the board has the right to accept gifts for the establishment and maintenance of the free public library system or its endowment.

The creation of a library board is generally mandatory under § 42.1-35 whenever a governing body establishes a free public library under § 42.1-33.2 If the governing body elects to establish a free public library, the governing body must appoint a library board, and thereafter the "management and control" of the library system is vested in the library board. See § 42.1-35.

The grant of management and control to the library board includes the power to control personnel employed in the library system. The governing body therefore has no authority to appoint those employees or to determine their compensation.3

Where a board of supervisors chooses to create a library board, the board of supervisors thereby decides to vest the management and control of library personnel in the library board,4 and the employees of the library board are directly responsible to the library board.5

Chapter 2 of Title 42.1 serves as a comprehensive treatment of the powers of local governments to establish free public libraries.6 Section 42.1-36 offers an option not to have a library board under certain special forms of government not adopted by King George County.7 Special provision is also made for regional library systems. See, for example, § 42.1-37.
Under present circumstances, however, a library board, as contemplated by §§ 42.1-33 and 42.1-35, is mandatory if the county establishes a free public library. To the extent that the 1973 ordinance is inconsistent with §§ 42.1-33 and 42.1-35, the statutes control.

Accordingly, I am of the opinion that the governing body of King George County has no authority to control the compensation of library board employees, despite the 1973 ordinance which establishes the library board solely as an agent of the governing body.

1See Ordinance adopted October 18, 1973, entitled "An Ordinance to Create the Board of Trustees of the Lewis Egerton Smoot Memorial Library for King George County, Virginia: to Define the Functions and Responsibilities of Same: and for Other Purposes."

Section 2A of the ordinance provides that the board of trustees of the library is created solely as the agent of the board of supervisors. Section 4A provides that the trustees shall operate the library as the agent of the board of supervisors. Section 4B provides that the term "operate" includes selection and setting rates of compensation of personnel.


6Compare, for example, Opinion to the Honorable William T. Parker, Member, Senate of Virginia, dated May 22, 1980, found in Report of the Attorney General (1979-1980) at 328 (land subdivision and development).


LICENSES. POWERS OF BOARD OF BARBER EXAMINERS OVER BARBERS AND TEACHERS LIMITED TO THOSE SPECIFICALLY DELEGATED. NO POWER TO LICENSE BARBER SHOPS.

May 4, 1981

Mrs. Ruth J. Herrink, Director
Department of Commerce
You ask whether the Board of Barber Examiners (the "Board") has the legal authority to license barber teachers, to regulate barber schools and the educational activities within those schools, or to license barber shops.

The powers of the Board emanate from the general statutes governing the regulation of professions and occupations, §§ 54-1.17 through 54-1.42 of the Code of Virginia (1950), as amended, as well as from the Board's specific enabling statutes, §§ 54-83.2 through 54-83.28. Looking first to the specific statutes, it is clear that the Board has authority to license barber teachers pursuant to § 54-83.22 which states, in part, that the "Board shall license persons to practice and teach barbering." I cannot find in the Board's specific enabling legislation any reference, however, to the Board's authority to regulate barber schools, the educational activities within those schools, or to license barber shops.

Because of the repeal of the vast majority of the Board's enabling statutes on July 1, 1974, however, further analysis of the Board's authority is required. This repeal was accompanied by a legislative directive that the Board adopt the repealed Code provisions as rules and regulations. Thus, the Board was given the authority to enforce regulations enacted in compliance with that directive. Examination of the pre-existing statutory scheme reveals that prior to July 1, 1974, the Board had specific statutory authority to regulate barber schools. That authority was found in former § 54-83.8.

Within the scope of former § 54-83.8, therefore, the Board can regulate barber schools and the educational activities within those schools. Absent a further grant of legislative authority, however, the regulation could not exceed the regulatory scope of the repealed statute. While it is true that great weight is accorded administrative application and construction of statutory provisions, it is equally true that a State board administering a statute has no power to extend or amend it by regulations. The power to change or amend a law is the power to make law, a power not possessed by administrative officers.

Authority for the Board to regulate barbershops also appears to have existed under the pre-existing statutory scheme. In § 54-83.24, for example, the Board was given the authority "to enter into and inspect any barbershop" and to "prescribe such rules and regulations and sanitary requirements...in aid or furtherance of the provisions of...[Ch. 4.1 of Title 54], as required by the State Board of Health pursuant to § 32-6 of the Code of Virginia." Moreover, Ch. 4.1 repeatedly referred to licensing or issuance of permits to operate barbershops and granted to the Board the power to issue such permits and charge fees. See, e.g., former §§ 54-83.3, 54-83.8 and 54-83.19. Finally, a review of the title of the original act establishing the Board shows that the act was intended, in part, "to regulate
In determining the proper meaning of a statute, reference to the title of an act is proper in determining the intention of the legislature. *Byrd v. Commonwealth*, 124 Va. 833, 98 S.E. 632 (1919).

Accordingly, I find that the Board has the authority to license and regulate barbershops at least to the extent that they were previously regulated under the former provisions of Ch. 4.1 of Title 54.

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2Former § 54-83.8 stated: "No school of barbering shall be approved by the Board unless its faculty are registered barber teachers under this chapter and pass an examination, conducted by the Board, as a registered barber teacher, as required in the course of instructions set forth in this chapter.

No barber school shall pay compensation of any kind to students.

No barber school shall allow instruction of more than sixteen students per barber teacher.

Any student entering a school of barbering to learn the occupation to practice as a barber in this State, shall be required to practice in a school of barbering not less than one thousand two hundred forty-eight hours study, and practice not more than eight hours in any one day, within a period of eight months, such course of instruction to include the following subjects:

- Scientific fundamentals for barbering; physiology, hygiene, elementary chemistry relating to sterilization and antiseptics; massaging and manipulating the muscles of the face, neck and scalp; haircutting, bobbing, waving, shaving, beard trimming and dyeing the hair.

No school of barbering shall enroll or admit any student thereto unless such student shall make and file, in duplicate, an application under oath which said application shall be of such form and contain such matters as the Board may prescribe and shall be obtained by such student or the school from said Board. One copy of such application shall be retained by the school enrolling or admitting the student and the other copy shall be filed by such school with said Board.

No school of barbering shall enroll or admit any student in a postgraduate course thereof, which said postgraduate course shall be for the purpose of qualifying persons to pass the examination conducted by the Board to determine fitness to practice barbering, unless such student shall file, in duplicate, an application, under oath, which said application shall be obtained by such student or school from the Board and shall be in such form and shall show that the applicant has passed an examination conducted by said Board, and that such applicant has either

(a) Graduated from a school of barbering approved by the Board,
(b) Then holds a valid, unexpired and uncancelled certificate of registration as a registered apprentice, or
(c) Who can prove by affidavit that he has practiced as a barber in this State or another state or country for at least two years immediately prior to making such application; one copy of such application shall be retained by the school so admitting or enrolling such student and the other shall be filed by such school with said Board. Nothing in this section contained shall be construed as limiting or modifying the provisions of § 54-83.6.

Any duly licensed barbershop operating under this chapter having or employing more than one apprentice therein at any one time is hereby declared to be a barber school, and shall be subject to all the provisions of this chapter relating to barber schools."

Additional authority might be found in § 54-1.28 which applies to regulatory boards in general and provides that boards shall have the power "[t]o establish the qualifications of applicants for certification or licensing...provided that all such qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation...." See my Opinion to you dated October 31, 1980, at 2.


LICENSES. POWERS OF BOARD OF PROFESSIONAL HAIRDRESSERS OVER PROPRIETARY SCHOOLS OF COSMETOLOGY LIMITED TO THOSE INHERENT IN LICENSURE AND EXAMINATION.

October 31, 1980

Mrs. Ruth J. Herrink, Director
Department of Commerce

You ask whether the Virginia State Board of Examiners of Professional Hairdressers (the "Board") has the legal authority to approve proprietary schools of cosmetology, and/or prescribe standards for the teachers of those schools.

The powers of the board emanate from the general statutes governing the regulation of professions and occupations, §§ 54-1.17 through 54-1.42 of the Code of Virginia (1950), as amended, as well as from the Board's specific enabling statutes, §§ 54-112.1 through 54-112.29. Looking to the specific statutes first, the only mention of the Board's power to approve schools occurs in an exemption in § 54-112.1(3), which states that nothing in the chapter shall apply to "[s]tudents enrolled in a tax-supported school taking a course in cosmetology or students of a school of cosmetology approved by the Board." The State Board of Education regulates trade schools generally, but an exemption exists for schools "approved under the laws of the Commonwealth...." Section 22.1-320(1). It would therefore appear that the General Assembly contemplated that the Board
approve proprietary schools. Nowhere, however, is it specifically spelled out what this approval shall entail.

Section 54-1.28 enumerates the powers and duties of all regulatory boards within the Virginia Department of Commerce. It provides that the Board shall have the power to "establish the qualifications of applicants for certification or licensing...provided that all such qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation." It would therefore appear that the Board has the power to approve proprietary schools only insofar as that approval is a legitimate extension of the Board's establishment of qualifications for applicants for examination for licensure.

Because the Board's power to identify and preserve competency is limited to the process of examination and licensing, its ability to approve schools must also be limited. It is therefore my opinion that the Board's approval of a proprietary school can be based only upon the school's holding a valid shop license pursuant to § 54-112.26, being staffed by licensed hairdressers pursuant to § 54-112.3, and teaching a course content which can be demonstrated to be preparatory for the examination and thus ensure competence pursuant to § 54-1.28(1). The Board possesses no further power to approve schools.

With reference to the Board's ability to prescribe standards for teachers in proprietary schools of cosmetology, my review of the pertinent statutes contains no reference to any such power. It is therefore my opinion that the Board has no authority to prescribe such standards.

LIENS. JUDGMENT DOCKETED IN COUNTY CREATES NO LIEN ON LAND LYING WITHIN SAID COUNTY IF NOT ACQUIRED BY JUDGMENT DEBTOR UNTIL AFTER ANNEXATION BY ADJOINING CITY.

January 23, 1981

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You have asked whether a judgment docketed in the Circuit Court of Washington County in 1971 would establish a lien upon a parcel of real estate then lying in said county but not acquired by the judgment debtor until after the 1973 annexation of said parcel by the adjoining City of Bristol. Section 8.01-458 of the Code of Virginia (1950), as amended, provides in part:

"Every judgment for money rendered in this Commonwealth...shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk's..."
office of the county or city where such land is situated...."

You will note that the effect of annexation is discussed by the last sentence of § 8.01-458:

"Any judgment or decree properly docketed under the provisions of this section shall, if the real estate subject to the lien of such judgment has been annexed to or merged with an adjoining city subsequent to such docketing, be deemed to have been docketed in the proper clerk's office of such city."

In order to create a lien, the judgment must be recorded in the jurisdiction where the land is situated. The complication in the case you describe is that, at the time the land is acquired by the judgment debtor, the land is situated in a jurisdiction in which there is no docketed judgment. The parcel was in Washington County when the judgment was recorded, but was in Bristol when acquired by the judgment debtor. Consequently, the question is whether the jurisdiction "where the land is situated" should be defined by the date of recording or by the period in which the debtor is the owner of the land.

The issue appears to have been resolved by the case of Wicks v. Scull, 102 Va. 290, 46 S.E. 297 (1904). There the court considered § 3570 of the 1887 Code of Virginia, a statute which preceded § 8.01-458 and which provided in part:

"No judgment shall be a lien on real estate...unless it be docketed...in the county or corporation wherein such real estate is...."

The court held that a judgment docketed in a county out of which a city was subsequently carved was not a lien against land acquired by the judgment debtor several years after the incorporation of the city.

Accordingly, the Bristol real estate acquired by the debtor after annexation is not subject to a lien on account of a judgment being recorded in Washington County.

LINE OF DUTY ACT. APPLICATION TO PARAMEDICAL SERVICES BUREAU.

February 12, 1981

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

You have asked whether members of the Norfolk Paramedical Rescue Services Bureau are included among persons covered under the Line of Duty Act (the "Act"). You have enclosed a copy of an ordinance passed by the Council of the
City of Norfolk in 1973 creating a Bureau of Paramedical Services (the "Bureau"). The function of the Bureau is to "operate the city's paramedical rescue services."

Section 15.1-136.2(a) of the Code of Virginia (1950), as amended, defines a "deceased" within the meaning of the Act to include:

"any person whose death occurs...as the direct or proximate result of the performance of his duty...as a member of any...rescue squad which shall have been recognized by an ordinance or a resolution of the governing body of any county, city or town of this State as an integral part of the official safety program of such county, city or town...."

In the Opinion of this Office to the Honorable Royston Jester, III, Commonwealth's Attorney for the City of Lynchburg, dated January 26, 1973, and found in Report of the Attorney General (1972-1973) at 328, it was held that members of the Lynchburg Life Saving Crew, Inc., were within the Act because that group had been recognized as an integral part of that city's official safety program when the city passed a resolution appropriating money and providing space for the group.

In my opinion the Bureau has been recognized by the City of Norfolk in its ordinance as an integral part of that city's official safety program. Accordingly, I conclude that members of that Bureau are covered by the Act.

MAGISTRATES.MAY HOLD SHOW CAUSE HEARING UNDER § 19.2-123(c) TO REVOKE BOND.

March 5, 1981

The Honorable Henry A. Vanover
Commonwealth's Attorney for Dickenson County

You have asked whether a magistrate can hold a hearing pursuant to a show cause order issued under the provisions of § 19.2-123(c) of the Code of Virginia (1950), as amended, and if so, whether the magistrate can revoke a bond previously set for an accused after listening to all the evidence at such a hearing.

Section 19.2-123(a) provides for the release of an accused by a judicial officer on an unsecured bond or his promise to appear. This section also allows the judicial officer to impose conditions of release if he determines that conditions are necessary to assure the appearance of the accused at trial.

Section 19.2-123(c) provides, in part:
"If any condition of release imposed under the provisions of this section is violated, the judicial officer may issue a capias or order to show cause why the bond should not be revoked."

The answer to your question thus depends on whether a "judicial officer" under § 19.2-123(c) includes a magistrate. In this regard, § 19.2-119 defines "judicial officer" as "unless otherwise indicated...any magistrate within his jurisdiction." Since § 19.2-123(c) does not indicate otherwise, I am of the opinion that a magistrate has the authority to issue a show cause order pursuant to § 19.2-123(c); to hold a hearing based on such an order; and to revoke a bond previously set for an accused after hearing evidence.

It should be noted that in other sections dealing with the alteration of bond, the authority to alter bond is placed in the court. See §§ 19.2-130 and 19.2-132. However, this does not mean that such authority is exclusively within the power of the court. Compare § 19.2-133. The language of § 19.2-123 is clear and unambiguous. When the intention of the legislature is expressed in clear and precise terms, there is no need for interpretation and effect should be given to its manifest meaning. Commonwealth v. Bailey, 124 Va. 800, 97 S.E. 774 (1919).

1Magistrates have also been found to be "judicial officers" in prior Opinions of this Office. See Reports of the Attorney General (1978-1979) at 174; (1975-1976) at 22 and 27.

2Section 19.2-133 provides, in part: "Although a party has been admitted to bail, if the amount thereof is subsequently deemed insufficient, or the security taken inadequate, the court having jurisdiction to try the case in which the bail was required, or the judge thereof, or the officer before whom the bail was given, may increase the amount of such bail, or may require new or additional sureties therefor, or both...." (Emphasis added.)

MARINE RESOURCES COMMISSION. ARREST. WARRANT. § 28.1-185.1 CONFERs UPON INSpectORS NO POWER OF ARREST WITHOUT WARRANT FOR CRIMES NOT COMMITTED IN PRESENCE OF INSPECTOR.

July 21, 1980

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You ask about the powers of arrest without a warrant conferred upon inspectors of the Marine Resources Commission pursuant to § 28.1-185.1 of the Code of Virginia (1950), as amended.
Section 28.1-185.1 provides that all inspectors shall have the power to arrest without a warrant any person who commits in his presence certain larcenies or violations of certain provisions of Title 62.1. The offenses covered include both felonies and misdemeanors.

A private citizen may make arrests, without a warrant, for felonies committed in his presence, and for misdemeanors committed in his presence. See Opinion to the Honorable Ruth J. Herrink, Director, Department of Professional and Occupational Regulation, dated August 24, 1977, found in Report of the Attorney General (1977-1978) at 29.

By statute, certain officers may also make arrests, without a warrant, for any crime committed in their presence (that is, both felonies and misdemeanors like the private citizen), and for felonies not committed in their presence, subject to certain requirements as to reasonable grounds or probable cause. See § 19.2-81.

Such officers also have limited powers to arrest without a warrant for certain misdemeanors not committed in their presence, provided certain requirements are met. Id.; see, also, Opinion to the Honorable James A. Cales, Jr., Commonwealth's Attorney for the City of Portsmouth, dated March 13, 1979, found in Report of the Attorney General (1978-1979) at 15.

Section 28.1-185.1 by its terms authorizes arrests without a warrant only for crimes committed in the presence of the inspector. Section 28.1-185.1, in effect, codifies for the inspector the arrest powers of a citizen with respect to the crimes mentioned therein.

Accordingly, I find that § 28.1-185.1 confers upon inspectors of the Marine Resources Commission no power of arrest without a warrant for any crimes not committed in the presence of the inspector.

1The larceny covered may be either a felony or a misdemeanor. See §§ 18.2-95 and 18.2-96 (grand larceny and petty larceny defined; how punished). Chapter 17 of Title 62.1 relates to motorboats and water safety, and violations of most provisions of Ch. 17 (and the regulations promulgated thereunder) are misdemeanors. See, for example, § 62.1-185 (penalties). Chapter 18 relates to protection of aids to navigation, and violations of §§ 62.1-187 and 62.1-189 are misdemeanors. Chapter 20 relates to miscellaneous offenses (mainly obstruction or contamination of waters), and violations of most provisions of Ch. 20 are misdemeanors. See, for example, §§ 62.1-194 and 62.1-195.
The Honorable Joseph E. Campbell  
Commonwealth's Attorney for the City of Norfolk  

This is in response to your letter of November 3, 1980, requesting an official Opinion of the Attorney General as to the legality of the institution of forfeiture proceedings pursuant to Title 19.2, Ch. 22 of the Code of Virginia (1950), as amended, for personal property seized in violation of Governor Dalton's Emergency Order Number 41(80). My staff has inquired into the facts which underlie your Opinion request. Specifically, one of my assistants discussed the seizure in question with James E. Douglas, Commissioner of Marine Resources, on November 18, 1980. The facts appear to be as follows.

On August 21, 1979, seven crab pots were seized in the Lafayette River, a portion of the James River closed in response to kepone at that time. The seizure was pursuant to the State Board of Health Emergency Rule dated August 9, 1979, prohibiting the taking of crabs and fish from the Chesapeake Bay/James River and its tributaries. This seizure was not pursuant to Governor Dalton's Emergency Order Number 41(80). In his letter to you of September 30, 1980, Mr. Markland of the Virginia Marine Resources Commission mistakenly cited § 44-146.17 of the Code to you as authority for this seizure. Section 44-146.17 is unrelated to the seizure which actually occurred.

The seizure on August 21, 1979, was in response to a violation of the State Board of Health August 9, 1979, Emergency Rule. That rule was adopted pursuant to the provisions of §§ 32-6 and 32-12 (now repealed). Please note the applicable provision at page 3 in the attached copy of the State Board of Health Emergency Rule. The seizure power cited by the Marine Resources Commission arises in § 28.1-185. Section 28.1-185 authorizes the Commissioner of Marine Resources and his inspectors to enforce the "Fish or shellfish laws" and "to seize...any...thing used in violating any such laws...." Forfeitures of such seized things may then be enforced pursuant to Ch. 10 of Title 29, §§ 29-214 through 29-229 and through Ch. 22 of Title 19.2, §§ 19.2-369 through 19.2-386. In my opinion, the Emergency Rule of the Virginia State Board of Health constitutes a fish or shellfish law in the context of § 28.1-185. Thus, the initiation of a forfeiture proceeding by you would be authorized by law.
REPORT OF THE ATTORNEY GENERAL

September 26, 1980

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You have asked two questions concerning the laws governing oyster planting grounds.

Effective July 1, 1978, the General Assembly amended § 28.1-108 of the Code of Virginia (1950), as amended, changing from 105 feet to 205 feet the minimum waterfront ownership required to be eligible for a riparian oyster ground assignment. You ask whether an applicant for assignment with more than 105 feet but less than 205 feet of frontage who applied for assignment prior to July 1, 1978, is eligible for an assignment after that date. In effect you ask whether the 1978 amendment to § 28.1-108 applies retroactively.

Statutory amendments are generally interpreted as having prospective application only unless the statutory language expressly indicates retrospective application. 17 M.J. Statutes § 73 at 365; see, also, Opinions to the Honorable V. Earl Dickinson, Member, House of Delegates, dated July 28, 1975, found in Report of the Attorney General (1975-1976) at 66; and to the Honorable William N. Alexander, II, Commonwealth's Attorney for Franklin County, dated January 11, 1977, found in Report of the Attorney General (1976-1977) at 197. Nothing in the amended statute expressly or implicitly indicates legislative intention that the amendment apply retrospectively.

Prospective application of statutory amendments is strongly presumed where retrospective application would affect vested property rights. 17 M.J. Statutes § 73 at 367. Under § 28.1-108, before and after its amendment, any riparian landowner with the minimum required footage is statutorily guaranteed an assignment of one-half acre of bottoms for his exclusive use for the purpose of planting or harvesting oysters or clams. See § 28.1-108(B). The statute further provides that the riparian assignment, once made, shall pass with the highland and cannot be separated. See § 28.1-108(C). Thus, § 28.1-108 establishes substantial additional vested property rights attributable to riparian highland ownership. An applicant who prior to July 1, 1978, owned the required minimum footage for an assignment under § 28.1-108 and who applied for assignment prior to July 1, 1978, would, in my view, have a vested property interest in an assignment. I, therefore, conclude that the amendment to § 28.1-108 should not be construed to apply retrospectively so as to destroy vested property rights. An applicant who met the minimum footage requirements and applied for assignment prior to July 1, 1978, remains eligible for assignment after July 1, 1978, even if such applicant cannot meet the footage requirement under § 28.1-108 as amended.
Your second question is whether 1980 amendments to § 28.1-109, effective July 1, 1980, concerning survey costs associated with oyster lease assignments should be applied to lease applications filed before July 1, 1980, but surveyed after that date. Prior to July 1, 1980, an applicant for an oyster planting ground lease was required to pay for a survey of the ground to be leased according to a fixed-fee schedule graduated according to the amount of acreage to be leased. See § 28.1-109(7) (1979 Replacement Volume). Under the amended provisions of § 28.1-109(7) the lease applicant must pay for the survey on an actual cost basis. See § 28.1-109(7) (1980 supplement).

For essentially the same reasons recited above, I conclude that the amendments to § 28.1-109(7) should not be applied retrospectively. Accordingly, the survey costs for an oyster ground lease are governed by the provisions of § 28.1-109(7) effective at the time of the application.

MENTAL HEALTH AND MENTAL RETARDATION. COMMUNITY SERVICES BOARD MAY TAKE PARENTAL INCOME INTO ACCOUNT IN DETERMINING ABILITY TO PAY FOR SERVICES RENDERED MENTALLY INCAPACITATED CHILDREN.

December 8, 1980

Leo E. Kirven, Jr., M.D., Commissioner
Department of Mental Health and Mental Retardation

You have asked two questions regarding the reimbursement system of the Mount Rogers Community Mental Health and Mental Retardation Services Board (the "Board"). You refer to § 20-61 which parents have raised in support of their claims that they are not liable. That statute provides that a parent who deserts or fails to support a child of any age who is crippled or incapacitated from earning a living is guilty of a misdemeanor. The same
statute provides, however, that parents are not criminally liable in such cases where "the child qualifies for and is receiving aid under a federal or State program for aid to the permanently and totally disabled...."

Section 20-61 is not dispositive of the questions you raise. It imposes criminal liability on parents in order to enforce their legal and moral duty to support dependent infant children. Boaze v. Commonwealth, 165 Va. 786, 183 S.E. 263 (1936). It is not applicable, however, in adjudging claims for civil liability. Department of Mental Hygiene v. Shepard, 212 Va. 843, 188 S.E.2d 99 (1972).

The question of civil liability of parents for services must be answered by reference to common law rules regarding a parent's obligation of support. In Virginia, the rule is that a parent has a common law duty to support an adult child who is mentally incapacitated. Department of Mental Hygiene v. Shepard, supra, at 846; Indemnity Insurance Company v. Nalls, 160 Va. 246, 248, 168 S.E. 346 (1933). This rule applies only where as a result of the mental incapacity the adult child is unable to adequately support himself. Since the basis for imposing such duty is the adult child's inability to earn a livelihood, Indemnity Insurance Company v. Nalls, supra, at 248, the duty no longer exists once an adult child is able to adequately support himself.²

The common law duty of parental support requires parents to provide support for "necessaries." Mihalcoe v. Holub, 130 Va. 425, 430, 107 S.E. 704, 706 (1921). The Virginia Supreme Court has not defined "necessaries," but has referred to 59 Am.Jur.2d Parent and Child § 55 (1971) for a discussion of that term. Department of Mental Hygiene v. Shepard, supra, at 846. The discussion found therein broadly defines the duty of supplying necessaries and including:

"such a place of abode, furniture, articles of food and wearing apparel, medicines, medical attention, nursing, means of education, and social protection and opportunity, as comport with the health, comfort, welfare, and normal living of human beings according to present standards of civilization, considering his [the parent's] own means, earning capacity, and station in life." 59 Am.Jur.2d Parent and Child § 55 at 145.

It is my understanding that the Adult Activities Center provides educational programs for mentally retarded individuals in order to teach them basic life skills. Such educational services, in my opinion, fall within the definition of "necessaries" as set forth above.

I conclude, therefore, that parents of mentally incapacitated adult children may be held liable for the cost of services provided by a community services board.

"2. Should Community Services Boards consider the financial resources of parents when prescribing the
manner of collection of fees required by Section 37.1-197(g) of the Code of Virginia?"

This question raises a policy matter which should be addressed locally by community services boards.

Parental income may be a factor to be considered in collecting costs from parents. Supplemental Security Income payments received by the child may also be considered in determining whether the adult child should himself first be billed for services rendered.

I am aware of the fact that § 37.1-197(g) directs community services boards to institute reimbursement schedules to "maximize the collection of fees from persons receiving services under the jurisdiction or supervision of the board and from responsible third-party payors." One method of maximizing such fees is to look to parents for payment where appropriate.

1Effective July 1, 1980, such entities are entitled "community services boards." See § 37.1-1(3a) of the Code of Virginia (1950), as amended.

2I do not deem the receipt of payments under Title XVI of the Social Security Act, 42 U.S.C. § 1381, et seq., to be "earning a livelihood" for purposes of the discussion which follows. However, as I note, infra, such payments may be considered by the Board in determining whether payment should be sought from the parents.

3I conclude from my analysis of the common law that parents of mentally incapacitated adult children may be held liable for necessaries provided the child. They are, therefore, considered primarily liable for such services, not as third-party payors within the meaning of § 37.1-197(g).

MENTAL HEALTH AND MENTAL RETARDATION. COMMUNITY SERVICES BOARD MAY TAKE PARENTAL INCOME INTO ACCOUNT IN DETERMINING ABILITY TO PAY FOR SERVICES RENDERED TO MENTALLY INCAPACITATED CHILDREN.

December 30, 1980

The Honorable W. L. Lemmon
Member, House of Delegates

You have requested my opinion regarding payment guidelines which have been developed by the Mt. Rogers Community Services Board. Specifically, you ask whether those guidelines, which take parental income into account in determining ability to pay for services rendered, are appropriate in light of § 37.1-197(g) of the Code of Virginia (1950), as amended.
Section 37.1-197(g) requires community services boards to develop fee schedules for services provided by personnel or facilities under the jurisdiction or supervision of the board and for the collection of those fees. That section also requires boards to "institute a reimbursement system to maximize the collection of fees from persons receiving services under the jurisdiction or supervision of the board and from responsible third-party payors." For the reasons stated in my Opinion to Leo M. Kirven, Jr., M.D., Commissioner, Department of Mental Health and Mental Retardation, dated December 8, 1980, a copy of which is enclosed, I find that the reimbursement guidelines issued by the Mt. Rogers Community Services Board are consonant with the intent of that section.

As I note in that Opinion, common law principles impose upon parents the responsibility for providing for necessaries supplied to their adult, mentally incapacitated children. I construe any ambiguity in § 37.1-197(g) in line with that common law principle and thus find that parents are primarily liable for the cost of services provided their adult, mentally incapacitated children.

MENTALLY ILL. INVOLUNTARY DETENTION. JUDGE MAY, PENDING HEARING AUTHORIZED IN § 37.1-67.2 OR 37.1-63.3, ORDER TEMPORARY DETENTION OF PERSON IN JAIL PURSUANT TO REGULATIONS ADOPTED BY STATE MENTAL HEALTH AND MENTAL RETARDATION BOARD.

July 14, 1980

The Honorable Joe Harris, Sheriff
City of Waynesboro

You have asked whether a person alleged to be mentally ill under the provisions of § 37.1-67.1 of the Code of Virginia (1950), as amended, may be confined in a jail pending a hearing as authorized in § 37.1-67.2 or § 37.1-67.3.

Section 37.1-67.1 provides that a person who is the subject of a petition alleging that he is mentally ill shall be brought before the judge who issued the petition for a hearing and if such person cannot be conveniently brought before him, the judge may issue an order of temporary detention.

This section further provides in part:

"The officer executing the order of temporary detention shall place such person in some convenient and willing institution or other willing place...The institution or other place shall be approved pursuant to regulations of the Board. Such person shall not be detained 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...."

The State Mental Health and Mental Retardation Board (the "Board"), in accordance with the provisions of § 37.1-67.1, has promulgated rules and regulations, effective April 1, 1980, a copy of which is enclosed, which set forth the procedure for the Board's approval of a jail for the purpose of temporary detention. This procedure requires that certain criteria be met by the facility before approval is granted. Included are detailed requirements regarding the physical plant and room specifications, the qualifications of staff members present during detention, the use of restraint, the provision of support services and the maintenance of records on the person detained. It is only when a jail conforms to these regulations and the Board grants its approval of the facility that a judge may subsequently authorize temporary detention therein.

It is my opinion that the temporary detention in a jail of a person who is alleged to be mentally ill pending a hearing is permissible only when there is no other convenient or willing institution available and the judge, in accordance with the designated procedure of the Board, authorizes such placement. In addition, it should be noted that § 37.1-67.1 prohibits temporary detention of a person for more than forty-eight hours prior to the hearing.

MENTALLY ILL. RELEASE FROM STATE HOSPITAL OF DEFENDANT PREVIOUSLY ACQUITTED BY REASON OF INSANITY. EXAMINATION REQUIRED UNDER § 19.2-181(2) PRIOR TO RELEASE MAY BE PERFORMED BY QUALIFIED PERSON DESIGNATED BY SUPERINTENDENT WHEN SUPERINTENDENT IS NOT PSYCHIATRIST.

November 10, 1980

The Honorable James H. Ward, Jr.
Commonwealth's Attorney for the County of Middlesex

You have asked for an interpretation of § 19.2-181(2) of the Code of Virginia (1950), as amended, relating to the release from a State hospital of a defendant previously acquitted by reason of insanity. Specifically, you have inquired whether a superintendent of a State mental institution who is not a qualified psychiatrist may designate a qualified person to perform the function required of him under this subsection.

Section 37.1-42.2 provides that whenever any act which constitutes the practice of medicine is required by law to be performed by a director of a State facility and such director is not a licensed physician, the act shall be performed by a licensed physician designated by the director. Thus, it is
my opinion that when a superintendent of a State hospital is required by § 19.2-181(2) to examine a defendant and such superintendent is not a qualified psychiatrist, he may designate a person who is a psychiatrist to perform the act.

Section 19.2-181(2) provides in pertinent part: "Upon receipt of such application for discharge or release, the court forthwith shall appoint at least two qualified psychiatrists, one of whom shall be the superintendent of a State mental institution other than the one in which the person is confined, to examine such person and to report within sixty days their opinion as to his mental condition...."

MINES AND MINING. § 45.1-81(a) DOES NOT REQUIRE PLACEMENT OF RESPONSIBLE PERSONS AT COMMUNICATION FACILITY WITHIN FIVE HUNDRED FEET OF EACH MAIN PORTAL OR MINE.

March 5, 1981

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You have asked whether Clinchfield Coal Company's communication practices at its Hurricane Creek Mine are in compliance with the requirements of § 45.1-81(a) of the Code of Virginia (1950), as amended.

Section 45.1-81(a) deals generally with mine safety and provides, in pertinent part, that:

"A telephone or equivalent two-way communication facility shall be located on the surface within five hundred feet of all main portals, and shall be installed either in a building or in a box-like structure designed to protect the facilities from damage by inclement weather. At least one of these communication facilities shall be at a location where a responsible person who is always on duty when men are underground can hear the facility and respond immediately in the event of an emergency."

The Clinchfield Coal Company has a communication network within its Hurricane Creek Mine which is connected with its Moss No. 2 Mine. These mines are not physically connected and are separated by a distance of more than one mile. As stated in your letter, during the first of three daily shifts, a communication facility within five hundred feet of one of the main portals of the Hurricane Creek Mine is attended by a Clinchfield employee. During the second and third shifts, however, this facility is not attended. Nevertheless, during the second and third shifts, at least one of the communication facilities located within five hundred feet of the Moss No. 2 Mine is manned by a
responsible person who can hear and respond to the Hurricane Creek facility. Upon receipt of an emergency call, the person manning the communications facility would then contact the necessary emergency service units.

Thus, it is clear that a communication facility must be installed within five hundred feet of all main portals and it must be constructed in a prescribed manner. That has been done in this case. The issue then is whether the statute requires that a facility be manned within five hundred feet as opposed to being connected with a manned facility located so as to permit an immediate response.

In reference to the placement of persons, the only requirement is that "at least one of these [attended] facilities" be "at a location" where a responsible individual can respond immediately in the event of an emergency.

In 1978, the General Assembly adopted the identical language of a federal regulation when it amended § 45.1-81(a). Compare Ch. 118 [1978] Acts of Assembly 199 with 30 C.F.R. 75.1600-1 (1978). In 1975, the federal agency charged with the administration of this regulation issued an interpretation indicating that:

"The second sentence requires that at least one communication facility be located where a responsible person who is always on duty when men are underground can hear the facility and respond. A telephone or equivalent facility at a central location which may be greater than five hundred feet from any portal, will satisfy the requirements of the second sentence of § 75.1600-1 as it applies to multiple portals of any one mine or a number of mines within a reasonable geographical area, provided a responsible person at a central location can hear the telephone and respond."


The Department of Labor and Industry, Division of Mines and Quarries, adopted this interpretation after the enactment of § 45.1-81(a) and has enforced the statute in conformity with it.

As a result, it would appear that the practices you have described at the Hurricane Creek and Moss No. 2 Mines are consistent with the requirements of § 45.1-81(a). This conclusion is bolstered by the fact that the Department of Labor and Industry, Division of Mines and Quarries, has consistently ruled that manned facilities which are over five hundred feet from a particular portal are in compliance with § 45.1-81 so long as the attended facility is at a location where a responsible person can respond in the event of an emergency. Such a construction given to a statute by public officials administering the law is entitled to great weight, and in doubtful cases will be regarded as decisive. Commonwealth v. Progressive Community Club, 215 Va. 732, 739,
Accordingly, it is my opinion that the communication practices of the Clinchfield Coal Company which you have described comply with § 45.1-81.

MINORS. DEPARTMENT OF LABOR AND INDUSTRY. ADMINISTRATIVE RULE CANNOT OVERCOME PROHIBITION CONTAINED IN STATUTE.

September 12, 1980

Mr. Robert F. Beard, Jr., Commissioner
Department of Labor and Industry

You have asked my opinion on the immunity an employer would have from § 40.1-103 of the Code of Virginia (1950), as amended, when employing or having custody of a minor in a "hazardous occupation" under one of the exemptions promulgated in the Rules and Regulations Declaring Hazardous Occupations. Section 40.1-103 provides in part that: "[i]t shall be unlawful for any person employing or having the custody of any child willfully or negligently to cause or permit the life of such child to be endangered or the health of such child to be injured, or willfully or negligently to cause or permit such child to be placed in a situation that its life, health or morals may be endangered...Any person violating this section shall be guilty of a misdemeanor."

The question has arisen in the context of volunteer fire companies training minors to participate in hazardous exercises. Section 40.1-100(A)(10) provides that no child under eighteen years of age may be employed in any occupation declared hazardous by the Commissioner of Labor and Industry. In response to this section, the Rules and Regulations Declaring Hazardous Occupations were promulgated by the Department of Labor and Industry and became effective November 1, 1979. Rule 17 provides that minors sixteen and seventeen years of age shall not enter burning structures or ride in fire apparatus, except in the cabin or crew compartments, but they may be exempted from the rules if they have completed a minimum of thirty hours of fire fighting instruction. In light of Rule 17, fire marshals and fire fighting instructors have inquired as to their immunity from prosecution under § 40.1-103 if they train and use minors in fire fighting activities.

Section 40.1-103 provides that any person who is an employer or custodian of a child in a dangerous occupation is in violation of the law and may be prosecuted. The Virginia Supreme Court has indicated that the term "custodian" should be interpreted broadly and should not be confined to meaning legal custody. Lovisi v. Commonwealth, 212 Va. 848, 188 S.E.2d 206 (1972), cert. denied, 907 U.S. 922. The court
specifically mentioned teachers, athletic instructors, and babysitters as persons having temporary custody of children who should be included in the purview of the statute. Id. at 850. The instructor mentioned in Rule 17 would clearly be a custodian of a minor taking classes in fire fighting, as would be a fire marshal overseeing a minor engaged in fighting a fire. Both parties have the care and supervision of the persons under their authority, performing the same type of duties as teachers and athletic instructors.

Having determined that fire marshals and fire fighting instructors are "custodians" within the meaning of § 40.1-103, the next issue is whether Rule 17 provides an exemption from liability to those parties having custody of minors engaged in dangerous occupations.

There is a substantial body of law which would indicate that the Department of Labor and Industry lacks the authority to create an exception to the hazardous occupation law in favor of volunteer fire departments.\(^2\)

A person accused of violating the statute would undoubtedly raise as a defense that, since he was complying with the Commissioner's exception for volunteer fire departments, he lacked the degree of intent necessary to constitute a crime. There is law to suggest that upon proper facts such a defense could be successful. Good v. Commonwealth, 155 Va. 996, 154 S.E. 477 (1930); United States v. Patillo, 431 F.2d 13 (4th Cir. 1971).

However, it is not possible in the absence of all facts to determine the success of the defense. The decision to prosecute is one which is made by the local Commonwealth's attorney based on the facts of a particular case. The prosecutor would have to evaluate the nature of the conduct alleged to be in violation of the law and what defenses an accused would have. In view of the doubtful validity of the Commissioner's regulation, the only way that one employing minors in fire fighting would have any assurance that he was not in violation of the statute would be if the General Assembly expressly granted the Commissioner the authority to exempt volunteer fire departments from the determination that firefighting is a hazardous occupation.

\(^1\)It should also be noted that § 40.1-113 makes it a misdemeanor to use minors in an occupation determined to be hazardous by the Commissioner pursuant to § 40.1-100(A)(10).

\(^2\)An administrative regulation cannot alter, limit, or repeal a statute. Richmond Food Stores, Inc. v. State Milk Commission, 204 Va. 46, 129 S.E.2d 35 (1963); Kohlberg v. Virginia Real Estate Commission, 212 Va. 237, 183 S.E.2d 170 (1971). Applying these well established principles to the case at hand, it is arguable that Rule 17 does not create an exception to the prohibition contained in § 40.1-103. By enacting §§ 40.1-100 and 40.1-103, the legislature clearly
intended to prevent minors from being exposed to situations that were dangerous to their health. It delegated the responsibility to determine precisely what were hazardous occupations to the Department of Labor and Industry in § 40.1-100(A)(10) and set out the penalty for violations in § 40.1-103. The legislature meant to prevent the use of minors in dangerous situations; the Department of Labor and Industry cannot change the legislative policy by adding a training requirement.

MOTOR VEHICLES. EMISSION CONTROL STATUTES REQUIRE INSPECTIONS PRIOR TO REGISTRATION.

November 24, 1980

The Honorable Donald E. Williams, Commissioner Division of Motor Vehicles

This is in response to the Honorable Vern L. Hill's letter of October 14, 1980, in which he inquires as to the affect of §§ 46.1-326.2 through 46.1-326.13 of the Code of Virginia (1950), as amended, which deal with establishing the requirements and standards for motor vehicle emission inspections. Specifically, he inquires whether, under the above legislation, used motor vehicles brought in from out-of-state or from areas of the State which are not subject to the requirements of this legislation, may be registered for the first time in those areas of the State subject to such legislative requirements if that attempt to register occurs during the months of July through December.

Your question is directed toward the provisions of §§ 46.1-326.3 and 46.1-326.9. Section 46.1-326.3 says in part, "Inspections carried out under the provisions of this article shall be carried out not earlier than January one nor later than June thirty of each calendar year at the same time as and in conjunction with safety inspections required pursuant to § 46.1-315." Section 46.1-326.9(A) states, "After January one, nineteen hundred eighty-two, no vehicle subject to the provisions of this article shall be registered or reregistered until such vehicle has passed an emissions inspection or has been issued a certificate of emissions and inspection waiver." In reading these two sections together, it is manifest that in order to be registered, a vehicle must be inspected satisfactorily, and that these inspections are to take place only during the first six months of the year. Since it is equally clear that no inspections are to be performed from July 1st through December 31st, if a previously uninspected used vehicle requires registration during the last six months of the year, because it is a recent arrival into an affected area of the Commonwealth from out-of-state, or because of annual renewal of registration of the motor vehicle previously garaged out of the affected area, these two Code sections will not permit a lawful registration of those vehicles as the law is currently written."
When the law is expressed in unambiguous terms, the legislature must presume 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 allow the inspections to be given throughout the year, it would have so stated.

In light of the above, I am of the opinion that, under the law as it is presently written, after January 1, 1982, all vehicles covered by the emission inspection law must have this inspection prior to registration, and since the emission inspections can be given only during the first six months of the year, a used vehicle coming into an affected geographical area for the first time cannot be registered. I trust this will answer your inquiry.

1 See § 46.1-326.4.
2 This creates no problem for new vehicles, inasmuch as there is a statutory exception protecting them. See § 46.1-326.3. See, also, § 46.1-41 which prevents the operation of a motor vehicle upon any highway of the State unless it is registered.

MOTOR VEHICLES. INSPECTION. IMPROPER INSPECTION OF MOTOR VEHICLE CHARGEABLE UNDER § 46.1-318.

October 31, 1980

The Honorable John D. Buck
Commonwealth's Attorney for the City of Radford

This is in response to your letter of September 26, 1980, in which you inquire as to whether § 46.1-325 of the Code of Virginia (1950), as amended,1 is the proper authority to make a charge of improperly inspecting a motor vehicle, as required under the provisions of §§ 46.1-315 through 46.1-326.1. In your opinion § 46.1-325 must be confined to inspection sticker offenses as distinguished from inspection offenses.

You are correct in your opinion in that § 46.1-325 deals with inspection stickers and not improper inspections. This is borne out by the long standing practices of the various law enforcement agencies within the Commonwealth, as reflected in a previous Opinion of this Office. See Report of the Attorney General (1967-1968) at 162. A review of the language involved reflects the intent of the legislature to limit the scope of the applicability of the Code section in question, and in a like manner, § 46.1-3182 has general application with regard to inspection standards. Accordingly, it is my opinion that the situation you describe would best be dealt with by charging the appropriate
individual with a violation of § 46.1-318, punishable under the provisions of § 46.1-324, rather than charging him with a violation of § 46.1-325.

1Section 46.1-325 states: "No person shall remove from the custody of any person to whom the same has been issued by or under the authority of the Superintendent of State Police, nor have in his possession or use otherwise than as authorized by the Superintendent for the purposes set forth in this article, any inspection sticker or other form of paper issued by the Superintendent in connection with the inspection of motor vehicles authorized herein. In any case where the Superintendent shall be suspended or revoked the designation or appointment of any official inspection station designated or appointed by him, such station shall surrender possession to the Superintendent or his duly authorized representative of all inspection stickers and other forms and papers used in connection with inspection of motor vehicles on or before the effective date of such suspension or revocation. Any person violating the provisions of this section shall be guilty of a misdemeanor and punished in accordance with § 46.1-324."

2Section 46.1-318 states: "The Superintendent may designate, furnish instructions to and supervise official inspection stations for the inspection of motor vehicles, trailers and semitrailers and for adjusting and correcting equipment enumerated in this chapter in such a manner as to conform to specifications hereinbefore set forth. The Superintendent shall adopt and furnish to such official inspection stations rules and regulations governing the making of inspections required by this chapter. The Superintendent may at any time, after five days' notice, revoke the designation or appointment of any official inspection station designated or appointed by him. When the equipment has been corrected in accordance with this title the official inspection station shall issue to the operator or owner of the vehicle, on forms furnished by the Department of State Police, a duplicate of which is retained by such station, a certificate showing the date of correction, registration number of the vehicle and the official designation of such station; there also shall be placed on the windshield of the vehicle at a place to be designated by the Superintendent an approval inspection sticker furnished by the Department of State Police. If any vehicle is not equipped with a windshield, the approval sticker shall be placed on the vehicle in a location designated by the Superintendent. This sticker shall be displayed on the windshield of such vehicle or at such other designated place upon the vehicle at all times when it is operated on the highways of the Commonwealth and until such time as a new inspection period shall be designated and a new inspection sticker issued; provided, however, that common carriers, operating under certificate from the State Corporation Commission, who desire to do so may install or use with the
approval of the Superintendent private inspection stations for the inspection and correction of their equipment."

Section 46.1-324 states: "Any person violating this article shall be punished by a fine of not less than $25 nor more than $500 for the first offense and not less than $100 nor more than $1,000 for each subsequent offense except as herein otherwise provided. If the violation of this article or regulations of the Superintendent made pursuant thereto is by an official inspection station in addition to or in lieu of such fine imposed by a court the Superintendent may, whether or not the violation is a first offense against this article, or regulation of the Superintendent, suspend the appointment of the inspection station or, if in his opinion after hearing, the facts warrant such action the Superintendent may revoke the authority and cancel the appointment of such inspection station."

MOTOR VEHICLES. LOCAL LICENSE. COUNTIES MAY REQUIRE PROOF OF PAYMENT OF PERSONAL PROPERTY TAXES TO TOWNS WITHIN THAT COUNTY.

April 24, 1981

The Honorable Ulysses P. Joyner, Jr.
County Attorney for Orange County

You have asked whether § 46.1-65(c) of the Code of Virginia (1950), as amended, authorizes a county to enact an ordinance to allow it to deny the issuance of a county license for a motor vehicle, trailer or semitrailer until satisfactory evidence is shown that any current or delinquent personal property taxes owed to a town within that county on any motor vehicle, trailer or semitrailer owned by the applicant have been paid.

You have indicated that the town in question has agreed to give up its right to collect a motor vehicle license tax so that the county is permitted to collect the full license tax allowed under §§ 46.1-65(a) and 46.1-65(d). However, the town does impose a personal property tax on motor vehicles.

Paragraph (c) of § 46.1-65 provides that:

"A county, incorporated city, or town may require that no motor vehicle, trailer or semitrailer shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence that all personal property taxes upon the motor vehicle, trailer or semitrailer to be licensed have been paid and satisfactory evidence that any delinquent motor vehicle, trailer, or semitrailer personal property taxes owing have been paid which have been properly assessed or are assessable against the applicant by the county, incorporated city or town."
This provision is obviously designed to give local governments leverage to enforce payment of local property taxes. Nonetheless, the language "by the county, incorporated city or town" at the end of the paragraph might seem to indicate that denial of a local license is proper only where the unpaid property taxes are owed to the county, incorporated city or town issuing the license and not to any other taxing jurisdiction. You have referred to an Opinion to the Honorable Hunter B. Andrews, Member, Senate of Virginia, dated September 14, 1964, found in Report of the Attorney General (1964-1965) at 204, and asked if that Opinion will support that conclusion.

The question posed in the Opinion to Senator Andrews was quite different. That Opinion dealt with the authority of the City of Hampton to impose a property tax on a vehicle purchased by a serviceman while stationed overseas when the domicile of the serviceman while he was overseas was in the Town of Lexington and not in the City of Hampton. Since the City of Hampton had no authority to assess a personal property tax against the vehicle in question, this Office was of the opinion that the City of Hampton could not deny issuance of a license for the vehicle on the grounds that such tax had not been paid to the City of Hampton. The question of whether the serviceman must pay property taxes to the Town of Lexington or to Rockbridge County, or whether such taxes had even been assessed against him by the Town of Lexington or by Rockbridge County, is not mentioned in the Opinion. Thus, your question is not answered by the Opinion to Senator Andrews.

It is a maxim of statutory construction that all of the terms and provisions of a statute are to be read together, as a whole, to determine the proper construction of any single provision. Maritime Union v. City of Norfolk, 202 Va. 672, 682, 119 S.E.2d 307 (1961). A reading of § 46.1-65 makes it apparent that the General Assembly intended for counties and towns to cooperate in the issuance of local motor vehicle licenses. Paragraph (d) of § 46.1-65 provides that:

"If in any county imposing license fees and taxes under this section, a town therein imposes like fees and taxes upon vehicles of owners resident in such town, the owner of any vehicle subject to such fees or taxes shall be entitled, upon such owner displaying evidence that he has paid the amount of such fees or taxes, to receive a credit on the fees or taxes imposed by the county to the extent of the fees or taxes he has paid to such town. Nothing herein contained shall be construed as depriving any town now imposing such licenses and taxes from increasing the same or as depriving any town not now imposing the same from hereafter doing so, but subject to the limitations provided in the foregoing paragraph. The governing body of any county and the governing body of any town in said county wherein each impose the license tax herein provided may provide mutual
agreements so that not more than one license tag in addition to the State tag shall be required."

Because the General Assembly has specifically provided that the governing body of a county and the governing body of a town within that county may agree to require only one license tag between them, it is my opinion that such agreements may also provide that such single license tag will be issued only upon proof of payment of the property taxes of both the county and the town. Any other interpretation would mean that when a county and town have utilized the authority granted them in paragraph (d) to require only a single license tag, one of the two would have to give up the right to use the provisions of paragraph (c) to enforce collection of its property taxes. I do not believe that was the intent of the statute.

Note that the provision in paragraph (d) which authorizes counties and towns to issue a single license tag between them literally applies only when both the county and town actually impose a license tax. However, it is my opinion that such provision would also apply where the town has the right to impose such tax but has expressly agreed with the county to give up that right in return for some consideration from the county. It would be absurd to hold that a town must impose a license tax before it can enter into such an agreement with the county. The obvious intent of the statute is to encourage towns and counties to cooperate in issuing a local license, and such cooperation is evident where the town has given up its right to impose such a tax. Moreover, such a holding might force towns to impose a tax simply to satisfy such requirement (even a nominal tax of 1¢ would presumably satisfy the literal language of the statute), and forcing towns to duplicate the taxation effort of the county would create a bureaucratic waste of time and money.

In light of the foregoing, it is my opinion that your question should be answered in the affirmative. Where a town, located within a county, cooperates with that county by giving up its right to collect a motor vehicle license fee under the provisions of § 46.1-65, that county may adopt an ordinance to provide that the county motor vehicle license will not be issued until proof has been presented of the payment of personal property taxes owed to the town on motor vehicles.

MOTOR VEHICLES. LOCAL LICENSE. LOCALITIES MAY REQUIRE PROOF OF PAYMENT OF PERSONAL PROPERTY TAXES ON OTHER VEHICLES.

January 26, 1981

The Honorable Edward M. Jasie
Commonwealth's Attorney for Craig County
This is in response to your inquiry whether paragraph (c) of § 46.1-65 of the Code of Virginia (1950), as amended, authorizes a county to enact an ordinance that would allow it to deny the issuance of a local license for a motor vehicle, trailer or semitrailer until satisfactory evidence is shown that any delinquent taxes on any other motor vehicle, trailer or semitrailer that may have been owned by the applicant have been paid.

Section 46.1-65(c) provides that a county may require that no motor vehicle shall be locally licensed unless and until the applicant for such license shall have produced satisfactory evidence (1) that all personal property taxes upon the motor vehicle to be licensed have been paid and (2) "that any delinquent motor vehicle...personal property taxes owing have been paid...." (Emphasis added.) The portion which I have quoted was added by Ch. 185 [1979] Acts of Assembly 244. You suggest that had the legislature intended to include delinquent taxes on other vehicles presently and previously owned by the applicant, the statute would have included the word "other" after the word "any" and before the word "delinquent."

In the construction of statutes, legislative intent is to be gathered from the words used in the statute, unless a literal interpretation would lead to a manifest absurdity. Kain v. Ashworth, 119 Va. 605, 89 S.E. 857 (1916). In this instance, the legislature chose to use the word "any," which is an indefinite word and includes "all" unless restricted. County of Loudoun v. Parker, 205 Va. 357, 136 S.E.2d 805 (1964). There is in the language added by the legislature in 1979, moreover, no language expressly limiting the personal property taxes for which proof of payment may be required to those upon the vehicle "to be licensed," or otherwise, as is the case with the preexisting portion of § 46.1-65(c). Furthermore, an amendment to a statute should always be construed to mean something, rather than nothing. Southern Ry. Co. v. United States Casualty Co., 136 Va. 475, 118 S.E. 266 (1923). If prior to the enactment of the amendment in question, local jurisdictions had power to condition the issuance of local motor vehicle licenses upon proof of payment of all personal property taxes upon the vehicle to be licensed, then one is hard-pressed to avoid the conclusion that the added language was intended to permit the requiring of proof of payment of personal property taxes for vehicles other than the one to be licensed at that particular time. Accordingly, I am of the opinion that § 46.1-65(c) does authorize a county to enact an ordinance that would allow it to deny the issuance of a local license for a motor vehicle until satisfactory evidence is shown that delinquent taxes on other vehicles that may have been owned by the applicant have been paid. Your question is therefore answered in the affirmative.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES. LOCAL LICENSE. PERSONAL PROPERTY TAXES DISCHARGED IN BANKRUPTCY DO NOT PREVENT ISSUANCE UNDER ORDINANCE ENACTED PURSUANT TO § 46.1-65(c).

June 24, 1981

The Honorable L. Ray Heironimus
Treasurer for the City of Covington

You have asked whether personal property taxes and real estate taxes are dischargeable in bankruptcy under the provisions of the Bankruptcy Reform Act of 1978 (the "Act") applicable to bankruptcy proceedings initiated after October 1, 1979. Certain of these taxes were nondischargeable under the old bankruptcy law. See Report of the Attorney General (1962-1963) at 261. The Act changes the law with respect to the dischargeability of claims for real and personal property taxes and makes the treatment of tax liens less favorable. Fewer tax claims survive bankruptcy and the new subordination rules may diminish the extent to which tax claims may participate in the distribution of the bankrupt estate even where the tax claim is protected by a lien.

Under the new law only property taxes which are assessed and due within one year before the bankruptcy petition is filed are nondischargeable. Thus, delinquent taxes assessed more than one year prior to the date the petition was filed will not participate in the distribution of proceeds of the bankrupt's estate except as a general unsecured claim unless such taxes enjoy the status of a secured claim protected by a judicial or statutory lien.

Personal Property Taxes

There are a few exceptions to the above-mentioned general rule as it applies to personal property taxes. If the locality has obtained a judgment for the tax due, has docketed the judgment and has caused a levy of execution to issue against the personal property, the tax has the status of a secured claim and will not be discharged even if the taxes were assessed and due more than one year before the bankruptcy filing. Property taxes will not be discharged if a required tax return was not filed or was filed late within two years prior to the date the bankruptcy petition was filed. Also, where the bankrupt has filed fraudulent returns, attempted to evade taxes, or where taxes were not listed by the debtor on his schedule of debts, such tax claims will not be discharged in bankruptcy irrespective of when the taxes were due. Finally, during the course of the bankruptcy proceeding, the locality with a tax claim may assume the posture of a secured creditor if it is able to exercise a right of setoff under § 58-921 of the Code of Virginia (1950), as amended.

Real Property Taxes
Under the old bankruptcy law, the statutory lien for real property taxes came ahead of all other secured claims as provided in §§ 58-762 and 58-1023. The new Act supersedes these provisions. It subordinates real property tax claims to certain secured creditors and "priority" unsecured claims. 11 U.S.C. § 724(b). If the claim for real property taxes secured by the statutory lien is not satisfied by distribution of assets in the bankruptcy proceeding, the statutory lien for such taxes remains and the tax debt is not discharged. If a judgment has been obtained and docketed prior to the filing of the petition, then the real property tax claim enjoys the same advantages as are applicable to personal property tax claims.

As was true of the old bankruptcy law, the new Act is complex and it is impossible to treat all the exceptions and special provisions in this Opinion. Your principal concern is whether you should issue a vehicle license decal without proof of payment of all outstanding personal property taxes on such vehicle under an ordinance enacted pursuant to § 46.1-65(c) when the applicant claims he has been discharged from such taxes in bankruptcy. If you are satisfied from evidence presented or available to you that a discharge has been issued, then you may only require that all tangible personal property taxes on the vehicle for which an assessment was made and payment was due within one year prior to the filing of the petition in bankruptcy (two years if no return was filed or if filed late) be paid prior to issuing such a license decal. All other personal property taxes are discharged except those which have been reduced to judgment, those secured by a judicial lien and those which are within the other exceptions enumerated herein.

MOTOR VEHICLES. MOPEDS. JUVENILES. OFFENSES UNDER TITLE 46.1 APPLICABLE TO PERSON UNDER 16 YEARS WHO OPERATES MOTOR-EQUIPPED BICYCLE.

July 31, 1980

The Honorable James A. Leftwich, Judge
Juvenile and Domestic Relations Court
City of Chesapeake

This is in response to your recent letter wherein you inquire (1) whether there are any offenses under Title 46.1 of the Code of Virginia (1950), as amended, chargeable against a person under 16 years of age who operates a bicycle equipped with a helper motor as described in § 46.1-1(1a), other than those offenses set forth in Ch. 4 of Title 46.1 and referred to in § 46.1-171, and (2) in the event there are some additional offenses, whether those classified as traffic infractions constitute traffic infractions as to such offender or cause him or her to be adjudicated a child in need of services under § 16.1-228(F)(4).
Section 46.1-171 currently provides in part that any person riding a bicycle upon a roadway "shall be subject to the provisions of this chapter and shall have all of the rights and all of the duties applicable to the driver of a vehicle, unless the context of the provision clearly indicates otherwise." The language "and shall have all of the rights and all of the duties" was added by Ch. 456 [1980] Acts of Assembly 524. Thus, prior to July 1 of this year, the provisions of law imposed by § 46.1-171 upon a person riding a bicycle were clearly and expressly limited to provisions found in Ch. 4 of Title 46.1. The added language, however, makes reference to "all of the duties" applicable to the driver of a vehicle and is not as clearly limited to the provisions of Ch. 4.

I am of the opinion that the language added this year to § 46.1-171 does not have the effect of making additional chapters within Title 46.1 applicable to persons riding bicycles. To hold otherwise would result in obviously unintended conflict. For example, the definition of a bicycle in § 46.1-1(1a) states that a person under 16 years of age shall not operate a motor-equipped bicycle, thereby implying that a person under 16 years may ride a bicycle not so equipped. On the other hand, § 46.1-357, which is in Ch. 5 of Title 46.1, limits the issuing of operator's licenses to individuals 16 years and older. Regarding vehicle registration, which is the other major concern of Title 46.1 in addition to driver licensing and the regulation of traffic, §§ 15.1-133 and 46.1-66.1 place the function of registering and licensing bicycles, which are not in fact within the scope of the definition of a vehicle in § 46.1-1(34),3 exclusively in the hands of local authorities in systems totally independent of the State statutes on vehicle registration.

There are in Ch. 4 of Title 46.1, however, a number of offenses which are expressly applicable to bicyclists independent of § 46.1-171. See §§ 46.1-229, 46.1-229.1, 46.1-229.2, 46.1-235, 46.1-263 and 46.1-277. In addition, I have recently held that the proviso in § 46.1-1(1a) to the effect that motor-equipped bicycles shall not be operated on any highway by any person under the age of 16 years is enforceable and persons under the age of 16 years operating such bicycles on a highway are in violation of the law punishable under the provisions of § 46.1-16.01. See Opinion to the Honorable John Paul Causey, Jr., dated July 14, 1980, a copy of which is enclosed. This latter offense, unlike §§ 46.1-229, et seq., 46.1-235, 46.1-263 and 46.1-277, concerns an act, i.e., operating a motor-equipped bicycle, which is otherwise lawful but which is a traffic offense only if committed by a person under 16 years of age. The definition of a "child in need of services" in § 16.1-228(F)(4) concerns those who commit acts which are crimes only if committed by a child. "Delinquent act" is defined to include traffic offenses and to exclude acts which are crimes only if committed by a child.4 A traffic offense is not a crime. See § 18.2-8. In addition, § 16.1-279,
concerning disposition of juvenile matters, expressly provides for traffic offenses in the case of delinquent children, but does not in the case of children in need of services. Accordingly, I am of the opinion that an individual who violates the proviso in § 46.1-1(1a), or any of the provisions of §§ 46.1-229, 46.1-229.1, 46.1-229.2, 46.1-235, 46.1-263 and 46.1-277 is a "delinquent child" pursuant to § 16.1-228(I) rather than a child in need of services under § 16.1-228(F)(4).

1 Section 46.1-1(1a) states: "'Bicycle' shall include pedal bicycles with helper motors rated less than one brake horsepower, which produce only ordinary pedaling speeds up to a maximum of twenty miles per hour, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of sixteen years."

2 Section 16.1-228(F)(4) provides that "'Child in need of services'" means "[a] child who commits an act, which is otherwise lawful, but is designated a crime only if committed by a child."

3 Section 46.1-1(34) states: "Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks and except any vehicle as may be included within the term bicycle as herein defined."

4 Section 16.1-228(H) states: "'Delinquent act' means an act designated a crime under the law of this State, or an ordinance of any city, county, town or service district, or under federal law, including traffic infractions as defined under § 46.1-1(40); except an act, which is otherwise lawful, but is designated a crime only if committed by a child."

5 Section 16.1-228(I) states: "'Delinquent child' means a child who has committed a delinquent act or an adult who has committed a delinquent act prior to his or her eighteenth birthday."

MOTOR VEHICLES. MOPEDS. OPERATOR UNDER AGE OF SIXTEEN YEARS VIOLATES § 46.1-1(1a).

July 14, 1980

The Honorable John Paul Causey, Jr.
Commonwealth's Attorney for the County of King William

This is in response to your letter of June 6, 1980, in which you ask the question whether it is a violation of the law for "a person under the age of 16 years to operate a pedal bicycle with a helper motor rated less than one brake horsepower, which produces only ordinary pedaling speeds up to a maximum of 20 miles an hour, upon a public highway." You base your question on the fact that the only mention of the age limit with regard to the operation of these vehicles,
more commonly known as "mopeds," is contained in § 46.1-1(1a) of the Code of Virginia (1950), as amended, which is a subsection of § 46.1-1 and primarily a definitional section. Because it is definitional as opposed to what might otherwise be referred to as a substantive provision of Title 46.1, you question whether it falls within the purview of § 46.1-16.01, which reads as follows:

"It shall be unlawful for any person to violate any of the provisions of chapters 1 through 4 (§§ 46.1-1 through 46.1-347) of this title, or any local ordinances adopted pursuant to the authority granted in § 46.1-180, and unless otherwise stated, such violations shall constitute traffic infractions punishable by a fine of not more than one hundred dollars." (Emphasis supplied.)

A review of the language contained in that section indicates that, unless otherwise stated, its purpose is to make violations of §§ 46.1-1 through 46.1-347 unlawful and provide sanctions for violations thereof. Since the language of § 46.1-16.01 clearly states that it applies to §§ 46.1-1 through 46.1-347, it therefore applies to § 46.1-1(1a). Accordingly, it is my opinion that the proviso contained in § 46.1-1(1a) is enforceable and those persons under the age of sixteen years operating a moped upon a public highway are in violation of the law punishable under the provisions of § 46.1-16.01.

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1Section 46.1-1(1a) states: "'Bicycle' shall include pedal bicycles with helper motors rated less than one brake horsepower, which produce only ordinary pedaling speeds up to a maximum of twenty miles per hour, provided such bicycles so equipped shall not be operated upon any highway or public vehicular area of this State by any person under the age of sixteen years."

MOTOR VEHICLES. RECKLESS DRIVING. PERSON MAY BE CONVICTED UNDER §§ 46.1-189, 46.1-190(h), OR 46.1-191, WHEN SPEEDING TWENTY OR MORE MILES PER HOUR IN EXCESS OF SPEED LIMIT IN RESIDENTIAL OR BUSINESS ZONE.

March 9, 1981

The Honorable Archie Elliott, Jr., Judge
Portsmouth General District Court

This is in response to your recent inquiry whether it is possible to convict a person of reckless driving in a residential or business speed zone if the person exceeds the speed limit by twenty miles per hour or more above the posted speed limit.
The general rule as to reckless driving appears in § 46.1-189 of the Code of Virginia (1950), as amended, which states in part that a person who drives a vehicle upon a highway recklessly or at a speed or in a manner so as to endanger life, limb or property of any person shall be guilty of reckless driving. The word "recklessly" as used in this section is said to impart a disregard by the driver of a motor vehicle for the consequences of his act and an indifference to the safety of life, limb or property. Powers v. Commonwealth, 211 Va. 386, 177 S.E.2d 628 (1970). Speed alone is not a violation of § 46.1-189, but speed may become so when it endangers life, limb or property. Id.

Certain specific instances of reckless driving are identified in §§ 46.1-190 and 46.1-191. Paragraphs (h) and (i), respectively, of § 46.1-190 provide that a person shall be guilty of reckless driving who shall "[e]xceed a reasonable speed under the circumstances and traffic conditions existing at the time regardless of any posted speed limit;" and "[d]rive a motor vehicle upon the highways of this State at a speed of twenty or more miles per hour in excess of the applicable maximum speed limits prescribed in § 46.1-193, paragraphs (1)(a)(b)(c)(e) of this title, or in excess of eighty miles per hour regardless of the posted speed limit." Section 46.1-191 provides in pertinent part that any person who shall engage in a race between two or more vehicles on the highways of this State shall be guilty of reckless driving.

You correctly note that paragraphs (1)(a)(b)(c) and (e) of § 46.1-193 pertain to certain fifty-five miles per hour and forty-five miles per hour maximum speed limits. Paragraph (1)(g) of § 46.1-193 sets twenty-five miles per hour as the maximum speed limit on highways in a business or residential district, except upon interstate or other limited access highways with divided roadways. Accordingly, that portion of § 46.1-190(i) which concerns driving at a speed of twenty or more miles per hour in excess of the applicable maximum speed limits prescribed in § 46.1-193, paragraphs (1)(a)(b)(c)(e) of this title, or in excess of eighty miles per hour regardless of the posted speed limit in question is that prescribed in § 46.1-193(1)(g). It does not follow, however, that a person who is driving twenty or more miles per hour in excess of a twenty-five miles per hour speed limit may not be convicted of reckless driving. Section 46.1-189 expressly defines reckless driving to include the operation of a vehicle on a highway at a speed so as to endanger life, limb or property. There is in this particular provision no limitation as to the speed limit applicable where the offense occurred. Similarly, § 46.1-190(h) establishes exceeding a reasonable speed under the circumstances as an instance of reckless driving regardless of any posted speed limit. The same may also be said for racing in violation of § 46.1-191. Consequently, I am of the opinion that in an appropriate case a person may be convicted of reckless driving under §§ 46.1-189, 46.1-190(h), or 46.1-191, where such individual was speeding twenty or more miles per hour in excess of the speed limit in a
residential or business speed zone but was not exceeding eighty miles per hour. Your question is therefore answered in the affirmative.

The expression of a similar view by one of my predecessors may be found in Report of the Attorney General (1971-1972) at 280.

MOTOR VEHICLES. SERVICE OF DRIVERS' LICENSE SUSPENSION AND REVOCATION ORDERS. SHERIFFS REQUIRED TO SERVE AS DIRECTED BY COMMISSIONER.

May 11, 1981

The Honorable Edgar P. Smith
Sheriff for the City of Staunton

This is in response to your recent inquiry as to the duty of a sheriff in serving drivers' license suspension and revocation orders under Ch. 619 [1981] Acts of Assembly, which amends §§ 46.1-397(b) and 46.1-441.2 of the Code of Virginia (1950), as amended. You specifically inquire whether a sheriff may decline to serve the orders and notices in question.

As amended by Ch. 619, § 46.1-441.2 authorizes the Division of Motor Vehicles (the "Division") to notify an individual of the suspension or revocation of his driver's license by certified mail, and, in the event the Division's records indicate that someone other than such operator or chauffeur has signed the return receipt, or in the event the return receipt is unsigned, then service of the notice or order may be made as provided in § 8.01-296.3. The word "may" is given its ordinary meaning, importing discretion, in the absence of a clear expression of the legislature's intent to use it in the sense of "shall" or "must." Masters v. Hart, 189 Va. 969, 55 S.E.2d 205 (1949). Inasmuch as Ch. 619 substituted "may" for "shall" in this particular passage, and since there are situations where it would be meaningless to serve an order or notice pursuant to § 8.01-296, e.g., where the suspension period has already expired, it is clear the legislature intended that "may" be given its ordinary meaning here. This does not mean, however, that sheriffs may refuse to serve notices or orders when so directed by the Commissioner of the Division. On the contrary, it is apparent from a reading of §§ 46.1-397 and 46.1-441.2 as a whole that the legislature intended that sheriffs would be required to serve orders and notice as directed by the Commissioner, and that the discretion as to attempting service after the notification of a licensee by certified mail lies with the Commissioner and not the sheriffs.

Section 46.1-397(b) expressly authorizes the Commissioner to direct any police officer to take possession of any license items suspended or revoked under the
provisions of Titles 46.1 and 18.2. This same paragraph, furthermore, in addressing a licensee's liability for a ten dollar service fee, states expressly that this liability arises "whenever the Division of Motor Vehicles directs a sheriff to effect service of a decision, order or notice pursuant to § 46.1-441.2." (Emphasis added.) A sheriff's lack of discretion to determine whether to serve the Commissioner's order is further confirmed in § 46.1-441.2 itself, which, in speaking of service made as provided in § 8.01-296, states that such service "shall" be made by a sheriff or deputy thereof who "shall, as directed by the Commissioner..." take possession of any suspended or revoked license items and return them to the Commissioner. The word "shall" in a statute is generally used in an imperative or mandatory sense. Schmidt v. City of Richmond, 206 Va. 211, 142 S.E.2d 573 (1965).

In view of the foregoing, I am of the opinion that § 46.1-441.2, as amended by Ch. 619, supra, does not authorize a sheriff to decline to serve orders or notices issued by the Commissioner of the Division, and when called upon to serve such orders or notices, service should be made as provided in § 8.01-296. Your specific question is therefore answered in the negative.

1As amended, § 46.1-397(b) provides: "The Commissioner is authorized to take possession of any license, registration certificate or set of registration plates or decals upon their suspension or revocation under the provisions of this title or in Title 18.2 or to direct any police officer to take possession of and return them to the office of the Commissioner. Whenever any person fails or refuses to surrender license, registration certificate or registration plates or decals requiring a representative of the Division of Motor Vehicles designated by the Commissioner to serve the order of suspension or revocation, or whenever the Division of Motor Vehicles directs a sheriff to effect service of a decision, order, or notice pursuant to § 46.1-441.2, the person sought to be served shall, in addition to any other required statutory fees, pay a fee of ten dollars to partially defray the cost of administration incurred by the Division and the Commissioner. No such revoked or suspended license or registration items shall be reinstated before the ten dollar fee is paid. All such fees shall be paid by the Commissioner into the State Treasury to be deposited in the same manner as reinstatement fees provided for in § 6.1-438."

2As amended, § 46.1-441.2 provides in pertinent part: "Whenever it is provided in this title that an operator's or chauffeur's license may or shall be suspended or revoked either by the Commissioner of the Division of Motor Vehicles or by a court, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Division by certified mail to the last known address supplied by such operator or chauffeur and on
file at the Division, and the certificate of the Commissioner or someone designated by him for that purpose that such notice or copy has been so sent shall be deemed prima facie evidence that such notice or copy has been sent and delivered to such operator or chauffeur for all purposes involving the application of the provisions of this title, including § 46.1-435. In the event the Division's records indicate that someone other than such operator or chauffeur has signed the return receipt or that the return receipt is unsigned, then service may be made as provided in § 8.01-296. Such service shall be made by a sheriff or deputy thereof in the county or city wherein is such address who shall, as directed by the Commissioner, take possession of any suspended or revoked license, registration certificate or set of registration plates or decals and return them to the office of the Commissioner. In any such case, return shall be made to the Commissioner, and a rebuttable presumption that service was made shall arise....

Section 8.01-296 pertains to the manner of serving process upon natural persons.

MOTOR VEHICLES. SUSPENSION OF OPERATOR'S LICENSE. § 46.1-441.2 DOES NOT APPLY TO JUDICIAL SUSPENSIONS.

August 13, 1980

The Honorable Russell I. Townsend, Jr., Judge
General District Court

This is in response to your recent letter wherein you inquire whether § 46.1-441.21 of the Code of Virginia (1950), as amended, is applicable in a situation where the suspension of a driver’s license was ordered by a court for failure to pay a fine.

Section 46.1-423.3(b) provides in part that whenever any person is convicted of any violation of any law of the Commonwealth pertaining to the operator or operation of a motor vehicle and "shall fail or refuse for any reason to provide for payment of any fine and costs lawfully assessed against him, the privilege of such person to operate a motor vehicle upon the highways of this State may be suspended by the court or judge...." (Emphasis added.) Notwithstanding the fact that the Division of Motor Vehicles mails letters to individuals advising them of such court suspensions, there is no statutory authority for the Commissioner of the Division of Motor Vehicles to suspend an operator's license for failure to pay fines or costs. Section 46.1-441.2 expressly concerns only suspensions and revocations by the Commissioner. Accordingly, I am of the opinion that § 46.1-441.2 is not applicable where the suspension was ordered by a court for failure to pay a fine. Your question is, therefore, answered in the negative.
Section 46.1-441.2 states: "Whenever it is provided in this title that an operator's or chauffeur's license may or shall be suspended or revoked by the Commissioner of the Division of Motor Vehicles, notice of such suspension or revocation or any certified copy of the decision or order of the Commissioner may be sent by the Division by certified mail to the last known address supplied by such operator or chauffeur and on file at the Division, and the certificate of the Commissioner or someone designated by him for that purpose that such notice or copy has been so sent shall be deemed prima facie evidence that such notice or copy has been sent and delivered to such operator or chauffeur for all purposes involving the application of the provisions of this title, including §46.1-435. In the event service cannot be completed by certified mail, then service shall be as provided in §8.01-296. Service shall be made by a police officer appointed pursuant to §46.1-37, or if no such police officer be available in the county or city wherein is such address, then by the sheriff of such county or city. Return shall be as provided in §8.01-325(1), and a rebuttable presumption that service was made shall arise."

The Honorable Frank D. Harris
Commonwealth's Attorney for Mecklenburg County

You have asked for an interpretation of §19.2-74.1 of the Code of Virginia (1950), as amended, which was passed by the most recent Session of the General Assembly.

You first ask whether a person detained and issued a summons per §19.2-74.1 is required to sign such summons. I recently concluded that there is no requirement under §19.2-74.1 that an accused sign the summons and even if he refuses to do so, the officer cannot take the individual before a magistrate for the fixing of bail or otherwise detain him. See Opinion to the Honorable Andre Evans, Commonwealth's Attorney for the City of Virginia Beach, dated July 29, 1980, a copy of which is enclosed.

You also ask whether §19.2-74.1 applies to traffic infractions which carry the penalty of a Class 3 misdemeanor or less.

Section 46.1-178.01 provides that for purposes of arrest, traffic infractions shall be treated as misdemeanors. It is therefore appropriate to look to the provisions dealing with misdemeanor arrests to determine what procedures should be followed in cases of traffic infractions.
Section 19.2-74 sets forth the procedures for the issuance of a summons in place of a warrant in misdemeanor cases. This section specifically exempts misdemeanors which are otherwise provided for in Title 46.1. Sections 46.1-178 and 46.1-179 generally parallel the provisions in § 19.2-74.

In 1980 the General Assembly enacted § 19.2-74.1. I have concluded that by enacting this statute the legislature intended to avoid the possibility of holding an accused in jail pending trial where he could not be incarcerated upon conviction. See Opinion to the Honorable Andre Evans, supra. Section 19.2-74.1 does not contain an exemption for Title 46.1 as does § 19.2-74.

Sections 46.1-178, 46.1-179 and 19.2-74.1 deal with misdemeanor arrests, and it is a basic rule of statutory construction that when construing statutes on the same subject matter in pari materia, the statutes should be harmonized if possible. See Report of the Attorney General (1974-1975) at 219. In addition, weight must be given to the object of the statute and the purpose to be accomplished, and a reasonable construction of the statute must be made so that the purpose of the statute is not limited or defeated, but instead is promoted. Dowdy v. Franklin, 203 Va. 7, 121 S.E.2d 817 (1961).

In my opinion the legislature intended that for purposes of arrest, traffic infractions be treated the same as misdemeanors for which no jail sentence could be imposed. Therefore, I am of the opinion that § 19.2-74.1 is generally applicable to traffic infractions.

Sections 46.1-178.1, 46.1-179.2 and 46.1-179.3 provide for the arrest or suspension of the operator's license for the noncompliance with a summons for traffic infractions by resident and non-resident motorists, who are residents of or hold a license issued by a state which has a reciprocal agreement with Virginia for the handling of traffic violations. Therefore, should one of these motorists fail to comply with a summons an effective method is available to insure that the summons is ultimately complied with.

A non-resident motorist, however, whose home state does not participate in a reciprocal agreement with Virginia presents a different situation. Unless an officer has the authority to take such non-resident motorist before a judicial officer for the posting of bail, such motorist upon leaving Virginia would have little or no incentive to comply with the summons and could ignore the summons with impunity. It is clear that the legislature did not intend for persons to be able to violate the law with impunity, and it is my opinion that non-resident motorists from states which do not have a reciprocal agreement with Virginia may be taken before a judicial officer for bond as provided in § 46.1-179.
Section 19.2-74.1 reads in part as follows: "Issuance of summons or notice to persons charged with certain misdemeanor offenses; pretrial release of such persons. -- A. Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city or town ordinance or of any provision of this Code punishable as a misdemeanor for which he cannot receive a jail sentence, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice.

Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of chapter 23 (§ 19.2-387 et seq.) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a disposition of guilt is entered as provided for in § 19.2-390...."

MOTOR VEHICLES. WEIGHT LIMITS. LIQUIDATED DAMAGES ARE CIVIL PENALTY.

August 26, 1980

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You asked whether a defendant convicted of a second motor vehicle weight violation offense within a three year period should be charged liquidated damages of two cents per pound or five cents per pound of excess weight pursuant to § 46.1-342 of the Code of Virginia (1950), as amended, if the weight of the vehicle was between 2500 pounds and 25,000 pounds. The heart of your question is whether the reference to "twenty-five thousand pounds" as used in § 46.1-342 was intended or represents a clerical error, because the statutory scheme seems to envision "twenty-five hundred pounds."

This question was the subject of an Opinion to the Honorable Donald W. Devine, Commonwealth’s Attorney for Loudoun County, dated March 13, 1978, and found in Report of the Attorney General (1977-1978) at 275. That Opinion addressed the incompatibility of the phrase "twenty-five thousand pounds" with the remainder of the statute and determined that the reference to twenty-five thousand pounds in § 46.1-342 was in error. The Opinion held that the General Assembly intended the words "two thousand five hundred pounds" and that the statute should be construed accordingly. It is my opinion that the previous Opinion was correct and that it controls in this matter.

You also raise the issue that this is a criminal statute and that even if this was due to clerical error it must be
read in the light which is most favorable to the defendant. The Supreme Court of Virginia has held that liquidated damages pursuant to § 46.1-342 "are not penal in a criminal sense and are not intended as additional punishment, they are regulatory and civil in their nature." Joyner v. Matthews, 193 Va. 10, 15, 68 S.E.2d 127, 131 (1951). See Report of the Attorney General (1974-1975) at 268.

In that case the court also held that "[s]ection [46.1-342] is a remedial statute and therefore it should be liberally construed so as to carry into effect the legislative will which prompted its passage." Joyner, supra, at 14. "A remedial statute is to be construed liberally so as to suppress the mischief and advance the remedy, so that which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed." 17 M.J. Statutes § 72 (1979). 3 C. Dallas Sands, Sutherland Statutory Construction, § 60.01 (3d ed. 1974). City of Richmond v. Richmond Metropolitan Authority, 210 Va. 645, 172 S.E.2d 831 (1970). Virginia Brewing Co. v. Webber, 167 Va. 67, 187 S.E. 447 (1936). Accordingly, it is my opinion that the assessment of liquidated damages is not a criminal sanction and that § 46.1-342 should be construed in accordance with the intent of the General Assembly.

NOTARIES PUBLIC. BONDS. NOTARIES PUBLIC WHO GAVE BOND UNDER TITLE 47 NEED NOT MAINTAIN BOND UNDER TITLE 47.1.

August 5, 1980

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You ask whether a notary public who has given bond under the former §§ 47-1(4) and 47-2(B) of the Code of Virginia (1950), as amended, must maintain that bond under the new Title 47.1, enacted by Ch. 580 [1980] Acts of Assembly, which does not require notaries to give bond.1

Clause 3 of Ch. 580 provides that Title 47 is repealed. Clause 2 of Ch. 580 provides that all appointments and commissions of all notaries made prior to the effective date of Ch. 580 are approved, confirmed and ratified as of the date of their appointment. Compare Ch. 14 [1979] Acts of Assembly, clause 3.

Notaries who gave bond under §§ 47-1(4) and 47-2(B) were appointed for terms of four years. See §§ 47-1(1) and 47-2(A). By reason of the approval, confirmation and ratification of those appointments under Ch. 580, those notaries continue to hold office for four years from the date of their appointment. Compare § 47.1-21 (term of office remains four years).
In view of the repeal of Title 47 by Ch. 580, the notaries appointed under Title 47 necessarily continue to hold office under the provisions of Title 47.1, in the absence of any transition provisions to the contrary.\(^1\) Except for Clause 3 of Ch. 580 confirming earlier appointments, I find no transition provisions.

Therefore, inasmuch as the new Title 47.1 does not require notaries to give bond, I am of the opinion that a notary public who gave bond under Title 47 need not maintain the bond under Title 47.1

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\(^1\)Under the former Title 47, a notary's commission was forfeited upon failure to maintain bond. See Opinion to the Honorable Katherine V. Respess, Clerk, Corporation Court, City of Norfolk, dated December 6, 1972, found in Report of the Attorney General (1972-1973) at 297.

\(^2\)Since any public office is the creation of some law, it continues only so long as the law to which it owes its existence remains in force, and when such law is repealed, the office ceases, unless perpetuated by some other legal provision. Walker v. Massie, 202 Va. 886, 121 S.E.2d 448 (1961) (terms of old officers ended upon consolidation of cities).

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NOTARIES PUBLIC. NOT PROHIBITED FROM SERVING AS ELECTION OFFICIALS.

September 26, 1980

The Honorable Frederick T. Gray, Jr.
Secretary of the Commonwealth

You have asked whether there is any conflict between service as a notary public and service as an election official. Article II, § 8 of the Virginia Constitution (1971) provides, in part, as follows:

"No person, nor the deputy of any person, who is employed by or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or registrar or officer of election."

This same language is incorporated into § 24.1-33 of the Code of Virginia (1950), as amended.

In an Opinion previously issued by this Office, it was held that a notary may not be appointed as an election official since the office of notary public is an office of profit under the government of the Commonwealth. See Report of the Attorney General (1974-1975) at 166. Accordingly, the
General Assembly amended the Code to prohibit the collection of any fee by a notary who is also a member of an electoral board, a general registrar, or an officer of election. See § 47.1-19(C). Thus, the office of notary public is no longer an office of profit when held by an individual who also serves in any of these other capacities.

Although the office of notary public nevertheless remains an office of trust, I am of the opinion that there is no conflict between service in this post and service as an election official. The occupant of any office of profit is prohibited from service as an election official, but the prohibition only applies to offices of trust that are elective. Since the office of notary public is not filled by election, but by appointment, no conflict arises.

PARDON, PROBATION AND PAROLE. PAROLEE MAY BE EMPLOYED IN JAIL.

August 7, 1980

The Honorable A. S. White
Sheriff of York County

You ask whether it is unlawful or otherwise improper to employ a parolee or inmate of the jail as a cook in the jail. The Virginia Parole Board and the Division of Community and Prevention Services of the Department of Corrections do not encourage the employment of a parolee in the capacity where he will be working with law enforcement or correctional personnel. Likewise, inmates in a jail normally are assigned duties throughout the jail and are not compensated for performance of those duties. I find nothing, however, in the Virginia Code which prohibits the employment you suggest. Further, I am advised that there does not exist any ordinance in the County of York which prohibits such employment. In my opinion, therefore, it is not unlawful to employ an inmate or parolee as a cook in a jail.

PARK AUTHORITIES. POWER TO MAINTAIN FORMER COURTHOUSE AS PARK IN MANNER THAT SPACE NOT REQUIRED FOR PARK SERVICES IS AVAILABLE FOR LOCAL GOVERNMENT OFFICES AND FOR MEETINGS OF CITIZENS.

June 1, 1981

The Honorable Paul X Bolt
County Attorney for Grayson County

You ask whether an authority established under the Park Authorities Act (the "Act") (Ch. 27 of Title 15.1 of the Code of Virginia (1950), as amended) may maintain and operate a former courthouse as a park in such a manner that space in the courthouse not required for the park and park services is
available for use as local government offices, and for meetings of citizens.¹

Section 15.1-1232(f) provides that a park authority may acquire, operate and maintain parks, and acquire, sell, lease as lessor, transfer or dispose of property and interests therein. Section 15.1-1232(n) provides that a park authority may make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under the Act. Section 15.1-1232(o) provides that a park authority may do all acts and things necessary or convenient to carry out the powers granted by the Act.

Section 15.1-1229(f) provides that "park" shall mean public parks and recreation areas as the terms are generally used. The dictionary definition of "park" includes such concepts as 1) a tract of land that includes lawns and woodlands attached to a building used for recreation, and 2) a piece of ground in or near a city or town kept for ornament and recreation.²

A leading example in the Commonwealth fitting these definitions is the State Capitol and grounds in Richmond, where a park and park services are combined with use of a building for governmental offices and activities. The proposed plan for the former courthouse is not unlike the mixture of park and government facilities and activities represented by the State Capitol and its grounds in Richmond.

Further, § 15.1-259 provides that any vacant rooms in a courthouse, after satisfaction of governmental requirements, may be rented to others for office purposes, and any public room or hall in the building may be hired for compensation for the purpose of giving public entertainment, with the moneys received constituting a fund to maintain and care for such building. The proposed plan is therefore not unlike an historic function of courthouses, as recognized by § 15.1-259, provided park and park service requirements are satisfied first.

Accordingly, I am of the opinion that an authority under the Act may maintain and operate a former courthouse as a park in such a manner that space in the courthouse not required for the park and park services is made available for use as local government offices and for meetings of citizens.

¹The former courthouse is on the Virginia Landmarks Register and the National Register of Historic Places, and would be preserved as an historical landmark.
²See Webster's New Collegiate Dictionary at 827 (G. & C. Merriam Co. (1979)); see, also, § 10-21(1) re acquisition by Division of State Parks of properties of scenic beauty,
recreational utility, historical interest, remarkable phenomena or any other unusual features which in the judgment of the Board of Conservation and Economic Development should be maintained for the use, observation, education, health and pleasure of the people of Virginia.

PHYSICALLY HANDICAPPED. PLACING AGENCY BEARS COSTS OF PLACEMENT. SCHOOL DIVISION NOT LIABLE FOR PHYSICAL THERAPY COSTS WHERE WELFARE AGENCY PLACED CHILD IN PROGRAM FOR NON-EDUCATIONAL REASONS.

October 31, 1980

The Honorable John P. Alderman
Commonwealth's Attorney for Carroll County

You ask whether a school division is liable for therapeutic costs in cases where a local social service department has assumed custody of a handicapped child and has placed that child in a different county for non-educational reasons.

You have stated that the legal custody of a handicapped child was placed with the Carroll County Department of Social Services. The Carroll County Social Services agency in turn placed the child in Roanoke County under a Foster Care Service plan because the Carroll County agency was unable to find a suitable home in Carroll. Subsequently, the child was referred to Roanoke County for physical therapy and unreimbursed costs have accumulated.

The Education for All Handicapped Children Act of 1975 provides that handicapped children are entitled to a free, appropriate education. 20 U.S.C. § 1401 (P.L. 94-142). Virginia's Special Education Act complements the federal law and designates the school division as the agency which is to provide the free educational programs in accordance with the pertinent State and federal requirements.

A "free, appropriate public education means special education and related services which are necessary to enable a handicapped child to benefit from special education." 45 C.F.R. §§ 121a4, 121a13; § 22.1-213(2). The term "related services" includes physical and occupational therapy, and other supportive services as are required to assist a handicapped child to benefit from special education. See 45 C.F.R. §§ 121a13 and Regulations for the Operation of Special Education Programs in Virginia, Glossary at 10.

However, prior to the delivery of such related services, the local school division must develop an individualized education program (hereinafter "IEP"). The IEP must include an assessment of the child's present level of educational performance and a statement of the specific education and related services to be provided. 45 C.F.R. § 121a346 and Virginia's Regulations at § II(F). I assume in this case
that Carroll County had developed the IEP as required by the State and federal regulations.

P.L. 94-142 and the Virginia laws are primarily designed to apply to handicapped children in local school divisions. See Opinion to the Honorable Jean L. Harris, M.D., Secretary of Human Resources, dated July 31, 1978, found in Report of the Attorney General (1978-1979) at 218.

These laws envision placements for educational reasons. Once other factors control placements, different statutes apply. This Office has previously ruled that when placements are made for other purposes, such as care and treatment, parents may be charged for room, board, and non-medical care. See Harris Opinion. It was further held that when a local school places a child in a facility for special education purposes, that placing agency is responsible for the costs of room, board, educational programs and non-medical services. Harris Opinion at 219.

Section 63.1-55 provides that child welfare boards must provide "either directly or through the purchase of services...any or all...services...when such services are not available through other agencies serving residents in the locality...." Furthermore, each local board must "provide rehabilitation and other services to help individuals to attain or retain self-care or self-support...."

A local board has the right to accept children for placement, and is authorized to have custody of children entrusted or committed to its care. See § 63.1-56. Therefore, a local welfare board may place a child in a suitable environment and must ensure that the child receives the appropriate services such as physical therapy.

In the case you have presented, the child was placed in Roanoke County for non-educational reasons. Generally, the placing agency must bear the costs of the placement. The general nature and scope of the agency will determine the reason for the placement. Since the schools of neither Carroll County nor Roanoke County contracted for the services nor participated in the decision to place the child, Carroll County is not liable for the costs.

Accordingly, neither Carroll County nor Roanoke County school divisions are liable for the physical therapy costs in the circumstances described herein.

1Section 22.1-213 of the Code of Virginia (1950), as amended.

PRACTICE OF LAW. WHEN NON-LAWYER EMPLOYEES OF CORPORATION MAY APPEAR ON BEHALF OF CORPORATION IN GENERAL DISTRICT COURT.
May 11, 1981

The Honorable Clifton A. Woodrum
Member, House of Delegates

You have asked several questions concerning whether non-lawyer employees of a corporation may appear on behalf of the corporation in General District Court without engaging in the unauthorized practice of law.

Several advisory opinions on the unauthorized practice of law have recently been adopted by the Virginia Supreme Court and one opinion deals directly with practice before tribunals.1 In that opinion, Unauthorized Practice Rule ("UPR") 1-101(B)2 and Unauthorized Practice Consideration ("UPC") 1-3 generally hold that a corporation can be represented only by a lawyer before any Virginia tribunal, judicial, administrative or executive, with respect to matters involving legal conclusions, examination of witnesses or preparation of briefs or pleadings.

Your first question concerns whether a non-lawyer employee of a corporation may on behalf of his employer "[appear before the Clerk of the General District Court and fill out the new Warrant in Debt forms, pay the court costs, and set a case for trial."

Pursuant to UPR 1-101(B) and UPC 1-3, a corporation may be represented before a tribunal by a non-lawyer employee so long as the employee does not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions. To commence an action based on a warrant an employee of a corporation would generally be required only to present factual information as to the debt which would not require the presentation of legal conclusions.4 See §§ 16.1-79 and 16.1-81 of the Code of Virginia (1950), as amended. Such conduct by the employee would not normally imply his possession and use of legal knowledge and skill and, therefore, would not constitute the unauthorized practice of law.5 Similarly, payment of court costs and setting a case for trial would not under usual circumstances involve the examination of witnesses, preparation of pleadings or presenting legal conclusions and would, therefore, be permissible.

You next ask whether a non-lawyer employee may appear on behalf of a corporation, present affidavits of account, testify as to what balances are due and owing, make motion for continuances, ask questions of the debtor, and take judgment on behalf of the corporation.

With the exception of asking questions of the debtor, it would appear that each of these activities is permissible for the reasons stated previously.6 Questioning the debtor, however, constitutes examination of a witness and would be improper under UPR 1-101 and UPC 1-3.
Finally, you ask whether a non-lawyer employee of a corporation may "ask for levy, garnishment, interrogatories, or obtain abstracts and record them in Circuit Court."

Because it would appear that to obtain an abstract and record it in a circuit court or to "ask" for levy or garnishment would not involve the examination of witnesses, or the presenting of legal conclusions, I am of the opinion that a non-lawyer employee of a corporation could permissibly engage in such activities. To ask for or propound interrogatories, however, is in essence to examine a witness and would appear to be improper under UPR 1-101 and UPC 1-3.

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2 UPR 1-101(b) provides: "A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal, judicial, administrative or executive, established under the Constitution or laws of the Commonwealth of Virginia, shall not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions."
3 UPC 1-3 provides: "A corporation (other than a duly registered law corporation) does not have the same right of appearance before a tribunal as an individual, and may not be represented before a tribunal by its officers, employees or agents who are not duly authorized or licensed to practice law in Virginia. A corporation can be represented only by a lawyer before any tribunal, judicial, administrative or executive, established under the Constitution or laws of the Commonwealth of Virginia, with respect to matters involving legal conclusions, examination of witnesses or preparation of briefs or pleadings.
4 See Former UPL Opinion No. 47, adopted June 19, 1975; Former UPL Opinion No. 28, adopted May 9, 1957; Former UPL Opinion No. 10, adopted February 21, 1940.
5 Id.
6 A motion for a continuance would not appear to involve the presenting of legal conclusions. Moreover, motions are not usually considered to be "pleadings" within the normal use of that term. See Filtrator Apparatus Company v. Food Enterprises, 491 F.Supp. 566, 568 (D. N.J. 1980).
You have asked for a definition of the word "process" as it is used in certain sections of the Code of Virginia (1950), as amended, including §§ 8.01-290, et seq., and 8.01-295.

In civil procedure, the word "process" has both a narrow and a broad definition. The narrow definition is incorporated at § 1-13.23:1, which provides:

"The word 'process' shall be construed to include subpoenas in chancery, notices to commence actions at law, process in statutory actions and scire facias."

Process has a "more comprehensive signification it includes not only the writ of summons, but all other writs which may be issued during the progress of an action." Black's Law Dictionary (4th ed. (1968)) This is the broad definition and it appears to be the intended meaning in a number of Virginia statutes, most explicitly § 8.01-292 which speaks of "process...whether original, mesne or final." See Report of the Attorney General (1978-1979) at 239.

Ultimately, the word "process" must be defined by the context in which it is used; but in my opinion, the narrow definition should be inferred unless the context clearly indicates otherwise. I base this view upon the narrow definition incorporated into § 1-13.23:1.

Turning to the specific statutes mentioned in your inquiry, I am of the opinion that "process" is used with the narrow meaning in §§ 8.01-290, 8.01-291 and 8.01-295 and with the broad meaning in § 8.01-292.

Section 8.01-290 provides as follows: "Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or in the papers the address or other identifying facts furnished. Failure to comply with the requirements of this section shall not affect the validity of any judgment." (Emphasis added.) Here, the validity of the narrow meaning is confirmed by construction of the statute, since the phrase "such process" refers to the clause "[u]pon the commencement of every action."

Section 8.01-291 provides: "The clerk issuing any such process unless otherwise directed shall deliver or transmit therewith as many copies thereof as there are persons named therein on whom it is to be served." (Emphasis added.) The absence of any independent antecedent for the phrase "such process" suggests that its meaning must be gleaned from the preceding section, § 8.01-290. Thus, the narrow meaning is again confirmed by construction.
Section 8.01-292 states: "Process from any court, whether original, mesne, or final, may be directed to the sheriff of, and may be executed in, any county, city, or town in the Commonwealth." (Emphasis added.) As noted above, this statute explicitly refers to process in its broad meaning.

Section 8.01-295 provides: "The sheriff may execute such process throughout the political subdivision in which he serves and any contiguous county or city. If the process appears to be duly served, and is good in other respects, it shall be deemed valid although not directed to an officer, or if directed to any officer, though executed by some other person." (Emphasis added.) The antecedent for the phrase "such process" is found in the proceeding statute, § 8.01-294, which requires the sheriff to "receive all process, and other papers to be served by him." If the word "process" were here intended to have its broad meaning, then the words "other papers" would be superfluous. Consequently, the narrow definition is indicated.

You have also asked whether the term "process" as used in § 8.01-295 would include certain specific legal papers: writs of execution, writs of possession, writs of attachment and garnishments. It is clear that writs of execution and writs of possession are final process, and therefore fall within the broad definition but not the narrow. Consequently, they cannot be served pursuant to § 8.01-295.

A writ of attachment pursuant to § 8.01-533, et seq., is neither a formal action at law nor a bill in equity, but a statutory procedure. Winfree v. Mann, 154 Va. 683, 153 S.E. 837 (1930). Consequently, it is original process and falls within the narrow definition set down by § 1-13.23:1. Thus, it may be served pursuant to § 8.01-295. This view is strengthened by § 8.01-546, which provides that the officer serving the attachment shall also summon the defendant(s) "if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ...." This statute clearly contemplates service by an officer outside his home jurisdiction.

Garnishment is regarded, not as a process of execution to enforce a judgment, but as an independent suit by the judgment-debtor in the name of the judgment-creditor against the garnishee. Butler v. Butler, 219 Va. 164, 247 S.E.2d 353 (1978). Consequently, a summons in garnishment is a form of original process and may be served pursuant to § 8.01-295.

PUBLIC CONTRACTS. FAIRFAX COUNTY WATER AUTHORITY AND SIMILAR AUTHORITIES MUST COMPLY WITH REQUIREMENTS OF § 11-23.5 CONCERNING AMOUNT OF RETAINAGE IN CERTAIN PUBLIC CONTRACTS.
August 18, 1980

The Honorable Ralph L. Axselle, Jr.
Member, House of Delegates

You have asked whether the Fairfax County Water Authority and similar authorities must comply with the requirements of § 11-23.5 of the Code of Virginia (1950), as amended.

Section 11-23.5 relates to public contracts for the improvement of real property and sets a ceiling on the amount or percentage of an installment contract price that may be retained by the owner or general contractor pending completion of the contract. This section applies to such contracts where "the State of Virginia or any department, institution, agency or political subdivision thereof is a party...." Specifically, you ask whether the Fairfax County Water Authority and similar authorities can be considered political subdivisions for purposes of this section.

Political Subdivisions

The term "political subdivision" is broad and comprehensive and applies generally to any division of a State made by the proper authorities thereof and may include a governmental body of the State created for public purposes. See Opinion to the Honorable L. T. Eckenrode, Director, Law Enforcement Officers Training Standards Commission, dated December 18, 1973, and found in Report of the Attorney General (1973-1974) at 217. Moreover, a political subdivision is a political division of the sovereignty of a State created by action of the legislature to aid in the administration of government and exercise some portion of the sovereignty of the State in regard to one or more specific governmental functions. See Opinion to the Honorable 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. Such functions may include, among others, the provision of water and sewer service, or the provision of public transportation. Id.

The Fairfax County Water Authority has been created pursuant to the Virginia Water and Sewer Authorities Act. See § 15.1-1239. It is therefore "a body politic and corporate" and is "an instrumentality exercising public and essential governmental functions to provide for the public health and welfare." See §§ 15.1-1241 and 15.1-1250. As a result, the Fairfax County Water Authority would appear to come within the general definition of the term "political subdivision." This conclusion is reinforced by prior Opinions of this Office holding that other similar authorities come within the scope of this term. See Opinion to the Honorable Frank M. Morton, III, County Attorney for James City County, dated February 13, 1975, and found in Report of the Attorney General (1974-1975) at 538.
In reviewing § 11-23.5, I find that the term "political subdivision" is used very broadly with no indication that its application is to be limited. Accordingly, I am of the opinion that the Fairfax County Water Authority and similar authorities should be considered political subdivisions for purposes of § 11-23.5 and should therefore comply with the requirements of this section.

1 Section 11-23.5 provides in pertinent part: "In any contract for the improvement of real property in which the total contract amount exceeds two hundred thousand dollars and to which the State of Virginia or any department, institution, agency or political subdivision thereof is a party which provides for progress payments in installments based upon an estimated percentage of completion with a certain amount or percentage of the contract price to be retained by the owner or general contractor pending completion of the contract, the retained amount on each progress payment or installment shall not exceed five per centum. The provisions of this section shall apply to any contracts let as a part of the total contract...."

2 Indeed, the General Assembly has indicated that § 11-23.5 applies to certain contracts "to which the State of Virginia or any department, institution, agency or political subdivision hereof is a party...." (Emphasis added). In interpreting § 11-23.5, reference to the companion sections on public contracts is not helpful since the use of the terms "political subdivision," "public authority," "public agency," and "public corporation" within those sections is quite varied. See, e.g., §§ 11-23, 11-23.2 and 11-23.3.

PUBLIC OFFICERS. COMPATIBILITY. ABSENT STATUTE TO CONTRARY, QUALIFICATION IN SECOND INCOMPATIBLE OFFICE VACATES FIRST OFFICE.

October 31, 1980

The Honorable J. Edgar Pointer, Jr.
County Attorney for the County of Gloucester

You inquire as to which office is vacated, and which is retained, when a member of the county school board also becomes a member of the county social services board, in violation of § 22.1-30 of the Code of Virginia (1950), as amended.

Section 22.1-30 (formerly § 22-69) provides that no State, county, city or town officer may during his term of office be appointed or serve as a member of the school board for such county. Members of a county social services board, appointed under § 63.1-40, are officers. I find no statutory prohibition against dual officeholding for members of county social service boards, so the statutory basis for incompatibility of the two offices is § 22.1-30.
In the absence of a statutory provision to the contrary, acceptance of a second incompatible office operates to vacate or surrender the first office.¹ Under this rule, when a person qualifies as a member of the county social services board, the person's office as a member of the county school board is vacated or surrendered.

You point out, however, that § 15.1-50, which deals with the incompatibility of certain offices was amended in 1978 to change the rule that acceptance of a second incompatible office operates to vacate or surrender the first office. See Ch. 762 [1978] Acts of Assembly. As amended in 1978, § 15.1-50(C) provides that if any person while holding any of the offices enumerated therein shall be appointed or elected to any other office, his qualification in such other office shall be null and void.

The offices enumerated within the prohibitions of § 15.1-50 are the offices of treasurer, sheriff, attorney for the Commonwealth, clerk of the court in the office of which deeds are recorded, commissioner of the revenue, or supervisor or councilman or any other office mentioned in Art. VII of the Virginia Constitution (1971). Membership on the county school board is therefore not among the offices enumerated within the prohibitions of § 15.1-50, so § 15.1-50(C) does not apply.

Accordingly, I find that when a member of a county school board qualifies as a member of the county social services board, in violation of § 22.1-30, the office on the county school board is vacated or surrendered. As you indicated, the General Assembly may wish to consider broadening the application of the amended § 15.1-50(C).

¹See, for example, Shell v. Cousins, 77 Va. 328 (1883) (sheriff's acceptance of second office vacates office of sheriff without necessity of judgment by court); 15 M.J. Public Officers § 32 (1979) (acceptance of incompatible office); Opinion to the Honorable Herbert A. Pickford, Judge, General District Court of Albemarle County, dated November 4, 1974, found in Report of the Attorney General (1974-1975) at 251 (acceptance of office of magistrate operates to vacate or surrender office of justice of the peace).

PUBLIC OFFICERS. COMPATIBILITY OF OFFICES. MAGISTRATES. POSTAL CARRIER EMPLOYED BY U.S. POSTAL SERVICE NOT ELIGIBLE FOR APPOINTMENT AS MAGISTRATE.

June 29, 1981

The Honorable John A. Paul, Judge
Twenty-Sixth Judicial District
You ask whether, under § 2.1-30 of the Code of Virginia (1950), as amended, a postal carrier employed by the United States Postal Service is eligible for appointment as a magistrate under § 19.2-37.

Section 19.2-37 provides that any person may be appointed to the office of magistrate subject to certain stated limitations, including the limitations of Ch. 4 (§ 2.1-30, et seq.) of Title 2.1.¹

Section 2.1-30 provides that no person shall be capable of holding any office of honor, profit or trust under the Constitution of Virginia, who is in the employment of the government of the United States, or who receives from it in any way any emolument whatever.

A number of exceptions appear in § 2.1-33. Section 2.1-33 provides, for example, that § 2.1-30 shall not be construed to prevent United States fourth-class or third-class postmasters from acting as justices of the peace,² to prevent any United States rural mail carrier, or star route mail carrier from holding any county or district office,³ or to prevent any person, otherwise eligible, from serving as an appointive officer or employee of any county, city or town.⁴ I do not find that any exemption in § 2.1-33 applies to the present situation.

This Office has previously ruled (most recently in May 1976) that magistrates (or justices of the peace) may not be employees of the federal government.⁵ The old Post Office Department has been abolished, of course, but the new United States Postal Service, established under the Postal Reorganization Act of 1970, is nevertheless an establishment within the executive branch of the federal government.⁶

Accordingly, I am of the opinion that, under § 2.1-30, a postal carrier employed by the United States Postal Service is not eligible for appointment as a magistrate under § 19.2-37.

¹Section 19.2-33 provides that the office of magistrate shall be vested with all the authority, duties and obligations previously vested in the office of justice of the peace prior to January 1, 1974.
²See § 2.1-33(4). I am advised that the person in question is not a fourth-class or third-class postmaster.
³See § 2.1-33(5). I am advised that the person in question is not a rural or star route mail carrier.
⁴See § 2.1-33(15). Magistrates are not appointive officers of a county, city or town. See, for example, Opinion to the Honorable Madison E. Marye, Member, Senate of Virginia, dated October 14, 1974, found in Report of the Attorney General (1974-1975) at 252 (magistrate is State employee under § 51-111.10(5)).
Public Officers. Incompatibility. Disability of Members of Board of Zoning Appeals to Hold Other Public Office in Same Locality. Assistant Commonwealth's Attorney of County is Also City Officer Under § 15.1-994.1 (Sharing of Offices).

August 28, 1980

The Honorable Paul B. Ebert
Commonwealth's Attorney for the County of Prince William

You ask whether an assistant to the Commonwealth's attorney for a county and for a city of the second class is prohibited from serving as a member of the board of zoning appeals of the city, pursuant to § 15.1-494 of the Code of Virginia (1950), as amended.

Section 15.1-494 provides that members of the board of zoning appeals shall hold no other public office in the municipality.

I understand the Commonwealth's attorney in question serves both the county and the city pursuant to § 15.1-994.1 (sharing of offices), and the qualified voters residing in the city are entitled to vote for the Commonwealth's attorney at the general election for county officers. See, again, § 15.1-994.1. The Commonwealth's attorney is therefore, at one and the same time, Commonwealth's attorney of both the county and the city.1

Deputies of officers are themselves officers, and subject to the same requirements and disabilities as the


6 For example, under 39 U.S.C. § 1001(b), most officers and employees of the postal service are in the postal career service, which is part of the civil service. See, also, 39 U.S.C. § 1005 (applicability to postal service of laws relating to federal employees).

7 See, also, Commonwealth ex rel. Kelly v. Rouse, 163 Va. 841, 178 S.E. 37 (1935) (Commonwealth's attorney's employment as district attorney, for Home Owners' Loan Corporation, an instrumentality of the United States, deemed in contravention of § 2.1-30).
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). The assistant Commonwealth's attorney is therefore an officer of the city.

Accordingly, I find that an assistant to the Commonwealth's attorney for a county and for a city of the second class under § 15.1-994.1, is prohibited, pursuant to § 15.1-494, from serving as a member of the board of zoning appeals of the city.

1 Compare Opinion to the Honorable Joseph M. Kuczko, Commonwealth's Attorney for the County of Wise and the City of Norton, dated June 16, 1975, found in Report of the Attorney General (1974-1975) at 168 (distinction between cities of the first and second class now statutory per Chapters 22 and 23 of Title 15.1).

PUBLIC OFFICERS. INCOMPATIBILITY. JUDGES. SUBSTITUTE JUDGE HOLDING OFFICE IN COUNTY UNDER § 15.1-494 PROHIBITED THEREBY FROM SERVING ON BOARD OF ZONING APPEALS.

February 9, 1981

The Honorable Norman deV. Morrison
Substitute Judge
Clarke County General District Court

You ask whether a substitute judge of the judicial district including Clarke County is prohibited by § 15.1-494 of the Code of Virginia (1950), as amended, from serving at the same time as a member of the Clarke County Board of Zoning Appeals (the "Board").

Section 15.1-494 provides that members of the Board shall hold no other office in the county. A substitute district court judge is a State officer. State officers, however, may nevertheless hold office in a particular county, city or town. The Canons of Judicial Conduct for the State of Virginia, Rule 6:III:C-8(D), exempt substitute judges from the general prohibition of Rule 6:III:C-5(G), 216 Va. at 1137, against extra-judicial appointments of judges.

Under § 16.1-69.6, the Commonwealth is divided into districts encompassing all counties and cities, and Clarke County, two cities and five other counties constitute the twenty-sixth district. Under § 16.1-69.7, there are district courts in the counties and cities, and for each such court there are one or more judges who are the judges of such district courts.

Under § 16.1-69.9:1(c), each substitute judge is appointed to serve every district court within the judicial
district for which the appointment is made. Therefore, a substitute judge of the twenty-sixth judicial district is a judge of the district courts in Clarke County.

Accordingly, I find that a substitute judge of the twenty-sixth judicial district holds an office in Clarke County, under § 15.1-494, and is prohibited thereby from serving at the same time as a member of the Board. 3


2 See Lambert v. Barrett, 115 Va. 136, 78 S.E. 586 (1913) (mayors and members of council treated as State officers, much as constables, justices of the peace and Commonwealth's attorneys, whose jurisdiction is confined to particular counties); Burch v. Hardwicke, 71 Va. (30 Gratt.) 24 (1878) (city police chief deemed State officer who exercises his office in a particular municipality—compared to city judge at 34).

3 Compare Opinion to the Honorable Paul B. Ebert, Commonwealth's Attorney for the County of Prince William, dated August 28, 1980 (assistant Commonwealth's attorney of county barred under § 15.1-494 from membership on board of zoning appeals of a city because deemed holding office in city under § 15.1-994.1) (copy enclosed).

Compare, also, Opinion to the Honorable Richard C. Grizzard, Commonwealth's Attorney for Southampton County, found in Report of the Attorney General (1968-1969) at 199 (member of board of zoning appeals should not serve on local agency funded and supervised under Federal Economic Opportunity Act).

PUBLIC OFFICERS. PLANNING COMMISSIONS. OFFICE OF SUPERVISOR REPRESENTATIVE STATUTORY AS TO TERM AND TENURE. BOARD OF SUPERVISORS MAY NOT REORGANIZE COMMISSION TO ELIMINATE OFFICE PRIOR TO EXPIRATION OF INCUMBENT'S TERM AS SUPERVISOR.

April 3, 1981

The Honorable Lawrence R. Ambrogi
Commonwealth's Attorney for Frederick County

You ask whether a board of supervisors may reorganize a local planning commission under § 15.1-437 of the Code of Virginia (1950), as amended, to eliminate the office of the supervisor representative, prior to expiration of the incumbent's term as supervisor.

Section 15.1-437 provides that the local planning commission shall consist of not less than five nor more than 15 members, appointed by the governing body. One member may be a member of the governing body. The term of this member
shall be coextensive with the term of office to which he has been elected to the governing body, unless the governing body, at the first regular meeting each year, appoints another to serve as their representative.

Section 15.1-437 also provides that the remaining members first appointed shall serve terms of from one to four years, with subsequent appointments to be for staggered terms of four years each, unless the local governing body establishes different terms of office for initial and subsequent appointments. Vacancies shall be filled by appointment for the unexpired term only. Members of the commission may be removed for malfeasance in office.

As a general rule, a legislative body, when no restrictions have been placed upon it, may create and abolish offices as it deems them necessary or superfluous. Further, a legislative body may, when no restrictions have been placed upon it, deprive officers of their positions, either directly, by removing them from office, or indirectly, by so changing the organization of a public body as to leave the officers without a place. At the same time, this power cannot be construed to extend to officers whose tenure and term of office are fixed and defined by higher authority.

With respect to tenure and term, § 15.1-437 creates two classes of members on the planning commission. The regular members first appointed are to serve terms of from one to four years, with subsequent appointments to be staggered terms of four years each. The governing body may, however, establish different terms of office for these initial and subsequent appointments.

The second class of members created by § 15.1-437 consists of the representatives of the governing body—one from the administrative branch of the local government, the other being a member of the governing body itself. As to this class of members, § 15.1-437 provides that the term of each shall be coextensive with the term of office to which elected or appointed, unless the governing body, at the first regular meeting each year, appoints others to serve as their representatives.

The offices of the administrative and supervisor representatives are, of course, in the first instance optional with the board of supervisors. As to tenure and term, however, the offices are statutory, and when a board of supervisors chooses to establish such offices in the county, the statute controls.

Accordingly, I am of the opinion that a board of supervisors is not authorized to reorganize a local planning commission, under § 15.1-437, to eliminate the office of the supervisor representative, prior to expiration of the incumbent's term as supervisor.
REPORT OF THE ATTORNEY GENERAL


I am advised the governing body has established a one-year term of office for the regular members.

I am advised that the board of supervisors also eliminated the office of the administrative representative. This representative, however, had not been appointed to a term of office in the administrative branch.

It is clear that the board of supervisors was authorized, at its first regular meeting of the year, to appoint another supervisor to serve as the supervisor representative. Instead, at the first regular meeting, the board sought to reorganize the commission to eliminate the offices of the administrative and supervisor representatives.

I am advised to the Honorable J. Richmond Low, Jr., Commonwealth's Attorney for King George County, dated February 26, 1981 (county need not establish free public library, but if county establishes library, status of library board determined by statute rather than by conflicting ordinance) (copy enclosed).

Compare Art. VII, § 4 of the Virginia Constitution (1971), which contains language about laws not reducing the term of any person holding a county or city office. This Office has construed this language to apply to more offices than the five traditional "constitutional" offices. See, for example, Opinion to the Honorable John N. Lampros, Commonwealth's Attorney for Roanoke County, dated October 26, 1977, found in Report of the Attorney General (1977-1978) at 141.

The office of the supervisor representative is an appointed office, the term of which is measured by the term of an elected county office. I find it sufficient, however, to base this Opinion on § 15.1-437 without considering Art. VII, § 4.

PUBLIC OFFICERS. RESIDENCE. COMMONWEALTH'S ATTORNEYS. REQUIRED TO REMAIN RESIDENT AS CONDITION OF HOLDING OFFICE.

September 22, 1980

The Honorable Raymond R. "Andy" Guest, Jr.
Member, House of Delegates

You ask whether a Commonwealth's attorney who must have resided in his county at the time of his election, pursuant to § 15.1-51 of the Code of Virginia (1950), as amended, is required to remain a resident of the county as a condition of holding office.

Section 15.1-51 provides generally that every county officer shall, at the time of his election or appointment, have resided in the county thirty days next preceding his election or appointment. There is also a special exemption

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for Commonwealth's attorneys, if no practicing lawyer, who has resided in the county for the period aforesaid, offers for election. I am advised that this exemption does not apply.

Section 15.1-52 provides that if any officer, required by the preceding section (§ 15.1-51) to be a resident at the time of his election of the county for which he is elected, remove therefrom, his office shall be deemed vacant. Again, there is a special exemption in the case of a non-resident who has been elected Commonwealth's attorney (because no resident practicing attorney offered for election), but again I am advised this exemption does not apply.

Accordingly, I find that a Commonwealth's attorney who must have resided in his county at the time of his election, pursuant to § 15.1-51, is required to remain a resident of the county as a condition of holding office, pursuant to § 15.1-52. The procedure for the filling of vacancies in county offices is stated in § 24.1-76 (appointment to fill certain vacancies; writ of election).

PUBLIC OFFICERS. RESIDENCE. POLICE CHIEF AND OTHER OFFICERS ARE TOWN OFFICERS AND MUST RESIDE IN TOWN.

September 15, 1980

The Honorable Kevin G. Miller
Member, House of Delegates

You ask two questions about §§ 15.1-51 and 15.1-52 of the Code of Virginia (1950), as amended, as applied to the police department of the Town of Elkton.

Residency of Chief of Police

Your first question is whether §§ 15.1-51 and 15.1-52 require that the chief of police reside within the corporate boundaries of the Town of Elkton.

Section 15.1-51 provides that every city and town officer except the town attorney shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment in such city or town unless otherwise specifically provided by charter. Section 15.1-52 provides that if any officer, required by the preceding section (§ 15.1-51) to be a resident at the time of his election or appointment, remove from such city or town, his office shall be deemed vacant.

Section 5 of the charter of the Town of Elkton provides that the municipal officers of said town shall, in addition to the mayor, consist of a treasurer, clerk of the council, a town attorney, and such other officers, including a town sergeant, as may be provided for by the town council. Section 44 of the charter provides that the town council
shall have the power and authority to appoint a chief of
police and such additional police officers and privates as it
may deem necessary or proper.

The chief of police then is an officer of the Town of
Elkton. Further, I have reviewed the town charter, and there
is no provision in the charter, pursuant to § 15.1-51, that
specifically provides otherwise as to the residency of town
officers, or the chief of police. Compare 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 (no exemption from
residency requirements found in city charter).

Accordingly, I find that the chief of police of the Town
of Elkton must reside within the corporate limits of the
town.

Residency of Other Members
Of Police Department

Your second question is whether §§ 15.1-51 and 15.1-52
require that other members of the police department reside
within the corporate boundaries of the Town of Elkton.

The privates of the police department are employees of
the town and not officers within the meaning of §§ 15.1-51
and 15.1-52. See Opinion to the Honorable J. Mercer White,
Jr., County Attorney for Henrico County, dated November 17,
92. As to any captains, lieutenants or sergeants in the
police department, I am of the opinion that they are officers
of the town.3

Accordingly, §§ 15.1-51 and 15.1-52 require that all
officers of the police department reside within the corporate
boundaries of the town of Elkton. Privates may reside
outside the corporate boundaries.

1 For definition of residence for purposes of holding
office, see Opinion to the Honorable Luther E. Miller, Clerk,
Circuit Court of Page County, dated January 6, 1976, found in

2 You advise that the present town charter may be found in
Acts of Assembly.

3 Prior to 1972, § 15.1-51 contained a comprehensive
exemption for members of police and fire departments, but this
exemption was eliminated by Ch. 620 [1972] Acts of
Assembly.

As noted, § 44 of the town charter speaks only of
additional police officers and privates. Section 15.1-138
(powers and duties of police force in cities and towns)
similarly divides all police personnel into two categories
only--officers and privates. Accordingly, sergeants and such
must be treated as full-fledged officers for purposes of §§ 15.1-51 and 15.1-52.

REAL ESTATE. JUDGMENT DOCKETED IN WASHINGTON COUNTY ESTABLISHES NO LIEN UPON REAL ESTATE ANNEXED BY THE CITY OF BRISTOL IF NOT ACQUIRED BY JUDGMENT DEBTOR UNTIL AFTER ANNEXATION.

October 6, 1980

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You have asked whether a judgment docketed in the Circuit Court of Washington County in 1971 would establish a lien upon a parcel of real estate then lying in said county but not acquired by the judgment debtor until after the 1973 annexation of said parcel by the adjoining City of Bristol. Section 8.01-458 of the Code of Virginia (1950), as amended, provides in part:

"Every judgment for money rendered in this Commonwealth...shall be a lien on all the real estate of or to which the defendant in the judgment is or becomes possessed or entitled, from the time such judgment is recorded on the judgment lien docket of the clerk's office of the county or city where such land is situated...."

You will note that the effect of annexation is discussed by the last sentence of § 8.01-458, but under different circumstances than those you describe. This sentence provides:

"Any judgment or decree properly docketed under the provisions of this section shall, if the real estate subject to the lien of such judgment has been annexed to or merged with an adjoining city subsequent to such docketing, be deemed to have been docketed in the proper clerk's office of such city."

The effect of this provision is that a lien, once created, is not destroyed by the subsequent annexation of the encumbered real estate into an adjoining city.

Accordingly, I am of the opinion that the Bristol real estate acquired by the debtor after annexation is subject to a lien on account of a judgment being recorded in Washington County prior to annexation.

REAL ESTATE BROKERS. COMMISSION BARRED BY LACK OF WRITTEN AGREEMENT OR MEMORANDUM.
You have asked my opinion as to whether § 11-2(6a) of the Code of Virginia (1950), as amended, would prohibit a real estate broker from maintaining an action for a real estate commission under any circumstances, except where a formal written listing or fee agreement was obtained from the seller of the real property. You further relate your understanding that it is the custom in the real estate industry in many places throughout Virginia, at least with regard to unimproved land, for the owner of land and for a real estate broker to enter into an oral agreement only, without benefit of a written listing agreement. You express concern that a broker, having spent a great deal of effort in reliance upon such an oral agreement, might be excluded from the final closing of a sale between the landowner and a purchaser whom he has found, thereby being deprived of his just commission, without being able to collect it through court action.

Section 11-2(6a) is part of what is commonly known as the "Statute of Frauds." The first statute of frauds in our legal tradition was enacted in England during the reign of Charles II. The purpose of statutes of frauds is to require that certain types of agreements between people must be in writing before they will be enforced by a court. This type of safeguard is created by the legislature for situations where it is felt that the parties are unlikely to remember the exact terms of their agreements or where fraud would be possible on the part of people who would knowingly misrepresent the terms of an oral agreement or even fabricate an oral agreement which had never existed. The Virginia Supreme Court has described the rationale for the Statute of Frauds thus:

"The statute was founded in wisdom and sound policy. Its primary object was to prevent the setting up of pretended agreements and then supporting them by perjury. There is further a manifest policy of requiring contracts of so important a nature as the sale and purchase of real estate to be reduced to writing since otherwise, from the imperfection of memory and the honest mistakes of witnesses, it often happens either that the specific contract is incapable of exact proof or that it is unintentionally varied from its original terms. It was not intended that the statute should perpetrate funds." Reynolds v. Dixon, 187 Va. 101, 106, 46 S.E.2d 6 (1948).

Obviously, § 11-2(6a) was intended to focus very specifically upon the real estate sales industry. In essence, it requires that any situation where a real estate broker or salesman is hired to provide services in the sale of real estate the
agreement must be in writing before it will be enforced in the courts of Virginia.

In many situations the strict application of Statute of Frauds provisions such as this give harsh results. Therefore, throughout our history, courts have found ways of avoiding the Statute of Frauds where application of the statute would have produced inequitable results. Perhaps the most common situation is the oral contract for the purchase of land. Depending upon the fact situation, where the oral contract has been fully or partially performed, the courts, in equity, have ordered specific performance of the oral contract by conveyance of the real estate notwithstanding the statute of frauds. **Dickenson v. McLemore, 201 Va. 333, 111 S.E.2d 416 (1959).**

In other fact situations, parties had been estopped by their statements or conduct from asserting the Statute of Frauds as a defense when those statements or conduct have misled another person into a course of action which would be detrimental to him, if he were not able to enforce the oral agreement. For example, in **T...v. T...**, 216 Va. 867, 224 S.E.2d 148 (1976), a husband, in a divorce action, was estopped from setting up the Statute of Frauds as a defense where prior to marriage he had promised to treat his pregnant wife's child by another man as if it were his own, and during the course of the ensuing marriage, had cared for and supported the child for more than four years. Based upon his oral promise, the mother had abandoned her plans for employment and her intention to place the expected child for adoption.

Of course, the latter part of § 11-2 itself provides an exception to the strict requirement of a written contract. It provides that an oral agreement may be enforced if the real estate broker or salesman can introduce some form of writing signed by the person for whom he was working, or that person's agent, which is a memorandum containing the essential terms of the agreement. The consideration to be paid for the broker of salesman's services need not be expressed in the writing nor must the writing have been intended to be a memorialization of the agreement. **Reynolds v. Dixon, 187 Va. 101, 46 S.E.2d 6 (1948).**

None of the examples cited here involved avoidance of the Statute of Frauds by a real estate broker or salesman seeking his commission. None have been found, with the exception of the statutorily permissible method of using some written memorandum of the contract. Only in rare circumstances would a real estate broker or salesman be permitted to enforce an oral agreement for real estate commissions by any legal theory such as partial performance or equitable estoppel. The reason for this is that the statute is so specifically aimed at the real estate industry and the fact that persons engaging in the real estate business ought to know the law relating to their profession. Comments by the Virginia Supreme Court in a recent case, are
consistent with this view. In that case, in an action on an oral contract brought against a real estate agent by his principals who had been defrauded by him, the Virginia court held that § 11-2(6a) would not bar the principal from suing the real estate agent on the oral contract. However, the court's comments suggest that § 11-2(6a) would be strictly enforced against a realtor:

"The legislative objective in enacting the statute requiring real estate service agreements and contracts to be in writing was to avoid frauds and perjuries, not to act as a bar to action by principals against their agents for fraud or breach of confidence. In short, this section of the statute of frauds was intended to protect the public from unscrupulous real estate agents and brokers, not to act as a shield behind which agents and brokers could seek refuge when their principals charge them with fraud or breach of faith...." H-B Partnership v. Wimmer, 220 Va. 176, 179, 257 S.E.2d 770 (1979).

Thus, based on the facts presented, no enforceable fee agreement exists. It would appear that the described practice of oral agreements for payment of commissions is the very practice which § 11-2(6) was designed to prohibit.

Section 11-2 reads as follows:

"No action shall be brought in any of the following cases:

(6a) Upon any agreement or contract for services to be performed in the sale of real estate by a party defined in § 54-730 or 54-731;

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence."

Section 54-730 defines the term "real estate broker." Section 54-731 defines the term "real estate salesman."

RECORDATION. TRANSFER FEES. CHARGEABLE ON CONVEYANCES TO UNITED STATES OF AMERICA.

October 16, 1980

Ms. Rosemary F. Davis, Clerk
Circuit Court of the County of Nelson

You have asked whether the language of § 58-54.1 of the Code of Virginia (1950), as amended, exempts conveyances to the United States of America from the recordation tax imposed
by that section. You also inquire whether the transfer fee imposed under § 58-816 is applicable to such transactions.

Section 58-54.1, as recently amended, expressly exempts from the recordation tax imposed thereunder conveyances from nonprofit educational institutions and conveyances from the State and its political subdivisions. Conveyances to the State or its political subdivisions are exempt only if the political unit is required by law to reimburse the amount of tax imposed upon the grantor by § 58-54.1.

The recordation tax imposed under § 58-54.1 is a grantor's tax and may not be imposed, on constitutional grounds, upon conveyances from the United States or its agencies unless the act creating the particular agency involved, or some other federal act, expressly consents to its imposition. See Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935) and Reports of the Attorney General (1969-1970) at 286; (1967-1968) at 282; and (1959-1960) at 362.

Under § 7.1-22, conveyances to the United States and its agencies are exempt from the § 58-54.1 recordation tax if the lands acquired are to be used for "public purposes." In addition, § 58-64.1 expressly provides that "[t]he taxes imposed by §§ 58-54, 58-54.1, 58-58 and 58-65.1 shall not apply to any deed of gift conveying real estate or any interest therein to...an agency of the United States government; nor to any lease of real property or any interest therein...to an agency of the United States government where such real estate is intended to be used exclusively for the purpose of preserving wilderness, natural or open space areas." (Emphasis added.) Under these sections, a case by case analysis must be made as to whether a particular conveyance to the United States or one of its agencies is exempt. All conveyances not found to be within these exemptions remain subject to the § 58-54.1 tax.

The transfer fees chargeable under § 58-816, to which you refer, are compensatory fees for services of local officials in entering and transferring land on the commissioner's land books and, as such, are properly chargeable in all conveyances, to or from the United States government and its agencies. Federal Land Bank v. Hubard, supra. The only exemption from these fees is as stated in § 58-817 for lands acquired in fee simple by the Commonwealth, as you have noted.

SANITARY DISTRICTS. AUTHORITY. TO HIRE PRIVATE COUNSEL TO REPRESENT DISTRICT, SEPARATE FROM COUNSEL REPRESENTING COUNTY.

September 22, 1980

The Honorable Floyd C. Bagley
Member, House of Delegates
You ask whether the governing body of a county, sitting as the governing body of a sanitary district under Ch. 2 of Title 21 of the Code of Virginia (1950), as amended, has authority to hire private counsel to represent the sanitary district, separate from counsel representing the county.

Section 15.1-507 provides that the governing body of a county may employ special counsel, but only in suits against the county or in matters affecting county property. Section 15.1-9.1:1 provides for the appointment of a county attorney to represent the county, its boards, departments or agencies, officials and employees. There is no specific mention, in either statute, of counsel representing districts or sanitary districts.

Section 21-118(7), however, provides that the governing body of a sanitary district may employ and fix the compensation of any technical, clerical or other force or help which from time to time, in the governing body's judgment may be necessary for the construction, operation or maintenance of any system in the district. There is once again no express provision for legal counsel to represent the district, but I likewise find no express provision for legal counsel to represent water and sewer authorities. Compare §§ 15.1-1249 (members of authority; chief administrative or executive officer) and 15.1-1250 (powers of authority).

No one would argue that drainage districts (and water and sewer authorities) do not need legal counsel. It is also axiomatic that drainage districts (and water and sewer authorities) are entities separate and apart from the counties they serve. Counties, of course, also use counsel, but under the law their civil representation is assigned primarily to Commonwealth's or county attorneys. Special counsel are therefore the exception for counties, not the rule, and the hiring of private counsel (at additional public expense) is closely controlled by statute. With separate entities, private counsel must be regarded as the rule, rather than the exception, and the authority to hire counsel may be necessarily implied from the authority of drainage districts (and water and sewer authorities) to engage in extensive activities requiring legal counsel.

Accordingly, I find that the governing body of a county, sitting as the governing body of a sanitary district, has authority to hire private counsel to represent the sanitary district, separate from counsel representing the county. If the General Assembly wishes to state expressly this authority to hire private counsel, an appropriate amendment could be made to § 21-118(7) (and to § 15.1-1250).

SCHOOLS. CONTINUING CONTRACT STATUS OF TEACHER AFTER PROBATIONARY EMPLOYMENT AS PRINCIPAL TERMINATED.
March 23, 1981

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You indicate that a teacher with continuing contract status has accepted probationary employment as a principal in the same school division. You ask if the teacher retains such continuing contract status in the event probationary service as principal is subsequently terminated by the school board.

In the Virginia public school system, teachers acquire continuing contract status after three years of probationary service. See § 22.1-303 of the Code of Virginia (1950), as amended. Such teachers generally have their employment continued during good behavior and competent service. See § 22.1-304. They may only be dismissed or placed on probation after the exhaustion of certain procedures. See § 22.1-309, et. seq. The continuing contract status in Virginia thus has many of the earmarks of tenure.

Principals are employed by school boards and, like teachers, serve a probationary term of three years. Such probationary service is required even though the individual has previously acquired continuing contract status in teaching. See § 22.1-294.


In such cases, the intent to abandon tenure rights is presumed from the clear conduct of the teacher in completely severing the employment relationship. However, accepting new or additional administrative and supervisory duties with the same employer, even under a new contract of employment, is a neutral fact that does not by itself clearly equate to abandonment of tenure rights. Houtz v. School District, 357 Pa. 621, 55 A.2d 375 (1947); Board of Education v. Sand, 27 Minn. 202, 34 N.W.2d 689 (1948). The tenured rights in teaching are suspended during the probationary term served as principal for the same employer, absent a clear understanding to the contrary. O'Conner v. Emerson, 185 N.Y.S. 49 (1920).
Accordingly, absent additional evidence of intent to the contrary, e.g., a clear policy statement of the school board or an affirmative agreement of the teacher indicating awareness and acceptance of the consequences, I am of the opinion that a teacher does not abandon continuing contract status by merely accepting probationary employment as a principal with the same employer. Abandonment of such valuable rights earned by Virginia teachers ought not be inferred except in a clear case.

Once continuing contract status has been obtained in a Virginia school division, another probationary period need not be served in any other school division unless the probationary period, not to exceed one year, is expressly agreed to. See § 22.1-303.

SCHOOLS. DISCLOSURE OF PUPIL RECORDS.

April 15, 1981

The Honorable Mary A. Marshall
Member, House of Delegates

You ask two questions regarding disclosure of pupil records pursuant to § 22.1-287 of the Code of Virginia (1950), as amended. I will answer the questions in the order raised.

1. May either parent have access to a pupil's records regardless of which parent has custody?

Section 22.1-287(1) provides in part that "[e]ither parent or a guardian of such pupil..." shall have access to such records. The statute places no condition of custody on the right of access accorded the parents. However, I call your attention to the Family Educational Rights and Privacy Act (hereinafter the "Act") (20 U.S.C. § 1232(g)) and implementing regulations (45 C.F.R. § 99.1 et seq.). These regulations govern the disclosure of certain educational records by public agencies that are recipients of federal funds administered by the U.S. Commissioner of Education. In pertinent part, they provide:

"An educational agency or institution may presume that either parent of the student has authority to respect and review the education records of the student unless the agency or institution has been provided with evidence that there is a legally binding instrument, or a State law or court order governing such matters as divorce, separation or custody, which provides to the contrary." See 45 C.F.R. § 99.11(c).
Accordingly, I am of the opinion that either parent may have access to the records unless restricted by the said Act. 2

2. May a student over 18 years of age refuse such access to his or her parents or guardian pursuant to § 22.1-287(2)?

Section 22.1-287(2) merely addresses when a student may designate persons with access to his records. Such power of designation accrues upon reaching the age of eighteen (18). This section must be read in conjunction with the preceding and subsequent sections authorizing parents, guardian and specified school officials with the right of access. These individuals are provided the statutory right of access over and beyond any other person designated by the student.

Likewise, however, the Act may have a bearing in the matter. Under the implementing regulations, once a student reaches eighteen, the student must consent to the disclosure of certain information contained in his school records. See 45 C.F.R. § 99.30. This general rule is subject to a number of exceptions. For example, parents of a dependent student, as defined in § 152 in the Internal Revenue Code of 1954, are entitled to access without the student's consent. See 45 C.F.R. §§ 99.4, 99.5, and 99.31. Therefore, on the assumption that the school is subject to the Act, absent any other exception authorized by the implementing regulations, the student's consent must be obtained before disclosure of certain school records is given to parents who do not claim the student as a dependent for tax purposes. 5

1Section 22.1-287 provides that "[n]o teacher, principal or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school in any class to any person except under judicial process..." or unless the person falls within certain specified categories provided in the statute.

2Section 22.1-287 provides that access may be provided either parent "except as otherwise provided by law."

3The section states: "[a] person designated in writing by such pupil if the pupil is eighteen years of age or older or by either parent or a guardian of such pupil if the pupil is less than eighteen years of age...."

4The regulations would not prevent nonconsensual disclosure of certain information termed "directory"; e.g., the student's name, address, telephone number, date and place of birth under certain circumstances. See 45 C.F.R. § 99.3. The disclosure of such information may, however, be precluded by § 22.1-287. Therefore, not only must the category of "persons" seeking access be considered, but also the specific information desired.

5The regulations further provide that if compliance is prevented because of a conflicting State or local law the
agency must advise the federal authorities thereof within 45
days of the determination. See 45 C.F.R. § 99.61.

SCHOOLS. HANDICAPPED CHILDREN. HANDICAPPED CHILD NOT
SUBJECT TO NORMAL DISCIPLINARY PROCEDURE IF THERE IS CAUSAL
RELATIONSHIP BETWEEN HANDICAP AND DISRUPTIVE CONDUCT.

July 24, 1980

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

You ask whether the Albemarle County School Board's
regulations regarding the suspension of students for drug
related offenses may be enforced against handicapped children
in view of the applicable State and federal laws prohibiting
discrimination on the basis of handicap.

A school district has a right to discipline special
education students subject to certain procedural safeguards
required by both federal and State law. Initially a
determination must be made as to whether or not there is a
direct causal relationship between the handicap and the
misconduct. This determination must be made by a
specialized, knowledgeable group of persons pursuant to the
change of placement procedure. Sherry v. N.Y. State
Department of Education, 3 EHRL 551:579 (W.D.N.Y. 1978); 45
C.F.R. 121a532, 533. If no causal relationship is
established, a handicapped child would then be subject to the
normal disciplinary procedures. If there is a direct causal
relationship between the handicap and the disruptive conduct,
and it is necessary to remove the student from the school,
then the student's placement should be changed in accord with
1235 (D. Conn 1978); S-1 v. Turlington, 3 EHRL 212 (S.D. Fla.
1979).

1See Education for All Handicapped Children Act of 1975, 20
U.S.C. §§ 1401, et seq., (P.L.54-142); § 504 of the
Rehabilitation Act; 29 U.S.C. § 794; and § 22-10.3 of the
Code of Virginia (1950), as amended.

2See 45 C.F.R. § 121a1, et seq.; 45 C.F.R. § 84; and
Regulations and Administrative Requirements for the Operation
of Special Education Programs in Virginia.

SCHOOLS. MEMBER OF CITY SCHOOL BOARD MAY ALSO SERVE ON
COUNTY SCHOOL BOARD.

January 6, 1981

The Honorable L. Ray Ashworth
Member, House of Delegates
You ask whether members of the School Board of the City of Emporia may be designated by city council for appointment to the Greensville County School Board. You have advised that pursuant to a decree in Wright v. County School Board of Greensville County, the City of Emporia may appoint two additional individuals to the Greensville County School Board to represent the city. Article II, § 5 of the Constitution of Virginia (1971) permits the General Assembly to ban dual officeholding. In the case of school boards, § 22.1-30 of the Code of Virginia (1950), as amended, prohibits certain local officers from serving on school boards in the jurisdiction for which they serve. This section has no application to the given circumstances where an officer of another locality is appointed to the school board. I am unaware of any other constitutional or legislative proscription to such appointment.

Accordingly, city council may appoint present members of the city school board to the Greensville County School Board.

SCHOOLS. PRIVACY PROTECTION ACTION APPLIES TO LOCAL SCHOOLS.

September 17, 1980

The Honorable W. Charles Poland
Commonwealth's Attorney for the City of Waynesboro

You ask whether public school teachers, required to be "certified" under State law, are "persons required to be licensed...to engage in the practice of [a] professional occupation..." within the meaning of § 2.1-384(5) of the Code of Virginia (1950), as amended. Section 2.1-384(5) excludes from the provisions of the Privacy Protection Act of 1976 (the "Privacy Act") personal information systems:

"Maintained by agencies concerning persons required to be licensed by law in this State to engage in the practice of any professional occupation, in which case the names and addresses of persons applying for or possessing any such license may be disseminated upon written request to a person engaged in the profession or business of offering professional educational materials or courses for the sole purpose of providing such licensees or applicants for licenses with informational materials relating solely to available professional educational materials or courses, provided such disseminating agency is reasonably assured that the use of such information will be so limited."

Thus, if public school teachers are within the intended coverage of § 2.1-384(5), records containing personal information concerning individual teachers maintained by local school boards, the State Department of Education would not be subject to the provisions of the Privacy Act.
The Privacy Act itself does not prohibit the dissemination of personal information, but instead, establishes specific record-keeping procedures which must be followed when personal information is released. See §§ 2.1-380(1) through 2.1-380(10). The Privacy Act, however, provides that the data subject of records containing personal information has rights of access to such records maintained by State and local governmental agencies.

Personnel records of teachers, of course, are exempt from required public disclosure under the Freedom of Information Act. See § 2.1-342(b)(3). Teachers, however, have a right of access to their own personnel records. Id. Thus, even if § 2.1-384(5) applies to public school teachers so as to exclude their records from the provisions of the Privacy Act it would have little effect upon public or teacher access to such records.

The Privacy Act has consistently been interpreted as being fully applicable to local school boards. See Reports of the Attorney General (1976-1977) at 317; (1977-1978) at 310; (1978-1979) at 317. As school teachers are employees of the school board, and since the public schools are subject to the control of the school boards, it therefore follows that the Privacy Act would be equally applicable to the local schools. See, e.g., Report of the Attorney General (1975-1976) at 298.

Section 2.1-384(5) is applicable only to agencies maintaining information of persons "required to be licensed by law in this State to engage in the practice of any professional occupation...." The statute does not define the term "license." Legislative intent may, however, be determined from reference to other statutes employing the term in question. 82 C.J.S. Statutes § 316 (1953).

Title 54 governs the regulation and licensure of specified professions and occupations. Section 54-1.18 defines "licensing" as:

"a method of regulation whereby the practice of the profession or occupation licensed is unlawful without the issuance of a license."

The General Assembly has further defined in § 54-1.18 "certification" as:

"the process whereby the Department or any regulatory board on behalf of the Commonwealth issues a certificate to any person certifying that he has minimum skills properly to engage in his profession or occupation and that it knows of no character defect that would make him a bad practitioner of the same."

Accordingly, there are distinctions between professional licensure and certification. Licensure is required in order to legally engage in a regulated occupation. Certification,
on the other hand, evidences minimum competence to engage in an occupation.

Public school teachers must possess a certificate prescribed by the Virginia State Board of Education. See § 22.1-299. The certificate itself does not license the teacher with the right to educate the citizens of this Commonwealth, but merely recognizes his or her professional qualifications requisite for teaching in the public schools. Teachers not certified may lawfully teach in privately funded schools. Thus, certification is not required in order to lawfully engage in teaching as an occupation. Accordingly, I am of the opinion that public school teachers are not persons "licensed" for a professional occupation within the meaning of § 2.1-384(5). Thus, records containing personal information concerning teachers maintained by State and local school authorities are not excluded from the provisions of the Privacy Act.

SCHOOLS. PUBLIC SCHOOL PARKING LOT IS PUBLIC HIGHWAY FOR PURPOSES OF § 18.2-268.

July 14, 1980

The Honorable W. Charles Poland
Commonwealth's Attorney for the City of Waynesboro

This is in response to your recent letter in which you ask my opinion as to whether Virginia's implied consent law found in § 18.2-268 of the Code of Virginia (1950), as amended, is applicable when an individual is arrested for driving under the influence of intoxicants under § 18.2-266 and the arrest takes place in a public school parking lot.

The scope of § 18.2-268, as you correctly point out, is limited in application to "[a]ny person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this Commonwealth...." The question that you pose, then, is whether a public school parking lot is to be considered a "public highway."

While the case of Prillaman v. Commonwealth, 199 Va. 401, 100 S.E.2d 4 (1957) and two Opinions of the Attorney General touch on this issue, they are distinguishable from the facts you present: the legal definition used in the Prillaman case, supra, has been amended; it deals with a vehicle operated on a private service station lot, and the two Opinions deal with roads within completely private subdivisions. Prillaman, supra, also relied heavily on the then existing definition of a public highway contained in § 46-1(8) which was later amended with the passage of Title 46.1 in 1958. The new definition is now found in § 46.1-1(10) and reads as follows:

"The entire width between the boundary lines of every way or place of whatever nature open to the use of the
Looking at the addition of the phrase "publicly maintained parking lots" to the other statutorily cited examples of public use, that is, streets and alleys, shows a clear indication that the General Assembly intended specifically to include a publicly maintained parking lot within the purview of a public highway.

Since all school property is vested in the county or city school board having jurisdiction over that school and public school boards are funded through taxes, there can be little doubt that parking lots within the public school system are maintained by public funds.

In light of the foregoing, it is my opinion that an arrest for a violation of § 18.2-266 which takes place in a public school parking lot, invokes the applicability of § 18.2-268, inasmuch as a public school parking lot is a "public highway."

1Section 18.2-268 states that, irrespective of license status, anyone who operates a motor vehicle on the public highways in this State impliedly consents to a blood/alcohol content analysis by either blood or breath sample if arrested for a violation of § 18.2-266. This statute also establishes methods and procedures of testing, the costs involved, sanctions for refusal, as well as establishing parameters for eventuary use of the results of such tests.

2Section 18.2-266 states: "It shall be unlawful for any person to drive or operate any motor vehicle, engine or train while under the influence of alcohol, or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purposes of this section, the term 'motor vehicle' shall include pedal bicycles with helper motors, while operated on the public highways of this State."

3Section 18.2-268(b).


5Any effect of the amendment of § 46.1-1(10) on those two Opinions is not discussed herein.

6Section 46-1 states: "Every way or place of whatever nature open to the use of the public for purposes of vehicular travel in this State, including the streets and alleys in towns and cities...."
REPORT OF THE ATTORNEY GENERAL

SCHOOLS. STUDENTS. JUVENILE DELINQUENTS MAY BE REQUIRED TO ATTEND SCHOOL AS CONDITION OF PROBATION.

July 22, 1980

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

You ask if a juvenile court may condition the probation of a juvenile who has been adjudged delinquent upon school attendance. You further ask if such authority would be dependent upon the age of the juvenile.

Section 16.1-279(E)(4) of the Code of Virginia (1950), as amended, authorizes a juvenile court to place the delinquent child on probation "under such conditions and limitations as the court may prescribe." I am of the opinion that the language of the foregoing statute would invest the court with authority to condition probation on school attendance.

I also take note of the fact that the General Assembly has conferred jurisdiction on the juvenile courts to enforce the compulsory attendance requirements of the Commonwealth. See § 22-275.11. The juvenile courts are also empowered to recommend that children of school age be excused from compulsory school attendance requirements. See § 22-275.4:1.

As you may know, compulsory school attendance is generally required for children between the ages of five and seventeen. See § 22-275.1. However, the juvenile court's authority to condition probation for delinquency would not be dependent upon the child's age so long as the child was under the age of eighteen. See § 16.1-228.

SUMMONS. SHOULD ISSUE TO NON-CUSTODIAL FATHER OF ILLEGITIMATE CHILD WHO IS CHARGED WITH DELINQUENCY OR IN NEED OF SERVICE.

April 22, 1981

The Honorable R. Baird Cabell, Judge
Juvenile and Domestic Relations District Court

You have asked whether notice to a non-custodial father of an illegitimate child is required when a petition filed with the court alleges that a child is delinquent or in need of services. You also asked whether notice is required to such a father where there has not been a judicial determination of child custody.
REPORT OF THE ATTORNEY GENERAL

Section 16.1-263(A) of the Code of Virginia (1950), as amended, provides, that when a petition is filed regarding a child "[t]he court shall direct the issuance of summonses... to the parents, guardian, legal custodian or other person standing in loco parentis, and such other persons as appear to the court to be proper or necessary parties to the proceeding." (Emphasis added.) Since the statute requires notice to "the parents" and fails to draw any distinction between parents of a legitimate child and parents of an illegitimate child, I am of the opinion that the court is required to summon the natural father of an illegitimate child whether or not there has been a judicial determination of custody. See Stanley v. Illinois, 405 U.S. 695 (1972).

You also ask what form of service, if any, is required when the address of a non-custodial father of an illegitimate child is unknown and not reasonably ascertainable. Since § 16.1-263(A) requires that a summons be served, it follows that the procedures for service of summons provided for under § 16.1-264 would govern. Section 16.1-264(A) provides, in part, that "[i]f after reasonable effort a party... cannot be found or his post office address cannot be ascertained... the court may order service of the summons upon him by publication in accordance with the provisions of §§ 8-71 and 8-72." I am, therefore, of the opinion that § 16.1-264(A) would permit service of the summons by publication where the father's address is not ascertainable after reasonable effort.

1Sections 8-71 and 8-72 have now been replaced by §§ 8.01-316 and 8.01-317. See Ch. 617 [1977] Acts of Assembly 1052.

SCHOOLS. SCHOOL BOARDS. DISTRIBUTION OF BIBLES TO STUDENTS PERMISSIBLE.

September 15, 1980

The Honorable James E. Buchholtz
County Attorney for the County of Roanoke

You ask if a proposed policy of the Roanoke County School Board would be constitutionally permissible. The proposal would permit each county school to accept donations of books from private citizens which students may select and retain as their personal property. The books, which would include bibles, would be placed on separate tables, persons donating books would not be allowed to supervise the placing of the books, and no pressure whatsoever would be placed on any student to select a certain book.

School boards have the power to regulate the disposition of books donated to them. See Art. VIII, § 7, of the
Constitution of Virginia (1971); and § 22.1-79 of the Code of Virginia (1950), as amended. Any such regulation, however, must be consistent with constitutional requirements. The wording of the policy about which you inquire is couched in neutral terms and, on its face, satisfies legal requirements. However, if the facts would show that the purpose or effect of the proposed policy is to distribute bibles through the schools, and that non-religious books or materials were seldom made available for selection, your question could not be answered by reference to the law concerning distribution of non-religious publications in the schools. Reference must be made to those constitutional provisions and cases which discuss the distribution of religious materials in the schools.

The Establishment Clause of the First Amendment


The Establishment Clause requires governmental action to have a clear secular purpose; to have a primary effect that neither advances nor inhibits religion; and to avoid excessive entanglement of the government in religious matters. School District of Abington v. Schempp, 374 U.S. 203 (1963); Committee For Public Education v. Nyquist, 413 U.S. 756 (1973); Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976). This three part analysis is used by the courts in examining cases where it is alleged that governmental bodies, like school boards, are promoting religion.

Schools May Accommodate Religion

Although schools must be particularly sensitive to the diverse views on religion held by both students and parents, I believe that the school division can accommodate religion by permitting bibles to be included among books donated to the schools for selection by students. As pointed out above, governmental action may not advance religion, but neither may it inhibit religion. The United States Supreme Court permits the schools to accommodate religion, so long as the other requirements of the Establishment Clause test are satisfied. Two cases illustrate what is permitted. In the first, the regular teacher was replaced in the classroom by a religious teacher for a period of religious instruction. If a student did not wish to receive religious instruction, he had to leave the classroom. The Supreme Court said that the school, by cloaking the religious instructor with the authority of its teacher, was endorsing and promoting religion, and that was not permitted. McCollom v. Board of Education, 333 U.S. 203 (1948).
In 1952, the Supreme Court considered a case where the public schools, upon written request of the parents, permitted release of students during the school day for attendance at religious courses operated outside the school building by, and at the expense of, a duly constituted religious body. This, the court held, did not involve the government in religion. Rather it was an accommodation to religion that would be permitted. *Zorach v. Clauson*, 343 U.S. 306 (1952). Released time religious instruction in Virginia schools has recently been approved in the federal courts. *Smith v. Smith*, 523 F.2d 121 (4th Cir. 1975).

Making donated books, including bibles, available for student selection would be constitutionally permitted, in my opinion, so long as the primary purpose of making books available was not to distribute bibles.

Under the proposed policy, the school board would accept any book donated which was included in the then-current library inventory or which had been approved for use as a textbook by the State Board of Education. So long as non-religious books were also available for selection, and the choice presented to the students is purely voluntary, it is my opinion that the proposed policy would be held constitutional, as an accommodation to religion. The table of books would constitute a public forum for the expression of free speech. Any person or group may donate books on the approved list in the hope that the students will read and keep them. This activity may be conducted within the school itself. See *Gambino v. Fairfax County School Board*, 429 F.Supp. 731 (E.D. Va. 1977), aff'd, 564 F.2d 157; or the tables may be set up outside the school, if done so in a manner that will not disrupt school activity. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Any such activity would remain subject to the authority of the school board to maintain discipline and order in the schools. *Pleasant v. Commonwealth*, 214 Va. 646, 203 S.E.2d 114 (1979).

In conclusion, I am of the opinion that the proposed policy would be constitutionally permissible if implemented in accordance with the above standards and authorities.

December 29, 1980

The Honorable William G. Broaddus
County Attorney for Henrico County

You ask three questions regarding persons entitled to attend public schools without payment of tuition.

Free Public School Attendance
You first ask if § 22.1-3 of the Code of Virginia (1950), as amended, precludes from free public school attendance children voluntarily placed by their parents in private licensed child-care institutions. You have indicated that the children are unable to live with their parents, and are not placed for the sole purpose of attending school in the county.

Section 22.1-3 is the recodification of § 22-218 which provided that children in certain categories of residence were deemed eligible for free education. Section 22.1-3 continues the categories set forth in § 22-218, but adds an additional category providing free attendance for students whose parents are unable to take care of them and who are residing in the locality with a court-appointed guardian or legal custodian not solely for school purposes. The children which you describe are placed by parents who are unable to care for them, and thus under the express terms of the statute they are entitled to free school attendance if they reside with a court appointed guardian or legal custodian.

Entitlement to State Funds

Section 22.1-101 provides State aid for children placed in an orphanage or children's home which exercises 'legal guardianship rights." Schools are prohibited from charging tuition to such children.

You ask whether the requirement of "legal guardianship rights" is satisfied by a circuit court order designating a placement in a licensed child care institution or by a juvenile and domestic relations court's approval of a placement in the best interests of the child.

"Generally, a guardian is a person lawfully invested with the power and charged with the duty of taking care of the person and managing the property and rights of another person, who, for some peculiarity of status or defect of age, understanding or self control, is considered incapable of administering his own affairs. The name 'guardian' is usually applied only to one having the care and management of a minor." 21A M.J. Words and Phrases 455 (1980); see, also, Black's Law Dictionary 834 (4th ed. 1968).

The parents are the natural guardians of their own children. Section 31-4 provides for a guardian by court appointment.

Unless the requirements of § 31-4 have been met, no legal guardianship relationship exists. There is nothing in § 22.1-101 which would give a licensed health care institution maintaining custody of a child automatic authority to exercise guardianship of that child. See Report of the Attorney General (1974-1975) at 267. A review of placement by a juvenile and domestic relations court for the best interests of the child is not necessarily an appointment of a guardian under § 31-4. Therefore an orphanage or
children's home which exercises legal guardianship rights must do so pursuant to Title 31.

Exercise of Guardianship Rights

You further ask whether a licensed home care institution must exercise legal guardianship rights individually for each child to satisfy § 22.1-101 or may such rights be exercised generally over all children at the institution.

A guardian has certain powers, duties and responsibilities as prescribed by § 31-8. Since a guardian has the right to possession, care and management of the estate of the minor, he is likewise liable for bad faith transactions or a dereliction in duty. 9A M.J. Guardian and Ward § 30 (1977). There is no provision in law for the appointment of an institution to exercise such guardianship rights as you describe. Accordingly, I am of the opinion that a court order would be required in the case of each child for whom the institution is to serve as guardian.

1Section 22.1-3 provides as follows:
"The public schools in each school division shall be free to each person of school age who resides within the school division; provided, however, that a school board may withdraw a child from kindergarten until the following school year upon the recommendation of the principal of the school the child attends and with the consent of the child's parent of guardian. Every person of school age shall be deemed to reside in a school division when he or she is living with a natural parent, a parent by legal adoption or, when the parents of such person are dead, a person in loco parentis, who actually resides within the school division including a military or naval reservation located wholly or partly within the geographical boundaries of such school division, or when the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who (i) resides in the county, city or town and (ii) is the court-appointed guardian, or has legal custody, of the person, or when the person is living in the county, city, or town, not solely for school purposes, as an emancipated minor or self-supporting person."

2This Office has interpreted the categories enumerated in § 22-218 as not being exclusive. Thus, even though the child's residence did not fall squarely within any of the categories listed in the statute, the child would be eligible for tuition-free education if his residence in the locality, apart from his parents, was considered bona fide; that is, not primarily for attending the public schools in the locality. See Reports of the Attorney General (1972-1973) at 348; (1974-T975) at 378; (1976-1977) at 240; (1979-1980) at 292.
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3Section 31-8 provides: "Every guardian who is appointed as aforesaid, and gives bond when it is required, shall have the custody of his ward, except as otherwise provided in §§ 31-1, 31-2, and 31-15 and the possession, care, and management of his estate, real and personal, and out of the proceeds of such estate shall provide for his maintenance and education."

SCHOOLS. SCHOOL BOARDS. HAS NO AUTHORITY TO OVERSPEND ITS BUDGET IN FISCAL YEAR.

June 4, 1981

The Honorable George W. Grayson
Member, House of Delegates

You have asked whether a local school board may, consistent with law, overspend its budget for a fiscal year.

Generally, a school board has the authority to manage and control the funds made available to the school board for public schools and may incur costs and expenses. See § 22.1-89 of the Code of Virginia (1950), as amended. However, § 22.1-91 clearly states:

"No school board shall expend or contract to expend, in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year without the consent of the governing body or bodies appropriating funds to the school board. Any member of a school board or any division superintendent or other school officer violating, causing to be violated or voting to violate any provision of this section shall be guilty of malfeasance in office."

It is my opinion, therefore, that a local school board may not, consistent with law, overspend its budget for a fiscal year.

SCHOOLS. SCHOOL BOARDS. LACK AUTHORITY TO RESTRICT EMPLOYEE MEMBERSHIP RIGHTS ABSENT COMPELLING REASON FURTHERING SUBSTANTIAL GOVERNMENT INTEREST.

July 22, 1980

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

You ask whether a local school board has the authority to prohibit or restrict its employees' membership in an employee association. Your inquiry focuses on three levels of restrictions:

(1) barring all employees from joining the association;
(2) barring some employees on the basis of their "confidential" classification; and

(3) allowing employees to join the organization but limiting the activities in which "confidential employees" may participate.

Action taken by the school board to abridge membership rights in the employee association would be an infringement of the employees' constitutional right to freedom of association. Infringement activity by the school board may be permissible, however, if the board's purpose or interest is so significant that on balance it warrants an intrusion into the constitutionally protected interests of the employees. Thomas v. Collins, 523 U.S. 516 (1945); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1957); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elk Grove Firefighters v. Willis, 400 F.Supp. 1097 (W.D. Ill. 1975).

The school board must be prepared to show first, that its purpose in limiting membership rights is to further a substantial, legitimate governmental interest and second, that the limitations imposed are the least drastic means available for furthering that purpose. Shelton v. Tucker, 364 U.S. 479 (1960). Although the school boards may not bargain collectively with employee associations, Commonwealth of Virginia v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977), such prohibition would not be sufficient to preclude all school board employees from joining independent labor associations. See Report of the Attorney General (1969-1970) at 158.

To restrict membership rights on the basis of a "confidential employee" classification, the board must likewise insure that its dissimilar treatment of employees is necessary to further a substantial and compelling governmental interest. For example, it has been held that supervisory personnel may be prevented from joining the same union as rank and file employees on an actual finding that such association would create a conflict of interest. York County Firefighters v. York County, 589 F.2d 775 (4th Cir. 1978). "It is not sufficient, however, to simply designate employees as "confidential," and on that basis alone restrict their constitutional rights. There must be some actual demonstration that the employees involved would impair a legitimate interest of the school board by membership in the association. York County, supra."

Accordingly, although governmental bodies may restrict employee membership rights in a proper case, such infringement is constitutionally suspect. The validity of the school board's actions however would necessarily depend upon the individual circumstances applying the above standards.
Tie Breaker

Section 22.1-75 of the Code of Virginia (1950), as amended, generally provides for the appointment of a special tie breaker who shall cast the deciding vote for ties in the votes of the county school boards:

"In any case in which there shall be a tie vote of the school board of any school division in a county when all the members are not present, the question shall be passed by till the next meeting when it shall again be voted upon even though all members are not present. In any case in which there is a tie vote on any question after complying with this procedure or in any case in which there is a tie vote when all the members of the school board are present, the proceedings thereon shall be in conformity with the proceedings prescribed by § 15.1-540, except that the tie breaker appointed pursuant to §§ 22.1-40, 22.1-44, 22.1-47, 15.1-609, 15.1-644, 15.1-708 or § 15.1-770, whichever is applicable, shall cast the deciding vote."

The tie breaker is appointed to a four year term by the board of supervisors, or the school board selection commission when the commission has the power in the county to appoint members to the school board. §§ 22.1-40, 22.1-44, 22.1-47; §§ 15.1-609, 15.1-644, 15.1-708, 15.1-770. The tie breaker must be a qualified voter and resident of the county. § 22.1-40.2

The power of supervision vested in school boards under Art. VII, § 7, is not absolute. DeFebio v. County School Board of Fairfax County, 199 Va. 511, 100 S.E.2d 760 (1957); Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977). The General Assembly has the primary constitutional duty to ensure the maintenance of educational programs of high quality; and the authority to prescribe standards of quality for all school divisions. See Art. VIII, §§ 1 and 2. Furthermore, the General Assembly has constitutional authority for setting the number, method of selection, term and qualification for school board members.

The tie breaker procedure, in my opinion, is within the foregoing constitutional powers of the General Assembly.
Section 22-70, the tiebreaker provision prior to the adoption of § 22.1-75, was adopted in 1922. The language of the constitutional revision bill provided that such acts would remain in effect. Ch. 786 [1970] Acts of Assembly 1727. Authority for supervision of the school system has not been delegated away from the school boards. Cf., School Board of the City of Richmond v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). The procedure simply prescribes a procedure for obtaining a final vote of the school board on a matter within the jurisdiction of the board.

Accordingly, I am of the opinion that the tiebreaker procedure does not offend Art. VIII, § 7.

Salaries

You also ask if there is any prohibition on school boards paying their current members the maximum salaries provided for in § 22.1-32. I am of the opinion that the school boards may raise the salaries of their current members to the limits authorized by this section on or after its effective date. Until then, the salaries specified in § 22-67.2 would be applicable.

The tiebreaker procedure has been in effect since 1922. See § 22-70.

In the case of school divisions composed of less than one county or city or part or all of more than one county or city, the Assembly has expressly provided that "the governing bodies concerned shall jointly select...one person who shall be a member of the division school board only for the purpose of voting in case of an equal division of the regular members of the board on any question requiring the action of such board...." Section 22.1-53. A similar express provision exists for boards of supervisors in § 15.1-540, the procedure to be followed by county school boards under § 22.1-75.

SCHOOLS. SCHOOL BOARDS. NO AUTHORITY TO CONTRACT IN EXCESS OF APPROPRIATIONS.

June 9, 1981

The Honorable R. Beasley Jones
Member, House of Delegates

You have asked several questions about the relationship between school appropriations and a school board's authority to contract.

Some of these questions recently have been answered by my Opinion to the Honorable Hunter B. Andrews, Member, Senate of Virginia, dated May 27, 1981. I am enclosing for your assistance a copy of that Opinion. Those questions which
have not been answered by the enclosed Opinion are answered as follows:

1. May a school board contract to spend for school purposes, or specifically, for teachers' salaries, an amount in excess of the sums appropriated to it by the local governing body?

Section 22.1-91 of the Code of Virginia (1950), as amended, provides:

"No school board shall expend or contract to expend, in any fiscal year, any sum of money in excess of the funds available for school purposes for that fiscal year without the consent of the governing body or bodies appropriating funds to the school board. Any member of a school board or any division superintendent or other school officer violating, causing to be violated or voting to violate any provision of this section shall be guilty of malfeasance in office."

Therefore, your question must be answered in the negative.

2. May a school board utilize funds appropriated to it pursuant to an ensuing year's school budget to pay teachers' salaries incurred under contracts in force during the preceding school year, without specific authorization from the appropriating body for such expenditures?

Section 22.1-91 limits the funds which are available to the school board for expenditures to those "available for school purposes for that fiscal year." (Emphasis added.) Therefore, the school board cannot, consistent with § 22.1-91, use the funds appropriated for the ensuing fiscal year to pay for contracts in the past fiscal year, without the consent of the local governing body which has appropriation authority.

Further, the school board may not on its own initiative attempt to meet instructional costs for the preceding year by reallocating from other classifications funds budgeted in that year. When appropriations are made to the school board by major classification:

"[N]o funds shall be expended by the school board except in accordance with such classifications without the consent of the governing body appropriating the funds." See § 22.1-89.

This means that the school board is not free to transfer funds from one major classification to another. It may do this only with the consent of the local governing body. See Report of the Attorney General (1971-1972) at 332.

3. What is the offense committed by a superintendent or school board member who expends or contracts to expend without the consent of the governing body or bodies
appropriating funds to the school board monies which are unavailable in any fiscal year?

The General Assembly has expressly provided that malfeasance in office arises whenever school officials contract to expend funds in any fiscal year, in excess of available funds without the consent of the appropriating body. See § 22.1-91. The offending school official, be it a member of the school board or a division superintendent, may be guilty of a Class 4 misdemeanor--punishable by fine of not more than one hundred dollars. See §§ 22.1-292; 18.2-11. In addition, it would be likely that such an official would be personally responsible for repayment of funds unlawfully expended. Removal from office and discipline by the Board of Education are possible. See §§ 24.1-79.6, 22.1-65.

SCHOOLS. SCHOOL BOARDS. QUALIFICATIONS FOR APPOINTMENT TO SCHOOL BOARD MAY NOT BE ENLARGED UPON BY LOCALITY.

October 22, 1980

The Honorable William R. O'Brien
Member, House of Delegates

You have asked if an ordinance recently adopted by the City Council of Virginia Beach is constitutional. The ordinance in question provides in part:

"[A]ny member appointed to a board or commission of the City shall be limited to:
  a. eight consecutive one-year terms
  b. four consecutive two-year terms
  c. three consecutive three-year terms
  d. two consecutive four-year terms
  e. two consecutive five-year terms...."

The effect of the foregoing ordinance would disqualify for reappointment an otherwise eligible incumbent.


Accordingly, the city charter and the general laws of the Commonwealth must be scrutinized to determine if the General Assembly has clearly conferred upon city council the power to adopt the above ordinance.

Section 3.05 of the City Charter of Virginia Beach provides that city council shall have the power:
"a) to provide for the organization, conduct and operation for all departments, bureaus, divisions, boards, commissions, offices and agencies of the city;

b) to create, alter or abolish departments, bureaus, divisions, boards, commissions, officers and agencies;

c) to provide for the numbers, title, qualifications, powers, duties and compensation of all officers and employees of the City."

The foregoing provisions grant city council, in my opinion, the implied power to impose reasonable limitations on the number of successive terms incumbents may serve on city boards or agencies pursuant to appointment by city council. See, also, § 15.1-839 of the Code of Virginia (1950), as amended, wherein municipalities have been vested with "all other powers pertinent to the conduct...and functions of the municipal government...."

It is an entirely different matter, however, as to city school boards. Although city council has the power to make appointments to the school board, a school board, unlike the local planning commission or social services advisory board, is a constitutionally created office. School boards supervise the daily affairs of the public school system in all localities throughout the Commonwealth.

Article VIII, § 7 of the Constitution of Virginia (1971) states:

"The supervision of schools in each school division shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law."

The foregoing constitutional provision singularly devolves upon the General Assembly the responsibility for prescribing the method of selection, term and qualifications of school board members. See II A.E. Howard Commentaries on the Constitution of Virginia 936 (1974). The Assembly has enacted specific and comprehensive legislation governing the method of appointments, term and qualifications for school board members. See Ch. 5 of Title 22.1. Qualifications for membership on the board are set forth in § 22.1-29; and their term set forth in § 22.1-50. The Assembly has chosen not to impose any limitation on the number of successive terms a school board member may serve.

In view of the special constitutional obligations imposed upon the General Assembly under Art. VIII of the Virginia Constitution, and the Assembly's specific and comprehensive legislation implementing their constitutional responsibility, I am unable to find any "necessary or essential" implied power for city council to apply the above.
ordinance to its school board. Service on the city school board is a valuable privilege possessed by the citizens of the Commonwealth, and any restriction therewith should be clearly manifested by the General Assembly. Any doubts as to the existence of a power must be resolved against the locality. See T. J. Dillon, Law of Municipal Corporations (1911).

Accordingly, the city council has no authority to adopt an ordinance limiting the number of terms a member of the school board may serve. See Opinion to the Honorable George P. Beard, Jr., Member, House of Delegates, dated October 4, 1979. See, also, Black v. Trower, 79 Va. 123 (1884) for the proposition that where qualifications for public office have lawfully been prescribed, such qualifications may not be enlarged or diminished.

As a practical matter, members of city council could decide on an individual basis not to reappoint an incumbent. However, city council may not disqualify all persons nor prevent a qualified incumbent from seeking the school board appointment by reason of the number of successive terms served.

1Such provisions have been upheld in other jurisdictions as furthering important governmental interests; e.g., preventing abuse of public powers to sustain tenure in office. Some courts, however, have questioned the wisdom of such legislation noting the value experience brings to office. See, e.g., State v. West, 116 S.E.2d 398 (W.Va. 1960); 59 A.L.R. 2d § 776 Public Office-Eligibility.

2Certain incompatibility of dual office holding for school boards has been proscribed. See § 22.1-30.

SCHOOLS. SCHOOL BOARDS. § 22.1-30 PREVENTS CERTAIN OFFICERS FROM SERVING ON SCHOOL BOARD.

December 24, 1980

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask why certain city officers are prohibited from serving on local school boards pursuant to § 22.1-301 of the Code of Virginia (1950), as amended.

The purpose of such legislation is to prevent actual or apparent conflicts of interest that may arise from dual office holding, Joy, Draheim and Cox v. Green, 194 Va. 1003, 76 S.E.2d 178 (1953). See, also, Dean v. Paolicelli, 194 Va. 219, 72 S.E.2d 506 (1952). The Virginia Constitution invests the General Assembly with virtual plenary power in establishing qualifications for appointment to local school

Such legislation also furthers the long-standing policy of the Commonwealth of making such educational appointments as far removed as possible from political influence that might arise should a school board member also be an elected officer of the locality. See, e.g., Board of Supervisors of Chesterfield County v. County School Board of Chesterfield County, 182 Va. 266, 28 S.E.2d 698 (1944); Huffman, Warren, McAleer v. Kite, 198 Va. 196, 93 S.E.2d 328 (1956); Board of Supervisors of Prince William County v. Wood, 213 Va. 545, 193 S.E.2d 671 (1973).

1"No State, county, city or town officer, no deputy of any such officer, no member of the governing body of a county, city or town and, in counties having a population of more than one hundred thousand persons, no father, mother, brother, sister, spouse, son, daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of a member of the county governing body may, during his term of office, be appointed or serve as a member of the school board for such county, city or town or as tie breaker for such school board except:

1. local superintendents of public welfare,
2. commissioners in chancery,
3. commissioners of accounts,
4. registrars of vital records and health statistics,
5. notaries public,
6. clerks and employees of the federal government in the District of Columbia,
7. medical examiners,
8. officers and employees of the District of Columbia,
9. in Northumberland County, oyster inspectors, and
10. in Lunenberge County, members of the county library board and members of the board of public welfare."

SCHOOLS. SCHOOL BOARDS. STATUTE WAIVING SOVEREIGN IMMUNITY IN TORT FOR STATE DOES NOT AFFECT IMMUNITY OF COUNTIES AND SCHOOL BOARDS.

May 11, 1981

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

You ask whether S.B. 196 and H.B. 1735 of the 1981 General Assembly waive the recognized immunity of counties and school boards to tort liability.

Senate Bill 196, called the "Virginia Tort Claims Act" (the "Act"), generally provides that the Commonwealth shall be liable, to the extent explicitly provided in the Act for claims accruing after July 1, 1982, for losses caused by the
tortious conduct of its employees. The Bill effects a significant change in the law.

The doctrine that the State and its governmental agencies are immune from liability for tortious employee conduct has long been recognized and applied in Virginia. See "Virginia Law of Sovereign Immunity: An Overview," 12 U. of Rich. L. Rev. 429 (1978). Moreover, the doctrine has long been part of our common law. United States v. M'Lemore, 45 U.S. (4 How.) 117 (1846).

In Virginia, under the doctrine of sovereign immunity, counties are political subdivisions of the State, "created by the sovereign power for the exercise of the functions of local government..." and like the State, cannot be sued except in cases where such suits are expressly allowed by statute. Fry v. County of Albemarle, 86 Va. 195, 9 S.E. 1004 (1890). Similarly, school boards cannot be held liable in tort. Mann v. County School Board of Arlington County, 199 Va. 169, 98 S.E.2d 515 (1957). This is not to say that individual employees of the State, county or school board are totally immune from liability. Employees of these entities may be found liable for damages resulting from acts of simple negligence done within the scope of their duties. See James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980); Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979).

A waiver of the immunity to suit in tort actions which applies to the State, counties and school boards cannot be implied from general statutory language or implied from merely procedural provisions. Consent to suit must be explicitly and expressly announced in the statutory language. The phrases "sue and be sued," "plead and be impleaded," "contract and be contracted with," are insufficient to constitute a waiver of immunity or a consent to suit. See 17 M.J. State § 25; Lauretzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F.Supp. 633 (E.D. Va. 1966); Crabbe v. School Board of Northumberland County and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968). Even the fact that a county or school board may purchase liability insurance does not constitute a waiver of sovereign immunity. Mann v. County School Board of Arlington County, supra. It is against this background that the effect of S.B. 196 and H.B. 1735 upon counties and local school boards must be assessed.

Senate Bill 196, by its terms, applies only to claims against employees of a "State agency." The Bill provides, by way of definition:

"'State agency' means any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth of Virginia...."

By its express terms, therefore, it does not extend to counties or school boards.
Sovereign immunity, as has been noted, may only be waived by clear legislative action. There is nothing in S.B. 196 which expressly waives sovereign immunity in tort for counties and school boards. Further, sovereign immunity is a doctrine firmly established in common law as applicable generally to government agencies. Statutes in derogation of the common law should be strictly construed. 17 M.J. Statutes § 48. An overexpansive reading of the said definition of "State agency" would not comport with reasonable statutory construction and would operate to waive immunity by implication.

Moreover, the manner in which the definition of "State agency" is set forth in S.B. 196 evinces the intent of the General Assembly that the Bill not apply to counties and school boards. The definitional section clearly declares that "State agency" means...agency of the government of the Commonwealth of Virginia" (emphasis added); rather than that State agency "includes" agencies of the Commonwealth of Virginia. The word "means" is usually a term of limitation, rather than a term of enlargement, as "includes" would be in this context. See Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1 (1941). Therefore, it is my opinion that S.B. 196 does not apply to counties and school boards.

House Bill 1735 concerns a different type of liability from that imposed in S.B. 196. It generally provides that a successful party may be awarded attorney's fees in a civil case brought to contest an agency action under certain portions of the Administrative Process Act (§§ 9-6.14:15 through 9-6.16:20 of the Code of Virginia (1950), as amended). Section 9-6.14:4, the portion of the Administrative Process Act which defines "agency" and, therefore, for the purpose of interpreting H.B. 1735 provides the parameters of an "agency action," provides:

"Agency' means any authority, instrumentality, officer, board or other unit of the State government empowered by the basic laws to make regulations or decide cases but excluding***(iii) municipal corporations, counties, and other local or regional governmental authorities including sanitary or other districts, and joint State-federal, interstate, or intermunicipal authorities...." (Emphasis added.)

Accordingly, I am also of the opinion that H.B. 1735 is inapplicable to counties and school boards.
September 26, 1980

The Honorable John P. Alderman
Commonwealth's Attorney for Carroll County

You ask if a conflict of interest would arise if a teacher's aide, whose father was subsequently appointed to the school board, accepts a teaching position with the same school division.

Section 2.1-349.1 of the Code of Virginia (1950), as amended, which becomes effective October 1, 1980, governs your question. This section generally prohibits the employment of a teacher whose father is a member of the employing school board. The statute however creates an exception:

"This provision shall not apply to any person within such relationship...who has been regularly employed or employed as a substitute teacher or teacher's aide by any school board prior to the taking of office of any member of such board..." (Emphasis added.)

Accordingly, under the foregoing circumstances, I am of the opinion that § 2.1-349.1 does not preclude the teacher's aide from accepting employment as a teacher in the school division.

SCHOOLS. UNEMPLOYMENT COMPENSATION. LIABILITY OF SCHOOL BOARD FOR PAYMENT TO TEACHER LAID OFF AFTER SABBATICAL.

October 6, 1980

The Honorable John C. Bennett
Commonwealth's Attorney for the County of Culpeper

You have inquired concerning the liability of a school board for unemployment compensation payments to a teacher who is unable to be reemployed after a year's sabbatical (to travel, to study, or because of illness) due to factors unrelated to his prior work performance: i.e., decline in enrollment. A school board that has elected to make payments in lieu of contributions under § 60.1-89.2 of the Code of Virginia (1950), as amended, must repay the Virginia Employment Commission (the "Commission") for benefits paid to its former employees. See § 60.1-89.

The answer to your question depends upon whether the teacher performed any services for and received any wages from the school during his sabbatical year. Eligibility for unemployment benefits is dependent upon the amount of wages earned during the employee's base period. See § 60.1-52(a).

Before paying any unemployment benefits the Commission must also determine that the claimant is eligible for benefits. Section 60.1-52. An employee who takes an unpaid
sabbatical for a year may not have sufficient wages in his base period to be eligible for benefits. Section 60.1-52(c). If the employee satisfies the other eligibility criteria, his eligibility will depend upon whether he has earned sufficient wages in his base period.

In addition to determining eligibility, the Commission would inquire into any possible disqualification for benefits under § 60.1-58. Section 60.1-58(a) provides that an individual shall be disqualified for benefits if he left work voluntarily without good cause. In deciding whether an individual, who became unemployed after returning from sabbatical, was so disqualified, the Commission would examine all the circumstances of the separation, including the reason for the sabbatical and the understanding between employer and employee with respect to the employee's continuing employment status.

In short, depending upon the specific facts of the case, an employee who becomes unemployed after completing a sabbatical could draw unemployment benefits and the school board would be liable to reimburse the Commission for those benefits paid.

1The base period is prescribed in § 60.1-6 as a minimum period of time an individual must work in order to be eligible for benefits.

SHERIFFS. COMMISSIONS. § 14.-69 PROHIBITS COLLECTION OF COMMISSIONS USUALLY ASSESSABLE UNDER § 14.1-109 WHEN PROCESS IS ISSUED FOR RECOVERY OF DELINQUENT TAXES FOR THE COMMONWEALTH OR FOR THE LOCALITY.

January 8, 1981

The Honorable C. A. Rollins, Jr., Sheriff
County of Prince William

You have asked whether commissions payable out of proceeds received upon execution, levy or other process, as authorized by § 14.1-109 of the Code of Virginia (1950), as amended, may be collected when such process is instituted to enforce a judgment for delinquent local taxes. A writ of fieri facias, writ of possession or other process for execution of a judgment is issued for purposes of levy and collection to a sheriff or other authorized official. See §§ 16.1-99 and 17-50.

The commissions payable on account of such levies and collections by a sheriff or other official are in the nature of fees, assessable under Title 14.1. Section 14.1-69 states, in part, that:
"Every sheriff, and every sheriff's deputy, shall, however, continue to collect all fees and mileage allowances provided by law for the services of such officer, other than such as he would have been entitled to receive from the Commonwealth or from the county or city for which he is elected or appointed...."

(Emphasis added.)

I am of the opinion that § 14.1-69 prohibits collection of commissions usually assessable under § 14.1-109 when process is issued for recovery of delinquent taxes for the Commonwealth or for the locality in which the sheriff or other collecting officer is elected or appointed. A prior Opinion of this Office reached the same conclusion with respect to other fees assessable under Title 14.1. See Opinion to the Honorable Wescott B. Northam, Commonwealth's Attorney for Accomack County, dated October 15, 1964, found in Report of the Attorney General (1964-1965) at 323.

SHERIFFS. SERVICE OF PROCESS IN CONTIGUOUS CITY OR COUNTY UNDER § 8.01-295.

November 10, 1980

The Honorable James H. Turner, III
Sheriff of Henrico County

You have asked whether a sheriff is required under § 8.01-295 of the Code of Virginia (1950), as amended, to serve process issued in his jurisdiction but with an address in an adjacent county or city.

As a general rule in the absence of a statute providing otherwise, the authority of a sheriff is co-extensive with his county. 80 C.J.S. Sheriffs and Constables § 36 (1953). Section 15.1-79 provides that every officer to whom any order, warrant, or process may be lawfully directed, shall execute the same within his county or corporation. The legislature has seen fit to extend the authority of sheriffs to serve process beyond their county by statute. Section 8.01-295 gives the sheriff the authority to execute process not only throughout the political subdivision in which he serves but also in any contiguous county or city.

A sheriff must serve or execute all process delivered to him for that purpose, which appears on its face to have issued from competent authority, and with legal regularity, and the service or execution of which is within the lawful power of his office. 80 C.J.S. Sheriffs and Constables § 44 (1953). The Supreme Court of Virginia in Narrows Grocery Co., Inc. v. Bailey, 161 Va. 278, 170 S.E. 730 (1933), held that a sheriff has a mandatory duty of service of process.

In view of these authorities, it is my opinion that a sheriff is required to serve process issued to him which has an address in a contiguous county or city.
REPORT OF THE ATTORNEY GENERAL  

SHERIFFS. SHERIFF MAY REFUSE TO ACCEPT PERSON SURRENDERED BY SURETY IF SURETY FAILS TO PRESENT BAIL PIECE.

December 11, 1980

The Honorable E. L. Wingo
Sheriff of Chesterfield County

You ask what procedure a sheriff should follow lawfully to accept a person when such person is surrendered by a surety under the provisions of § 19.2-149 of the Code of Virginia (1950), as amended.

Section 19.2-149\(^1\) clearly establishes the right of a surety to arrest the principal and surrender him to the sheriff, but this section does not prescribe the prerequisites for the sheriff's acceptance of such person. In my opinion before accepting a principal under § 19.2-149, the sheriff is entitled to require of the surety a showing of lawful authority for the arrest and surrender of the principal.\(^2\)

To establish his authority a surety may obtain a bail piece from the clerk at the time of the posting of bond.\(^3\) A failure of the surety to present a bail piece or other suitable proof establishing his right to bring the person before the sheriff would justify the sheriff in refusing to take custody of the alleged principal.

\(^1\)Section 19.2-149 provides in part: "A surety in a recognizance may at any time arrest his principal and surrender him to the court before which the recognizance was taken or before which such principal's appearance is required, or to the sheriff, sergeant or jailer of the county or city wherein the court before which such principal's appearance is required is located...."

\(^2\)Cf. Report of the Attorney General (1948-1949) at 116 (while jailor need not have formal mittimus prior to committing prisoner to jail, "there must always be some lawful authority..." permitting such incarceration). Report of the Attorney General (1975-1976) at 11 (police officer must have capias physically in his possession to lawfully arrest convicted misdemeanant). See also, 8 C.J.S. Bail § 25 at 43 (1962).

\(^3\)See § 19.2-134.

SIGNATURES. COUNSEL OR JUDGE MAY AFFIX BY RUBBER STAMP.

October 22, 1980

The Honorable Dale W. LaRue, Judge
Twenty-Seventh Judicial Circuit
You have asked whether the use of a facsimile signature by counsel or a judge meets requirements for the "signing" of pleadings, judgments, orders and decrees.

Although there is no statute in Virginia precisely defining what the term "signature" means, the issue appears to have been resolved by the leading authorities. In the case of Pilcher v. Pilcher, 117 Va. 356, 84 S.E. 667 (1915) the Supreme Court of Virginia considered the validity of a will which had been signed by the testator with his initials. The following language from the court's opinion is pertinent here:

"No dictionary, so far as we are advised, restricts the meaning of 'signature' to a written name...what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is the vital factor. Whatever symbol is employed, it must appear that it 'is intended as a signature.'" 117 Va. at 365.

Likewise, 80 C.J.S. Signatures § 1 (1953) states that "'to sign' means to attach a name or cause it to be attached by any of the known methods of impressing the name on paper with the intention of signing it." It is also stated that a facsimile signature may be a genuine signature. Id. § 7.

In light of these authorities, I am of the opinion that the use of a facsimile signature by counsel or a judge is a valid method of signing pleadings, judgments, orders and decrees.

This conclusion is in accordance with a previous Opinion of this Office in which it was said that the signature of the Governor of Virginia may be affixed to notary commissions by use of a rubber stamp. See Opinion to the Honorable Martha Bell Conway, Secretary of the Commonwealth, dated March 8, 1962, and found in Report of the Attorney General (1961-1962) at 238; see also, Report of the Attorney General (1969-1970) at 222.

It is not my intent to suggest that the use of facsimile signatures on pleadings is without attendant problems. The practice could reduce the accountability that a handwritten signature provides. While the facsimile signature may be valid, § 8.01-279 of the Code of Virginia (1950), as amended, permits it to be challenged without having to allege that the signature is false. Accordingly, it would appear to be within the court's discretion to require that signatures be handwritten or in the alternative, that they be proved.

SIGNATURES. COUNSEL OR LAYMEN MAY AFFIX BY RUBBER STAMP IN GENERAL DISTRICT COURT.
The Honorable Leonard B. Sachs, Judge  
Norfolk General District Court

You have asked whether the use of a facsimile stamp may constitute a valid signature when used by counsel or laymen on pleadings filed in general district court.

In a recent Opinion to the Honorable Dale W. LaRue, Judge, Twenty-Seventh Judicial Circuit, dated October 22, 1980 (copy enclosed), I noted that the use of a facsimile signature by a judge is a valid method of signing judgments, orders and decrees. This conclusion was not based upon any consideration peculiar to courts, but turned upon a general principle of law allowing a facsimile signature to be counted as a genuine signature.

The use of facsimile signatures was again discussed in my Opinion to the Honorable Kenneth M. Covington, Judge, Henry County General District Court, dated March 30, 1981 (copy enclosed). There I noted that § 16.1-94 of the Code of Virginia (1950), as amended, modifies the general principle of validity when a facsimile signature is affixed by a judge in a general district court. Although a facsimile stamp may be used by a court not of record, it is necessary to comply with the statute's requirement that a notation of the judgment be initialed by the judge. There is, however, no similar statutory requirement applicable to counsel or laymen. Accordingly, I am of the opinion that use of a facsimile stamp by counsel or laymen is a valid method of affixing their signature to pleadings in general district court.

I would, however, repeat the caveat mentioned in my Opinion to Judge LaRue. While a facsimile signature may be valid, it does not have the special evidentiary status granted handwritten signatures under § 8.01-279. The genuineness of a facsimile may be put in issue without any party having to allege it is false.

SIGNATURES. IN COURT OF RECORD, FACSIMILE SIGNATURE IS INADEQUATE FOR ENTRY OF JUDGMENT UNLESS INITIALED BY JUDGE.

The Honorable Kenneth M. Covington, Judge  
Henry County General District Court

You ask whether the use of a facsimile signature will meet the requirement of § 16.1-94 of the Code of Virginia (1950), as amended, that a judgment be "signed by the judge" and whether it is necessary for a judge to initial the notation of judgment when such a facsimile is used.

Section 16.1-94 provides, in part:
"Whenever a judgment is rendered in a court not of record the judgment shall be entered on the warrant, motion for judgment, counterclaim, cross-claim or other pleading and signed by the judge, or the signature of the judge may be affixed by a facsimile stamp, in which event the judge shall initial a notation of the judgment made on the warrant or other paper...."

In a recent Opinion to the Honorable Dale W. LaRue, Judge, Twenty-Seventh Judicial Circuit, dated October 22, 1980 (copy enclosed), I noted that the use of a facsimile signature by a judge is a valid method of signing judgments, orders and decrees. As you correctly note, however, that Opinion did not deal with courts not of record nor with the specific procedure set forth for such courts by § 16.1-94.

Section 16.1-94 presents two alternative methods by which a judgment may be signed. One method is for the judgment to be "signed by the judge." The other method is for "the signature of the judge [to] be affixed by a facsimile [stamp]." In my opinion, the juxtaposition of these two methods as alternatives clearly indicates that, in the context of § 16.1-94, the phrase "signed by a judge" does not include the use of a facsimile stamp. Although a facsimile stamp may be used in a court not of record, it is necessary to comply with the statute's requirement that a notation of the judgment be initialed by the judge.

STATE POLICE. BUREAU OF CRIMINAL INVESTIGATION. NO AUTHORITY TO CONDUCT INVESTIGATION OF ELECTED OFFICIAL WITHOUT REQUEST FROM GOVERNOR, ATTORNEY GENERAL OR GRAND JURY.

April 15, 1981

Col. D. M. Slane, Superintendent
Department of State Police

You have asked whether the Bureau of Criminal Investigation may conduct an investigation or polygraph examination of an elected official at such elected official's request.

The powers and duties of the Bureau of Criminal Investigation (the "Bureau") are generally set out in § 52-8.1 of the Code of Virginia (1950), as amended. This section authorizes the Bureau to conduct investigations into any matters referred to it by the Governor, and to investigate matters involving allegations of criminal conduct when so requested by the Attorney General, Commonwealth's attorneys, grand juries, sheriffs and chiefs of police. The authority of the Bureau to investigate alleged criminal conduct of elected officials, however, is specifically provided for in § 52-8.2. This section provides that investigations of elected officials shall not be initiated,
undertaken or continued by the Bureau except upon the request of the Governor, Attorney General or a grand jury.

Section 52-8.2 was added to the Code in 1977, Ch. 331 [1977] Acts of Assembly 470, and until this enactment any person could request the Bureau to conduct an investigation of an elected official. The investigation of an elected official can have a devastating effect upon government. Unwarranted and groundless investigations of elected officials can cause an undermining of confidence in government as well as do damage to the reputation of the elected official. I believe it is for these reasons that the legislature enacted § 52-8.2.

It is my opinion that before the Bureau may become involved in an investigation of an elected official, the matter must be reviewed by the Governor, Attorney General or a grand jury. Therefore, absent a request of the Governor, Attorney General or a grand jury, the Bureau may not initiate, undertake or continue an investigation of an elected official. Since the polygraph examination you referred to would be conducted as a part of a criminal investigation of the elected official, it is my opinion that the Bureau would not be authorized to conduct such examination absent compliance with the conditions of § 52-8.2.

1Section 52-8.2 provides: "No investigation of an elected official of the Commonwealth or any political subdivision to determine whether a criminal violation has occurred, is occurring or is about to occur under the provisions of § 52-8.1 shall be initiated, undertaken or continued except upon the request of the Governor, Attorney General or a grand jury."


STATE POLICE. RETIREMENT SYSTEM. WORK AFTER OBTAINING AGE 60 BY LOCAL POLICE OFFICER WHO RECEIVES BENEFITS LIKE THOSE OF STATE POLICE RETIREMENT SYSTEM.

December 24, 1980

The Honorable Owen B. Pickett
Member, House of Delegates

I have your letter requesting my opinion with respect to the following three questions:

"a. May a police officer who is in the employ of a city, county or town, who is covered by the State Police Officer's Retirement System, work after attaining the age of sixty, notwithstanding the provisions of Section
51-150 of the Code of Virginia mandating retirement at age sixty?

b. In the event such an employee elects to work past age sixty, what effect, if any, will it have upon such employee's right to retirement benefits under the State Police Officer's Retirement System?

c. Does Section 51-150 of the Code of Virginia mandating retirement at age sixty prohibit an employee covered by such system from working past age sixty?

A local police officer in the employment of a city, county, or town is not technically covered by the State Police Officers Retirement System. Section 51-145 of the Code of Virginia (1950), as amended, provides only that State police officers are members of that system. However, Title 51, Ch. 3.2, Art. IV provides for participation by localities in the Virginia Supplemental Retirement System and § 51-111.37, found in Art. IV, provides in part that for employees who are employed in "law-enforcement positions comparably hazardous to that of a State police officer..." the locality may "elect to provide benefits equivalent to those provided for State police officers of the Department of State Police..." as set out in certain enumerated Code sections which, inter alia, include § 51-150. This is the situation to which you refer.

The benefits provided for State police officers are essentially the same as those provided for other employees of the Commonwealth under the Virginia Supplemental Retirement System. The difference is that benefits for State police officers are geared to early retirement at age sixty. Special provisions were made for them so that they would not be penalized by receiving inadequate retirement benefits because of their earlier retirement age. Therefore, the retirement provisions of § 51-150 must be read as an integral part of Title 51, Ch. 6 which deals with the State Police Officers Retirement System. Likewise, since § 51-150 is among those sections specifically listed in § 51-111.37 as being applicable when localities elect to give State police type benefits, the early retirement age provided in that section must also be considered an integral part of the local law-enforcement officers benefit package. If a locality has elected to give its police officers the benefits provided by the State Police Officers Retirement System, then it must also retire its police officers at the times provided by § 51-150. In most instances, that date will be the "normal retirement date" which is defined in § 51-144 to be the "member's sixtieth birthday."

In those localities which have elected not to give their law-enforcement officers the same benefits as State police officers, the law-enforcement officer may work until age 65, the normal retirement age for employees under the Virginia Supplemental Retirement System (§ 51-111.53), or even age 70 if he desires (§ 51-111.54(A)), unless that age is a bona
fide occupational qualification reasonably necessary to the normal operation of the localities' law-enforcement activities and the employer therefore provides for compulsory retirement prior to age seventy. See § 51-111.54(B).

On the other hand, a police officer working for a locality which has elected to provide retirement benefits comparable to those of State police officers does not have the option of working past age sixty unless he falls within the exception provided in § 51-150(a), that is, he has not yet at age sixty completed twenty-five years of creditable service, in which case he shall be retired upon his sixty-fifth birthday or the completion of twenty-five years of creditable service, whichever occurs first. That is the only instance in which such an employee may elect to work past age sixty.

STATUTES. LAST AMENDMENT REGARDING SUBJECT PASSED IN SAME SESSION OF GENERAL ASSEMBLY PREVAILS.

September 12, 1980

The Honorable Stuart W. Connock
Assistant Secretary for Financial Policy

You have asked whether a portion of the funds appropriated under the State-Local Hospitalization of the Indigent Program must be held in reserve. This program is authorized by Ch. 7 of Title 63.1 of the Code of Virginia (1950), as amended. Until July 1, 1980, § 63.1-135 required the State Board of Welfare to set aside a reserve fund which could not be used until other funds appropriated for the program had been exhausted. Among other changes, H.B. 671, enacted by the 1980 General Assembly, repealed § 63.1-135(c), which required the reserve fund. See Ch. 424 [1980] Acts of Assembly 489, approved March 29, 1980. However, Item 500 of the 1980-1982 Appropriations Act requires that a reserve fund be set aside. See Ch. 760 [1980] Acts of Assembly 1333, approved April 7, 1980.

It is presumed that the General Assembly knows the legislation it has passed during a Session and the effect subsequent legislation may have on legislation already enacted in the same Session. It is also well settled that if there are two statutes in an apparent conflict, they should be construed to permit both to stand, giving force and effect to each. See Kirkpatrick v. Board of Supervisors, 146 Va. 113, 136 S.E. 186 (1926). However, if the statutes are in irreconcilable conflict, the last enacted statute must prevail. See Commonwealth v. Sanderson, 170 Va. 33, 195 S.E. 516 (1938). See also, Report of the Attorney General (1973-1974) at 220.

Chapter 424 eliminates the requirement of a reserve fund in the statute authorizing the program, while Ch. 760 conditions the appropriation for that program upon a reserve
fund. It is my opinion that there is no conflict between these statutes. The 1980 amendments deleted the general statutory requirement for a reserve fund, leaving the decision whether to require a reserve fund to the appropriations process in each legislative Session. However, even if there were a conflict, it is my opinion that the Appropriations Act, which was the last act approved, takes precedence over an earlier measure.

STATUTES. SPECIFIC REPEALS GENERAL TO EXTENT NECESSARY TO ABROGATE CONFLICT. § 22.1-92 REPEALS PORTION OF § 15.1-162.

January 7, 1981

The Honorable David T. Stitt
County Attorney for the County of Fairfax

You have inquired whether the advertisement of the county budget required by § 15.1-162 of the Code of Virginia (1950), as amended, must include an educational budget which has been approved by the school board. In my opinion it must.

Section 22.1-92 requires each division superintendent to submit to the governing body annually by April 1 a budget estimate; this estimate must be prepared with the approval of the school board before it can be submitted.

Section 15.1-162 requires a brief synopsis of the proposed budget to be advertised at least seven days prior to the date of the public hearing on the budget. This section provides that all portions of the budget, except the educational estimate, are for informative and planning purposes only. It seems to contemplate that the education portion will be a fixed item.

The difficulty is that § 15.1-162 refers to a statute which is no longer in force. Section 15.1-162 requires any hearing on the educational portion of the budget to be held seven days before the date set in § 22-127 for its approval. Section 22-127, which was repealed by the 1980 General Assembly, preempted the provisions of § 15.1-160, et seq. It required the governing body to approve the educational budget by May 1; § 22-120.3 required the division superintendent to submit his estimates to the governing body that same date.

In recodifying the education title of the Code, the obvious intent of the General Assembly was to harmonize and streamline the sections into a cohesive body of law. New § 22.1-92 requires the educational estimate, approved by the school board, to be submitted by the same deadline as that imposed upon all the other agencies of the county. This eliminates the necessity of holding two different public hearings on the budget.
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. City of South Norfolk v. City of Norfolk, 190 Va. 591, 58 S.E.2d 32 (1950); Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935). See, also, Reports of the Attorney General (1979-1980) at 60; (1976-1977) at 102. Thus, § 22.1-92, a 1980 statute, supersedes that portion of § 15.1-162 which purports to set a different hearing date for the educational budget estimate.

In my opinion, the educational budget estimate must be approved by the school board prior to submission to the county governing body by April 1. The requirement of school board approval prior to submission is appropriate due to the unique framework in which the educational process exists. The division superintendent does not possess the ultimate control over the schools. This power, of course, is vested in the school board, § 22.1-28.

STATUTES. UNIFORM STATEWIDE BUILDING CODE. "GRANDFATHER" CLAUSE. PHRASE IN § 36-99.1 EXEMPTS SKILLED WORKERS OTHERWISE CERTIFIED OR LICENSED FOR ANY TWO YEARS PRIOR TO JANUARY 1, 1980.

May 22, 1981

The Honorable David Wm. Shreve
County Attorney for Campbell County

You ask whether the phrase "for two years prior to" January 1, 1980, appearing in § 36-99.1 of the Code of Virginia (1950), as amended, means any two years prior thereto, or the two years next prior thereto (emphasis mine).

Section 36-99.1 provides that certain skilled workers need not be examined or certified by or at the direction of the Board of Housing and Community Development if such persons were otherwise certified or licensed for two years prior to January 1, 1980.

The second interpretation requires addition of the word "next," and addition of the definite article. Under the first interpretation, no words need be added.1

Further, § 36-99.1, prior to its amendment in 1978, gave "grandfather" status to skilled workers otherwise certified or licensed for two years prior to September 1, 1975.2 The second interpretation would mean that skilled workers having "grandfather" status under the first version might lose that status under the present version.

The normal purpose of "grandfather" provisions is to delay application of some new and stricter standard. When a "grandfather" provision is amended to incorporate a later
starting date, the normal purpose is to enlarge the class of persons enjoying "grandfather" status.

If the General Assembly had intended to limit the exemption to the two years next prior to the delayed cut-off date, the General Assembly could have done so in direct and specific terms. While it might be that the public would be better served by so limiting the exemption, such a limitation is not dictated or permitted by the clear language of the statute.\(^3\)

Accordingly, I am of the opinion that the phrase "for two years prior to" January 1, 1980, appearing in § 36-99.1 means any two years prior thereto, rather than the two years next prior thereto.

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1 The concept "any" is consistent with the absence of a modifier for the word "years."
3 Harbor Cruises v. Commonwealth, 217 Va. 458, 230 S.E.2d 248 (1976) ("grandfather" exemption not limited - court without authority to add words to statute, or accomplish same result by judicial interpretation).

SUBDIVISIONS. PLATS. VACATION. STREETS AND ALLEYS.
VACATION OF PLATS PURSUANT TO § 15.1-482 AUTOMATICALLY OPERATES TO VEST FEE SIMPLE TITLE IN VACATED STREETS AND ALLEYS IN ABUTTING LANDOWNERS.

July 23, 1980

The Honorable William L. Heartwell, III
Commonwealth's Attorney for Botetourt County

You asked (1) whether the vacation of a portion of a plat pursuant to § 15.1-482 of the Code of Virginia (1950), as amended, operates to pass fee simple title to adjacent landowners in those circumstances where the street right-of-way was dedicated pursuant to § 15.1-478 and (2) whether a county must execute a deed to the Virginia Department of Highways and Transportation (the "Department") in order to pass title to such dedicated streets which are to be included in the secondary system of State highways.

In response to your first question, § 15.1-482 establishes the only two methods by which all or part of a plat may be vacated after any lot has been sold. The first method, set forth in paragraph (a), provides for vacation
when an instrument in writing agreeing to such vacation, signed by all owners of lots shown on the plat and by the governing body of the county or municipality, has been acknowledged and recorded. The second method, set forth in paragraph (b), provides for vacation by the enactment of an ordinance of the governing body of the county or municipality after giving notice as required by § 15.1-431.

Section 15.1-483 prescribes the effect of such vacation. It provides that if all or part of a plat is vacated pursuant to § 15.1-482, such vacation "shall operate...to vest fee simple title to the center line of any streets, alleys or easements for public passage so vacated in the owners of abutting lots free and clear of any rights of the public or other owners on lots shown on the plat...." In addition, if any such streets, alleys or easements for public passage are located on the periphery of the plat, the fee simple title for such street, alley or easement shall vest in abutting lot owners. Pursuant to § 15.1-483, title to the streets, alleys and easements dedicated for public passage cannot return to the owners, proprietors or trustees who dedicated the property to the county once any lot has been sold unless they qualify as abutting landowners. Accordingly, it is my opinion that if the requisites of § 15.1-482 are met, fee simple title is automatically vested in the adjacent landowners and it is not necessary that a deed be executed pursuant to § 15.1-262.

With respect to your second question, § 33.1-72.1 governs the manner in which streets or highways shown on plats which have been recorded or otherwise opened to public use are to be taken into the secondary system. That section does not require the county to convey title in the streets or highways to the Department in order to have such streets included in the secondary system. The only requirements are that such streets have a minimum dedicated width of forty feet at the time of such recommendation, and have easements appurtenant thereto which conform to the policy of the Highway and Transportation Commission with respect to drainage.

Accordingly, it is only necessary to demonstrate to the Department that such street has the requisite dedicated width and drainage easements and that the public has the right to use the streets or highways for motor vehicles. It is the policy of the Department to require the board of supervisors to include in its recommendation evidence that the board has obtained the necessary rights-of-way for the new road. See Report of the Attorney General (1958-1959) at 146. In light of the foregoing, it is my opinion that it is not necessary that the county prepare a deed in favor of the Department in order to pass title to a dedicated street when the Department is ready to accept the street into the secondary system.
SUBDIVISIONS. STREETS. TAXATION. PLAT RECORDED PRIOR TO ADOPTION OF SUBDIVISION ORDINANCE. STREETS TAXABLE PRIVATE PROPERTY IN ABSENCE OF DEDICATION.

July 31, 1980

The Honorable John P. Beale
Commissioner of the Revenue for Westmoreland County

You ask whether streets on a subdivision plat recorded prior to adoption of a county subdivision ordinance are taxable private property, where there has been no dedication to the county.

Title to streets vests in accordance with the law applicable at the time of recordation. In an Opinion to the Honorable Joseph M. Kuczko, Commonwealth's Attorney for Wise County, dated October 4, 1973, found in Report of the Attorney General (1973-1974) at 340, it was ruled that fee simple title to streets remained in the subdivider.


In the present situation, however, you state there was no dedication to the county on the earlier recorded plats, so § 15.1-478 and the Jones Opinion do not apply. In that event, even though the streets may be dedicated to public use (but not to the county), the streets are not public property. Compare Opinion to the Honorable H. Selwyn Smith, Member, Senate of Virginia, dated May 9, 1974, found in Report of the Attorney General (1973-1974) at 416 (in absence of dedication, town may not maintain streets).

Without a dedication, there can be no transfer of title from private ownership to public ownership. Until the property becomes public, it cannot be exempted from taxes. Opinion to the Honorable J. Monroe Burke, Jr., Commissioner of the Revenue for Warren County, dated July 31, 1978, found in Report of the Attorney General (1978-1979) at 253 (developments which are not subdivisions within meaning of local subdivision ordinance).

Accordingly, I find that streets on a subdivision plat recorded prior to adoption of a county subdivision ordinance are taxable property, where there has been no dedication to the county.
Section 15.1-478 provides that recordation of a certain kind of subdivision plat transfers to the county fee simple title to land set apart for streets, alleys or other public uses, without affecting, however, any reserved rights of the subdivider.

The kind of subdivision plat referred to in § 15.1-478 is a plat, under § 15.1-475, covering a tract of land located within any territory to which a subdivision ordinance applies.

Subdivision ordinances have been mandatory since July 1, 1977. See § 15.1-465. I am aware of no requirement, prior to that date, for mandatory dedication to the county, in the absence of a subdivision ordinance. Compare § 15.1-473 (statutory provisions effective after ordinance adopted).

SUBDIVISIONS. VACATION. GOVERNING BODY NEED NOT REQUIRE VACATION OF PLAT WHERE NO STREETS, PUBLIC PLACES, ETC., SHOWN ON PLAT AFFECTED.

December 30, 1980

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

You ask whether a county must require vacation of a recorded subdivision plat, under §§ 15.1-481 or 15.1-482 of the Code of Virginia (1950), as amended, for adjustments in the boundary lines of individual lots shown on the plat, where no streets, alleys, easements for public passage or public places shown on the plat are affected.

Present Statutes for Vacation of Subdivision Plats

Section 15.1-481 provides for vacation of a recorded plat, or part thereof, at any time before sale of a lot in the subdivision. One method is provided. The plat may be vacated, with consent of the local governing body, by recordation of an instrument declaring the same to be vacated, signed by the owners who signed the statement required by § 15.1-477.2 Section 15.1-481 further provides that recordation of such instrument shall operate to destroy the force and effect of recording the plat so vacated, and divest all public rights in, and reinvest the owners with title to the streets, alleys, easements for public passage and other public areas laid out or described in such plat.

Section 15.1-482 provides for vacation of any recorded plat, or part thereof, in cases where any lot has been sold. Two methods are provided. Section 15.1-482(a) provides for vacation by recordation of an instrument agreeing thereto signed by all owners of lots shown on said plat, and also signed on behalf of the governing body. Section 15.1-482(b) provides for vacation by an ordinance of the governing body,
adopted after notice and hearing, with right of appeal to a
court of record, which court may nullify the ordinance if it
finds that the owner of any lot shown on the plat will be
irreparably damaged.

Under § 15.1-483, the effect of vacation by either
method is much the same as vacation before sale of a lot
under § 15.1-481, except that special provision is made for
vesting title to the streets, alleys, easements for public
passage and places set aside for other public use among
abutting lot owners and the owners who signed the statement
required by § 15.1-477, all free and clear of any rights of
public use, or rights of other owners shown on the plat, but
subject to public utility installations previously erected.

By way of comparison, § 15.1-484 provides that,
notwithstanding the current provisions as to land subdivision
and development, any streets, alleys, easements or public
places shown on plats of subdivisions recorded pursuant to
any statute in effect prior to June 29, 1962, may be vacated
according to the provisions then in existence, even though
such statute has been repealed.

Past Statutes for Vacation
of Subdivision Plats

The present statutes on vacation of subdivision plats
trace back to § 5221 of the 1919 Code, and § 2510a of the
1904 Code (and beyond). Both sections appear in statutory
chapters on the authentication and recording of deeds and
other writings. Both relate to the technical requirements of
land transfer, in particular dedication, rather than land-use
regulation.

Section 2510a did not prohibit creation of new or
additional ways or easements not shown on the original plat.
Its manifest purpose and policy was to prevent diminution of
public uses and conveniences guaranteed in the original plan
of subdivision. Consent of the owners of the lots affected
was the only prerequisite to adjustment of the plat, where no
guaranteed public use or convenience was adversely affected.
Daniel v. Doughty, 120 Va. 853, 92 S.E. 848 (1917) (creation
of alley before sale of lots, but after recordation of plat;
without vacation of plat); Raleigh Court v. Faucett, 140 Va.
126, 124 S.E. 433 (1924) (dedication by land company of
subdivision lots for use as public street, approved despite
claim of reliance on plat).

By 1950, the provisions on subdivision plats and their
vacation had become part of the "Virginia Land Subdivision
Act" with authority given to localities to adopt requirements
of the type now found in § 15.1-466.3 The 1950 version also
contained a prohibition against recordation of plats until
submitted and approved under local requirements.4 Violation
by a subdivider constituted a misdemeanor, and proceedings
were authorized to restrain violations.5
Much the same scheme remains under present law, with the prohibitions and sanctions modified and consolidated in § 15.1-473. Under § 15.1-473, land may not be subdivided, plats may not be recorded, and subdivision land may not be sold or transferred, without the approval (and recording) of a subdivision plat. No prohibition or sanction applies under § 15.1-473 once the plat is approved and recorded. Like its predecessors, the present law contains no provision for the modification of plats, short of vacation.

Except for the land transfer-and dedication requirements that go back to the Codes of 1919 and 1904 (and beyond), § 15.1-466 provides the only statutory standard for disapproval of a subdivision plat. Section 15.1-466 no longer authorizes localities to regulate the orderly development of a general area by subdivision ordinance. Instead, regulation under § 15.1-466 is restricted to 1) public facilities, such as streets and storm and sanitary sewers, 2) financial requirements for the subdivider, and 3) mechanical matters, such as plat details and property-line monuments.

Statutory Authority and Purposes: Vacation vs. Modification

The subdivision statutes are different from the zoning statutes, and not a substitute for the zoning statutes. The subdivision statutes are different from restrictive covenants, and not a substitute for restrictive covenants. The police power delegated to the localities under the subdivision statutes is restricted to land transfer and dedication matters, and matters covered by § 15.1-466. Any local prohibition against adjustment in the boundary lines of individual lots, without vacation of the plat, where no streets, public places, etc., are affected, is beyond that statutory delegation.

The term "vacation" implies not a modification or alteration, but abandonment, extinguishment, a permanent ending. In recognition of this, §§ 15.1-481 and 15.1-483 provide that the effect of vacation is to divest the public of its interest in streets, public places, etc., covered by the vacation. In such a case, particularly under § 15.1-483, the public may be required to seek purchase, condemnation or dedication of the streets, public places, etc., affected by the vacation, if the public is to recover its prior interest. In short, vacation is much too drastic to be appropriate for boundary-line adjustments, and may be contrary to the public interest.

Accordingly, I find that a county need not require vacation of a recorded subdivision plat, under §§ 15.1-481 and 15.1-482, for adjustments in the boundary lines of individual lots shown on the plat, where no streets, alleys, easements for public passage or public places shown on the plat are affected.
This Opinion does not deal with questions related to 1) re-subdivision, 2) zoning or 3) restrictive covenants.

Section 15.1-477 provides that every subdivision plat, or deed of dedication to which the plat is attached, shall contain a statement that the platting or dedication is with the free consent, and in accordance with the desire of, the undersigned owners.

4Code of 1950, § 15-784.

SUMMONS. ISSUED UNDER § 19.2-74.1 TO NON-RESIDENT. OFFICER MAY TAKE VIOLATOR BEFORE JUDICIAL OFFICER FOR SETTING BOND.

November 10, 1980

The Honorable Frank A. Hoss, Jr., Judge
General District Court of Prince William County

You have asked several questions concerning the interpretation of § 19.2-74.1 of the Code of Virginia (1950), as amended, in light of a recent Opinion to the Honorable Andre Evans, Commonwealth's Attorney for the City of Virginia Beach, dated July 29, 1980 (copy enclosed). Several of your questions are answered in an Opinion to the Honorable Frank D. Harris, Commonwealth's Attorney for Mecklenburg County, dated September 12, 1980, a copy of which is enclosed. In that Opinion I concluded that the provisions of § 19.2-74.1 were generally applicable to traffic offenses. It was my opinion that resident and non-resident motorists from states with reciprocal agreements should be issued summonses pursuant to § 19.2-74.1. Non-resident motorists from states without reciprocal agreements, however, may be taken before a judicial officer for bond as provided in § 46.1-179 since there exists little or no incentive for such non-resident motorists to comply with a summons once the motorist leaves Virginia.
You ask whether the provisions of § 19.2-74.1 are applicable to non-residents. As you point out, there exists no practical way to enforce a summons once a non-resident leaves the State.

In the Harris Opinion, I concluded that the legislature did not intend to create a situation which would allow a person to ignore a summons with impunity. It was therefore my opinion that non-resident motorists from states without a reciprocal agreement could be taken before a judicial officer for the setting of bond. The basis for that opinion was that there did not exist any reasonable procedure to enforce the summons once such motorist left the State. I believe the same rationale is applicable in the case of a non-resident who commits a misdemeanor for which no jail sentence is possible. Once such non-resident left the State he could virtually ignore the summons with impunity. It is my opinion that in such cases the officer may take the non-resident before a judicial officer for the setting of bond as provided in § 19.2-74.

SUMMONS. NO REQUIREMENT THAT PERSON ISSUED SUMMONS UNDER § 19.2-74.1 SIGN IT PROMISING TO APPEAR IN COURT.

July 29, 1980

The Honorable Andre Evans
Commonwealth's Attorney for the City of Virginia Beach

You ask what procedure a police officer should follow when a person is detained for a violation of any county, city or town ordinance or of any provision of the Virginia Code punishable as a misdemeanor for which he cannot receive a jail sentence, if the person refuses to sign a summons promising to appear in court.

The recently enacted § 19.2-74.1 of the Code of Virginia (1950), as amended, specifies that an arresting officer must issue a summons for any misdemeanor, which does not carry the possibility of a jail sentence. This new section eliminates the arresting officer's discretion under § 19.2-74 of not issuing a summons for such a misdemeanor when the officer believed the person was likely to disregard the summons or was likely to cause harm to himself or another. Therefore, the arresting officer must attempt to issue a summons under § 19.2-74.1 to any person who commits a misdemeanor not punishable with a jail sentence.

One of the cardinal rules of statutory construction is to determine and follow the legislative intent. See 17 M.J. Statutes § 35 (1979). The language of § 19.2-74.1 leads me to the conclusion that the legislature intended to avoid the possibility of holding an accused in jail pending trial where he could not be incarcerated upon conviction. This conclusion is further supported by the absence of language similar to that in § 19.2-74 requiring an accused to sign the
summons and if he refuses, allowing him to be taken to a magistrate for bail.

Except where required by specific statutory language, such as found in § 19.2-74, I know of no general requirement that an accused is required to sign a summons. In designating what is required in a summons, Rule 3A:4(c)(2) does not mandate that an accused sign a summons. Therefore, in view of the manifest legislative intent of § 19.2-74.1, it is my opinion that an accused is not required to sign a summons issued under that provision. Therefore, if the accused refuses to sign such a summons, it is my opinion that an officer cannot take the individual for the fixing of bail as provided for § 19.2-74.

However, where the accused does not sign a summons issued under § 19.2-74.1 and then fails to appear in court as directed by the summons, the court is not left powerless to adjudicate the case. In construing § 19.1-92.1 (the predecessor to § 19.2-74), this Office has previously stated that a person may be tried solely on a summons issued pursuant to that section without the need of a warrant. I believe this conclusion can also be applied to a summons issued under § 19.2-74.1. A general district court may try a defendant, accused of a misdemeanor violation, in his absence when the defendant fails to appear pursuant to a summons. Thus, I am of the opinion that the court would still have jurisdiction to try the matter if the defendant did not sign the summons agreeing to appear and then failed to appear. Any other conclusion would not be consistent with the legislative intent.

Section 19.2-74.1 provides that the officer shall take the name and address of the person detained in order to issue the summons. Should the person refuse to give his name and address, it is my opinion that the officer would be unable to issue the summons and would be authorized to take the person before a judicial officer for the setting of bail as provided by § 19.2-74.6. It is clear that the legislature did not intend for persons to be able to commit offenses with impunity.

1Section 19.2-74.1 provides: "A. Whenever any person is detained by or is in the custody of an arresting officer for a violation of any county, city or town ordinance or of any provision of this Code punishable as a misdemeanor for which he cannot receive a jail sentence, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Any person so summoned shall not be held in custody after the issuance of such summons for the purpose of complying with the requirements of chapter 23 (§ 19.2-387 et seq.) of this title. Reports to the Central Criminal Records Exchange concerning such persons shall be made after a
disposition of guilt is entered as provided for in 
§ 19.2-390.

B. The provisions of this section shall not be 
applicable to any detention or arrest made under the 
provisions of § 18.2-388."

Section 19.2-74 provides, in part: "A. Whenever any 
person is detained by or is in the custody of an arresting 
officer for any violation committed in such officer's 
presence which offense is a violation of any county, city or 
town ordinance or of any provision of this Code punishable as 
a misdemeanor, except as otherwise provided in Title 46.1, or 
§ 18.2-266 of the Code of Virginia, or an arrest on a warrant 
charging an offense for which a summons may be issued, and 
when specifically authorized by the judicial officer issuing 
the warrant, the arresting officer shall take the name and 
address of such person and issue a summons or otherwise 
notify him in writing to appear at a time and place to be 
specified in such summons or notice. Upon the giving by such 
person of his written promise to appear at such time and 
place, the officer shall forthwith release him from custody. 
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Any person refusing to give such written promise to 
appear shall be taken immediately by the arresting or other 
police officer before the nearest or most accessible judicial 
officer or other person qualified to admit to bail having 
jurisdiction, who shall proceed according to provisions of 
§ 19.2-123...." Similar language requiring the person to 
give his written promise to appear does not appear in 
§ 19.2-74.1.

3 Rule 3A:4(c)(2) provides: "Summons. -A summons, whether 
issued by a magistrate or by a law-enforcement officer, shall 
command the accused to appear at a stated time and place 
before a court of appropriate jurisdiction in the county, 
city, or town in which the summons is issued. It shall (i) 
state the name of the accused or, if his name is unknown, set 
forth a description by which he can be identified with 
reasonable certainty, (ii) describe the offense charged and 
state whether the offense is a violation of State, county, 
city, or town law, and (iii) be signed 
by the magistrate or 
the law-enforcement officer, as the case may be."

6The refusal to give one's name and address under these 
circumstances may provide cause for an additional charge of 
impeding an officer in the discharge of his duties for which 
the officer could proceed under § 19.2-74. See Sullivan v. 

SUNDAY CLOSING LAW. SELLING OF AUTO PARTS BY JUNK YARD ON 
SUNDAY PERMISSIBLE.

April 3, 1981

The Honorable W. Edward Meeks, III
Commonwealth's Attorney for Amherst County
You have asked whether the selling of automobile parts on a retail basis by a junk yard on Sunday constitutes a violation of § 18.2-341 of the Code of Virginia (1950), as amended.

In general, § 18.2-341 (the Sunday Closing Law) prohibits persons from engaging in work, labor or business on Sundays, or engaging others to do the same, with certain specified exceptions.1 Section 18.2-341(a)(4) permits the "[s]ervicing, fueling and repair of motor vehicles, boats and aircraft, and the selling of parts and supplies therefor." (Emphasis added.)

In 1977, § 18.2-341(a)(4) provided an exception to the Sunday Closing Law for the "servicing, fueling and emergency repair of motor vehicles, boats and aircraft including the selling of such parts and supplies for such emergency repairs." (Emphasis added.) In Malibu Auto Parts v. Commonwealth, 218 Va. 467, 237 S.E.2d 782 (1977), the Supreme Court held that § 18.2-341(a)(4) was applicable only to businesses engaged in the servicing, fueling and emergency repair of motor vehicles, boats and aircraft, and that only such businesses could sell on Sunday the parts and supplies necessary to perform emergency repairs. The court specifically rejected Malibu's contention that § 18.2-341(a)(4) allowed the selling of parts and supplies for emergency repairs by any business whether or not the business was engaged in the servicing, fueling and repair of vehicles.

In 1978 the legislature amended § 18.2-341(a)(4) to its present language. The amendment deleted the word "emergency" and changed the language "including the selling of such parts and supplies for such emergency repairs" to read "and the selling of parts and supplies therefor."

I believe the change in the statutory language from "including" to "and" is significant since the decision in Malibu Auto Parts concerned the construction of the phrase "including the selling of such parts and supplies for such emergency repairs." In my opinion, the 1978 amendment evidenced an intent on the part of the legislature to alter the decision in Malibu Auto Parts and was designed to allow any business to sell parts and supplies whether or not the business is engaged in the servicing, fueling and repair of vehicles.

Therefore, it is my opinion that the mere selling of automobile parts from a junk yard on Sunday does not constitute a violation of § 18.2-341.

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1Section 18.2-341(a) provides as follows: "On the first day of the week, commonly known and designated as Sunday, no person shall engage in work, labor or business or employ others to engage in work, labor or business except...."
TAXATION. ASSESSMENT. FAIR MARKET VALUE REQUIRES CONSIDERATION OF INFLUENCE OF NEARBY COMMERCIAL DEVELOPMENT. NO RELIEF FROM RESULTING HIGHER VALUES.

December 5, 1980

The Honorable Joseph P. Crouch
Member, House of Delegates

You have asked whether any avenues for tax relief exist for your constituents who are experiencing a rapid rise in their real property taxes because their residences lie in the path of creeping commercial real estate development along arterial highways. You have indicated that Campbell County has recently reassessed real estate at 100% of fair market value, as required by law, and that this reassessment has taken into account the "highest and best use" of these properties in reaching the fair market value. The result is that these constituents are assessed real estate taxes far in excess of those assessed against comparable homes in residential areas away from commercial development. You have set forth three questions focusing on this issue.

You first ask whether this method of assessment is proper. Not only is assessment at fair market value proper, it is required by § 58-760 of the Code of Virginia (1950), as amended, that all reassessments "shall be made at one hundred per centum fair market value...."

You next ask whether a local governing body may "establish a policy of assessing property values based upon the actual utilization being made of the property so as to avoid forcing people to sell their residences because of an inability or impracticality of paying taxes based upon a commercial utilization assessment." The General Assembly has adopted such a policy with respect to land being used for agricultural, horticultural, forest and open space use. Those provisions are found in Title 58, Ch. 15, Art. 1.1, § 58-769.4, et seq. No similar legislation, however, authorizes preservation of residential values in the midst of surrounding commercial development.

Your last question asks whether there are "other possibilities for tax relief...available to citizens who find themselves in this predicament." Special relief is afforded to the elderly and to handicapped persons in those jurisdictions which have adopted an ordinance authorizing tax relief pursuant to § 58-760.1. Your letter proceeds from the assumption that all of the assessments accurately reflect the current fair market value of the real property in question. Absent an appeal of any irregularity in the assessment, there is no other source of tax relief available to the general public.
REPORT OF THE ATTORNEY GENERAL

TAXATION. CONSTITUTIONALITY. LIMITATIONS ON INCREASES IN REAL ESTATE PROVIDED FOR IN § 58-730.5(C) WOULD NOT PREVENT TAX INCREASE IF REQUIRED TO ENABLE LOCALITY TO SATISFY ITS GENERAL OBLIGATION DEBT AS PROVIDED IN § 15.1-210.

January 16, 1981

The Honorable Jerry K. Emrich
County Attorney for Arlington County

You have inquired about an apparent conflict between two statutes which involve Arlington County's borrowing and taxing powers. Section 58-730.5(C) of the Code of Virginia (1950), as amended, requires a real estate tax reduction in calendar years 1982 and 1984 in localities located in transportation districts which impose a fuels sales tax pursuant to § 58-730.5(A). Section 58-730.5(C) further states that the "reduced tax rate shall not be raised during the entire tax year for which the tax rate is reduced...." (Emphasis added.) Section 15.1-210 of the Public Finance Act, on the other hand, requires a locality which issues general obligation bonds to levy and collect annually "a tax upon all taxable property within the unit [locality] over and above all other taxes authorized or limited by law sufficient to pay..." the principal and interest on such bonds as the installments come due. (Emphasis added.) Section 15.1-210 authorizes and, in fact, requires a locality to levy and collect sufficient tax revenues to pay the installments on its general obligation bonds. Because § 15.1-210 requires a locality issuing general obligation bonds to levy a tax on property over and above all other taxes authorized "or limited" by law, I conclude that such localities, even though subject to the provisions of § 58-730.5(C), can increase real property taxes consistent with the provisions of § 58-730.5(C).

When such general obligation bonds were sold, § 15.1-210 and the locality's pledge of its unlimited taxing power were elements of the contract made with the bondholder. Rees v. City of Watertown, 86 U.S. 72 (1874); Maxey v. American Casualty Co. of Reading, 180 Va. 285, 23 S.E.2d 221 (1942). If § 58-730.5(C) is construed to limit § 15.1-210, it would constitute an impairment of the obligation of contracts between the locality and its bondholders in violation of both the federal and State Constitutions. Article I, § 10 United States Constitution; Art. I, § 11 of the Constitution of Virginia (1971).

There is a presumption that the General Assembly in the passage of an act did not intend to violate the Constitution of the State or of the United States, and if an act is susceptible to an interpretation that will render it valid, such interpretation will be adopted upon the theory of legislative intent not to violate any provision of either of such instruments. 17 M.J. Statutes § 56 (1979). An interpretation of § 58-730.5(C) which will make it entirely consonant with both State and federal Constitutions is that
the General Assembly, in enacting the transportation district fuels sales tax, did not intend for § 58-730.5(C) to override or supersede § 15.1-210. This language in § 15.1-210 can be reasonably interpreted as overriding the tax reduction language of § 58-730.5(C), and it would be the duty of an appellate court to construe it thusly to avoid an unconstitutional result. Almond v. Gilmer, 188 Va. 822, 51 S.E.2d 272 (1949).

Therefore, I must conclude that the limitations on increases in real estate taxes provided for in § 58-730.5(C) would not prevent a tax increase if required to enable a locality to satisfy its general obligation debt as provided in § 15.1-210.

TAXATION. DELINQUENT. ABSENCE OF NEWSPAPER IN COUNTY REQUIRES USE OF NEWSPAPER PUBLISHED IN ADJOINING CITY FOR DELINQUENT TAX LISTS.

December 5, 1980

The Honorable Alfred C. Anderson
Treasurer of Roanoke County

You have asked for my Opinion concerning the provisions of the second paragraph in § 58-983(a) of the Code of Virginia (1950), as amended, pertaining to the publication of the delinquent tax lists. Your question is whether a particular publication, "The Valley Shopper" which is mailed to all postal patrons of the U. S. Postal Service in Roanoke County would satisfy the provisions of § 58-983 regarding publication. The copy of "The Valley Shopper" you forwarded is a twelve-page tabloid-size newsprint bulk mailing claimed by the publisher to have a circulation of almost 70,000 in the Greater Roanoke Valley. The publication consists principally of advertising from local merchants, television schedules, free classified ads to readers, and one or more feature columns. The publication is mailed without charge to all postal patrons.

This Office has held that the publication of such lists is not mandatory but lies within the discretion of the Board of Supervisors. See Report of the Attorney General (1940-1941) at 175. I assume that the Board of Supervisors has determined that such lists or portions thereof should be published.

A prior Opinion has held that the lists of delinquent taxes must be published in a newspaper published in the taxing jurisdiction if there is such a newspaper. See Report of the Attorney General (1940-1941) at 183. Therefore, I assume from your question that there is no such newspaper published in Roanoke County. Section 8.01-323 provides that newspapers published in any city adjoining or within a county are deemed to be published in the county for purposes of required legal advertisements. Thus, any newspaper published
in the City of Salem or the City of Roanoke would satisfy the requirements of § 58-983(a).

Your inquiry is governed by § 8.01-324. Section 8.01-324 establishes the standards qualifying newspapers for purposes of legal advertisements. "The Valley Shopper" does not meet those requirements. It is not a publication to which one would normally turn to find legal notices. Moreover, no news is contained in the publication you submitted and there are no paid subscribers. Thus, "The Valley Shopper" does not qualify as a newspaper under § 8.01-324.

I further conclude that "The Valley Shopper" is not a "handbill" within the meaning of § 58-983(a). A "handbill" is a "written or printed notice displayed to inform those concerned of something to be done." Black's Law Dictionary 845 (4th ed. rev. 1968). Section 58-983(a) requires that handbills "be posted generally throughout the county." "The Valley Shopper" is neither displayed, posted, nor is it distributed for the limited purpose of publishing legal notices. Thus, I conclude that "The Valley Shopper" is neither a newspaper nor a handbill within the meaning of § 58-983.

1"The governing body shall cause the lists mentioned in paragraphs (2) and (3) of § 58-978, or such parts thereof as deemed advisable, to be published once in a newspaper in the county, city or town, but if there be no newspaper published in the county, city or town then in some newspaper having general circulation therein or in handbills to be posted generally throughout the county, city or town, and at the front door of the courthouse thereof for a period of thirty days."

TAXATION. EXEMPTION OF PROPERTY OWNED BY GREATER SOUTHEAST DEVELOPMENT CORPORATION. EXEMPTION LOST IF EXCLUSIVE USE REQUIREMENT NOT SATISFIED.

July 23, 1980

The Honorable Robert C. Scott
Member, House of Delegates

You have asked whether § 58-12.106 of the Code of Virginia (1950), as amended, exempts all property owned by the Greater Southeast Development Corporation in Newport News from local taxation. The operative language is found in § 58-12.106(B), and the exemption is granted for "[p]roperty owned by the Greater Southeast Development Corporation and used by it exclusively for benevolent and charitable purposes on a nonprofit basis...." (Emphasis added.)
By its own terms, the exemption granted by § 58-12.106 is limited to property owned and used for certain specified purposes. When the use requirement is not satisfied, the exemption is lost. Moreover, § 58-758.1 requires that a leasehold interest be taxed when an owner exempt from local taxation leases real property to a non-exempt lessee. Nowhere in § 58-12.106 is § 58-758.1 overridden. Because a tax levied under the authority of § 58-758.1 is levied upon the leasehold interest, and not upon property owned by Greater Southeast Development Corporation, the language of § 58-12.106 is not violated. See Shaia v. City of Richmond, 207 Va. 885, 889, 153 S.E.2d 257, 260 (1967). If the lessee should fail to pay the tax, the tax collector cannot proceed to have the real estate sold because of delinquent taxes. Shaia, supra, at 888. See, also, §§ 58-14 and 58-16.

Therefore, all property owned by the Greater Southeast Development Corporation is not automatically exempt from local taxation under § 58-12.106. The "exclusive" use requirements of that provision must first be satisfied. In addition, because the tax on leasehold interests under § 58-758.1 is not otherwise limited, it is to apply in accordance with its terms.

TAXATION. INCOME. VIRGINIA RESIDENTS FILING JOINT FEDERAL RETURN MAY ELECT TO FILE SEPARATE RETURNS UNDER § 58-151.062(b)(2)(B).

April 15, 1981

The Honorable Elise B. Heinz
Member, House of Delegates

You have asked whether married taxpayers who file a joint federal income tax return are precluded from filing separately for Virginia income tax purposes. Section 58-151.062(b) of the Code of Virginia (1950), as amended, permits married taxpayers, both of whom are residents of Virginia, to file a joint State income tax return if a federal joint return was filed. Residents of Virginia who file a joint federal return may elect, however, to file separately under the provisions of § 58-151.062(b)(2)(B). Separate State returns are required under § 58-151.062(b)(3) if one spouse is a resident and the other is a nonresident, unless both elect to file as if both were residents, in which case they may file a joint State return. The language of both § 58-151.062(b)(2)(B) and § 58-151.062(b)(3) permits the Department of Taxation to require married taxpayers filing separately under those sections to make their returns on a single form.

If separate returns on a single form are filed under either of the above sections, § 58-151.062(b)(4) permits the Department of Taxation to credit any overpayment or refund due one spouse against the underpayment or tax liability of the other; unless the taxpayer states on his or her return
that any overpayment be applied only to his or her separate tax liability. Refunds may, however, be made payable by the Department of Taxation jointly to both spouses. See § 58-151.062(b)(4)(B).

You have also inquired as to the validity of a provision contained in H.B. 1101, Ch. 408 [1981] Acts of Assembly permitting the Commonwealth to recoup a debt owed to it by a taxpayer by offsetting a tax refund payable jointly to the taxpayer and to his or her spouse. The provision, found in H.B. 1101 at § 58-19.7(E) is valid only to the extent it limits set-off to that portion of a joint refund belonging or attributable to monies paid by or withheld from the debtor spouse. See Rosen v. U.S., 397 F.Supp. 342, 75-2 U.S.T.C. Par. 9716 (1975); and In Re Wetteroff, 324 F.Supp. 1365, 72-1 U.S.T.C. Par. 9181 (1971).

TAXATION. INTEREST. LATE PAYMENT NOT SUBJECT TO INTEREST IF TIMELY MAILED.

April 22, 1981

The Honorable Bennie L. Fletcher, Jr.
Treasurer of Arlington County

You have asked whether late payment penalties and interest may be assessed against a taxpayer whose payment of taxes reaches your office after the day on which such taxes are due. You indicate that the taxpayer represents to you that payment was made by mail on August 15, 1980, for taxes which are due on December 5, 1980. The taxpayer also indicates that he contacted your office to determine why checks mailed as payment had not cleared and was subsequently informed that payment had not been received. No payment was ever received and the taxpayer indicates that neither of the two checks has ever cleared the bank. You indicate that your practice in such situations is to treat the matter as a late payment and assess penalties and interest.

It appears that, at least in part, the practice observed by your office is incorrect in light of the provisions of § 58-4.2 of the Code of Virginia (1950), as amended. That statute provides that payment which reaches your office after the due date is timely made when your office receives the payment "in a sealed envelope bearing a postmark on or before midnight of the day such return is required to be filed...." Thus, it is incumbent upon your office staff to record the postmark of any payments or returns received after the due date. Moreover, it would be advisable to retain envelopes of late payments bearing a postmark after the due date in the event the taxpayer later claims that the return or payment was timely posted.

Where no payment or return from a taxpayer is received and the taxpayer claims to have mailed such payment or return a somewhat different situation is presented. In such
situations the provisions of § 58-963 apply and provide "[n]o penalty shall be imposed for failure to pay any tax if such failure was not in any way the fault of the taxpayer." Section 58-963 read in conjunction with § 58-4.2 makes it clear that a properly mailed and postmarked return or payment whose delivery is delayed is not in any way the fault of the taxpayer.

Thus, where the taxpayer claims to have mailed a return or payment to your office but no payment is received whether this circumstance is or is not "in any way the fault of the taxpayer" will determine whether late payment should be applied. The evidence which you may consider is not statutorily prescribed and could vary, for example, from a simple affirmation of payment by the taxpayer to evidence that payment was mailed as certified or registered mail. Other evidence relevant to this determination might include records such as have been offered by the taxpayer in this case, that is, checkbook stubs and a telephone message record. If, upon considering the evidence available to you, you determine that the failure of your office to receive a return or a payment was not in any way the fault of the taxpayer, no penalties or interest should be assessed.

TAXATION. LOCAL LEVIES. CONSTITUTIONALITY. § 15.1-210 OVERRIDES § 58-730.5(C) WITH RESPECT TO GENERAL OBLIGATION BONDS WHICH MAY BE ISSUED IN FUTURE.

February 9, 1981

The Honorable Jerry K. Emrich
County Attorney for Arlington County

This is in response to your letter of January 19, 1981, in which you ask whether § 15.1-210 of the Code of Virginia (1950), as amended, controls over § 58-730.5(C) with respect to general obligation bonds which may be issued in the future as well as to general obligation bonds which have already been issued.

I am of the opinion that § 15.1-210 overrides § 58-730.5(C) in both situations. If, in order to satisfy general obligation bonds which may be issued in the future, a tax increase is necessary, such tax increase is authorized by § 15.1-210 notwithstanding the provisions of § 58-730.5(C).

TAXATION. LOCAL LEVIES. MAINTENANCE OF BRANCH OFFICE WITHIN STATE SUFFICIENT NEXUS FOR IMPOSITION OF LOCAL BUSINESS TAX.

June 9, 1981

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County
You have asked whether a firm would need to purchase a local business license under the following circumstances:

1. The firm has an office located in Chesterfield County. All sales are initiated by a salesman operating out of this office.

2. All purchase orders are sent from this office to the home office out of state.

3. The merchandise is shipped from their own manufacturing company direct to the customer.

4. All billing is prepared by the home office and all payments are sent to that office.

Section 58-266.1 of the Code of Virginia (1950), as amended, permits localities to levy license taxes on the gross receipts of any person, firm or corporation operating a licensable business, trade, profession, or occupation within their jurisdiction. Section 58-266.5 provides that the situs for local taxation of any licensable business is the locality in which the person or firm has a definite place of business or maintains an office.

Foreign corporations which maintain a branch office in this State staffed with salesmen who regularly solicit orders from Virginia customers are not exempt under the Commerce Clause from local license or occupation taxes on sales to in state customers serviced by that branch. Norton Co. v. Department of Revenue of State of Illinois, 340 U.S. 534, 71 S.Ct. 377 (1951); Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560, 95 S.Ct. 706 (1975); General Motors Corp. v. Washington, 377 U.S. 436, 84 S.Ct. 1564 (1964); J. C. Penney Co., Inc. v. Hardesty, 264 S.E.2d 604 (W.Va. 1980). The processing of orders, shipment of merchandise, and billing through a home office or other location out of state does not alter this result. Norton and General Motors Corp., supra.

Maintenance of a branch office within the state is sufficient "nexus" to sustain imposition of the tax on a foreign corporation, Norton, supra, and is distinguishable from the situation where only itinerant salesmen or "drummers" are sent into the state to solicit orders. McLeod v. Dilworth Co., 322 U.S. 327, 64 S.Ct. 1023 (1944). Under the more recent case of Standard Pressed Steel Co. v. Washington Department of Revenue, 419 U.S. 560, 95 S.Ct. 706 (1975), the presence of a single resident employee operating out of a home office constitutes sufficient "nexus" for the imposition of a business and occupation tax on sales to in state customers serviced by that employee.

Thus, in the circumstances which you present, the firm would be subject to local business license tax to the extent permitted by § 58-266.1 on gross receipts derived from sales
initiated by the branch office located within your jurisdiction.

TAXATION. LOCAL LEVIES. ORDINANCE ADOPTED IN VIOLATION OF § 15.1-504 MAY NOT BE ENFORCED.

May 29, 1981

The Honorable John Latane' Lewis, III
Commonwealth's Attorney for Powhatan County

You have asked two questions concerning 1980 actions of the Powhatan County Board of Supervisors which relate to the board's enactment of a license tax on merchants in lieu of a tax on the capital of merchants. See § 58-266.1(A)(5) of the Code of Virginia (1950), as amended.

Your first inquiry relates to the following situation: In the first half of 1980, the board did not levy a merchants' capital tax for the year, opting instead to impose a license tax under the authority of § 58-266.1(A)(5). The board advertised a hearing on the matter to be held June 11, 1980, indicating that a license tax of $30.00 annually would be considered. The hearing was held and the $30.00 annual license tax adopted. At the board's July meeting, without prior advertisement or notice, the board purportedly rescinded its June action and adopted a local license tax ordinance based on gross receipts, with a maximum tax of $300.00. The rationale behind the board's failure to advertise its July action in advance was that the new tax rate was lower than that advertised for the June hearing and that prior notice is required only when a local levy is increased.

You ask whether the license tax ordinance adopted in July 1980 is legally adopted and can be enforced.

While the board's determination that only notices of tax rate increases are required to be published may be consistent with a prior Opinion of this Office, I cannot agree that the gross receipts tax enacted in July necessarily produces a lower tax rate than the $30.00 annual rate enacted by the Powhatan board in June. A merchant paying the maximum tax of $300.00 under the gross receipts tax would be taxed at a higher effective rate than if he paid the $30.00 annual license tax. Therefore, for some merchants, the gross receipts tax adopted in July may result in a higher tax rate. The July 1980 tax ordinance does not, therefore, fall within the scope of the Asbury Opinion and its holding that ordinances reducing taxes need not be advertised in advance does not control here.

Section 58-266.1(A) permits counties to adopt local license tax ordinances. This power was properly exercised at the board's June meeting after the board's proposed action had been duly advertised. The July meeting of the board
which adopted a license tax based on gross receipts (which for at least some taxpayers constituted a tax rate increase), was not preceded by a published notice advertising the proposed action. The board's July action, therefore, violated § 15.1-504.2 The July ordinance was not legally adopted and may not be legally enforced.

Your letter further states that although the board of supervisors levied the merchants' capital tax for tax years 1968 through 1979, the county neither required taxpayers to report such property nor attempted to collect the tax monies due under such tax. In 1980, the board did not levy the merchants' capital tax under the authority of § 58-266.1(A). Your inquiry is whether § 58-1164 requires the commissioner of revenue to list and assess unreported merchants' capital3 for tax years 1978, 1979, and 1980 (which constitute the "tax year(s) of the three years last past...").

No omitted merchants' capital tax may be assessed for tax year 1980 because no such tax was levied by the board of supervisors. Without the levying of a tax by the board, the commissioner has no authority to assess omitted taxes under § 58-1164. County of Sussex v. Jarratt, 129 Va. 672, 106 S.E. 384, 627 (1921). There is no requirement that merchants' capital taxes collected for tax year 1980 be automatically refunded, unless a taxpayer makes an application for such a refund. See Opinion to the Honorable Shirley L. Wheeler, Commissioner of the Revenue for Giles County, dated April 21, 1981 (copy enclosed).

With respect to tax years 1978 and 1979, the commissioner of revenue must comply with § 58-1164. The fact that the commissioner's predecessor failed to enforce the tax ordinance does not estop the present commissioner from enforcing the law. See Report of the Attorney General (1976-1977) at 33; see, also, Report of the Attorney General (1977-1978) at 430 (relating to imposition of penalties).


2"No ordinance which imposes or increases any tax or levy shall be adopted unless fourteen days shall have elapsed following the last required publication of intention to propose the same for passage." (Emphasis added.)

3See § 58-833.

TAXATION. PENALTIES. RETROACTIVE REDUCTION BY ORDINANCE PERMITTED.
report of the attorney general

May 22, 1981

The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have asked whether an amendment to an ordinance decreasing the minimum penalty for late filing of personal property tax returns may apply retroactively. You do not state whether the proposed ordinance contains any language addressing retroactive effect. Generally, ordinances providing for the reduction of penalties are construed not to apply retroactively to penalties which have accrued prior to the date the ordinance becomes effective in the absence of any language to the contrary. See 72 Am.Jur.2d State and Local Taxation § 864 (1974). I am, therefore, of the opinion that an ordinance decreasing the minimum penalty for late filing of personal property tax returns may apply retroactively if expressly provided in the language of the ordinance.

TAXATION. REAL PROPERTY. GREENFIELD INSTITUTE EXEMPT UNDER § 58-12(4).

May 5, 1981

The Honorable Lee T. Keyes
Commissioner of the Revenue for Loudoun County

You have asked whether the Joint Laborer's Trust Fund of Washington, D.C. and Vicinity (the "Trust"), which operates the Greenfield Institute (the "Institute") on a 20.27 acre parcel of land located in Loudoun County, qualifies for the property tax exemption authorized by § 58-12(4) of the Code of Virginia (1950), as amended. Section 58-12(4) grants the exemption to "incorporated colleges or other incorporated institutions of learning...primarily used for literary, scientific or educational purposes...."

The Institute trains construction laborers in safety and job skills. These trainees are paid $3.25 per hour plus transportation costs to attend sessions lasting about three weeks on the average. The Institute's facility serves the general public and is not limited to union members. It does not engage in any political, lobbying, promotional, or similar efforts on behalf of the employers or unions which support it. The Institute has two full-time instructors and a secretarial and custodial staff. Other instructors are hired as the programs offered require. The training programs include oxyacetylene burning and cutting, safety and first aid, forklift, chainsaw, small engines, trenching and shoring, pipe laying, ladder safety, scaffold building, jackhammer operation, and other similar programs. The trainees change with each new series of training programs. No products are sold to the public and all construction by the trainees is eventually destroyed. The Trust is exempt from federal income taxes under § 501(c)(3) of the Internal

Article X, § 6(f) of the Constitution of Virginia (1971) requires that "[e]xemptions of property from taxation as established or authorized hereby shall be strictly construed."

Subsection (f), however, contains a grandfather clause providing "that all property exempt from taxation on the effective date [July 1, 1971] of this section shall continue to be exempt until otherwise provided by the General Assembly." This Office has previously ruled that the "grandfather" clause of Art. X, § 6(f) is intended "to continue the constitutionally exempt [property] classifications set forth in § 58-12." (Emphasis added.) See Report of the Attorney General (1971-1972) at 412, 415. Thus, the grandfather clause requires that the exemptions in § 58-12 be applied to property acquired after July 1, 1971, if within an exempt classification under § 58-12. Id. The relevant question is, therefore, whether the property owned by the Institute is within the exemption provided for incorporated institutions of learning in § 58-12(4).1

The term "institution of learning" presupposes the existence of a faculty, a student body, and prescribed courses of study. See Report of the Attorney General (1968-1969) at 228(2). This Office has previously ruled that the American Press Institute qualified for the property tax exemption as an institution of learning. See Report of the Attorney General (1973-1974) at 364. The American Press Institute provided one to two week courses to reporters, editors, and others in the newspaper industry similar to those provided by the Institute. The program provided by the Institute is, in effect, an abbreviated industrial school which concentrates in the area of construction skills. The instructional training provided is educational in nature. I am, therefore, of the opinion that the Institute is entitled to the exemption under § 58-12(4) for that property necessary to fulfill its educational function.

You ask whether a nonprofit corporation which merely holds title for the Trust can still qualify for the exemption as an institution of learning, or whether the corporation itself must manage and operate the training center. The exemption found in § 58-12(4) extends to "[p]roperty owned by...incorporated institutions of learning..." which is "primarily used for...educational purposes or purposes incidental thereto...." Under the terms of § 58-12(4) the property must be owned by an incorporated institution of learning3 and the property must be used primarily for educational purposes. It is not required that the corporation itself manage the operation "so long as...[the corporation's property is] used for the purposes specified in the Constitution and statute and without profit." See St. Andrew's Association v. City of Richmond, 203 Va. 630, 637, 125 S.E.2d 864, 868 (1962); see, also, City of Richmond v. United Givers Fund, 205 Va. 432, 137 S.E.2d 876.
(1964); County of Hanover v. Trustees of Randolph-Macon College, 203 Va. 613, 125 S.E.2d 812 (1962).


2See Webster's Third New International Dictionary, 1155 (1966); definitions of industrial school ("school specializing in the teaching of the industrial arts") and industrial art ("subject taught in elementary and secondary schools that aims at developing a manual skill, a familiarity with tools and machines, or acquaintance with processes and designs").

3An "institution of learning" presupposes the existence of a faculty, a student body, and a prescribed course of study. See Report of the Attorney General (1968-1969) at 228(2).

TAXATION. ROLL-BACK TAXES. NOTIFICATION TO ASSESSING OFFICER.

September 4, 1980

The Honorable Frederick T. Gray
Member, Senate of Virginia

You have asked three questions pertaining to "roll-back" taxes under § 58-769.10 of the Code of Virginia (1950), as amended, in the following situations.

Facts

You have posited three hypothetical fact situations and asked how § 58-769.10 would apply.

1. A landowner owns 120 acres and is participating in the county's land use tax program. See §§ 58-769.4 to 58-769.15:1. While retaining title to the land, the landowner permits one of his children to build a home on a portion of the land.

2. After the home is completed, the landowner, by deed of gift, conveys the land upon which the house was built and five surrounding acres to his son. An additional three acres is also conveyed to the landowner's daughter at this time.

3. The landowner did not notify the taxing authorities of these gifts in writing.

Questions

Under each fact situation, should a roll-back tax apply, and if so, should the roll-back be applied to the entire tract or only to the land conveyed or changed in use?
Analysis

No dates are given as to when building on the parcel commenced or when the deeds of gift were executed. Section 58-769.10 has been amended several times since its original enactment; however, none of these amendments are germane to your inquiries.

1. Under § 58-769.10(A), when land qualifying for use assessment and taxation is converted to a non-qualifying use, a roll-back tax liability attaches. Building a residence is such a change in use. Section 58-769.10(B) provides the formula by which the roll-back tax liability is computed. Subparagraph B does not require that the roll-back tax be applied to the entire parcel but rather limits the roll-back to "real estate which has changed in use." The use of the 120 acre parcel which initially qualified has not changed; rather, a change in use has occurred only upon that portion of the parcel upon which the son has built a house. Only that small parcel has changed in use and is liable for the roll-back tax.

To hold that the entire 120 acre parcel is subject to roll-back tax liability first would require the conclusion that the use of the entire parcel has changed. Such a conclusion, under the facts considered, simply defies common sense. Moreover, that result would not carry out the intent of the General Assembly, i.e., to encourage the preservation of certain uses of real estate and to ameliorate the financial pressures towards converting such real estate to more intensive uses. See § 58-769.4 and Art. X, § 4 of the Constitution of Virginia (1971).

However, the remaining, and larger portion of the 120 acres may be disqualified from further continuance in the use assessment program if an application informing the assessing officer of the change in use were not timely filed. See §§ 58-769.8 and 58-769.10(C). No five year roll-back liability is involved with respect to such acreage.

2. The first inquiry does not state how many acres of the total 120 acres were changed in use. Such a determination is a factual one and the later deeds of gift, while perhaps probative, are not dispositive of the question. If the acreage conveyed by the deeds of gift is the same acreage which was changed in use, there is no additional roll-back liability because such roll-back was previously triggered by the change in use, and the conveyances are not changes in use. Of course, failure to report the change in acreage can disqualify the parcels from continued participation in the use assessment program. See § 58-769.8.

If the deeds of gift involve less real estate than that previously subjected to roll-back tax liability, no further roll-back taxes are incurred. If the deeds of gift convey additional real estate beyond that previously subjected to
roll-back taxes, than additional roll-back liability may attach if an accompanying change of use also occurs. In any event, the real estate deeded to the daughter and son will no longer qualify for future participation in the use assessment program because the minimum acreage requirement cannot be satisfied.

3. As previously noted, change in use is the event which triggers roll-back tax liability. Whether or not notification to the assessing officer is given, the liability attaches. The notice is simply a mechanism by which assessment of the roll-back taxes can be facilitated. The political subdivision should receive payment in a more expeditious manner, while the landowner avoids undue penalty and interest accruals. In addition, the landowner should be thereby prompted to re-apply for participation in the use assessment program, assuming his remaining real estate continues to qualify. The application must be timely filed or the landowner cannot participate in the program. See Report of the Attorney General (1975-1976) at 359.

\[1\] Requiring a roll-back tax on the entire parcel would also be inconsistent with the policy of § 58-769.13(a), which permits the "remaining real estate" to continue in the use assessment program.

TAXATION. SALE OF LAND FOR DELINQUENT TAXES. § 58-1117.3 PROVIDES TERMINATION OF RIGHTS OF FORMER OWNERS, HEIRS, AND ASSIGNS TO ANY SURPLUS REMAINING FROM PROCEEDS OF SALE OF LAND FOR DELINQUENT TAXES AFTER TWO YEAR PERIOD HAS EXPIRED.

February 27, 1981

The Honorable Henry Lee Carter
Commonwealth's Attorney for Orange County

Your inquiry concerns § 58-1117.3 of the Code of Virginia (1950), as amended, and whether this provision terminates the rights of former owners, heirs, and assigns to any surplus remaining from the proceeds of a sale of land for delinquent taxes after the two year period specified in such provision has expired.\[1\] Although the plain language of § 58-1117.3 provides for termination of the former owner's rights, you note that under the escheat provisions, §§ 55-168 through 55-201.1, a five year owner recovery period exists (§ 8.01-255) and that under the Uniform Disposition of Unclaimed Property Act, §§ 55-210.1 through 55-210.29, no period of limitations is prescribed. See § 55-210.20. You ask if these other statutory provisions enlarge, expand, or otherwise override the two year claims limitation period contained in § 58-1117.3.

Although both the escheat power and the authority to sell land for delinquent taxes may result in the satisfaction
of delinquent taxes, the statutory provisions providing for escheat and sale of property to pay delinquent taxes do not serve the same purposes. The escheat provisions allow land, whose owners are unknown, to be sold so that it may be put to productive use, while the power to sell land for delinquent taxes is a tax collection device which does not always involve unknown owners. In certain instances the same parcel of land may be subject to disposition under either statutory scheme. See Report of the Attorney General (1975-1976) at 125. The two statutory mechanisms, however, are entirely separate and distinct, except to the extent that § 55-200(B) requires the Comptroller to pay delinquent taxes from the net proceeds. Likewise, the Uniform Disposition of Unclaimed Property Act is an entirely separate statutory mechanism, not applicable to surplus sales proceeds because § 58-1117.3 specifically allots such unclaimed surplus to the county or city in which the real estate is located.

These statutes are clear and unambiguous and each statutory scheme is complete without reference to the others. Section 58-1117.3, without qualification, assigns unclaimed surplus proceeds, after the two year holding period, to the appropriate local treasury. I am of the opinion that § 58-1117.3 terminates the rights of former owners and their heirs or assigns to any surplus after sale of property to satisfy delinquent taxes after the passage of two years from the date of confirmation of the tax sale.

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1Section 58-1117.3 provides in part: "If no claim for such surplus is made by such former owner, his heirs or assigns, within two years after the date of confirmation of such sale, then such surplus shall be paid...to the county or city in which such real estate is located."
2See § 55-200(B) (payment of liens for real estate taxes, including penalties and interest, as well as liens for other purposes).
3See § 55-171.
4See § 58-1117.1.

TAXATION. SITUS. FARM EQUIPMENT TAXED IN LOCALITY WHERE IT IS ORDINARILY KEPT OR MAINTAINED.

March 13, 1981

The Honorable Donna S. Clark
Commissioner of the Revenue for New Kent County

You have asked for my opinion concerning the following factual situation:

Taxpayer, a farmer, resides in New Kent County near the James City County line. Taxpayer's home and equipment sheds are located in New Kent County, but the majority of his land under cultivation lies in James City County. Up to and
including 1979, taxpayer filed his personal property returns in New Kent County and paid the New Kent County property tax. On December 31, 1979, taxpayer removed his farm equipment from the location where it is normally kept in New Kent County across the county line into James City County. The equipment was returned to New Kent County on or about January 2, 1980. (James City has eliminated its personal property tax on farm equipment.) Taxpayer asserts that as his farm equipment was not physically located in New Kent County on January 1, 1980, he is not liable for personal property taxes on such equipment in New Kent County because farm machinery and equipment are not specifically mentioned classes of personal property which are to be taxed where they are normally garaged or parked under § 58-834 of the Code of Virginia (1950), as amended. You ask whether the taxpayer can avoid payment of the personal property tax in New Kent County in such a situation.

In Hogan v. County of Norfolk, 198 Va. 733, 96 S.E.2d 744 (1957), the Supreme Court of Virginia construed the terms "physically located on the first day of the tax year" contained in § 58-834, holding that the statutory language "means something more than simply the place where the property is" on January 1. It does not include "property which is casually there or incidentally there in the course of transit..." 198 Va. at 735, 96 S.E.2d at 746. Thus, in determining the situs of personal property for tax purposes, it is the ordinary location of the property that controls, that is, the place where the property is ordinarily kept or maintained. Id.

In the situation you have described, the farm equipment in question is ordinarily kept and maintained in New Kent County, the county of the owner's domicile.' Moreover, prior to James City County's exemption of farm equipment, the taxpayer apparently agreed that New Kent County was the situs of the equipment for tax purposes. The fact that the taxpayer removed the equipment from New Kent County on December 31, 1979, and returned the property on or about January 2, 1980, belies any claim that the permanent situs of the equipment has, in fact, changed. If in this situation James City County was determined to be the situs of such property for tax purposes, "unscrupulous taxpayers...might simply transfer their movable property across the county line...depriving their home county of needed revenue." Flowerree Cattle Co. v. Lewis and Clarke County et al., 81 P. 398, 399 (Mont. 1905). Where the removal of property is intended for purposes of tax avoidance, the property remains taxable at its original situs. Brock & Co. v. Board of Sup'rs of Los Angeles County, 65 P.2d 791, 794 (Cal. 1937), citing Buck v. Beach, 206 U.S. 392 (1907).

I am of the opinion that under the circumstances you describe the taxpayer cannot successfully avoid payment of New Kent County personal property taxes from the county.

TAXATION. STATE AND LOCAL. VANS LEASED TO INDIVIDUALS BY TRANSPORTATION DISTRICT NOT SUBJECT TO CERTAIN TAXES. BUSES LEASED TO BE OPERATED FOR PROFIT SUBJECT TO SAME TAXES.

October 21, 1980

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

This is in response to your recent letter wherein you advise that the Tidewater Transportation District Commission (the "Commission") leases both buses to firms and vans to individuals for the purpose of transporting persons to and from their homes and places of employment. The buses are said to be leased to companies engaged in "for profit" carrier service along routes not otherwise served by Tidewater Rapid Transit's own fixed-route system. The vans are said to be leased to individuals for use in a non-profit ride-sharing program.

You inquire (1) whether both of these types of vehicles are exempt from local personal property and vehicle license taxes pursuant to § 15.1-1370 of the Code of Virginia (1950), as amended, or rather whether they are made liable therefor by virtue of the provision of § 58-831.2; and (2) whether the Virginia Division of Motor Vehicles may furnish "public use" license plates for use on these two types of vehicles.

Buses

This Office previously expressed the Opinion that where a transportation district leased vehicles to, and contracted with, a certified common carrier for bus service on specified routes, such transportation district is not itself operating or maintaining transportation facilities within the meaning of § 15.1-1370 and that, therefore, such firm must be treated as a separate entity for taxation purposes. See Report of the Attorney General (1971-1972) at 436. I have reviewed this Opinion of my predecessor and believe its result to be controlling here. Notwithstanding the tax exempt status of the Commission, its activities and the property under its supervision, see § 15.1-1370, the leased buses in issue are operated by firms "engaged in business for profit" within the meaning of § 58-831.2 and, thus, are subject to local taxation in this respect.

Insofar as your second inquiry is concerned, § 46.1-49 provides an exemption from license and registration fees to motor vehicles owned by the State, her counties, cities and
towns where such vehicles are used purely for State, county and municipal purposes. I am of the opinion that the buses in question do not qualify for "public use" license plates and, thus, are subject to the usual license plate, as well as registration fees.

Virginia adheres to the rule of strict construction of tax exemptions. WTAR Radio-TV Corp. v. Commonwealth, 217 Va. 877, 234 S.E.2d 245 (1977). Taxation being the rule and exemption the exception, statutory provisions exempting property from taxation are strictly construed against the exemption and any doubt is to be resolved in favor of the taxing authority. Golden Skillet Corp. v. Commonwealth, 214 Va. 276, 199 S.E.2d 511 (1973). In my opinion, where such buses are operated by the firms "engaged in business for profit" it cannot be fairly said that they are being used purely for State or municipal purposes within the meaning of § 46.1-49. I would also note that this conclusion is again in accord with the previously-cited Attorney General's Opinion. See Report of the Attorney General (1971-1972), supra.

Vans

The transportation of large numbers of taxpaying employees to and from their places of employment by the most energy-efficient means available surely constitutes a public purpose in the context of today's energy-consciousness. II A. E. Howard, Commentaries on the Constitution of Virginia, at 1133, n.32. Indeed this was the very purpose of the Transportation District Act of 1964 (§ 15.1-1342, et seq.). Since these vans may be operated for this purpose solely on a non-profit basis, I conclude that they are being operated solely for a public purpose. Accordingly, I am of the opinion that such vans are not subject to the registration tax imposed by § 58-831.2 even though, as you note, the Commission does not set or limit directly the toll charged the van passengers.

This holding is also consistent with the language of § 15.1-1370 which states that transportation districts and their governing commissions "will be performing an essential governmental function in the exercise of the powers conferred by this chapter...." This statute goes on to provide as follows:

"Accordingly, the transportation district shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction, control, possession or supervision or upon its activities in the operation and maintenance of any transportation facilities or upon any revenue therefrom and the property and the income derived therefrom shall be exempt from all State, municipal and local taxation." (Emphasis supplied.) Id.

I have examined the lease agreements concerning the vans in question and find that the conditions relating to their use
and maintenance by lessees are stringently circumscribed and are to be supervised carefully. Accordingly, I am of the opinion that within the meaning of § 15.1-1370, (1) these vans constitute property of the Commission under its supervision and (2) their operation constitutes an activity of the Commission.

The question remains whether these vans qualify for "public use" license plates by virtue of the above-mentioned provisions of § 46.1-49. While by its literal terms the availability of "public use" license plates is there limited solely to motor vehicles owned by the State, her counties and cities and towns, I am advised that it has been the long-standing administrative practice of the Division of Motor Vehicles to make such plates available to vehicles owned by a far more inclusive range of political subdivisions. Proper interpretation of a statute must take into account the construction that has been placed upon it by public officials charged with its administration. Where a reasonable construction has, as here, continued for a long period of time without change, the General Assembly is presumed to have acquiesced therein. Peyton v. Williams, 206 Va. 595, 600-601, 145 S.E.2d 147, 151 (1965); Board of Supervisors of Henrico County v. Corbett, 206 Va. 167, 171-172, 142 S.E.2d 504, 507-508 (1965); Richmond Food Store v. City of Richmond, 177 Va. 592, 15 S.E.2d 328 (1941). Inasmuch as I have heretofore found that the vans are property under the supervision of the Commission, and since § 15.1-1370 determines and declares that in carrying out its powers the Commission will be performing an essential governmental function, I am of the opinion that the issuance of "public use" license plates to such vans is fully authorized by, and consistent with, the controlling administrative interpretation previously placed upon the terms of § 46.1-49.

TAXATION. TRANSPORTATION DISTRICT FUEL SALES TAX. INTEREST.

September 2, 1980

The Honorable Jerry K. Emrich
County Attorney for Arlington County

You have asked eight questions with regard to implementing certain aspects of the transportation district fuel sales tax imposed by Ch. 225 [1980] Acts of Assembly 245 (§§ 58-730.5 to 58-730.6 of the Code of Virginia [1950], as amended). I will address your questions seriatim.

1. The Commonwealth will distribute the fuel sales tax proceeds monthly to the transportation district commission (hereafter "commission"), with such monies being applied to the operating deficit and debt service of the commission. Under the current payment system, the localities remit their portions of the allocated costs in quarterly installments, and the final quarterly payment for fiscal year 1981 is due
in April 1981. Therefore, the localities must pay the commission their entire annual contribution prior to the commission receiving May and June payments from the State.

You asked whether local governments must consider the May and June payments from the Commonwealth as having been used to pay the local governments' allocated share of costs during fiscal year 1981. If such payments are deemed not to have been used to pay a locality's allocated share of the costs, the required tax reduction is correspondingly diminished.

The tax reduction required by § 58-730.5(C) is an amount which equals "the portion...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 levy." (Emphasis added.) A locality is committed to make its payments to the commission in quarterly installments. See §§ 15.1-1357(a)(4), 15.1-1357(b)(4), and 15.1-1357(d). Therefore, if a locality pays its allocated share of rail and bus service costs before the Commonwealth makes its monthly distribution, then that portion of the locality's allocated share is not paid from the fuel sales tax levy. If such a payment does not occur, then the required tax reduction is diminished.

If the locality delays its last quarterly payment until after the Commonwealth makes the May and June distributions, then the fuel sales tax proceeds will have been used to pay a larger portion of the locality's allocated share of rail and bus service costs for fiscal year 1981. Consequently, the tax reduction required is increased.

If the delay in payment results in an interest penalty, then the fuel sales tax proceeds would have paid a somewhat smaller portion of the locality's commitment and the required tax reduction amount would be decreased by the amount of interest expense incurred.

2. Should interest earned on the fuel sales tax receipts be taken into account for purposes of determining the tax reduction?

The general rule is that if money is put out at interest, the interest is considered to have the same ownership as the principal which produced it. 45 Am.Jur.2d Interest and Usury § 39 (1969); Cf. § 58-930 (both codifying and modifying the general rule). Both the principal and interest will be applied against the operating deficit and debt service of the mass transit system. To the extent that a locality's allocated share of rail and bus services costs are paid out of the fuel sales tax proceeds, which includes interest earned on the fund prior to disbursement, a corresponding tax reduction is required.

3. Section 58-730.5(A) provides that effective July 1, 1982, the fuel sales tax will be increased by an additional
two per centum. You ask if the tax reduction required for calendar year 1984 is to be based on the entire four percent tax or only on the additional two percent tax effective July 1, 1982.

The tax reduction required by § 58-730.5(C) is that portion of a locality's allocated costs "paid by the Commission from the tax" in effect; to the extent that this four percent tax is used to pay for rail and bus services, a tax reduction is required. Section 58-730.5(C) does not limit the tax reduction in calendar year 1984 to the revenue generated by the additional two percent tax, but rather refers to the four percent tax levy as the benchmark from which the tax reduction is to be computed.

4. May the fuel sales tax proceeds be used by the commission to "finance" a sinking fund administered by the Washington Metropolitan Area Transit Authority (hereinafter "W.M.A.T.A.") to repay funds advanced by the federal government?

Section 58-730.5(B) states that the fuel sales tax is "to be applied to the operating deficit and debt service of the mass transit system..." of the transportation district. I am informed that the transportation district has no debt service of its own; however, the rail portion of the transportation district's mass transit system is subject to debt service. Currently, the localities contract directly with the W.M.A.T.A. to pay this debt service.

A sinking fund generally is a cumulative security for the payment of the debt with which it is connected and is specially earmarked for the extinction of the debt. 64 Am.Jur.2d Public Securities and Obligations § 5 (1972); Black's Law Dictionary 803 (4th ed. 1968). If W.M.A.T.A. includes in its charges to the participating local governments for operating deficit and debt service an amount for a sinking fund, and if the commission on behalf of the localities, applies the fuel sales tax proceeds to debt service instead of operating deficit, the use of the fuel sales tax to finance a sinking fund to retire outstanding debt would be appropriate.

5. May localities increase the rates of taxes other than the taxes whose rates are reduced pursuant to § 58-730.5(C)?

Subparagraph C requires that the real property tax rate, or the real property tax rate and other local tax rates, be reduced in an amount equal to the particular locality's allocated share of rail and bus service costs paid by the fuel sales tax. Subparagraph C also states that "[s]uch reduced rate shall not be raised during the entire tax year for which the tax rate is reduced..." No limitation on other local tax rates is imposed. Therefore, I must conclude
that none was intended and that other local tax rates may be raised during the tax year.

6. May the reduced tax rates be increased during the tax year in the event of an extraordinary loss of revenue under the authority of § 58-851.8?

Section 58-851.8 permits localities on a calendar tax year basis to change their property tax rates at any time during the calendar year "notwithstanding any other provision of law, special or general, to the contrary...." Section 58-730.5(C) states that "such reduced tax rate shall not be raised during the entire tax year for which the tax rate is reduced...." There is no irreconcilable conflict between these two statutory provisions; however, if such an inconsistency does exist, it clearly appears that § 58-730.5(C), which is the later and more specific provision, was intended by the General Assembly to furnish the only rule to govern the tax reduction situation present here. 17 M.J. Statutes § 53 (1979). Those taxpayers burdened by the fuel sales tax were intended to receive some sort of real estate tax relief. To the extent that § 58-851.8 is deemed to be repugnant to that intent, it is inapplicable.

7. In the Commonwealth it is customary to impose taxes only in full one cent increments. It is possible that a one cent reduction in the real estate tax rate in some of the jurisdictions in the transportation district will result in a tax reduction greater than that required by § 58-730.5(C). If that situation exists, you ask if a locality may accomplish the entire required tax reduction by reducing rates of other taxes in lieu of reducing the real estate tax rate.

Section 58-730.5(C) requires that the real estate tax rate or the rate of the real estate tax and other locally levied taxes be reduced. In plain language this subparagraph requires a real estate tax rate reduction, either singly or in combination with other local tax levies. No discretion to avoid this mandate is granted, and I am of the opinion that the real property tax rate must be reduced even if the result is a tax rate involving increments of less than one cent. I understand that the localities within the transportation district utilize computer-generated assessments; surely the computers can be programmed in such a manner as to achieve this legislative directive.

8. The City of Fairfax has never agreed to pay any portion of its "allocated" share of the subsidy paid to W.M.A.T.A., and under the Transportation District Act of 1964 and the Interstate Compact, the City of Fairfax is not obliged to pay this allocated amount. W.M.A.T.A. has borrowed the money to pay for this unpaid share and asserts that the transportation district member localities must make up this difference because it represents services provided to the district. Your final inquiry is whether the share of
costs allocated to the City of Fairfax, but which the city has not agreed to pay, may be paid out of the fuel sales tax proceeds for future years (from July 1, 1980 forward).

The City of Fairfax is a member of the transportation district. Section 58-730.5(B) requires that the fuel sales tax proceeds be applied to the operating deficit and debt service of the mass transit system of the transportation district. In an Opinion to the Honorable John H. Rust, Jr., Member, House of Delegates, dated May 1, 1980 (copy enclosed), I ruled that the fuel sales tax revenues were to be shared on the same basis as costs were shared. This allocation of costs and revenues to the transportation district member jurisdictions, other than the City of Fairfax, will leave a percentage of the revenues unallocated. This unallocated amount is attributable to the City of Fairfax, and under § 58-730.5(B) must be used by the commission for operating deficit and debt service purposes. Some portion of the operating deficit and debt service are allocable to the City of Fairfax and, therefore, will be paid, at least in part, from the fuel sales tax proceeds. Therefore, in this manner the City of Fairfax's share of costs may be paid from the fuel sales tax.

TRUSTS. LAND TRUST DOES NOT BAR INCHOATE DOWER OR CURTESY INTEREST.

July 22, 1980

The Honorable Bernard S. Cohen
Member, House of Delegates

You have asked whether there is a conflict between the provisions of §§ 55-17.1 and 64.1-41 of the Code of Virginia (1950), as amended, which would permit an individual to divest a spouse of an inchoate dower or curtesy interest in realty by transferring the real property into a land trust pursuant to § 55-17.1.

A land trust is created when realty is conveyed to a trustee. Often, no beneficiaries are specified by name in the trust agreement and the trustee is given the power to sell, lease or otherwise dispose of the property. Section
55-17.1\(^1\) does not affect in any way the inchoate dower or curtesy interests in the corpus of the trust; rather, that statute makes any trust agreement legally sufficient, even though no beneficiaries are specified by name or no duties are imposed upon the trustee. Further, no person dealing with the trustee shall be required to make further inquiry concerning his powers or the disposition of any proceeds.

Section 55-17.1 expressly states that the interest of the beneficiaries under the trust is personal property, not real property. The trustee takes the real property conveyed to the trusts subject to any recorded legal interests or inchoate equitable interests, including dower or curtesy. Nowhere in § 55-17.1 is the intention manifested to extinguish dower or curtesy interests, or to transform those interests into personal property. Indeed, § 64.1-41 expressly negates such a suggestion by creating curtesy or dower interests in the spouse's trust or equitable estates.\(^2\)

If the spouse does not join in the conveyance creating the land trust, title examiners will be on notice that the property which is made the corpus of the land trust is subject to the inchoate dower or curtesy interest of the spouse. Therefore, it is my opinion that an individual may not divest a spouse of an inchoate, dower or curtesy interest in realty by transferring the property into a land trust.

\(^1\)"No trust relating to real estate shall fail nor shall any use relating to real estate be defeated because no beneficiaries are specified by name in the recorded deed of conveyance to the trustee or because no duties are imposed upon the trustee. The power conferred by any such instrument on a trustee to sell, lease, encumber or otherwise dispose of property therein described shall be effective and no person dealing with such a trustee shall be required to make further inquiry as to the right of such trustee to act nor shall he be required to inquire as to the disposition of any proceeds.

In any case under this section, where there is a recorded deed of conveyance to a beneficiary, the interest of the beneficiaries thereunder shall be deemed to be personal property.

Nothing in this section shall be construed (1) to affect any right which a creditor may otherwise have against a trustee or beneficiary, (2) to enlarge upon the power of a corporation to act as trustee under § 6.1-5 or (3) to affect the rule against perpetuities."

\(^2\)"When a person, to whose use or in trust for whose benefit another is seized of real estate has such inheritance in the use or trust as, if it were a legal right, would entitle such person's husband or wife to curtesy or dower thereof, such husband or wife shall have curtesy or dower of such estate."
UNEMPLOYMENT COMPENSATION ACT. INSTRUMENTALITIES OF STATE 
GOVERNMENT AND POLITICAL SUBDIVISIONS MAY BE AN EMPLOYING 
UNIT AS USED IN § 60.1-13. 

April 3, 1981 

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

This is in response to your request for my opinion as to 
whether the Office of the Commonwealth's Attorney for the 
City of Richmond constitutes an "employing unit," within the 
meaning of § 60.1-13 of the Code of Virginia (1950), as 
amended. You also inquired who has the responsibility to 
file with the Virginia Employment Commission ("VEC") the 
required reports concerning an employee's income pursuant to 
§ 60.1-73. You further asked what procedure should be used 
to obtain funds to pay claims for unemployment compensation 
benefits if the Office of the Commonwealth's Attorney is the 
employing unit and has the responsibility of filing the 
required reports. I will answer these inquiries seriatim. 

Section 60.1-13 provides that units of State government, 
political subdivisions and the instrumentalities of both may 
constitute employing units for VEC purposes. Accordingly, 
either the Office of the Commonwealth's Attorney or the city 
or county which is served may be the employing unit. 
Consistent with this interpretation is the VEC's statewide 
practice of extending to the Office of the Commonwealth's 
Attorney and the city or county, an option to select which 
will do the reporting. Normally, that entity which performs 
the functions of hiring and day to day supervision and 
control of routine employee activities should be deemed the 
employing unit. In most Virginia jurisdictions, the city or 
county being served has assumed the responsibility of acting 
as the employing unit. 

Section 60.1-73 requires periodic reporting to VEC 
concerning the wages of all covered employees. This function 
must be carried out by the entity acting as the employing 
unit. 

Whether the Office of the Commonwealth's Attorney for 
the City of Richmond or the city itself should choose to act 
as the employing unit, funds to pay any claim should be 
considered as, and obtained on the same basis as salary and 
other benefits. The right to receive unemployment compensation 
benefits while eligible is guaranteed to all public employees not subject to an exemption, and the cost 
must be considered as an associated obligation to the general 
compensation of the employee. Accordingly, under § 14.1-63, 
the costs of benefits should be considered as compensation 
within the meaning of that section and are properly 
reimbursable as compensation authorized by the State 
Compensation Board upon the submission of satisfactory 
evidence that the expense was incurred.
UNEMPLOYMENT COMPENSATION ACT. § 60.1-52.3(B) INCLUDES FULL-TIME AND PART-TIME EMPLOYMENT FOR PURPOSES OF ELIGIBILITY FOR UNEMPLOYMENT COMPENSATION.

June 16, 1981

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You have asked whether individuals employed full-time by educational institutions in capacities other than instructional, research or principal administrative are denied unemployment compensation under § 60.1-52.3(B) of the Code of Virginia (1950), as amended. You correctly note that such employees employed part-time are expressly denied unemployment compensation during the period between two successive academic years and during normal vacation periods and holiday recesses under § 60.1-52.3(B).

Section B of § 60.1-52.3 was first enacted as an amendment to § 60.1-52.3 in 1977. The 1977 enactment made no express provision regarding part-time employment. Following the 1977 amendment to § 60.1-52.3 there was some question whether the disqualification for unemployment compensation benefits applied to part-time employment as well as to full-time employment. This Office ruled that the disqualification applied to both part-time and full-time employment. See Opinion to the Honorable J. Harry Michael, Jr., Member, Senate of Virginia, dated November 7, 1977, and found in Report of the Attorney General (1977-1978) at 469.

The last paragraph of the section, which specifically denies compensation to individuals performing services on a part-time or substitute basis, was added to § 60.1-52.3(B) in a 1979 amendment. Prior to the 1979 amendment to § 60.1-52.3, full-time employment, as defined by that section, was clearly covered, as there was no reference to part-time employment. It is an accepted principle of statutory construction that a statute is not repealed by implication. South Norfolk v. Norfolk, 190 Va. 591, 58 S.E.2d 32 (1950). I conclude the 1979 amendment adding the language specifically covering part-time employment was not intended to repeal the statute's application to full-time employment. I am, therefore, of the opinion that full-time employees of educational institutions are denied unemployment compensation under the provisions of § 60.1-52.3 during periods between successive academic years and normal vacation or holiday periods.

UNEMPLOYMENT COMPENSATION ACT. STATE EMPLOYEES. VIRGINIA DEPARTMENT OF HIGHWAYS AND TRANSPORTATION. STATE HIGHWAY DEPARTMENT EMPLOYEES AFFECTED BY LAYOFF ARE SUBJECT TO POSSIBLE DISQUALIFICATION FOR FAILURE TO DEMONSTRATE GOOD CAUSE TO LEAVE WORK.
May 11, 1981

The Honorable Frederick C. Boucher
Member, Senate of Virginia

This is in response to your request for my opinion concerning unemployment compensation benefits for employees affected by lay-offs contemplated by the Virginia Department of Highways and Transportation. Specifically, you inquired whether employees who choose to work at less remunerative positions rather than be laid off, and subsequently relinquish such a lower paying job would be subject to disqualification for voluntarily leaving employment pursuant to § 60.1-58(a) of the Code of Virginia (1950), as amended.

Section 60.1-58(a) does disqualify those individuals who leave work voluntarily, without good cause. Good cause within the meaning of unemployment statutes has never been defined by the Supreme Court of Virginia. Several circuit courts have adopted the view that good cause is present when circumstances are so compelling that a reasonable person desirous of retaining his employment would have no alternative other than to leave work. The situations about which you ask would be subject to case by case determinations under § 60.1-58(a), with eligibility for unemployment benefits dependent upon whether or not the employee left work for good cause as defined above.

USURY. EFFECT OF USURY LAWS ON SHARED APPRECIATION MORTGAGES.

January 8, 1981

The Honorable Willard J. Moody
Member, Senate of Virginia

You have asked for my interpretation of the effect of Virginia's usury laws on shared appreciation mortgages (hereinafter "SAMs") made by an unlicensed and nonregulated lender, as a first mortgage and as a second mortgage. Based on the information which you provided, this opinion is limited in its application to residential first mortgages regardless of the length of maturity, and residential second mortgages with terms in excess of 10 years.

The interest on a SAM is made up of two components: 1) a stated interest rate lower than the current market rate for the full term of the loan and 2) additional interest equal to a percentage of the appreciation in the value of the property. The additional interest component is computed and paid to the lender at the time when the property is sold or transferred or the loan becomes due.

Section 6.1-330.37 of the Code of Virginia (1950), as amended, applies to loans secured by a first mortgage. Section 6.1-330.16(E) applies to loans secured by a
subordinate mortgage with an initial maturity in excess of 10 years. Both sections provide that such contracts may be lawfully enforced at the "interest rate stated therein." Section 6.1-330.37(B) states that for the purpose of §§ 6.1-330.37(A) and 6.1-330.16 "an interest rate which varies in accordance with any exterior standard, or which cannot be ascertained from the contract without reference to any exterior circumstances or documents, shall not be an 'interest rate stated therein....'"

Part of the interest rate on a SAM is computed as a percentage of the appreciation in property values. In order to compute this amount, reference must be made to exterior circumstances, namely, the real estate market. Therefore, the interest on a SAM is not an "interest rate stated therein." Consequently, it is not enforceable under either § 6.1-330.37 or § 6.1-330.16(E).

In the event that a mortgage rate varies with regard to an exterior standard, as does the SAM, §§ 6.1-330.37 and 6.1-330.16 provide that an unlicensed lender may impose interest not in excess of the eight per centum per annum rate stated in § 6.1-330.11. As you pointed out in your letter, the exact interest rate is unknown at the time that the loan is made. However, given the prevailing interest rates, it can reasonably be assumed that the interest rate on a SAM mortgage would be greater than eight per centum per annum. Accordingly, I am of the opinion that SAMS made by unlicensed and nonregulated lenders would be in conflict with Virginia's usury laws.

VIRGINIA ANTITRUST ACT. TRADE ASSOCIATION NEWSLETTER MAY BE VEHICLE FOR PRICE FIXING.

January 5, 1981

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

You ask whether certain comments contained in a newsletter of the Virginia Gasoline Retailers Association, Inc. ("VGRA") constitute a violation of Virginia's antitrust laws.

The VGRA Newsletter, dated 6/23/80, contains a paragraph which reads as follows:

"WHILE WE ARE ON THE SUBJECT OF ALLOCATIONS--LET'S ALSO TALK ABOUT VOLUME AND PROFITS--After we and other Associations worked our tails off to get you an increase in margin--now 16.8¢ per gallon--some dealers are now giving away part of this margin to try and get more volume. Let's look at some hard facts:
1. Dealer pumps 40,000 gallons @16.8¢ = $6,720 gross profit."
2. Dealer cuts margin 5¢ and works on 11.8¢, increases gallonage by 30% to 52,000 gallons (provided dealer can get gas from supplier). His gross profit is now $6,136.00--or $584.00 LESS for the month.

3. Dealer reduces margin 10¢ and works on 6.8¢ gallon, increases volume by 100% to 80,000 gallons (provided dealer can get gas from supplier). His gross profit is now $5,440.00--or $1,280.00 LESS than when he sold his 40,000 gallons at full allowable margin.

As Tom Anderson of the Pennsylvania Association says, 'Some people cannot stand prosperity while some cannot stand poverty--both words begin with the letter "P", but the meanings are as far apart as success and failure.'

Applicable Antitrust Principles

The VGRA Newsletter invites members of the association to maintain prices in the upper range of the margin allowed by federal regulations. It stigmatizes the behavior of retailers who choose to trade a high profit margin for increased volume.

The Virginia Antitrust Act states that, "Every contract, combination or conspiracy in restraint of trade or commerce of this State is unlawful." See § 59.1-9.5 of the Code of Virginia (1950), as amended. This language follows closely the language of § 1 of the Sherman Act, 15 U.S.C. § 1. The General Assembly provided that interpretation of the Virginia Antitrust Act should harmonize with the construction of comparable federal provisions. See § 59.1-9.17. Therefore, it is necessary to scrutinize federal case law to analyze the question here presented.

In United States v. Socony-Vacuum Oil Co., Inc., et al., Justice Douglas enunciated the applicable rule: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." 310 U.S. 150, 223 (1940). The proper test under the per se rule is not whether there is an actual effect on prices, but whether the agreement may "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., et al., 340 U.S. 211, 213 (1951). See L. Sullivan, Handbook of the Law of Antitrust § 74 (1977). An agreement by VGRA members to set prices as suggested in the newsletter would be a clear example of such illegal activity.

Even in the absence of an agreement between VGRA members, the circulation of this type of price information may in some circumstances constitute a violation of antitrust laws. In the area of data dissemination, the facts of each case are of great importance. It has been held that the mere exchange of general statistics or market information does not give rise to a violation of § 1 of the Sherman Act (or,
therefore, a violation of the Virginia Antitrust Act). In Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563 (1925), a trade association gathered and disseminated information about product cost, volume of production, transportation costs, and actual prices received in past transactions. The U.S. Supreme Court held on those limited facts that no antitrust violation existed. Indeed, for the court to hold otherwise would have rendered meaningless the existence of trade associations.

Accordingly, circulation of the VGRA Newsletter in and of itself does not constitute on its face a violation of antitrust laws. However, if gasoline retailers act upon the VGRA's suggestion, pursuant to agreement with the association or with each other, I believe that a horizontal price fixing agreement—which is a per se violation of federal and Virginia law—would exist.¹

¹Activities of a trade association to promote price uniformity among members can constitute a violation of antitrust laws. This was the case in Plymouth Dealers Ass'n of Northern California v. United States, 279 F.2d 128 (9th Cir. 1960) where the association activity had the acquiescence of the membership. United States v. Container Corp. of America, 393 U.S. 333 (1969), held unlawful an agreement between competitors to exchange price information in circumstances in which the practical effect was to promote price uniformity.

VIRGINIA CONFLICT OF INTERESTS ACT. CABLE TELEVISION FRANCHISE UNDER § 15.1-23.1 NOT CONTRACT UNDER § 2.1-349. MEMBER OF LOCAL GOVERNING BODY NOT PROHIBITED FROM HAVING MATERIAL FINANCIAL INTEREST IN CABLE TELEVISION FRANCHISE AWARDED BY GOVERNING BODY.

September 15, 1980

The Honorable J. Paul Councill, Jr.
Member, House of Delegates

You ask whether, under § 2.1-349 of the Code of Virginia (1950), as amended, a member of a local governing body may have a material financial interest in a business holding a cable television franchise awarded by the governing body.

Section 2.1-349(a) provides that no officer of a governmental agency shall have a material financial interest in any contract with the governmental agency of which he is an officer, and the fact that any such contract is let after competitive bidding is irrelevant.

A contract under § 2.1-348(c) includes any agreement to which a governmental agency is a party.¹ The cable television franchise in question is presumably a license,
franchise or certificate of public convenience and necessity issued under the authority of § 15.1-23.1 (licensing and regulation of community antenna television systems), or some similar statute.  

Under § 15.1-23.1, the local governing body has authority to franchise one or more systems, impose a tax thereon, regulate the systems, establish fees and rates, assign and operate certain channels, and set certain minimum standards. A franchise under § 15.1-23.1 is therefore a classic example of the local government's exercise of its police and taxing powers. The enforceable promises and undertakings normally involved are terms and conditions ancillary to the exercise of the police and taxing powers. Compare § 15.1-491.1 (conditional zoning—whereby a zoning reclassification may be allowed subject to certain conditions preferred by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned).

A franchise under § 15.1-23.1 is therefore not a contract within the meaning of § 2.1-349 (certain contracts, sales, purchases forbidden). The franchise will, however, in the normal course of things, give rise to transactions before the governing body that may be covered by § 2.1-352 (disqualification as to transactions not of general application).

Accordingly, I find that § 2.1-349 does not prohibit a member of a local governing body from having a material financial interest in a business holding a cable television franchise awarded by the governing body under § 15.1-23.1, or some similar statute. At the same time, however, the requirements of §§ 2.1-352 (disqualification) and 2.1-353 (disclosure) remain applicable.


2Section 2.1-348(f)(3) provides that for purposes of § 2.1-349 only, employment by, ownership of, an interest in, or service on the board of directors of public service corporations shall not be deemed to be a material financial interest. While operation of a cable television franchise is similar in many ways to a public service business, cable television franchises are not regulated as public service corporations. See §§ 56-1 (definition of public service corporation) and 56-2 (every public service corporation to be governed by the provisions of Title 56 (Public Service Corporations)). Accordingly, I have concluded the exemption in § 2.1-348(f)(3) does not apply in the present situation.

3Similarly, § 2.1-349 does not prohibit the Commissioner of Motor Vehicles from holding a motor vehicle operator's
permit, nor does § 2.1-349 prohibit a commissioner of the revenue from holding a local license for an automobile. Compare Opinion to the Honorable Donald G. Pendleton, Member, House of Delegates, dated April 13, 1971, found in Report of the Attorney General (1970-1971) at 431 (member of General Assembly may serve on board of organization holding ABC license—no mention of § 2.1-349, which could apply if ABC license deemed contract).

The power of a local government to regulate franchises is a power to impose conditions upon a consent of the local government, which consent the local government has the right to withhold or to grant subject to conditions and the power is therefore not, strictly speaking, a power to contract. Virginia-Western Power Company v. Clifton Forge, 125 Va. 469, 125 Va. 469, 99 S.E. 723 (1919), cert. denied, 251 U.S. 557 (1919). Compare Town of Victoria v. Victoria Ice, Light & Power Co., 134 Va. 134, 114 S.E. 92 (1922) and City of Richmond v. Virginia Rwy. & Power Co., 141 Va. 69, 126 S.E. 353 (1925).

See, also, Opinion to the Honorable J. Richmond Low, Jr., Commonwealth's Attorney for King George County, dated July 14, 1980 (permit to mine sand and gravel does not confer vested rights beyond reach of police power, citing Art. IX, § 6 of Virginia Constitution (1971)) (copy enclosed).

Contrast, however, Opinion to the Honorable David D. Brown, Commonwealth's Attorney for Washington County, dated March 5, 1973, found in Report of the Attorney General (1972-1973) at 33 (assumes franchise under § 15.1-23.1 is contract for purposes of § 2.1-349). The Brown Opinion is overruled to the extent it is inconsistent with this Opinion.

You also ask for general guidance on how a member of the governing body may discharge his responsibilities under §§ 2.1-352 and 2.1-353.


See, also, Opinion to the Honorable William B. Hopkins, Member, Senate of Virginia, dated March 24, 1975, found in Report of the Attorney General (1974-1975) at 553 (compliance with §§ 2.1-352 and 2.1-353); Opinion to the Honorable N. Samuel Clifton, Executive Director, Virginia State Bar, dated July 25, 1974, Ibid, at 560 (disqualification where personal interests affect ability to make decision in objective and unbiased manner).

VIRGINIA CONFLICT OF INTERESTS ACT. COMMONWEALTH'S ATTORNEYS. "EXCLUSIVE" JURISDICTION UNDER § 2.1-356 AS TO LOCAL LEVEL OF GOVERNMENT. NOT BAR TO PROSECUTION UNDER § 2.1-354 BASED ON COMPLAINT OF PRIVATE CITIZEN.
May 4, 1981

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You ask whether § 2.1-356 of the Code of Virginia (1950), as amended, bars prosecution of a public officer serving at the local level of government on misdemeanor charges under § 2.1-354, where prosecution is based on a warrant issued under § 19.2-72 on complaint of a private citizen, rather than on process initiated by the Commonwealth's attorney.

Sections 2.1-354 and 2.1-356 are part of the Virginia Conflict of Interests Act (Ch. 22 of Title 2.1) (herein the "Act"). Section 2.1-354 provides that any officer who willingly violates certain provisions of the Act shall be guilty of a misdemeanor, and upon conviction thereof, shall, in addition to any other fine or penalty provided by law, forfeit his office.

Section 2.1-356 provides that the Act shall be enforced by the Attorney General with regard to violations by an officer serving at the State level of government, and by each attorney for the Commonwealth with regard to violations by an officer serving at the local level of government.

Further, § 2.1-356 provides that in addition to the other powers and duties prescribed by law, the Attorney General and each attorney for the Commonwealth shall have the power and duty within the area within which each is responsible under § 2.1-356, to render advisory opinions as to whether the facts in a particular case would constitute a violation of the Act. Irrespective of whether such an opinion has been rendered, § 2.1-356 states that this provision shall not be construed to deny to any person the right to seek a declaratory judgment or other judicial relief as provided by law.

Section 19.2-72 provides that on complaint of a criminal offense to any officer authorized to issue criminal warrants, such officer shall examine on oath the complainant and any other witnesses. If upon such examination such officer finds that there is probable cause to believe the accused has committed an offense, such officer shall issue a warrant for his arrest.

Section 15.1-8.1(B) provides that the Commonwealth's attorney shall be part of the department of law enforcement in the county or city in which he is elected, and shall have the powers and duties imposed upon him by general law, including the duty of prosecuting all warrants, indictments and informations charging felony, and he may in his discretion, prosecute certain other violations. Further, § 15.1-8.1(B) states that the Commonwealth's attorney shall enforce all forfeitures, and carry out all duties imposed upon him by § 2.1-356.
Section 19.2-265.3 provides that nolle prosequi shall be entered only in the discretion of the court, upon motion of the Commonwealth with good cause therefor shown.¹

None of the foregoing provide that § 2.1-356 bars prosecution of a public official at the local level of government, on misdemeanor charges under § 2.1-354, where prosecution is based on a warrant issued under § 19.2-72 on complaint of a private citizen. There is language, of course, about exclusive jurisdiction under § 2.1-356 in Commonwealth v. Holland, 211 Va. 530, 178 S.E.2d 506 (1971), but the person excluded is the Attorney General, not a member of the general public.

By way of contrast, § 2.1-356 directs that the Commonwealth's attorney shall enforce the Act at the local level of government, and § 15.1-8.1(B) provides that the Commonwealth's attorney shall carry out all duties imposed upon him by § 2.1-356. As to some misdemeanors, the Commonwealth's attorney has discretion under § 15.1-8.1, but that discretion is more limited under § 2.1-356.

In addition, warrants under § 19.2-72 are a regular form of criminal process whereby misdemeanor prosecutions may be initiated without participation of the Commonwealth's attorney.² I find no language in § 2.1-356 indicating that such process is inappropriate for prosecutions under the Act.

The Commonwealth's attorney retains, of course, discretion to move for nolle prosequi, but as § 19.2-265.3 provides, the granting of such a motion is in the discretion of the court with good cause therefor shown.

Accordingly, I am of the opinion that § 2.1-356 does not bar prosecution of a public officer serving at the local level of government on misdemeanor charges under § 2.1-354, where prosecution is based on a warrant issued under § 19.2-72 on complaint of a private citizen.³

¹Compare Opinion to the Honorable Joseph H. Campbell, Commonwealth's Attorney for the City of Norfolk, dated January 27, 1975, found in Report of the Attorney General (1974-1975) at 257 (magistrate may not withdraw warrant after it has been issued); and Opinion to the Honorable Orby L. Cantrell, Member, House of Delegates, dated April 4, 1977, found in Report of the Attorney General (1976-1977) at 156 (judge may not order magistrate not to issue arrest warrant - decision of magistrate based upon probable cause).

²Rule 3A:8(b) of the Supreme Court of Virginia provides that a "person accused of a misdemeanor may be tried on an indictment, information, warrant or summons or, where expressly authorized by statute, on an oral charge."

³
REPORT OF THE ATTORNEY GENERAL


Compare Opinion to the Honorable Benjamin L. Campbell, Judge, Juvenile and Domestic Relations Court, dated December 15, 1961, found in Report of the Attorney General (1961-1962) at 136 (justice of peace not to refuse to issue warrant solely because complaining witness is a juvenile); and Opinion to the Honorable G. L. Forrester, Sheriff of Lancaster County, dated June 16, 1969, found in Report of the Attorney General (1968-1969) at 76 (validity of arrest warrant is not to be tested by who makes the complaint).

VIRGINIA CONFLICT OF INTERESTS ACT. COMMONWEALTH'S ATTORNEYS MAY LEASE SPACE TO COUNTY, EVEN THOUGH COUNTY IN TURN ALLOCATES SPACE TO COMMONWEALTH'S ATTORNEY'S OFFICE.

January 16, 1981

The Honorable Mark S. Gardner
Commonwealth's Attorney for Spotsylvania County

You ask whether a Commonwealth's attorney who owns an office building may lease space to the county under the exemption in §2.1-349(b)(1) of the Code of Virginia (1950), as amended, if the county in turn allocates part of the space to the Commonwealth's attorney's office.

Section 2.1-349(a) restricts contracts between public officers and governmental agencies. Section 2.1-349(b)(1) provides, however, that §2.1-349(a) shall not apply to a lease of real property between an officer and a governmental agency, provided the officer does not participate as such officer in the lease, and this fact is made a matter of public record.

The allocation of space by the county to the Commonwealth's attorney will be pursuant to §§15.1-257 and §15.1-258 which require the governing body to provide suitable space and facilities for the Commonwealth's attorney to discharge the duties of his office.

The county will be the only governmental agency that is a party to the lease. Allocation of space under §§15.1-257 and 15.1-258 is largely in the governing body's discretion. The Commonwealth's attorney has little control over the exact location of his office. See, for example, Board of Supervisors of Lee County v. Commissioner of Accounts, 215 Va. 722, 214 S.E.2d 137 (1975).

Accordingly, I am of the opinion that the Commonwealth's Attorney will not be participating as such officer in the lease, and may lease space to the county, under the exemption in §2.1-349(b)(1), even though the county in turn allocates part of the space to the Commonwealth's attorney's office under §§15.1-257 and 15.1-258.
The Honorable Sidney Barney  
Commonwealth's Attorney for the City of Petersburg

Mr. Hermanze E. Fauntleroy, Jr., member of the City Council of Petersburg, has asked for my review of your opinion that, under given circumstances, a council member need not disqualify himself, under § 2.1-352 of the Code of Virginia (1950), as amended, from consideration of a proposed appropriation.

Section 2.1-356 provides that the Virginia Conflict of Interests Act (the "Act") shall be enforced by each Commonwealth's attorney with regard to officers and employees serving at the local level of government in and for the jurisdiction served by such Commonwealth's attorney. At the local level of government, the role of the Attorney General under § 2.1-356 is limited, to a large degree, to review of advisory opinions of the Commonwealth's attorney.¹

Further, § 2.1-356 prescribes that the Attorney General shall review the opinion of the Commonwealth's attorney in case the opinion finds a violation of the Act. Section 2.1-356 does not provide for review by the Attorney General when the the Commonwealth's attorney finds no violation.

Section 2.1-356 does provide, however, that irrespective of whether an opinion of the Commonwealth's attorney has been rendered, § 2.1-356 shall not be construed to deny any person the right to seek a declaratory judgment or other judicial relief as provided by law.

Virginia (1950), as amended, so as to exempt an officer, director and indirect stockholder under § 2.1-349.

Section 2.1-348(f)(3) provides that, for purposes of § 2.1-349 only, employment by, ownership of, an interest in, or service on the board of directors of financial institutions shall not be deemed a material financial interest within the meaning of the Virginia Conflict of Interests Act (Ch. 22 of Title 2.1).

The finance leasing and service firm has assets of about $29 million, and outstanding debts of about $22 million. Formal lines of credit of about $30 million are available from institutional lenders, and substantial additional credit is available under informal lines. The firm has active leases in a majority of states throughout the United States, and it has been operating for ten years.

The firm provides a wide range of financial services for private business, and for state and local governments. These financial services include 1) equipment lease financing, on a full pay-out basis, both as equipment lessor and as packager for banks which act as equipment lessors for their customers, 2) conditional sales financing of certain property with high residual value, 3) equipment leasing and conditional sales financing for state and local governments at tax-exempt money rates, 4) sale and leaseback financing, and 5) occasional transactions involving consultant and finder's services as to various kinds of property.

The first category of service is permissible for affiliates of registered bank holding companies. See 12 C.F.R. § 225.4. Furthermore, under § 6.1-58.1 (part of the Virginia Banking Act), controlled subsidiaries of state and national banks are expressly permitted to engage in this category of service.

This Office has previously ruled that commercial banks and investment banking firms are financial institutions under § 2.1-348(f)(3). In the present case, the activities of the finance leasing and service firm are a mixture of investment banking and commercial bank financing. An element of novelty, perhaps, is the emphasis on equipment lease financing, on a full pay-out basis. Financial markets, services and institutions have been changing, however, and as noted above, the law already recognizes this lease financing as an appropriate financial service for controlled subsidiaries of state and national banks, and for affiliates of registered bank holding companies.

Accordingly, I am of the opinion that a finance leasing and service firm, as described herein, is a financial institution under § 2.1-348(f)(3), so as to exempt an officer, director and indirect stockholder under § 2.1-349. It will be necessary for the officer to disclose his interest in specific transactions as required by § 2.1-352 and to comply with other provisions of the act. To the extent that
the firm in question may desire to make sales of goods or equipment to the University of Virginia, it would be necessary to examine the facts of each transaction in order to determine whether the activity is properly one which falls within the exemption for finance companies.

1Opinion to the Honorable William B. Hopkins, Member, Senate of Virginia, dated March 24, 1975, found in Report of the Attorney General (1974-1975) at 553 (relating to an investment banking firm) and 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 (relating to a Culpeper commercial bank).

2As § 2.1-348(f)(3) expressly provides, the exemption applies only to § 2.1-349 and to material financial interests thereunder.

VIRGINIA CONFLICT OF INTERESTS ACT. MUST BE CAUSAL CONNECTION BETWEEN OFFICIAL TRANSACTION AND MATERIAL FINANCIAL EFFECT ON OFFICIAL'S PECUNIARY INTERESTS. DEFINING REQUIRED CAUSAL CONNECTION IS QUESTION OF FACTUAL ANALYSIS.

January 28, 1981

The Honorable Richard H. Barrick
Commonwealth's Attorney for the City of Charlottesville

I have been asked to review, under § 2.1-356 of the Code of Virginia (1950), as amended, your opinion to Mr. John G. Conover ruling that as a council member he has a material financial interest, under § 2.1-352, in certain official transactions before the council.

The official transactions relate to development of a hotel and conference center in a cleared portion of an urban renewal project. You advise Mr. Conover has an ownership interest in real estate across the street from the development site. He acknowledges a "successful" development may have a positive influence on his ownership interest, and an "unsuccessful" development may have a negative impact.

Under § 2.1-352, there must be some causal connection between the official transaction and a material financial effect on the public official's pecuniary interests.

Defining the required causal connection in each situation is largely a question of factual analysis.

On the facts presented, I find no basis for making a determination different from that of your opinion.

Nevertheless, you may want to consider whether any of the council's official transactions in respect of the
The applicable principles of valuation are clear. As in condemnation, the value affected (upwards or downwards) must be the present fair market value. Remote and speculative effects are not to be considered. See Appalachian Elec. Power 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).

Your opinion states that the intent of the Virginia Conflict of Interests Act (the "Act") is to avoid even the appearance of impropriety. While such is one of the underlying purposes of the Act, many of its provisions are not operative in the absence of a "material financial interest." The concept of material financial interest operates in part as a de minimis provision.

If the effect of the development on the present value of Mr. Conover's ownership interest (and his spouse's) does not give rise to a material financial interest, then the requirements of § 2.1-352 do not apply. In the present situation, the question of material financial interest is a question of changes in valuation, but no valuation has been submitted to me.

VIRGINIA CONFLICT OF INTERESTS ACT. SCHOOLS. TIE-BREAKER FOR SCHOOL BOARD MAY NOT HAVE MATERIAL FINANCIAL INTEREST IN HARDWARE BUSINESS SELLING NUMEROUS AND SUNDRY ITEMS TO SCHOOL BOARD.

January 8, 1981

The Honorable Philip P. Purrington, Jr.
Commonwealth's Attorney for Lancaster County

You ask whether, under § 2.1-349(a)(1) of the Code of Virginia (1950), as amended, an individual may at the same time serve as tie-breaker for a county school board, under § 22.1-75, and have a material financial interest in a hardware business selling numerous and sundry items to the school board.

This Office has ruled that tie-breakers under §§ 15.1-535 and 15.1-540 are officers of a governmental agency, albeit part-time officers, for purposes of the Virginia Conflict of Interests Act (Ch. 22 of Title 2.1). See Opinion to the Honorable Robert C. Wrenn, Clerk, Circuit
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I see no material difference between tie-breakers under § 22.1-75 and tie-breakers under §§ 15.1-535 and 15.1-540. In fact, § 22.1-75 provides that proceedings involving school board tie-breakers shall be in conformity with the proceedings prescribed by § 15.1-540.

Further, this Office has ruled that an individual may not at the same time serve as a member of a county school board, and have a material financial interest in a business selling numerous and sundry items to the school board.

Accordingly, I am of the opinion that, under § 2.1-349(a)(1), an individual may not at the same time serve as tie-breaker for a county school board, under § 22.1-75, and have a material financial interest in a hardware business selling numerous and sundry items to the school board.

1See, for example, Opinion to the Honorable John L. Jeffries, III, Commonwealth's Attorney for Culpeper County, dated June 23, 1970, found in Report of the Attorney General (1969-1970) at 308 ("odds and ends of automotive repair parts on an over the counter basis at the regular set price schedule charged by the concern to all customers").

VIRGINIA CONFLICT OF INTERESTS ACT. SEPARATE GOVERNMENTAL AGENCY. OIL SUPPLY FIRM MAY PARTICIPATE IN STATE FUEL ASSISTANCE PROGRAM ADMINISTERED BY LOCAL WELFARE DEPARTMENT EVEN THOUGH MEMBER OF LOCAL GOVERNING BODY HAS MATERIAL FINANCIAL INTEREST IN FIRM.

September 12, 1980

The Honorable Peter K. Babalas
Member, Senate of Virginia

You ask whether an oil supply firm may participate as a vendor in the State Fuel Assistance Program (as administered by the local welfare department), when a member of the local governing body has a material financial interest in the oil supply firm, as defined in the Virginia Conflict of Interests Act, Ch. 22 of Title 2.1 of the Code of Virginia (1950), as amended.

Your inquiry is controlled by this Office's Opinion to the Honorable Floyd Caldwell Bagley, County Attorney for Prince William County, dated August 25, 1972, found in Report of the Attorney General (1972-1973) at 486 (subject to § 2.1-349(a)(2), board of public welfare may refer welfare recipients to physician who is member of governing body and pay for such services out of welfare funds).
The premise for the Bagley Opinion is that the local governing body and the local welfare department are separate governmental agencies for purposes of the Virginia Conflict of Interests Act. The absolute prohibition of § 2.1-349(a) applies only to contracts involving the public officer and his own governmental agency. If the contract involves another governmental agency, the contract is permissible, subject to the requirements of § 2.1-349(a)(2).

You enclosed with your inquiry an opinion of the Commonwealth's attorney to the effect that § 2.1-349(a)(1) would apply. Unless the Commonwealth's attorney has special facts that make the Bagley Opinion inapplicable, it is my conclusion that the oil supply firm may participate as a vendor in the State Fuel Assistance Program (as administered by the local welfare department) even though a member of the local governing body has a material financial interest in the oil supply firm, subject, however, to the requirements of § 2.1-349(a)(2).

1See Opinion to the Honorable J. M. H. Willis, Jr., Commonwealth's Attorney for the City of Fredericksburg, dated September 17, 1970, found in Report of the Attorney General (1970-1971) at 408 (local welfare department may buy food from grocery store owned and operated by member of city council, subject to § 2.1-349(a)(2)).


VIRGINIA FREEDOM OF INFORMATION ACT. DEFINITIONS. "MEETINGS" SUBJECT TO ACT. MEETINGS OF COMMITTEE OF LOCAL GOVERNING BODY WITH ONLY TWO MEMBERS.

May 11, 1981

The Honorable J. Paul Councill, Jr.
Member, House of Delegates
You ask whether meetings of a committee of a county governing body are meetings subject to the Virginia Freedom of Information Act (the "Act") (Ch. 21 of Title 2.1 of the Code of Virginia (1950), as amended), if the committee has only two members.

Section 2.1-341(a) provides that a meeting under the Act means a meeting, when sitting as a body or entity, or as an informal assemblage of (i) as many as three members, or (ii) a quorum, if less than three, of the constituent membership of any legislative body or agency of any political subdivision of the Commonwealth, including counties; governing bodies of counties; and other organizations or agencies in the Commonwealth, supported wholly or principally by public funds.¹

Prior to the amendment of § 2.1-341(a) in 1979, this Office had held that a gathering of two or more members of a governing body, as a committee, for the purpose of discussing official business or functions of the governing body, constituted a "meeting" under § 2.1-341(a), and that such meeting was subject to the same provisions as gatherings of the full membership of a governmental body at which official business is considered.²

Under the present wording of § 2.1-341(a), the two-member committee presumably does not constitute a quorum of the governing body, but the two members necessarily constitute a quorum of the two-member committee, which committee constitutes a legislative body or agency of a political subdivision of the Commonwealth, and an organization or agency in the Commonwealth, supported wholly or principally by public funds.³

Accordingly, I am of the opinion that meetings of a committee of a county governing body are meetings subject to the Act, even though the committee has only two members.

¹Section 2.1-341(a) was amended in 1979 to insert the language "(i) as many as three members, or (ii) a quorum, if less than three, of...." See Ch. 687 [1979] Acts of Assembly. Prior to the amendment, § 2.1-341(a) provided that a meeting under the Act meant a meeting, when sitting as a body or entity, or as an informal assemblage, of the constituent membership of, etc.
³Compare Opinion to the Honorable James B. Murray, Member, House of Delegates, dated March 22, 1978, found in Report of the Attorney General (1977-1978) at 482 (honor committee elected by student body to administer public university's honor code deemed other organization or agency supported wholly or principally by public funds).
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VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETING. DISCUSSION OF ELECTION OF MAYOR.

July 28, 1980

The Honorable Owen B. Pickett
Member, House of Delegates

You ask whether the Virginia Freedom of Information Act (the "Act") permits city council to discuss the selection of a mayor in an executive meeting. The Virginia Beach City Code requires that, following a general election of councilmen, the council shall choose one of its members to serve as mayor.

The Act requires that all meetings of public bodies shall be public meetings, except as specifically provided in §§ 2.1-344(a)(1) through 2.1-344(a)(9) and 2.1-345 of the Code of Virginia (1950), as amended. Section 2.1-344(a)(1) provides that public bodies may hold executive meetings for: "[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, 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." (Emphasis supplied.) I, therefore, conclude that the city council may hold an executive meeting for discussion of selecting a mayor. Council would, however, be required by the Act to elect its mayor in a public meeting. See § 2.1-344(c); Opinion to the Honorable John H. Chichester, Member, Senate of Virginia, dated July 14, 1980 (copy enclosed); see, also, Opinion to the Honorable Charles A. Christophersen, Director, Division of State Planning, dated September 18, 1974, and found in Report of the Attorney General (1974-1975) at 578.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETING. DISCUSSION OF HEALTH HAZARDS IN PUBLIC BUILDINGS.

July 28, 1980

The Honorable George W. Grayson
Member, House of Delegates

You ask whether a public body may hold an executive meeting to discuss "matters of possible public health hazard, such as government asbestos ratings on publicly-owned buildings...."

The Virginia Freedom of Information Act (the "Act") requires that all meetings of public bodies be public, except as specifically authorized by §§ 2.1-344(a)(1) through 2.1-344(a)(9) and 2.1-345 of the Code of Virginia (1950), as amended. See § 2.1-343. Section 2.1-344(a)(2) permits executive meetings for: "[d]iscussion 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(a)(2) is designed to allow private discussion concerning publicly owned real property or property that may be acquired for public purposes to avoid injury to interests of the public in acquiring and disposing of real property at fair market value. You do not indicate, however, that there is any present plan of acquisition or disposition of the buildings in question.

Section 2.1-340.1 provides that the exceptions to the open meeting rule are to be construed narrowly to effectuate the broad purposes of the Act, which include ensuring that "no thing which should be public may be hidden from any person." See § 2.1-340.1. The possible existence of a public health hazard in publicly-owned buildings is information which should not be hidden from the public. I, therefore, conclude that a public body may not hold an executive meeting to discuss potential health hazards or government asbestos ratings of publicly-owned buildings.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS.

September 22, 1980

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask whether the Virginia Freedom of Information Act (the "Act") permits an executive meeting held by a city council for discussion of the following topics: (1) resolution of drainage problems in a particular area of the city; (2) use of private auto repair firms for servicing city vehicles; (3) reduction of city garbage collections; (4) prosecution of adult movie theaters under city obscenity ordinances; and (5) relocation of the city's arts center to a building now privately owned.

The Act requires that all meetings of public bodies shall be open meetings except as otherwise specifically provided by law. See § 2.1-343 of the Code of Virginia (1950), as amended. Section 2.1-340.1 further provides that any statutory exceptions to the Act's public access requirements shall be narrowly construed. The specific purposes for which public bodies may conduct executive meetings are set forth in §§ 2.1-344(a)(1) through 2.1-344(a)(9).

Drainage

I find no provision of the Act which would authorize an executive meeting for discussion of solutions to the city's drainage problems. Your inquiry does not indicate that these
discussions involved possible acquisition of drainage easements or other real property acquisitions which would be appropriate matters for executive discussion under § 2.1-344(a)(2). In any event executive discussion of possible real estate acquisitions would not authorize executive discussion of other aspects of city drainage problems. See § 2.1-344(b). The council's discussions concerning drainage, therefore, violated the Act.

Use of Private Firms for City Auto Repairs

No provision of the Act authorizes executive discussion of the city's possible use of private firms for city school bus repairs. You do not indicate that council considered the terms of proposed contractual arrangements with specific auto repair firms, which discussion may be authorized under § 2.1-344(a)(6). Council's discussions of the use of private firms for auto repairs was in violation of the Act.

Garbage Collection

Executive discussion of possible reduction of city garbage collections is not authorized by the Act. The fact that a reduction in garbage collections would affect the work schedules of city garbage collection employees does not make applicable § 2.1-344(a)(1), authorizing executive discussion of personnel matters. Section 2.1-344(a)(1) has been consistently interpreted to apply only where discussions involve personnel matters of individually identified employees. See Opinion to the Honorable James H. Dillard, II, Member, House of Delegates, dated March 20, 1980 (copy enclosed). Thus, council's executive discussion of possible reductions in garbage collections violated the Act.

Obscenity Prosecutions

Council's executive discussion of pending or potential prosecution of theater operators under city obscenity ordinances was permitted by the Act. Section 2.1-344(a)(6) authorizes executive discussion of actual or potential litigation or other legal matters within the jurisdiction of the public body. You indicate that under city obscenity ordinances the city attorney has authority to bring prosecutions for violations. Council's discussion of potential obscenity prosecutions was, therefore, permitted by the Act.

Relocation of Arts Center

Council's executive discussion of possible relocation of its arts center to a specific location now privately owned was permitted. Executive discussion concerning acquisition or use of real property for public purposes is authorized under § 2.1-344(a)(2). Since you indicate that council's discussions involved a specifically identified privately owned site for possible relocation, I find § 2.1-344(a)(2)
applicable. Accordingly, such executive discussions concerning relocation of the city arts center were proper under the Act.

With respect to council's executive discussions which were not permitted by the Act, three points are important. First, the fact that no vote or other formal action was taken in the executive meeting does not cure the illegality of such meeting. The Act requires that all "meetings" be open and defines "meetings" as any assemblage of three or more members of a public body where official business of the public body is discussed or transacted, whether or not votes are cast. See § 2.1-341(a). Second, since no votes or other final actions were taken in the illegal, executive discussions, the provisions of § 2.1-344(c), requiring a public vote on matters voted on in executive session, is not applicable. Finally, the fact that matters which may not be discussed legally in a closed meeting arise spontaneously in a lawful executive meeting does not make legal the entire executive meeting. The Act specifically anticipates this problem and provides that discussions in lawfully authorized executive meetings must be limited to only those matters specifically permitted by law. See § 2.1-344(b).

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. DISCUSSION OF ZONING, RE-ZONING AND RELATED GENERAL LEGAL CONSIDERATIONS.

July 28, 1980

The Honorable Jerry H. Geisler
Member, House of Delegates

You ask whether the Virginia Freedom of Information Act (the "Act"), specifically § 2.1-344(a)(6) of the Code of Virginia (1950), as amended, authorizes the town council to hold an executive meeting to discuss such matters as the "purpose of zoning...steps in the rezoning process and legal matters to consider in rezoning cases."

Section 2.1-344(a)(6) permits public bodies to hold executive meetings for discussion, consultation with counsel or briefings by staff "pertaining to actual or potential litigation, or other legal matters within the jurisdiction of the public body...." Section 2.1-344(a)(6) is designed to allow private discussions concerning pending litigation or specific potential legal disputes. The reference to "other legal matters" in § 2.1-344(a)(6) would similarly authorize executive discussion of specific legal questions confronting the town council, for example, whether a particular provision of a zoning ordinance is constitutionally valid. This exception to the general rule of public meetings must, however, be construed narrowly as provided by the Act and may not be relied upon as a catch-all exemption from the open meeting requirements of the Act. See § 2.1-340.1.
Matters such as the "purpose of zoning and the steps in the rezoning process" are obviously not within the meaning of § 2.1-344(a)(6). Discussion of "legal matters to consider in rezoning cases," though generally legal in nature, would not, as I read your inquiry, relate to any specific legal matter confronting the town council. I, therefore, conclude that the matters you describe are not within the parameters of § 2.1-344(a)(6) and may not be discussed in an executive meeting.

**VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS. SCHOOL TRUSTEE ELECTORAL BOARD.**

**July 14, 1980**

The Honorable John H. Chichester
Member, Senate of Virginia

You have asked whether the school trustee electoral board may hold an executive meeting to discuss prospective school board appointees before electing them in a public meeting.

School trustee electoral boards are established under § 22-60 of the Code of Virginia (1950), as amended, and are empowered to elect the members of the county school board. See §§ 22-60 and 22-61.

The Virginia Freedom of Information Act (the "Act") requires that public bodies conduct meetings in public, except as specifically authorized by §§ 2.1-344(a)(1) through 2.1-344(a)(9). See § 2.1-343. School trustee electoral boards are public bodies subject to the requirements of the Act. See § 2.1-341(a). Section 2.1-344(a)(1) permits executive meetings for:

"Discussion or consideration of employment, 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." (Emphasis supplied.)

I conclude that § 2.1-344(a)(1) authorizes the school trustee electoral board to hold executive meetings for discussion of prospective school board appointees. The board, however, would be required to elect school board members in a public meeting. See § 2.1-344(c).
The Honorable Glenn L. Berger  
Commonwealth's Attorney for the County of Pittsylvania

You ask two questions about whether § 2.1-342(b)(1) of the Code of Virginia (1950), as amended, exempts from the Virginia Freedom of Information Act (Ch. 21 of Title 2.1) certain official records containing the results of breath analyses under § 18.2-267.

When Use Restricted to Preliminary Determination to Charge Suspected Violators

You ask first whether the official forms used to record the results of breath analyses are excluded under § 2.1-342(b)(1) when their use is restricted to the preliminary determination to charge suspected violators.

Section 18.2-267(d) provides that whenever a breath sample indicates that there is alcohol present in the blood, the police officer, who stopped the person from whom the breath was taken, may charge such person for violation of § 18.2-266, or a similar local ordinance. Under § 18.2-270, any person violating any provision of § 18.2-266 shall be guilty of a Class 2 misdemeanor.

Section 2.1-342(b)(1) provides that memoranda, correspondence, evidence and complaints related to criminal investigations are excluded from the provisions of the Virginia Freedom of Information Act. Section 18.2-267(e) provides that the breath analysis shall not be admitted in any prosecution under § 18.2-266, the purpose of the section being to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated § 18.2-266. Under the terms of § 18.2-267(e), there is no question that breath analysis forms are initially memoranda related to criminal investigations.

Accordingly, I am of the opinion that official forms used to record the results of breath analyses, under § 18.2-267, are excluded from the Virginia Freedom of Information Act when their use is restricted to the preliminary determination to charge suspected violators.

When Breath Analysis Results Made Part of Arrest Warrant

Your second question is whether records containing breath analysis results are excluded under § 2.1-342(b)(1) when they are made part of arrest warrants, by attachment of
the official forms to the warrant, or by attachment of an affidavit containing the same information.

This Office has previously held that actual executed arrest warrants held in a law-enforcement office, or copies thereof, are not exempt under § 2.1-342(b)(1). See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated July 21, 1975, found in Report of the Attorney General (1975-1976) at 418. To the extent that the breath analysis forms, or affidavits containing the same information, are made part of actual executed arrest warrants, the forms and affidavits are not exempt under § 2.1-342(b)(1).

Unexecuted arrest warrants and attached papers, however, remain memoranda relating to criminal investigations under § 2.1-342(b)(1). This is true, whether the attached papers are official forms containing breath analysis results, or affidavits containing the same information. See, also, § 15.1-135.1 and Opinion to the Honorable James A. Cales, Jr., Commonwealth's Attorney for the City of Portsmouth, dated March 2, 1976, found in Report of the Attorney General (1975-1976) at 284.

Accordingly, I am of the opinion that arrest warrants and attached papers containing breath analysis results are exempt under § 2.1-342(b)(1) until executed, and not exempt once executed.2

1The status of an official record can vary, depending upon its use. See Opinion to the Honorable S. R. Royall, Sheriff of Nottoway County, dated August 19, 1976, found in Report of the Attorney General (1976-1977) at 250.

2I offer no opinion about the desirability of attaching official forms containing breath analysis results to the arrest warrant, or placing the same information in an affidavit attached to the arrest warrant.

Rule 3A:3 (The Complaint) of the Supreme Court's Rules of Criminal Practice and Procedure requires only that the complaint shall consist of sworn statements of facts relating to the commission of an alleged offense. Rule 3A:4(a) (Arrest Warrant or Summons) provides that if it appears from the complaint there is probable cause to believe the accused has committed an offense, the magistrate shall issue a warrant for his arrest.

Section 18.2-267 authorizes arrest whenever the breath analysis indicates the presence of alcohol in the blood. Section 18.2-267(d) does not require an indication as to any specific amount of alcohol.

VIRGINIA FREEDOM OF INFORMATION ACT. RECORDS OF SHERIFF'S SPECIAL FUNDS ACCOUNT.
The Honorable W. Onico Barker  
Member, Senate of Virginia

You have asked whether financial records pertaining to funds in a special account maintained by the Pittsylvania County Sheriff's Office are official records subject to required public disclosure under the Virginia Freedom of Information Act (the "Act").

The information provided with your inquiry indicates that the funds in the special account are derived from sources such as the sale of calendars by the sheriff's department and receipts from drink vending machines located at the jail. None of the funds in the account are provided by State or county government appropriations. The account funds are, however, used, in part, for expenses related to the official function of the sheriff's department, including the purchase of business forms, automobile equipment and postage, salaries of temporary employees, reimbursements of deputies' travel expenses, and cleaning of uniforms. I am also advised that some funds have been used for criminal investigations. Expenditures have also been made for unofficial purposes such as flowers in cases of employee illness or family deaths, contributions to Christmas parties for State penal institution prisoners, and donations to local rescue squads.

The Act requires that, except as otherwise provided by law, all "official records" maintained by State and local governmental officials shall be subject to required public disclosure upon request by any citizen of this State. See § 2.1-342(a) of the Code of Virginia (1950), as amended. "Official records" are defined in § 2.1-341(b) to include:

"all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business."

Although the funds in the account you describe are not governmental appropriations they are clearly used, in part, for some of the sheriff's expenses in the performance of official duties. I, therefore, conclude that the account records in question are official records made in the transaction of public business within coverage of the Act.

The fact that these records may reflect expenditures for criminal investigations would not bring them within the exception from required disclosure provided for criminal investigative records under § 2.1-342(b)(1), provided that no
investigative information is revealed in the account records.

The account records are, therefore, official records of the sheriff's department subject to required public disclosure under the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. SALARIES. GOVERNING BODY, WHEN ADVERTISING NEW BUDGET, NOT PROHIBITED UNDER § 2.1-342(c) FROM PUBLISHING OFFICIAL SALARIES OF PUBLIC EMPLOYEES WHOSE ANNUAL RATE OF PAY IS $10,000 OR LESS.

March 20, 1981

The Honorable James H. Ward, Jr.
Commonwealth's Attorney for the County of Middlesex

You ask whether a county governing body, when advertising the budget, is prohibited under § 2.1-342(c) of the Code of Virginia (1950), as amended, from publishing the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less.

Section 2.1-342(c) provides that no provision of the Virginia Freedom of Information or Privacy Acts shall be construed as denying public access to the records of the official salary or rate of pay of any public officer, official or employee at any level of local government; provided, however, that subsection (c) shall not apply to records of the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less.

Subsection (c) was added by Ch. 810 of the 1978 Acts of Assembly to require public disclosure, upon proper request, of certain personnel records of any public officer, official or employee at any level of local government. Prior to the amendment, the Virginia Freedom of Information Act had been interpreted as not requiring the disclosure of salary records of individually named public employees.1

The amendment modified the Virginia Freedom of Information and Privacy Acts to require disclosure of salary records of named individuals previously exempt from required disclosure under the personnel records exemption. See § 2.1-342(b)(3). The amendment, however, specifically exempted from required disclosure the salaries of employees whose annual pay is $10,000 or less.2

Subsection (c) therefore leaves the salary records of such employees exempt from mandatory disclosure. Subsection (c) does not affect voluntary disclosure of the salary records of such employees.3

Accordingly, I am of the opinion that a county governing body, when advertising the new budget, is not prohibited
under § 2.1-342(c) from publishing the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less.

2 See, again, Harris Opinion, supra.
3 Regarding voluntary disclosure by a public body of personnel records, see the following in Report of the Attorney General (1977-1978):
   a) Opinion to the Honorable Mary A. Marshall, Member, House of Delegates, dated October 27, 1977, at 310;
   b) Opinion to the Honorable Jerry K. Emrich, County Attorney of Arlington County, dated January 12, 1978, at 489;
   c) Opinion to the Honorable Claude V. Swanson, Member, House of Delegates, dated May 24, 1978, at 481.


VIRGINIA FREEDOM OF INFORMATION ACT. SCHOOLS. OFFICIAL RECORDS ROUTINELY GENERATED ELSEWHERE PURSUANT TO LAW DO NOT ACQUIRE SPECIAL STATUS MERELY BECAUSE DEPOSITED WITH CHIEF EXECUTIVE OFFICER IN ORDINARY COURSE OF BUSINESS. BUS DRIVER'S MONTHLY REPORTS HELD BY SCHOOL SUPERINTENDENT.

February 26, 1981

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County

You ask whether the Bus Driver's Monthly Reports (the "Reports") held by the county superintendent of schools are excluded under § 2.1-342(b)(4) of the Code of Virginia (1950), as amended, from the Virginia Freedom of Information Act (Ch. 21 of Title 2.1).

Section 2.1-342(b)(4) excludes memoranda, working papers and correspondence held or requested by the chief executive officer of any political subdivision of the Commonwealth. School boards are political subdivisions, and the superintendents are their chief executive officers.1

The Reports give a daily summary of pupils transported, miles driven, stops made, and gas and oil added. At the end of each month, the daily amounts are totalled, and the Reports transmitted by the transportation supervisor to the superintendent of schools.
The Reports are used for internal administrative purposes, such as the planning of changes in bus routes, and are not routinely distributed to the school board or any other public body. At the same time, the Reports are prepared and maintained to comply with items 14, 17 and 18 of the Regulations Governing Pupil Transportation and Minimum Standards for School Buses prescribed by the State Board of Education under § 22.1-176(D). The Reports are also used to prepare the annual transportation report to the State Department of Education.

This Office has recently held that materials specially prepared by a superintendent come within the exclusion provided by § 2.1-342(b)(4). The materials at issue in that Opinion originated with the superintendent, however, and reflected the superintendent's special work product. The materials were not official records routinely generated elsewhere pursuant to State regulation, for which the superintendent's office became a depository in the ordinary course of business.

For the exclusion under § 2.1-342(b)(4) to be applicable, there must be some factor that specially relates an official record to the chief executive officer's requirements for the conduct of his office. Official records specially generated at the chief executive officer's request come within the exclusion. Official records routinely generated elsewhere pursuant to law do not acquire a special character merely because they come to be deposited in the superintendent's office in the ordinary course of business.

Accordingly, I find the Reports held by the county superintendent of schools are not excluded under § 2.1-342(b)(4) from the Virginia Freedom of Information Act.


WARRANTS. ARREST WARRANT CANNOT BE EXECUTED BY ISSUANCE OF SUMMONS BY POLICE OFFICER UNDER § 19.2-74.1

August 21, 1980

The Honorable Joseph H. Campbell
Commonwealth's Attorney for the City of Norfolk
You have asked two questions concerning the interpretation of § 19.2-74.1 of the Code of Virginia (1950), as amended, governing the issuance of a summons by a police officer for misdemeanors for which a person could not receive a jail sentence. Your first question is addressed in a recent Opinion to the Honorable Andre Evans, Commonwealth's Attorney for the City of Virginia Beach, dated July 29, 1980, a copy of which is enclosed.

Your remaining question concerns the situation where a magistrate has issued a warrant charging an offense for which a person cannot receive a jail sentence. You ask whether the officer serving the warrant must issue a summons in lieu of making an arrest, based on the requirements of § 19.2-74.1.

Section 19.2-74.1 requires the arresting officer to issue a summons rather than a warrant for certain misdemeanor offenses. There is no similar requirement placed on a magistrate. Upon receiving a complaint, the magistrate may issue either a summons or a warrant. See § 19.2-73. This Office has previously held that, except for violation of the motor vehicle laws, a police officer may not execute a warrant by issuing a summons in lieu of bringing the accused before a magistrate for a bond hearing. See Opinion to the Honorable Richard H. Barrick, Commonwealth's Attorney for the City of Charlottesville, dated May 2, 1978, and found in Report of the Attorney General (1977-1978) at 497. I am of the opinion that the holding of the above cited Opinion would be applicable to the situation which you pose.

I would note that when a warrant is issued and served for such an offense and the accused appears for a bail hearing, the magistrate should keep in mind the legislative intent of § 19.2-74.1. Thus, release on personal recognizance would seem to be a preferable course of action. In conclusion, it is my opinion that a police officer may not issue a summons in lieu of serving a warrant.

WASTE DISPOSAL. GARBAGE DISPOSAL SERVICES. TOWNS. UNLESS EXPRESS STATUTORY EXCEPTION APPLIES, COUNTY MAY NOT CHARGE INCORPORATED TOWNS PORTION OF OPERATING COSTS OF CENTRAL COUNTY LANDFILL.

December 30, 1980

The Honorable W. Curtis Coleburn, III
Commonwealth's Attorney for Nottoway County

You ask whether a county may charge incorporated towns within the county a portion of the operating costs of a central county landfill, established pursuant to §§ 32.1-183 and 15.1-282 of the Code of Virginia (1950), as amended.
Absent a regional plan, § 32.1-183 makes each county, city and town responsible for implementation of a local solid waste management plan. The requirement is for a separate plan, not necessarily separate facilities. There is no prohibition against a town plan that calls for participation in a county plan. Section 15.1-282 authorizes counties, cities and towns to acquire land, facilities or equipment for use in solid waste management. Sanitary landfills constitute such facilities. See §§ 32.1-177(12) and 32.1-177(15).

Towns are not exclusive of the counties in which they are located. For county-wide purposes, incorporated towns are an integral part of a county, subject to the jurisdiction of county authorities and to taxation for county purposes.1

When providing a service not required by law, a county may exclude the citizens of a town. However, this Office ruled in 1973 under the predecessor to § 32.1-1832 that where a landfill is required for an entire county, a county cannot require towns in the county to pay a percentage of the capital outlay and operating costs.3

In 1974, the General Assembly amended the predecessor to § 32.1-183 to allow counties to charge towns for solid waste disposal when both the county and town levy a consumer utility tax, and the county tax ordinance provides that revenues derived from the tax are to be used for solid waste disposal. In other words, the General Assembly carved out an express statutory exception to the rule recognized in the 1973 Opinion. This statutory exception was carried over into § 32.1-183 on the recodification of Title 32 into Title 32.1.

Accordingly, I find that, unless the express statutory exception applies, a county may not charge incorporated towns within the county a portion of the operating costs of a central county landfill, established pursuant to §§ 32.1-183 and 15.1-282.

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1Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated May 2, 1979, found in Report of the Attorney General (1978-1979) at 288.
2Section 32-9.1.

WATER. COUNTIES, CITIES AND TOWNS. MAY RESTRICT OR CURTAIL USE OF WATER IN SHORTAGE WITHOUT DECLARATION OF LOCAL EMERGENCY BY GOVERNOR.
February 9, 1981

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

You have inquired whether § 15.1-37.3:4 of the Code of Virginia (1950), as amended, and the 1978 amendment to § 44-146.16(6), authorize the City of Alexandria to restrict or curtail the use of water in a water shortage without the declaration of a local emergency by the Governor.

In 1977, this Office issued an Opinion to the Honorable Frederick Lee Ruck, County Attorney for Fairfax County, dated July 7, 1977, indicating that a locality had no such authority. See Report of the Attorney General (1977-1978) at 36. Section 15.1-37.3:4, which was enacted in 1978, however, provides as follows:

"Whenever the governing body of any county, city or town finds that a water supply emergency exists, it may adopt an ordinance restricting the use of water by the citizens of such county, city or town for the duration of such emergency; provided, however, such ordinance shall apply only to water supplied by a county, city or town, authority, or company distributing water for a fee or charge. Such ordinance may include appropriate penalties designed to prevent excessive use of water, including, but not limited to, a surcharge on excessive amounts used...."

The Emergency Services and Disaster Law has also been recently amended providing that "nothing in this chapter shall be construed as prohibiting a local governing body from the prudent management of its water supply, in the absence of a declared state of emergency, to prevent a water shortage." Prudent water supply management would, in my view, include restrictions on water use or the curtailment of water supplies during periods of water shortage. See § 44-146.16(6)

I am therefore of the opinion that the City of Alexandria may restrict or curtail the use of water in the city to prevent a water shortage without the declaration of a local emergency by the Governor.

WATER AND SEWER AUTHORITIES. NONUSER FEES AND SERVICE CHARGES UNDER § 15.1-1261. ALLOCATION OF DEBT SERVICE CHARGES FOR NONUSERS ON SAME BASIS AS REGULAR CUSTOMERS.

January 16, 1981

The Honorable J. G. Overstreet
County Attorney for Bedford County
You ask two questions about calculation of the monthly nonuser fees and service charges that a water and sewer authority may impose under § 15.1-1261 of the Code of Virginia (1950), as amended. The authority in question has a system made up of separate, unconnected facilities, and your questions relate to allocations between the separate facilities and the overall system.

Upper Limit on Nonuser Fees and Service Charges

You first ask whether calculation of the upper limit on nonuser fees and service charges is to be on the basis of the overall system, or on the basis of each separate, unconnected facility.

Section 15.1-1261 provides that persons having a domestic supply or source of potable water shall not be required to discontinue its use, 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.

The purpose of the monthly nonuser fees and charges is to allow an authority to recover debt service costs, even when a qualified person elects not to accept regular service from an authority. Your question indicates the authority has allocated its total debt service costs in different ways among different parts of its overall system. I find nothing in § 15.1-1261 that requires, or authorizes, allocation of debt service costs to nonusers on a basis other than the allocation basis used for regular customers on the same part of the authority's system.

Accordingly, I find that allocations of debt service costs, for purposes of calculating nonuser fees and service charges under § 15.1-1261, are to be on the same basis of allocation as may validly be in effect for regular customers on that part of the system.

Lower Limit on Nonuser Fees and Service Charges

You next ask about the nature of the lower limit on nonuser fees and service charges in § 15.1-1261.

Section 15.1-1261 provides that the authority's fees and charges to nonusers may be not less than any monthly nonuser fee or service charge being charged by any county, city or town in which the authority operates.

By its terms, the provision does not regulate the authority's nonuser fees and charges as between different parts of the authority's overall system. The apparent purpose of the provision is to permit the orderly division of nonuser accounts between different providers of public water service.
It is only providers of public water service that are authorized to require mandatory hook-ups. See Goode Opinion, supra. For the service provider, nonuser fees and charges represent additional revenue to meet fixed charges, without incremental operating expense. For the landowner, the nonuser fees and charges represent purchase of an exemption, from an otherwise mandatory hook-up requirement. A lower limit on nonuser fees and charges permit the orderly division of nonuser accounts as between different providers of public water service. The lower limit on nonuser fees and service charges in § 15.1-1261 does not regulate an authority's nonuser fees and service charges as between different parts of the authority's overall system, but between different providers of public water service. Accordingly, there is no requirement that fees in one part of the system be no lower than nonuser fees in counties or cities with other systems operated by the authority.


2I offer no opinion at this time on the validity of debt service cost allocations. Debt service cost allocations can be appropriate whenever an authority consolidates separate facilities with different pre-existing debt service requirements.

WATER AND SEWER AUTHORITIES. POWER OF GOVERNING BODY TO APPROVE PROJECTS UNDER § 15.1-1247. UNDER CHARTER AMENDMENT, GOVERNING BODY SURRENDERED MUCH OF POWER TO APPROVE PROJECTS.

October 31, 1980

The Honorable John S. Bundy
County Attorney for Washington County

You ask whether, under § 15.1-1247 of the Code of Virginia (1950), as amended, the Washington County Service Authority (the "Authority") is required to obtain approval of the county governing body on water projects to be undertaken by the Authority.

An authority established under the Virginia Water and Sewer Authorities Act (Ch. 28 of Title 15.1) is normally vested with all powers set forth in § 15.1-1250. Such an authority is an independent instrumentality exercising public and essential governmental functions in the area included in the authority. Therefore, the authority may generally exercise its discretion and judgment without any agency of the county exercising control over the authority.
There is, however, a statutory limitation on the foregoing rule in § 15.1-1247. Section 15.1-1247 provides that having specified the initial purpose and/or project, the governing body of the political subdivision may, from time to time by subsequent ordinance or resolution, specify further projects, and no other projects shall be undertaken than those so specified. If the governing body fails to specify any project to be undertaken, then the authority shall be deemed to have all the powers granted by the Water and Sewer Authorities Act.²

In § 4 of the Authority's charter,³ the initial purpose and/or project is clearly specified as the supply of water within the bounds of Washington County Sanitary District No. 3 and territory adjacent thereto. Therefore, as of the Authority's organization, its power to undertake projects was clearly limited pursuant to the first sentence of § 15.1-1247.

Under a 1976 charter amendment, however, the governing body has surrendered much of its power to limit projects.⁴ The amendment describes itself as a resolution to specify further projects, expressly pursuant to § 15.1-1247, but when the amendment specifies further projects, those specified projects are stated in very broad terms.

For example, the amendment adds in § 4 of the charter that the purposes of the Authority are to acquire, finance, construct, operate and maintain one or more water systems, sewer systems, sewage disposal systems, or any combinations thereof and garbage and refuse collection and disposal systems in Washington County and the counties adjacent thereto. The purposes of the Authority are thereby greatly enlarged beyond supplying water within the bounds of Sanitary District No. 3 and territory adjacent thereto. The purposes conferred by amendment are much the same as the purposes conferred under § 15.1-1250(f), in the absence of limitation under § 15.1-1247.

Further, the 1976 amendment adds to § 5 of the Authority's charter the powers granted by Ch. 28 of Title 15.1, particular reference being made to § 15.1-1250 relating to the powers of the Authority. I can see that there are certain projects that the governing body has not authorized the Authority to undertake, such as water systems beyond adjacent counties, but clearly the Authority has been authorized to acquire, finance, construct, operate and maintain one or more additional water systems in Washington County and the counties adjacent thereto.

Accordingly, I find that the Authority is not required, under § 15.1-1247, to obtain further approval of the county governing body on water projects within the scope of the 1976 resolution and charter amendment.
WATER AND SEWER AUTHORITIES. REQUIRED CONNECTIONS. SEWER CONNECTION MAY BE REQUIRED, DESPITE ABSENCE OF WATER SERVICES.

November 6, 1980

The Honorable Clinton Miller
Member, House of Delegates

You ask two questions about the power of an authority under the Virginia Water and Sewer Authorities Act (the "Act"), Ch. 28 of Title 15.1 of the Code of Virginia (1950), as amended, to require abutting landowners to connect with the authority's sewer system.

Sewer Connection Required, Despite Absence of Water Service

Your first inquiry is whether § 15.1-1261 requires abutting landowners to connect with a water and sewer authority's sewer system, when the authority does not offer water service.

Section 15.1-1261 provides that upon establishment of any water system or sewer system under the provisions of the Act, property owners may in certain circumstances be required to connect with the water main or sanitary sewer, and shall
cease to use any other source of water supply for domestic use or any other method for the disposal of sewage, sewage waste or other polluting matter.

On its face the statute says hookups can be required when either a water or a sewer system is offered. The history of § 15.1-1261 is consistent with this interpretation. At one time § 15.1-1261, and its predecessor, provided for mandatory connections only in the case of sanitary sewers. See, for example, § 15-764.23 (sewer connections) (1956 Repl. Vol. 3 to 1950 Code) and § 15.1-1261 (sewer connections) (1964 Repl. Vol. 3 to 1950 Code) (copies enclosed).

The provisions as to water systems and water mains were not added until 1970. See Ch. 617 [1970] Acts of Assembly. Furthermore, the second paragraph of § 15.1-1261 added by Ch. 603 [1980] Acts of Assembly allows an option as to certain water connections, while allowing no option as to sewer connections, further indicating a legislative intent to treat water connections as separate and apart from sewer connections.

Accordingly, I find that § 15.1-1261 requires abutting landowners to connect with a water and sewer authority's sewer system, even when the authority does not offer water service at the same time. See Opinion to the Honorable Kenneth M. Covington, Commonwealth's Attorney for Henry County, dated February 26, 1968, found in Report of the Attorney General (1967-1968) at 299.

Metering of Domestic Water Supply To Determine Sewer Charges

Your second inquiry is whether § 15.1-1261 empowers a water and sewer authority to require metering of a domestic water supply at landowner expense to determine sewer usage, when the authority does not offer water service.

Under § 15.1-1261, the authority's rules and regulations may require a reasonable connection charge for mandatory connections. What is reasonable depends on all the circumstances, but the metering of a domestic water supply, at landowner expense, does raise a question of reasonableness.

For example, I am advised there are 11 privately-owned sewer companies in the State that offer no water service. None of these sewer companies require metering for residential or commercial customers. Instead, flat-rate connection charges are used for residential customers. Sometimes with commercial customers, connection charges are based on estimated usage and later adjusted for average usage. However, in other cases, flat-rate connection charges are used for commercial customers as well.
In the present situation, it is unclear why metering is required, unless for precision. The necessity for precision has not been stated. As indicated, private sewer companies are able to dispense with metering. If the metering is for the convenience of the authority, then its cost is more appropriately a cost to be borne by the authority.

On the limited material presented, I find a substantial question as to the reasonableness of requiring metering of a domestic water supply at landowner expense to determine sewer usage, when the authority does not offer water service.

WATER AND SEWER AUTHORITIES. SALES OF WATER TO PERSONS OUTSIDE PARTICIPATING POLITICAL SUBDIVISIONS PERMISSIBLE.

September 19, 1980

The Honorable Ford C. Quillen
Member, House of Delegates

You ask several questions about the sale of water by an authority organized and operating under the Virginia Water and Sewer Authorities Act, Ch. 28 of Title 15.1 of the Code of Virginia (1950), as amended.

Sale of Water to Persons Outside Participating Subdivisions

Your first question is whether such an authority may sell water to persons located outside the participating political subdivisions.

Section 15.1-1250(f) provides that an authority is authorized and empowered to construct, extend, operate and maintain any water system within, without, or partly within and partly without one or more of the political subdivisions by action of whose governing bodies the authority was created. Section 15.1-1250(f) provides that an authority is authorized and empowered to enter into contracts with counties, municipalities, private corporations, co-partnerships, associations or individuals providing for or relating to the furnishing of services and facilities of any water system.

Further, § 15.1-1250(1) provides that an authority is authorized and empowered to make and enter into all contracts or agreements, as the authority may determine, which are necessary or incidental to the performance of its duties and to the execution of the powers granted by the Water and Sewer Authorities Act on such terms and conditions as the authority may approve, relating to the use of any water system. See, also, Opinion to Mr. Charles H. Graves, Director, Division of State Planning and Community Affairs, dated September 15, 1970, found in Report of the Attorney General (1970-1971) at
450 (cities may purchase water from water and sewer authorities for resale to consumers).

Accordingly, I find that water and sewer authorities have the power to sell water to persons located outside the participating political subdivisions.

Interruptible Contracts for Sale of Water

Your second question is whether an authority may contract with such persons on terms that allow the authority to restrict or cut off deliveries under the contract in the event the authority has insufficient water for its other customers.

As noted, § 15.1-1250(1) provides that an authority is empowered to make contracts or agreements relating to the use of any water system on such terms and conditions as the authority may approve. The type of contract you describe is a contract for so-called "interruptible" service. Interruptible contracts are regularly used by utilities to sell fluctuating excess capacity.

Accordingly, I find that under § 15.1-1250(1) an authority may contract on terms that allow the authority to restrict or cut off deliveries in the event the authority has insufficient water for its other customers.

Potential Liability of Authority for Acts of Reselling Customer

Your third question is whether an authority has potential liability for the acts or omissions of a reselling customer.

Generally, one person cannot be held liable for the acts of another, absent contract, statute or some common-law rule of imputed responsibility, such as respondeat superior in the law of agency. However, under certain circumstances, a seller may have a direct responsibility to third parties arising out of how a buyer uses the product.

To illustrate how a seller may have a direct responsibility to third parties, I enclose a copy of the Supreme Court's opinion in Vepco v. Daniel, 202 Va. 731, 119 S.E.2d 246 (1961) (power companies--injury caused by city line--generating company liable if knows of unsafe condition). In Daniel, the court ruled the seller of electricity was not liable to a third-party because the seller was not aware of the unsafe condition of the buyer's electric lines, but the court did state that under certain circumstances the seller could have been liable. There are, of course, special rules applicable to the sale of electricity that may not apply to the sale of water, but the Daniel case illustrates the underlying principle.
Accordingly, while the likelihood of liability is remote, I cannot say that the authority has no potential liability for the acts or omissions of a reselling customer.

Re-Sale Price and Profit
Not Concern of Authority

Your last question is whether it is legally permissible for the customer to make a profit on the resale of water sold by the authority.

Once the customer owns the water, it alone may fix the price of such water. See Graves Opinion, cited above. The re-sale price and profit of the customer are not of concern to the authority, except as they may bear on negotiation of the authority's price to the customer. The re-sale price and profit of the customer may, however, be subject to regulation by some appropriate authority, such as the State Corporation Commission. See Title 56 (Public Service Companies, Ch. 10 (Heat, Light, Power, Water and other Utility Companies Generally), and compare Ch. 10.2 (Certain Water and Sewerage Systems Not Regulated as Public Utilities).

I find, however, that subject to any such regulation, it is legally permissible for the customer to make a profit on the resale of water sold by the authority.

1Other than the qualification that the authority's wholesale prices must provide funds to meet the requirements of § 15.1-1250 (rates and charges), there appears to be no provision that would prevent a city from buying water from an authority at such wholesale prices and reselling the water at a retail price. See Graves Opinion, supra.

However, any contract or agreement under § 15.1-1250(1) shall be subject to such provisions, limitations or conditions as may be contained in the resolution of the authority authorizing revenue bonds of the authority or the provisions of any trust agreement securing such bonds.

2For a general discussion of customer classification by type of service, see Opinion to the Honorable Andrew J. Ellis, Jr., County Attorney for Hanover County, dated September 16, 1976, found in Report of the Attorney General (1976-1977) at 219.

3See, for example, § 8.01-43 (action against parent for damage to public property by minor) and § 8.01-44 (action against parent for damage to private property by minor).

WATER AND SEWERAGE SYSTEMS. COUNTIES, CITIES AND TOWNS. STATUTORY DEBT MAY BE COLLECTED FROM OWNER OF FEE ESTATE EVEN THOUGH ACCOUNT IN NAME OF LESSEE OR TENANT ONLY.
March 3, 1981

The Honorable Gerald S. Stokes
Treasurer of the City of Hopewell

You ask two questions about the collection of sewer fees, rents and charges, under § 15.1-321 of the Code of Virginia (1950), as amended.

Statutory Debt, Under § 15.1-321, May Be Collected From Owner Of Fee Estate, Even Though Account In Name Of Lessee Or Tenant Only

Your first question is whether the fees, rents and charges may be collected from the owner of the fee estate, as a statutory debt under § 15.1-321, even though an account is in the name of a lessee or tenant only.

Section 15.1-321 provides that the fees, rents and charges for the use and services of a sewage disposal system may be charged to and collected from any person contracting for the same, or from the owner or lessee or tenant, or some or all of them who use or occupy any real estate which directly or indirectly is or has been connected with the sewage disposal system, and the owner or lessee or tenant of any such real estate shall pay such fees, rents and charges at the time and place where the same are due and payable.

For purposes of § 15.1-321, the owner is deemed to use and occupy the real estate, the owner is deemed to have the beneficial use of the sewage disposal system, and the owner is deemed a person contracting for use of the system. Section 15.1-321 therefore makes the fees, rents and charges the direct statutory debt of the owners, even though the real estate is occupied by lessees or tenants.

How the owners, lessees and tenants shift the burden of fees, rents and charges among themselves is not of primary concern to the provider of sewage disposal service. Under § 15.1-321, the owner or lessee or tenant shall pay such fees, rents and charges at the time and place where the same are due and payable. The statute makes no alternate provision for when an account is in the name of a lessee or tenant only.

Accordingly, I find that the fees, rents and charges may be collected from the owner of the fee estate, as a statutory debt under § 15.1-321, even though an account is in the name of a lessee or tenant only.

Statutory Lien, Under § 15.1-321, Enforceable Against Fee Estate By The Entireties Even Though Account In The Name Of One Spouse Only

Your second question is whether the statutory lien for fees, rents and charges may be enforced against a fee estate...
by the entireties, under § 15.1-321, even though an account is in the name of one spouse only.

Section 15.1-321 provides that "[s]uch fees, rents and charges and interest thereon...shall constitute a lien against the property, ranking on a parity with liens for unpaid taxes."

When a tenancy by the entirety is created, the property is immune from claims of creditors against one spouse alone. However, as noted above, § 15.1-321 makes fees, rents and charges for the use and services of a sewage disposal system the direct statutory debt of the owners of the real estate, and if the fee estate is owned by the entireties, then § 15.1-321 makes the fees, rents and charges the joint debt of the owners by the entireties. An estate by the entireties is liable for the joint debts of both spouses.

Accordingly, I find that the statutory lien for fees, rents and charges may be enforced against a fee estate by the entireties, under § 15.1-321, even though an account is in the name of one spouse only.

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1Bott v. Hampton Roads Sanitation District Comm'n., 190 Va. 775, 38 S.E.2d 306 (1950) (decided under the same language now found in §§ 21-180 and 21-260, which is essentially the same language found in § 15.1-321).

2Compare Annotation "Liability of Premises, or Their Owner or Occupant, for Electricity, Gas, or Water Charges, Irrespective of Who is the User". 19 A.L.R.3d 1227 (1968 and Supp. 1980).

3Compare, also, Amendment in the Nature of a Substitute for House Bill No. 170, Engrossed with House Amendments--Virginia General Assembly--January 23, 1981--to amend and reenact § 15.1-321, to give owners, upon their request, notice of a tenant's delinquency, to limit an owner's liability for tenant's utility service contracts to one billing period, and other related matters.

4See, for example, Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (1951); Ingram v. Lunsford, 216 Va. 785, 224 S.E.2d 129 (1976).


WEAPONS. USE OF IN COMMISSION OF FELONY. CRIMINAL DEFENDANT MAY BE FOUND GUILTY UNDER § 18.2-53.1 EVEN THOUGH HE DOES NOT PERSONALLY POSSESS, CARRY OR USE FIREARM, OR UNDER § 18.2-300, EVEN THOUGH HE IS NOT IN ACTUAL PHYSICAL POSSESSION OF SAwed-OFF SHOTGUN.
March 9, 1981

The Honorable C. Phillips Ferguson
Commonwealth's Attorney for the City of Suffolk

You have asked whether a criminal defendant must personally possess, carry or use a firearm in order to be found guilty of the use of a firearm in the commission of a felony.

Section 18.2-53.1 of the Code of Virginia (1950), as amended, proscribes the use of a firearm in the commission of certain enumerated felonies. This section was enacted not for the purpose of reforming offenders but to deter violent criminal conduct. Ansell v. Commonwealth, 219 Va. 759, 250 S.E.2d 760 (1979). In view of the legislative intent behind the enactment of this section, I am of the opinion that the purpose of discouraging crimes involving the use of firearms is served regardless of whether the accused personally uses the firearm or is a coactor in the use thereof. I see nothing in § 18.2-53.1 indicating that the legislature intended that a firearm be in the personal possession of a person to bring him within the ambit of its prohibitions.

Under § 18.2-18, in the case of a felony, every principal in the second degree may be indicted, tried, convicted and punished as if a principal in the first degree. Grant v. Commonwealth, 216 Va. 166, 217 S.E.2d 806 (1975). A principal in the second degree is one who is not the perpetrator but is aiding or abetting the act done. Ward v. Commonwealth, 205 Va. 564, 138 S.E.2d 293 (1964), and the test is whether the accused was encouraging, inciting or in some manner offering aid in the commission of the crime. Thus, in my opinion, in a case involving the use of a firearm in the commission of a felony, a coactor who aids and abets the act done, even though he may not personally commit the enumerated crime or personally hold the firearm, may be convicted as a principal in the first degree. This is unlike the offense of capital murder for which § 18.2-18 expressly provides that only the perpetrator of a homicide, and not a principal in the second degree, may be convicted under the provisions of § 18.2-31.

While there is no case law in Virginia on this point, a number of jurisdictions have held that an accused need not personally possess the firearm under similar statutes. State v. Humphreys, 255 A.2d 273 (N.J. 1969); Kemp v. State, 254 So.2d 228 (Fla. Dist. Ct. of App. 1971); Broadway v. State, 326 A.2d 212 (Md. 1974); Kennedy v. State, 220 S.E.2d 788 (Ga. 1975); State v. Asfoor, 249 N.W.2d 529 (Wis. 1977).

You also ask whether the offense of possession of a sawed-off shotgun is a purely possessory crime for the person in actual physical possession of the weapon.
Section 18.2-300 provides that the "[p]ossession or use of a 'sawed-off' shotgun in the perpetration or attempted perpetration of a crime of violence is a Class 2 felony." In my opinion, this section should be applied to coactors in the same manner as § 18.1-53.1. Thus, an aider or abettor who does not personally hold the sawed-off shotgun may be convicted in accordance with the provisions of § 18.2-18 as a principal in the first degree.

Section 18.2-53.1 provides in part: "It shall be unlawful for any person to use or attempt to use any pistol, shotgun, rifle, or other firearm or display such weapon in a threatening manner while committing or attempting to commit murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction."

WETLANDS ACT. COUNTIES, CITIES AND TOWNS. ORDINANCES. AUTHORITY TO REPEAL STANDARD WETLANDS ZONING ORDINANCE ONCE ADOPTED.

February 9, 1981

The Honorable Daniel M. Stuck
County Attorney for New Kent County

You ask whether a county, city or town is authorized to repeal the standard Wetlands Zoning Ordinance provided for in § 62.1-13.5 of the Code of Virginia (1950), as amended, once the governing body has adopted the ordinance.

Section 62.1-13.5 provides that any county, city or town may adopt a standard Wetlands Zoning Ordinance, as set out in the statute. I find no specific provision in the wetlands law (Ch. 2.1 of Title 62.1) that authorizes repeal, but at the same time, I find no specific provision that prohibits repeal.

The adoption of ordinances is a legislative act, and ordinarily the legislative power of a local governing body is not limited or exhausted by one exercise, and an ordinance once adopted may be amended or repealed.1

Accordingly, in the absence of any express statutory prohibition against repeal, I find that a county, city or town is authorized to repeal the standard Wetlands Zoning Ordinance provided for in § 62.1-13.5.2

1See Opinion to the Honorable Stephen C. Harris, Commonwealth's Attorney for Louisa County, dated March 24, 1976, found in Report of the Attorney General (1975-1976) at 26; Opinion to the Honorable J. Richmond Low, Jr.,
Commonwealth's Attorney for King George County, dated July 14, 1980 (copy enclosed).

Section 62.1-13.9 provides that when a county, city or town has not adopted the standard ordinance, applications for permits shall be made directly to the Marine Resources Commission, and the Commission shall process such applications in accordance with the standard ordinance. In the event a county, city or town repeals the standard ordinance, applications for permits shall again be made directly to the Commission under § 62.1-13.9.

WET SETTLEMENT ACT. DISBURSEMENT OF LOAN FUNDS.

March 23, 1981

The Honorable Owen B. Pickett
Member, House of Delegates

You ask the following questions concerning the disbursement of loan funds under § 6.1-2.10(5) of the Code of Virginia (1950), as amended, which is popularly known as the Wet Settlement Act:

"A. Would a check drawn by a privately owned mortgage company on a Federal Reserve member bank located within the Fifth Federal Reserve District comply with the requirement for 'disbursement of loan funds'?

B. Would a check drawn on a Federal Reserve member bank of the Fifth Federal Reserve District by the mortgage subsidiary of a bank-holding company, of which the drawee bank is a member, comply with the requirements for 'disbursement of loan funds'?

C. Would a check drawn on a Federal Reserve member bank located in the Fifth Federal Reserve District by a savings and loan association located within the Fifth Federal Reserve District be in compliance with the requirement of 'disbursement of loan funds'?

D. Would a check drawn by a savings and loan association on itself, where such savings and loan association is located within the Fifth Federal Reserve District be in compliance with the requirement of 'disbursement of loan funds'?

E. If a settlement agent is delivered a check drawn by a private mortgage lender on an account in a Federal Reserve member bank located within the Fifth Federal Reserve District, with instructions to have the check certified prior to settlement, and funds are in fact on deposit to cover such check, but the settlement agent completes the settlement and negotiates the check without having it certified, has there been compliance with the requirement for 'disbursement of loan funds'?"
Your first four questions concern the use of a check for the disbursement of loan funds. In order to comply with the definition set forth in § 6.1-2.10(5), a check used for the purpose of disbursing loan funds must be in the form of a certified check, a cashier's check, a check issued by a political subdivision of the Commonwealth, or a check issued by a financial institution, the accounts of which are insured by an agency of the federal or State government. These checks must be drawn on a financial institution located within the Fifth Federal Reserve District, the accounts of which are insured by an agency of the federal government.

These questions also involve different drawers and drawees of checks which are neither certified nor issued by a political subdivision of the State. Therefore, if the checks used in your four examples are to satisfy the statutory definition of "disbursement of loan funds," they must either be cashier's checks or issued by a financial institution which has federally or State insured accounts, and further, they must be drawn on a financial institution which is located within the Fifth Federal Reserve District and has federally insured accounts. My analysis of your specific questions is as follows.

**Mortgage Company**

A privately owned mortgage company is not a financial institution as that term is defined in § 6.1-2.1. Therefore, a check issued by a privately owned mortgage company would not be considered disbursement of loan funds.

**Mortgage Subsidiary**

A mortgage subsidiary of a bank-holding company is not a financial institution with federally or State insured accounts. Therefore, as in the previous example, a check issued by such a mortgage company would not be considered disbursement of loan funds.

**Savings And Loan Check Drawn On Another Bank**

A check issued by a savings and loan association and drawn on a Federal Reserve member bank that is located within the Fifth Federal Reserve District would be considered disbursement of loan funds as long as the accounts of the savings and loan association are insured by an agency of the federal or State government. Most savings and loan associations are insured by the Federal Savings and Loan Insurance Corporation (FSLIC). Therefore, a check issued by a savings and loan association which is insured by FSLIC, or other federal or State agency, would conform to the statutory definition of "disbursement of loan funds."

**Savings And Loan Check Drawn On Itself**
A cashier's check is usually defined as a check drawn by a bank upon itself. See Black's Law Dictionary 301 (4th ed. 1951) and H. Bailey, Brady on Bank Checks § 1.11 (5th ed. 1979). Nevertheless, a check drawn by a savings and loan association on itself functions in the same manner, serves the same purpose and offers the same protection as a cashier's check. The importance of a cashier's check is that the drawer and drawee are the same. It is my opinion, therefore, that a check drawn by a savings and loan association on itself is a cashier's check for the purposes of the Wet Settlement Act.

Such checks must be drawn on a financial institution, located within the Fifth Federal Reserve District, the accounts of which are insured by an agency of the federal government. Therefore, if the accounts of the savings and loan association are insured by FSLIC, then the statutory definition is satisfied. The check in question would be considered "disbursement of loan funds."

Settlement With Uncertified Check

Section 6.1-2.12 places on the lender the duty of causing disbursement of loan funds. Under the circumstances which you propose, the definition of disbursement of loan funds is met only if the check is actually certified. Therefore, instructions to the settlement agent to have the check certified do not meet the statutory requirement that the check actually be certified. The lender does not fulfill his duty by instructing an agent to perform the duty. Accordingly, it is my opinion that a check drawn by a private mortgage lender must actually be certified if the lender is to meet his duty to cause the disbursement of loan funds.

ZONING. AUTHORITY. LOCAL GOVERNMENT MUST DETERMINE WHETHER HEIGHT RESTRICTIONS ADVANCE LEGITIMATE STATE INTEREST.

February 24, 1981

The Honorable Arthur G. Lambiote
County Attorney for Shenandoah County

You have asked if the Board of Supervisors of Shenandoah County is authorized to impose height restrictions on private properties within the glide path of a privately owned airport used by the public. Based upon your research of the matter, you expressed concern that such restrictions may constitute a taking of property without just compensation.

Comprehensive zoning authority has been delegated to counties, cities and towns. See Title 15.1, Ch. 11, Art. 8, of the Code of Virginia (1950), as amended. Section 15.1-486 provides, in part, that local governments may regulate by zoning:
"(b) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;

(c) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures...."

Section 15.1-489 provides, in part, that acceptable purposes for zoning ordinances include:

"(1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; ***

(4) to facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, flood protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements...." (Emphasis added).

It is a well established principle that zoning ordinances are presumed to be valid absent a showing of unreasonableness or a total lack of relation to public health, safety, or welfare. In Board of Supervisors of Fairfax County v. Carper, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959), the Virginia Supreme Court stated that "[t]he legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary. The burden of proof is on him who assails it to prove that it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. The court will not substitute its judgment for that of a legislative body, and if the reasonableness of a zoning ordinance is fairly debatable it must be sustained...."

In Agins v. City of Tiburon, ___ U.S. ___, 100 S.Ct. 2138 (1980), the United States Supreme Court determined whether the enactment of a zoning ordinance constituted a taking of property without just compensation. That case involved density restrictions limiting the number of single-family residences which could be built on a single tract of land. There the court determined that "[t]he application of a general zoning law to particular property effects a[n unlawful] taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." Id. at 2141. The court held that a balancing of the public and private interests was required and found that "[a]lthough the ordinances limit development, they neither prevent the best use of appellants' land, nor extinguish a fundamental attribute of ownership." Id. at 2142.
Applying these principles, I am of the opinion that a resolution of this controversy must be preceded by an inquiry into whether a legitimate state interest would be advanced by the proposed ordinance. Assuming this is the case, the inquiry then becomes whether the ordinance in question impairs any "economically viable" uses of the property owner's land. Such uses would include not only the land's current use but at least, as well, those uses to which it is readily adapted in light of all of the prevailing circumstances.

Finally, the controversy must be resolved by addressing the issue of whether the ordinance, while to some degree limiting development of the property in question, prevents the best use of the land or destroys any of the more fundamental incidents of ownership.

ZONING. BOARD OF ZONING APPEALS. AUTHORITY TO GRANT "USE" VARIANCES UNDER § 15.1-495(b), NOTWITHSTANDING DEFINITION OF VARIANCE IN § 15.1-430(p).

June 26, 1981

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You ask whether a board of zoning appeals has authority under § 15.1-495(b) of the Code of Virginia (1950), as amended, to grant variances for special uses not otherwise permitted, in view of the definition of "variance" appearing in § 15.1-430(p).

Section 15.1-495(b) provides that boards of zoning appeals have the power and duty to authorize certain variances from the zoning ordinance, when owing to special conditions, a literal enforcement will result in unnecessary hardship, and further where 1) by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property at the effective date of the ordinance, or 2) by reason of exceptional topographic conditions or other extraordinary situation or condition of such piece of property, or 3) by reason of the use or development of property immediately adjacent thereto, the strict application of the ordinance would effectively prohibit or unreasonably restrict the use of the property, or the granting of such variance will alleviate a clearly demonstrable hardship approaching confiscation.

Section 15.1-430(p) provides that "variance" means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure.
Two kinds of variances have been recognized in zoning law—"area" variances, and "use" variances. Sections 15.1-495(b) and 15.1-430(p) both speak of "area" considerations.

Section 15.1-430(p) became law July 1, 1976. I find no cases of the Supreme Court of Virginia citing § 15.1-430(p). Since 1976, the Supreme Court has decided several cases citing § 15.1-495(b), but I find none involve "use" variances. Nevertheless, in earlier cases the Supreme Court recognized "use" variances as appropriate under § 15.1-495(b), and similar charter provisions.

Section 15.1-495(b) deals with the jurisdiction of boards of zoning appeals, and allows variances not only for "area" considerations, but also hardship considerations generally. Further, the Supreme Court has recognized § 15.1-495(b) as a jurisdictional authority for "use" variances.

By way of contrast, § 15.1-430(p) does not mention the jurisdiction of boards of zoning appeals and expressly restricts its definition to the application of zoning ordinances rather than statutes.

To the extent there may be a conflict between § 15.1-495(b) and § 15.1-430(p), it is the accepted rule of statutory construction that statutes applicable to a special or particular subject must be treated as exceptions to more general and comprehensive statutes. Section 15.1-495(b) is applicable to the variance jurisdiction of boards of zoning appeals. Section 15.1-430(p) is part of a comprehensive set of definitions applicable to planning, subdivisions and zoning generally.

Accordingly, it is my opinion that a board of zoning appeals has authority under § 15.1-495(b) to grant variances for special uses not otherwise permitted, notwithstanding the definition of "variance" appearing in § 15.1-430(p).

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1 An "area" variance is a variance from area, height, density, setback or sideline restrictions. A "use" variance is a variance permitting a use other than that permitted in a particular district by zoning ordinance. See, for example, Anderson v. Board of Appeals, 22 Md. App. 28, 322 A.2d 220 (1974); City and Borough of Juneau v. Thioudeau, 595 P.2d 626 (Alaska 1979).


3 See, especially, Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140 (1980) (oceanfront setback requirement--fullest discussion of § 15.1-495(b)).

4 See C. & C. Incorporated v. Semple, 207 Va. 438, 150 S.E.2d 536 (1966) (off-street parking in residential district) (variance defined as permitting use of property in
manner forbidden by zoning law in order to alleviate conditions peculiar to a particular property).


Compare Opinion to the Honorable Donald W. Devine, Commonwealth's Attorney for Loudoun County, dated August 30, 1974, found in Report of the Attorney General (1974-1975) at 600 (interpreting Tidewater Utilities as authority for a) size or shape variances, b) topographic conditions variances, c) adjacent use variances, and d) miscellaneous hardship variances.

For criticism of "use" variances, see Vol. 4 of Williams, American Land Planning Law (1975 & Cum. Supp. 1980) at Ch. 98 (Variances), 131 (The Variance Power Comes From Statute) and 132 (Validity of Use Variances).

ZONING. "SPOT" ZONING. ILLEGAL IF SOLELY TO SERVE PRIVATE INTERESTS OF ONE OR MORE LANDOWNERS. NOT ILLEGAL IF PART OF OVERALL ZONING PLAN, EVEN THOUGH PRIVATE INTEREST SIMULTANEOUSLY BENEFITED.

June 1, 1981

The Honorable Thomas Stark, III
Commonwealth's Attorney for Amelia County

You ask several questions about the validity of Agricultural A-2 zoning under the Amelia County zoning ordinance.

"Spot" Zoning

You first ask whether the Agricultural A-2 zoning constitutes illegal "spot" zoning.

Section 15.1-489 of the Code of Virginia (1950), as amended, provides that ordinances shall be for the general purpose of promoting the health, safety or general welfare of the public and of further accomplishing the objectives of § 15.1-427.1. To these ends, § 15.1-489 states that zoning "ordinances shall be designed...(7) to encourage economic development activities that provide desirable employment and enlarge the tax base; and (8) to provide for the preservation of agricultural and forestal lands."

Spot zoning or illegal spot zoning has been variously defined. In Wilhelm v. Morgan, decided under § 15.1-489 in
1967, the Supreme Court of Virginia adopted the following test for determining whether a zoning ordinance constitutes illegal spot zoning:

If the purpose of a zoning ordinance is solely to serve the private interests of one or more landowners, the ordinance represents an arbitrary and capricious exercise of legislative power, constituting illegal spot zoning.

However, if the legislative purpose is to further the welfare of the entire county as part of an overall zoning plan, the ordinance does not constitute illegal spot zoning even though private interests are simultaneously benefited.4

Under the Amelia ordinance, "normal farming operations" are a permitted use under A-1. The A-2 category is reserved for "special agricultural operations," defined as those which produce a nuisance in the form of odors, flies and noise. There is no area generally set aside for A-2 zoning. Land is considered for rezoning to A-2 as applications are received.

Most of Amelia County is zoned A-1, and so far, applications for A-2 have been confined to land already zoned A-1. Most A-2 applications concern dairy farming, hog farming and chicken farming (broilers and layers), or in other words, concentrations of animals or fowl.

The Wilhelm case involved the rezoning of an 8-acre tract to M-1 Industrial as a quarry and stockpile site within an A-1 agricultural zone. The Virginia Supreme Court held that, under the circumstances, the fact that the board of supervisors rezoned an 8-acre tract for a use different from that of the surrounding land does not mean that the board abandoned its overall zoning plan. In the absence of evidence to the contrary, the Virginia Supreme Court assumed the board of supervisors acted in furtherance of its overall zoning plan when it provided for an additional industrial zone; that the board rezoned the 8-acre tract for industrial use to further the welfare of the entire county as part of an overall zoning plan; and concluded that the rezoning of the 8-acre tract did not constitute illegal spot zoning.

Accordingly, under similar circumstances, I am of the opinion that Agricultural A-2 zoning under the Amelia County zoning ordinance does not, on its face, constitute illegal spot zoning.5

"Buffer" Zone

You next ask about the validity of a 2,500-foot "buffer" zone imposed not within A-2 tracts, but instead on districts surrounding an A-2 tract.
For example, § 4-8 of the ordinance, relating to Residential R-1 zoning, provides that no such district shall be established within 2,500 lineal feet of an A-2 district. Similar provisions appear in §§ 5-8 and 6-5 of the ordinance (relating to other residential districts).

There are two kinds of regularly recognized buffer zones. In some situations, external buffer zones are set up to permit uses of intermediate intensity on tracts surrounding an intensive use. An example would be a buffer district between a residential district and an industrial district.

In other situations, internal buffer zones are set up to require a protective barrier on the same tract as the intensive use. An example would be a hedge on a commercial tract surrounded by a residential district.

The Amelia ordinance sets up a different kind of buffer zone, for which I find no favorable precedent. The Amelia ordinance imposes an external buffer zone that prohibits districts of lower intensity surrounding an intensive use.

If A-2 agricultural zoning requires a buffer, an external zone that prohibits districts of lower intensity surrounding an A-2 zone is unreasonable. The buffer, if one is required, is more appropriately imposed within the A-2 zone. I note, however, that § 3-10 of the ordinance provides that special use permits will be granted for residences actually within an A-2 district to persons who are knowledgeable of and accept the fact that they are in an area of "possible nuisance." Under these circumstances, it is unreasonable to require an external buffer zone that prohibits surrounding districts of lower intensity.

Accordingly, I am of the opinion that the buffer zone, under § 4-8 of the Amelia zoning ordinance, imposed not within A-2 tracts, but instead on districts surrounding A-2 tracts, is not authorized under § 15.1-489.

Conditional Use Permit For Residences in A-2 District

You also ask about the validity of § 3-10 of the Amelia zoning ordinance, requiring special use permits for residences actually within A-2 districts.

As noted above, § 3-10 provides that a permit will be granted to persons who are knowledgeable of and accept the fact that an A-2 district is an area of possible nuisance.

Unlike § 4-8 of the ordinance, which prohibits residential districts within 2,500 lineal feet beyond an A-2 tract, § 3-10 allows residences within an A-2 tract, but only on acknowledgment and acceptance of the risk of "possible nuisance." As such, § 3-10 does not operate as a substantial
restriction on the use of land. At most, § 3-10 operates as a notice provision. At the same time, I find no statutory authority for such a notice provision.1

Accordingly, I find that § 3-10 of the Amelia zoning ordinance is invalid in requiring special use permits for residences in A-2 districts, as a notice procedure of the kind described above.

1Section 15.1-427 provides that the laws on planning, subdivision of land and zoning are intended to encourage local governments to improve the public health, safety, convenience and welfare of their citizens, and to plan for the future development of communities to the end, among other things, that the needs of agriculture, industry and business be recognized in future growth.

2See 82 Am.Jur.2d 514, Zoning and Planning § 76 (Spot Zoning) and § 77 (Particular Factors Affecting Validity) (1976).

3208 Va. 398, 157 S.E.2d 920 (1967)


5You have also asked whether the intent of A-2 zoning to confine special agricultural operations to a special zoning classification is constitutionally permissible. On the facts given, I find no facial constitutional question.

6As a reciprocal of § 4-8, § 3-11 provides that no A-2 district shall be established within 2,500 lineal feet of a residential district.

7See 82 Am.Jur.2d 525, Buffer Zones § 82 (1976).

8See, for example, Armstrong v. McInnis, 264 N.C. 616, 142 S.E.2d 570 (1965) (re zoning vacant property within residential area to planned industrial park district).


10See Kozesnick v. Montgomery Twp., 24 N.J. 154, 131 A.2d 1 (1957) (where a business is recognized as a "potential nuisance" the zoning ordinance should require the business operator to provide the necessary buffer and not cast the burden on the neighboring owner) (Kozesnick is the same case as the Virginia Supreme Court followed in Wilhelm, supra); compare Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975) (part IV - land use restrictions).

11Compare Opinion to the Honorable Warren E. Barry, Member, House of Delegates, dated May 14, 1979, found in Report of the Attorney General (1978-1979) at 74 (no authority for counties to require disclosures to prospective purchasers of single-family dwellings).
ZONING. SUBDIVISIONS. REQUIREMENT THAT AREA BE REZONED AS "RESIDENTIAL SUBDIVISION" AS PREREQUISITE TO COMPLIANCE WITH SUBDIVISION ORDINANCE. ABSENT VALID ZONING PURPOSE, REZONING REQUIREMENT IS INVALID DEVICE FOR CONFERRING LEGISLATIVE DISCRETION WHERE DISCRETION NOT AUTHORIZED.

June 4, 1981

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You ask about the validity of the "Residential Subdivision," RS-1 district provided for in Art. 6 of the Rappahannock County zoning ordinance.

Section 6-1 of the ordinance provides that no subdivision shall be approved by the governing body until the entire area of the proposed subdivision is rezoned as RS-1 (Residential Subdivision) by amendment of the ordinance. Section 6-2 provides that after the proposed subdivision area has been rezoned RS-1, the provisions of the Rappahannock County subdivision ordinance shall apply.

There is a significant distinction between local subdivision regulations under Art. 7 of Title 15.1 of the Code of Virginia (1950), as amended, and local zoning regulations under Art. 8 of the same title. For example, approval of a site plan and issuance of a building permit are ministerial, rather than discretionary acts, enforceable by mandamus by any applicant who is ready, willing and able to comply with the local requirements. By way of contrast, local zoning ordinances are legislative acts, which so long as their reasonableness is fairly debatable, are not to be invalidated by the courts.

The RS-1 district provided for in Art. 6 of the Rappahannock County ordinance may serve some valid zoning purpose, but I do not see what that purpose may be. Absent some valid zoning purpose, the RS-1 district serves only as a device for conferring legislative discretion on the county governing body where no such discretion is authorized by statute.

Accordingly, in the absence of some valid zoning purpose, I am of the opinion that the "Residential Subdivision," RS-1 district in Art. 6 of the Rappahannock County zoning ordinance, is invalid under Art. 8 of Title 15.1.5

1The prohibition is restricted to subdivisions containing more than five lots, any one of which contains less than 25 acres. As a practical matter, however, the prohibition is quite comprehensive.
5 Compare Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated April 14, 1980, found in Report of the Attorney General (1979-1980) at 406 (no authority to impose relocation contribution or subdivider as condition of zoning appeal).
The following is an Economic Impact Statement issued by this Office to the Virginia State Bar. It is not a formal Opinion of the Office of the Attorney General.
REPORT OF THE ATTORNEY GENERAL

ECONOMIC IMPACT STATEMENT

ATTORNEYS. REAL ESTATE PRACTICES.

March 12, 1981

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

In accordance with the request of Chief Justice I'Anson, I am submitting further analysis of the economic effect on competition of proposed Unauthorized Practice of Law ("UPL") Advisory Rules 6 and 7. Pursuant to instructions of the governing Council of the Virginia State Bar (the "Council"), the analysis has centered on the rules as amended and revised by the Standing Committee on the Unauthorized Practice of Law (the "Committee") on April 4, 1980.

My effort has been to gather all available evidence on the subject. I have not attempted to generate new data. Because some of the references are not available generally, I am transmitting them to you to hold during the subsequent comment period on Rules 6 and 7.

The question whether the purchaser should be allowed to choose for himself whether he wants a lawyer even if there is no factual dispute as to the need for an attorney is one which is within the discretion of the rulemaking authority. This analysis is conducted in the context of the following principles of law, and is not intended to influence consideration of this issue.

Applicable Principles of Law

The appropriate legal principles under which these proposed rules must be judged have been set forth in previous opinions on proposed UPL rules. In summary, to withstand scrutiny the rules must bear a reasonable relationship to some public purpose which they serve. In this case, the rules must be shown to be essential to the protection of consumers. In this regard, 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). Similarly, where only a very distant possibility of harm exists, broad application of a rule which limits constitutional freedoms cannot be justified. See In Re Primus, 436 U.S. 412, 436 (1978); United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 223 (1967).

General Background

In real estate transactions, there are substantial costs involved in the transfer of title. Such costs include amounts for title search and examination, title insurance,
closing and escrow fees, surveys, credit reports, inspections, appraisals, attorneys' fees and numerous other charges. During the last decade, there has been growing concern over these costs by government officials as well as the public. Some have asserted that the costs of transferring residential property may, as well, have a significant impact on two important national goals, widespread homeownership and expanded housing production, since such costs limit the number of prospective home buyers.

In assessments of the costs involved in the transfer of title, lawyers have in the past been the object of criticism for expensive and sometimes inefficient services. In defending their role, lawyers have pointed to the need to protect unknowledgeable laymen from the incompetent and the unscrupulous. It is from attempts to define their role that unauthorized practice of law rules have been promulgated.

In deciding cases of alleged unauthorized practice, the courts have frequently attempted to weigh the relative importance of the broad concepts of "public protection" on the one hand and "public convenience and cost saving" on the other. These concepts have often been considered in conjunction with a particular state's definition of the practice of law and the result has been a vast but inconsistent body of decisions. The actual practices in different states are as varied as the case law. In substantial areas of the country, for example, no attorney need be involved in real estate transactions while on the East Coast attorney involvement remains significant. (See Attachment A.)

In assessing the current trend in UPL regulation, some have observed a decrease in the protected status of the legal profession in providing the more routine procedural services. In analyzing home transfer costs, commentators have in fact noted an apparent inefficiency which stems from requiring the involvement of an attorney in less complex aspects of real estate conveyance. While the possibility for legal complications has moved some courts to insist that only lawyers are capable of adequately serving the public need, it has been questioned, for example, that "the lawyer is the only person with the requisite morality, education and intelligence to select or draft an instrument with legal significance." Others have noted that, a literal interpretation of most definitions of the practice of law "would leave virtually no commercial area of human endeavor untouched." The position has been taken that if the doctrine of unauthorized practice were invoked in every case where an instrument having legal effect is drafted by a layman, or wherever advice predicated on legal assumptions is given, the world's business could not be carried on.
There is an important purpose to be served by restricting the practice of law to persons trained in the law and subject to the ethics of the profession. Today there is a considerable body of thought, however, that lay competition in matters closely associated with the practice of a profession or the operation of a legitimate business should be proscribed only when evidence of a nonspeculative threat to the public welfare is shown and no offsetting social benefit can be demonstrated. It is contended that the public interest may not be well served by designating areas of endeavor the exclusive province of a single group of professionals unless it is found that they alone possess sufficient skill and knowledge to serve the public.

Analysis of Possible Economic and Anticompetitive Effect of UPL Rules 6 and 7

This analysis proceeds as follows: (1) It is apparent that UPL Rules 6 and 7 will limit competition in providing services to consumers in real estate transactions by prohibiting non-lawyers from conducting closings of real estate sales and by preventing title insurers from selling insurance directly to consumers. (2) This increases the costs of those services to the consumer. (3) Sellers, lenders, real estate agents, and title insurance companies all have interests which are not necessarily consistent with that of the purchaser of real estate. (4) The policy decision to be made is whether the increased costs are justified by the benefit of a lawyer's services.

(1) Anticompetitive Effect

In my Opinion of June 3, 1980, I noted that adoption of Rule 6 would 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 the 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. Finally, the rule impacts directly upon the consumer who is prevented from closing on a home unless he purchases the services of an attorney.

Similarly, I found that adoption of Rule 7 would also affect competition. First, and perhaps most obviously, revised Rule 7 will prevent competition for the home-buyer's business between lawyers in private practice and lawyers employed by title insurance companies. Absent the 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 rule will fall directly on the consumer insured who is prevented from purchasing a title insurance policy unless he first purchases the services of a private attorney.

(2) Higher Costs

In allowing only lawyers to conduct real estate closings and in allowing title insurance companies to issue their commitments, binders or policies only through a lawyer, there is significant evidence that costs to the consumer will remain higher in Virginia than they might otherwise be. Such evidence takes a number of forms.

First, in Surety Title Ins. Agency Inc. v. Virginia State Bar, Judge Merhige found that the plaintiff title company proposed "to lower the cost of title insurance by eliminating the services of an attorney..." and using "trained lay personnel" in connection with insuring titles in land transactions. Further, he concluded that it was "uncontroverted that [this]...approach would result in the consumer receiving greater services than presently offered at a substantially lower cost."18

Similarly, in State Bar v. Guardian Abstract & Title Co., the Supreme Court of New Mexico addressed the issue of whether it is the unauthorized practice of law for non-lawyers working for a title company to fill in the blanks of form instruments used in closing real estate transactions. In reaching its decision, the court concluded that "the uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money...."20

Perhaps significantly, available information indicates that the additional cost of lawyer involvement in normal transactions is not very high, presently about $100 or so on a typical house. This small differential may reflect competition among real estate attorneys for the available title work.

One source of information is provided in the 1979-80 HUD Evaluation of the Real Estate Settlement Procedures Act, which was prepared by Peat, Marwick, Mitchell and Co. Specifically, in discussing title insurance and conveyancing costs, pricing data is presented for the Washington, D.C., SMSA, which includes portions of Maryland and Virginia. A review of this data appears to confirm that costs to consumers are higher as a result of significant involvement of lawyers in residential real estate transactions. (See Attachments B and C.) This is seen most clearly in a comparison of Virginia with Maryland and the District. In the District of Columbia, title companies tend to perform most of the title search and conveying functions while in Maryland these functions are provided by attorneys as well as
title insurance companies. Services in Virginia are rendered almost solely by attorneys.

Analysis of the pricing data for each of these areas indicates that the fees charged in the District of Columbia are lower than in Virginia or Maryland, with the estimated charges in Virginia being 30 percent higher than those in the District. While the data presented for Maryland is for attorney providers, the cost is estimated to be approximately $100 lower when the same services are provided by title insurance companies. No literature has been found which speculates on whether this differential may be expected to remain in the future.

Finally, the HUD Evaluation also observes that in the San Antonio SMSA, UPL regulation requires that necessary documents must be prepared by an attorney, with the result that total costs were raised by more than $75. Moreover, a telephone survey by the American Land Title Association gives some indication that $100 is a typical difference between the rates of a full service title company and rates reported by a number of firms in Northern Virginia. (See Attachment D.)

Although the foregoing data does not contain a detailed evaluation of the prices charged by members of the Bar for legal advice, it provides a basis for concluding that the participation of lawyers in the process increases costs.

(3) Conflicting Interests

Real Estate agents have influence in determining the terms of the contract of sale, make recommendations on the terms of counteroffers, and assist in locating a lender. Typically these may be done without involvement of a lawyer. The agent derives a monetary advantage from the completion of the transaction. The lender is in business to make a profit, and may impose a number of conditions which affect the cost of his services. Credit insurance, origination fees, assumption clauses, anticipation privileges, requiring title insurance, and raising the quoted interest rate prior to closing, are examples. The insurer of the title has an interest in making as many exceptions as possible in the policy. The consumer may be unaware that a re-issue rate is available. The seller is not anxious to disclose problems with the title or the description of the property. None of the foregoing parties have any interest in whether any particular form of ownership is desirable.

For all of these reasons, the purchaser is well advised to have the services of an attorney. Indeed, it may be assumed that in most instances the lender will want a lawyer's participation. Some lenders have been known to specify a particular law firm or title insurer. Certainly increased regulation of the foregoing entities could be anticipated if lawyers were written out of the process. The cost of additional regulation would depend on the nature of the regulatory program.
This portion of the analysis is a discussion of the relevant literature and judicial precedent on the subject. Generally, the studies and judicial decisions considered in the preparation of this statement have not found that significant involvement against their interest. This is not unexpected, for much of the comment appears to be premised on the fact that costs are too high and that costs can be lowered by decreasing attorney involvement. (This underscores the need to consider the source of data when evaluating arguments on this subject.) The trend of recent pronouncements seems to be that there is no rational basis for concluding that only attorneys are able to adequately perform various aspects of real estate transfer. (One explanation of this may be that the lay agencies willing to expose the details of their operations by challenging a UPL regulation are likely to be the better operated businesses.)

Given the extensive involvement of non-lawyers, there is a conspicuous absence of an indication that such activities have brought any significant harm to the public. The general consensus appears to be that non-lawyers are performing adequately. In this regard, it is significant that where the activities of non-lawyers such as brokers have been challenged in the courts, the cases tend not to involve instances where "a broker is sued for inaccurate legal work." Rather they tend to involve a seller's reporting the allegedly illegal activity by a broker in order to avoid paying a commission, or a bar association seeking an injunction to prohibit the activity.

In those cases where courts have addressed the issue of possible harm to the public, for the most part there has been no finding of such harm. In Guardian Abstract, for example, the Supreme Court of New Mexico found no threat to the public posed by the title insurance company's activities in completing standard forms. This case seems to indicate that a key element of the public interest is actual harm or the danger of concrete injury in the future, without which a practice should not normally be enjoined. In addition, it would seem that:

"[T]he mere showing that some harm has occurred from the activities of laymen should not be enough to brand such activities as the unauthorized practice of law. Certainly, even lawyers do some injury to the public through malpractice and negligence. The harm that results from layman's activities would have to go beyond that which could be expected if lawyers had exclusive province."

The U.S. Department of Housing and Urban Development (the "Department") has also noted the "[i]n most states, skilled laypersons, such as title insurers, are free to deal directly with the public...[with] no evidence which suggests that transactions in these states are more likely to be
flawed or deficient than transactions in which lawyers are involved." The Department further stated that "the evidence we have seen indicates that the transaction costs tend to be lower in areas where laypersons are able to market their services directly to the public." The Department characterized Rules 6 and 7 as "unnecessarily restrictive," it found that "few states construe the practice of law as broadly as these proposed opinions do..." and concluded that "the experience across the nation does not support rules of this type." Ultimately, the Department recommended "that the citizens of Virginia...[be] entitled to choose who will provide their transaction-related services..." and that "[i]f consumers wish to entrust their business to laypersons, they should be free to do so."

The Department is not alone in making such a recommendation. Indeed, the Special Committee on Residential Real Estate Transactions of the American Bar Association appears to have concluded that any realistic effort to increase legal services must come about primarily through education and persuasion and that "it is not practicable to force legal services on unwilling recipients...." While the Committee is of the firm opinion that it is desirable that all parties in residential real estate transactions be represented by counsel, it recognized that "[a]t the present and for years past the lawyer's role has steadily declined and in some places the lawyer plays no role at all." In stressing that this trend should be reversed, the Committee has placed its emphasis on the need for such measures as a long-term educational project to make buyers and sellers of houses aware of their need for legal services.

With submission of the foregoing analysis, this matter is ready for further consideration by the UPL Committee and the Council.

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1See Minutes of Council Meeting of the Virginia State Bar, October 31, 1980, at 3.
5See, generally, Kessler, "Hidden Fees Boost Home's Cost," The Washington Post, January 10, 1972, at 1, col. 1; Kessler...

"See, e.g., Annot. 85 A.L.R.2d 184 (1962). "Title examination activities by lending institution, insurance company, or title and abstract company, as illegal practice of law"; 53 A.L.R.2d 788 (1957), "Drafting or filling in blanks in printed forms of instruments relating to land by real-estate agents, brokers, or managers as constituting the practice of law"; Annot. 111 A.L.R. 19 (1937), supplemented in 125 A.L.R. 1173 (1940) and 151 A.L.R. 781 (1944) "What amounts to practice of law."

"See 1979-80 HUD Report, Vol. II, Section VI at 6-8 and Section XII at 57; Whitman, supra, note 4, at 1334.

"See 1979-80 HUD Report, Vol. II, Section VI at 17. Indeed, the HUD study further notes that "[m]any courts are deciding that the legal nature of such routine procedures as preparing documents is an artificial one. The courts have recognized that the state has the capacity to adequately ensure that real estate professionals are qualified to perform these functions." See, e.g., Conway-Bogue Realty Investment Co. v. Denver Bar Association, 735 Colo. 398, 415-416, 312 P.2d 998, 1007 (1957); State ex rel Indiana State Bar Association v. Indiana Real Estate Association, Inc., 244 Ind. 214, 222, 191 N.E.2d 711, 715 (1963).


"See Michals, "The Unauthorized Practice of Law In New Mexico," 9 New Mexico L.Rev. 403, 408 (1979); 2 Rutgers Camden L.J., supra, note 11, at 343.


"See Michals, supra, note 13, at 413.

"Id. at 302-303.

"Id. at 303 (Emphasis added). There was no trial on the merits in that case and the "uncontroverted" facts were stipulations tendered by the plaintiffs and unopposed by the
REPORT OF THE ATTORNEY GENERAL

Bar on grounds that such averments were irrelevant to the Bar's defense of lack of jurisdiction.


20 Id. at 440, 575 P.2d at 949. It should be noted, however, that the court also indicated its unwillingness to permit this activity by non-lawyers "when the filling in of the blanks affects substantial legal rights and... requires legal skill and knowledge greater than that possessed by the average citizen." Id.

See 1979-80 HUD Report, Vol. II, Section XII at 23. Surveys in 1979 and 1980 showed that estimated combined title insurance and conveyancing fees in Virginia were $590, compared with $512.50 in Maryland and $445 in the District of Columbia.

22 Id., Section XII at 24.

23 Id. at 51.


25 Since the HUD study did not involve a systematic nationwide effort to determine whether attorney involvement increases costs, no overall conclusions on this issue were presented in the report. See 1979-80 HUD Report, Vol. I, Section III at 10-11 and Vol. II, Section XII at 51. Nevertheless, conclusions can properly be drawn for those areas for which data is presented. See, also, Morgan, supra, note 9, at 709; Whitman, supra, note 4, at 1334.

26 See 1979-80 HUD Report, Vol. II, Section VI at 6-8 and Section XII at 57; see, e.g., Bar Ass'n of Tenn. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959); Cooperman v. West Coal Title Co., 75 So.2d 818 (Fla. 1959); LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948); and People v. Title Guar. & Trust Co., 227 N.Y. 125 N.E. 666 (1919).

27 See Whitman, supra, note 4, at 1334; Michals, supra, note 13 at 409.

28 See K. Llewellyn, Jurisprudence: Realism In Theory and Practice (1962) in which Professor Llewellyn notes:

"As one looks through the list of encroachments [by non-lawyers], certain conclusions became hard to escape...Old lines of business are certainly drifting...into non-Bar hands, but with real probability that this is because they are being done more adequately or more cheaply or both by outside agencies...Abuses there are, on the side of lay practitioners. But the steady drift of business is too steady, it recurs in too many fields, to permit the conclusion that the lay agencies, over the long haul are not giving satisfaction." Id. at 254.

See, also, Morgan, supra, note 9, at 709, in which Professor Morgan states:

"In specific fields of controversy about unauthorized practice...it is clear lawyers are overtrained for many required activities. In each role and each field there are problems of correspondence, documents management and psychological judgment as to which lay experience may be as important as intellectual training. In such situations, it seems entirely reasonable to expect that
many lay persons would perform legal services at a level of quality equal to or exceeding that of many lawyers."


31 Id.

32 75 P.2d at 949, wherein the court held:
"We must first consider the paramount interest of the public in determining who should perform the service of completing the forms. There was no convincing evidence that the massive changeover in performance of this service from attorneys to the title companies during the past couple of years has been accompanied by any great loss, detriment or inconvenience to the public."

See, also, Conway-Bogue Realty Investment Co. v. Denver Bar Association, 135 Colo. 398, 212 P.2d 998 (1957), wherein the court in allowing brokers to prepare instruments in the regular course of their business stated:
"Though not controlling, we must make note of the fact that the record is devoid of evidence of any instance in which the public or any member thereof, layman or lawyer has suffered injury by reason of the act of any of the defendants sought to be enjoined...We feel...that the advantages...of granting injunctive relief are outweighed by the conveniences now enjoyed by the public...." Id. at 415-416, 312 P.2d at 1007.

33 Michals, supra, note 13, at 415.

34 See Record of June 19, 1980, proceedings to consider UPL Rules 6 and 7 at 149-150. See, also, 1979-80 HUD Study, Vol. II, Section XII at 53.

35 See Brossman and Rosenberg, supra, note 14, at 461, wherein the authors state their opinion that:
"[E]ach party should be encouraged to secure independent legal counsel and it is the function of the organized bar to educate the public about the legitimacy of the attorney's role in the real estate settlement. Alternative sources of assistance should not be foreclosed, however, when the purchasers might reasonably prefer the less expensive to the most sophisticated service."

See, also, Whitman, supra, note 4, at 1334:
"The most reasonable system would be one in which laymen conducted the mechanical work of title transfers, but under which each party could determine his own need for legal representation."


37 Id. at 604.

38 In its conclusions and recommendations, it is perhaps significant that the Committee has not mentioned the use of UPL regulation as an essential measure for defining desirable roles for the various participants in residential real estate transactions. Id. at 605-606.
Attachment A

(Taken from 1979-80 HUD Study Volume II)
Attachment B
EXHIBIT XII-6
ESTIMATED PRICING DATA — ALL SITES
TITLE ASSURANCE & CONVEYANCING
For a $60,000 House With a $50,000 Loan

<table>
<thead>
<tr>
<th>SMSA</th>
<th>BOSTON</th>
<th>DENVER</th>
<th>VIRGINIA</th>
<th>MARYLAND</th>
<th>DISTRICT OF COLUMBIA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title Assurance (1)</td>
<td>$ N.A. (3)</td>
<td>$261.00</td>
<td>$215.00</td>
<td>$212.50</td>
<td>$220.00</td>
</tr>
<tr>
<td>Conveyancing (2)</td>
<td>N.A. (3)</td>
<td>10.00</td>
<td>375.00</td>
<td>300.00</td>
<td>225.00</td>
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<tr>
<td>TOTAL</td>
<td>$500.00</td>
<td>$271.00</td>
<td>$590.00</td>
<td>$512.00</td>
<td>$445.00</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SMSA</th>
<th>JACKSONVILLE</th>
<th>LOS ANGELES</th>
<th>ST. LOUIS</th>
<th>SAN ANTONIO</th>
<th>SEATTLE</th>
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<tbody>
<tr>
<td>Title Assurance (1)</td>
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<td>$348.00</td>
<td>$375.00</td>
<td>$391.00</td>
<td>$364.00</td>
</tr>
<tr>
<td>Conveyancing (2)</td>
<td>125.00</td>
<td>294.00</td>
<td>25.00</td>
<td>84.00</td>
<td>126.50</td>
</tr>
<tr>
<td>TOTAL</td>
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<td>$642.00</td>
<td>$400.00</td>
<td>$475.00</td>
<td>$490.50</td>
</tr>
</tbody>
</table>

(1) 'Title Assurance' includes all fees specifically quoted as being for title search, title examination, opinion of title and/or title insurance.

(2) 'Conveyancing' includes all other fees customarily paid for conveyancing services, including settlement, escrow, document preparation and attorneys' fees.

(3) This subtotal breakdown is rarely defined in Boston, where attorneys generally provide all such services, without title insurance.

**Attachment C**

**EXHIBIT XII-11**

**TITLE ASSURANCE AND CONVEYANCING PRICING DATA (1)**

**FOR WASHINGTON, D.C.**

<table>
<thead>
<tr>
<th></th>
<th>ESTIMATED PRICES</th>
<th>HUD-1 DATA</th>
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<tbody>
<tr>
<td></td>
<td>VIRGINIA</td>
<td>MARYLAND</td>
</tr>
<tr>
<td>Title Assurance Fees (2)</td>
<td>$215.00</td>
<td>$212.50</td>
</tr>
<tr>
<td>Conveyancing Fees</td>
<td>$375.00 (3)</td>
<td>$300.00 (3)</td>
</tr>
<tr>
<td>Total Title Charges</td>
<td>$590.00</td>
<td>$512.50</td>
</tr>
</tbody>
</table>

(1) The criteria for comparison are detailed in Exhibits XII-4 and XII-6.

(2) In almost all cases, the title assurance fees were identified as the fairly standard rate for the title insurance premium.

(3) In Virginia and Maryland, where attorneys are heavily involved, the attorneys fees were not broken down to identify any title search fee.

(4) In the District of Columbia, where title companies are a principal provider, the conveyancing fees are usually identified as a 'settlement fee' without being further broken down.

**SOURCE:** PMM&CO., 1980 and 1979 HUD-1 Survey.

(Taken from 1979-80 HUD Study Volume II)
The American Land Title Association (ALTA) has recently provided information for Northern Virginia giving a comparison of the costs of title insurance and settlement when handled by a full service title company and when handled by an attorney. While this data is neither exhaustive nor conclusive it tends to support the findings of the 1979-80 HUD Study. (See 1979-80 HUD Report, Vol. II, Section XII at 51.)

Specifically, ALTA conducted a brief survey of twelve Northern Virginia law firms and requested information on the cost of their services for settlement on a $100,000 home with a conventional mortgage. The survey produced an average charge of approximately $390. When combined with the published Virginia title insurance rate, the resulting total cost was $725.

Detailed cost comparisons with "full service" title companies are not possible because there are not more than one or two such companies in Virginia. The schedule of fees and charges for a full service title company located in Fairfax, however, appears to indicate that the cost for similar services would be approximately $100 less to the consumer. This figure is comparable with the data for Maryland presented in the 1979-80 HUD Study. (See Vol. II, Section XII at 24.)
## AGENCY

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<td>Agricultural and Forestal District Act. Land use value assessments apply to portion of real estate taxes imposed by county but not real estate taxes imposed by town</td>
<td>3</td>
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<tr>
<td>Agricultural and Forestal District Act. Town may not create Agricultural and Forestal District</td>
<td>3</td>
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<tr>
<td>Public officers. De facto officers. Members of board under § 3.1-1 to act after expiration of terms prior to qualification of successors</td>
<td>4</td>
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<tr>
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<td>4</td>
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<td>Elections. Referendums. § 15.1-29.5(e) prohibits Sunday closing law referendums more often than once every two calendar years in even calendar year</td>
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<td>6</td>
</tr>
<tr>
<td>19 year-old who buys &quot;take-out&quot; beer with intent to provide it to 18 year-old for off-premises consumption violates § 4-73 or § 4-112.1 (effective July 1, 1981)</td>
<td>6</td>
</tr>
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</table>
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In absence of consent of owner or exigent circumstances search warrant is required for entry into home of third party for purpose of arresting accused on felony warrant.

Investigative stop of motor vehicle operator by officer on basis of report that operator was "drunk".

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Witness may not be impeached on basis of prior conviction for prostitution.

**WORKMEN'S COMPENSATION ACT**

Insurance. Audit of employer by Compensation Rating Bureau permitted.

**ZONING**

Authority. Local government must determine whether height restrictions advance legitimate State interest.

Authority. Local government must determine whether height restrictions impair any economically viable uses of affected land.

Authority. Local government must determine whether height restrictions prevent best use of land or destroy fundamental incidents of ownership.

Board of Zoning Appeals. Authority to grant "use" variances under § 15.1-495(b), notwithstanding definition of variance in § 15.1-430(p).

"Buffer" zone. External buffer zone that prohibits districts of lower intensity surrounding an intensive use. Not authorized under § 15.1-489.
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