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

From July 1, 1981 to June 30, 1982

Commonwealth of Virginia
Office of the Attorney General
Richmond
1982
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*In order to conserve space the complete listing of cases is not reprinted herein but is an Addendum to this Report. Interested members of the public may obtain copies by contacting the Librarian, Office of the Attorney General.*
LETTER OF TRANSMITTAL

July 1, 1982

The Honorable Charles S. Robb
Governor of Virginia
State Capitol
Richmond, Virginia 23219

My dear Governor Robb:

Enclosed is the Annual Report of the Attorney General for the Fiscal Year July 1, 1981, through June 30, 1982. The Report contains official Opinions which were rendered during the year by this Office in order to provide for uniform construction of law in the Commonwealth. I have also included as an attachment a complete listing of cases pending or completed since the transmittal of the 1980-1981 Report of the Attorney General.¹

As part of my pledge to make the Office of the Attorney General more responsive to the legal needs of the Commonwealth and her citizens, I have, since January 16th, reorganized the structure of the Office to correspond more closely to that of the legislative and executive branches of government. This reorganization will make the delivery of State legal services more efficient and effective.

During my review of the Office, undertaken during the transition period and since January 16th, it became apparent that stronger managerial control of the Office was necessary. To that end, I have created the position of Senior Assistant Attorney General. These positions will offer an incentive to especially capable attorneys to remain in State service and will assist the Deputy Attorneys General of the various Divisions in managing caseloads and complex legal issues. The resulting appointments, I believe, have significantly improved the quality of the legal representation for the Commonwealth, and have given greater case management control to the Office of the Attorney General.

To enhance that managerial effort, I have requested from the General Assembly, and have received, authorization for implementation of a computerized case management system within the Office of the Attorney General. This first computerized effort within this Office will give the Attorney General and his deputies an effective administrative method of managing case loads, directing litigation efforts, and improving the fiscal and managerial control of the Office. The result will be more efficient legal representation for the Commonwealth, especially in the management of thousands of cases and administrative proceedings.

¹In order to conserve space in the published volume of the Report, the complete listing is not reprinted herein. Interested members of the public may obtain copies by contacting the Librarian, Office of the Attorney General.
In order to strengthen further the fiscal and administrative control of the Department of Law, I have requested and the General Assembly has approved, a consolidated State legal services budget, giving the legislature and the citizens of the Commonwealth a true representation of the costs of providing legal services and giving me, and future Attorneys General, an accurate managerial tool to manage the Office in an effective, cost efficient method.

Criminal Law Enforcement

The highest responsibility of government is to provide for the safety and welfare of its citizens. To that end, I have reorganized the criminal law work and created the Division of Criminal Law Enforcement to make public safety a primary objective of this Office. The primary changes involve the creation of a Criminal Litigation Section, a Corrections Litigation Section, a Medicaid Fraud and Abuse Control Section, and a strengthened State Police and Local Law Enforcement Assistance Section.

Attorneys from the Criminal Law Enforcement Division also worked closely with members of the General Assembly who sponsored portions of the anti-crime proposals of this Administration. The 1982 General Assembly acted favorably on many of the Administration's proposals for anti-crime legislation. The new laws included more severe penalties for drunk driving and the use of a firearm in the commission of a felony, as well as the enlargement of police authority to make warrantless arrests in assault cases and to utilize wiretaps in appropriate cases. In an effort to curb drug trafficking, the legislature also adopted our proposals authorizing confiscation by the courts of illegal profits and property acquired as a result of violations by convicted drug dealers.

The Criminal Law Enforcement Division handles all post-conviction litigation filed by State prisoners. This year we defended 892 petitions for writs of habeas corpus filed in State and federal courts and represented the Commonwealth in 37 criminal appeals in the Supreme Court of Virginia. My staff also defends on appeal and collateral attack the convictions of persons under sentence of death in Virginia, who now number nineteen.

In addition to providing day-to-day legal advice to the Department of Corrections, Criminal Law Enforcement Division attorneys represented Corrections personnel in 1,129 federal lawsuits filed by prisoners who alleged that conditions of their confinement violated their civil rights. These cases included major litigation alleging overcrowding and hazardous conditions at the Virginia State Penitentiary, the maximum security facility at Mecklenburg, and the Powhatan Correctional Center. In addition, we defended some 20 suits initiated by Virginia localities or their officials who sought transfer of State prisoners to State custody to relieve overcrowding in local jails.

The Criminal Law Enforcement Division has also begun since January to work closely with federal and local law
enforcement agencies, to provide a more cohesive, coordinated investigative and prosecutorial effort. The steady increase in drug traffic in the past several years has added serious new burdens in the field of law enforcement. This Office is committed to working with all levels of law enforcement to carry that burden, and to use new legislation to strike back at drug dealers.

As the fiscal year approached its end, the Division also established a special trial team to prepare for appeals in a death penalty case in which the inmate had renounced further appeals and had requested that an execution date be scheduled. The purpose of the special team is to ensure that the Commonwealth is ready to react on short notice to any last minute interventions in the case.

Human and Natural Resources Division

The Division of Human and Natural Resources represents those agencies which report to the Governor's Secretaries of Human Resources, Education, and Commerce and Resources. Three sections were established within this Division, each reporting to a Senior Assistant Attorney General, to coordinate directly with a cabinet secretary and to provide counsel to those agencies which report to that secretary.

The Division of Human and Natural Resources is currently handling 528 active cases. This figure represents only those cases pending as of June 30, 1982, and does not reflect the number closed or settled during the preceding year. These cases involve the full range of possible civil litigation—constitutional issues, personal injury, property damage, contract, injunction, mandamus, and various other actions. The cases concern issues which, in monetary value, range from hundreds to millions of dollars.

Since January of this year, assistant attorneys general assigned to this Division have provided counsel to the Governor's Medicaid Task Force, which was established to propose, for approval by you and the Board of Health, revisions in the Medicaid program necessitated by the federal budget cuts. The Division also provides counsel to the Governor's Commission on Block Grants, as that Commission moves into the new field of establishing the priorities of the Commonwealth in dealing with anticipated or proposed federal grants, and reorganizations and reductions in federal funding for Human and Natural Resources programs.

The attorneys assigned to the Department of Social Services' seven regional offices have provided legal counsel to its Division of Support Enforcement which has resulted in the collection of $11,000,000 in Fiscal Year 1981-1982.

A major case in which the Education attorneys were involved concerned a challenge to Virginia's laws permitting local school boards to charge tuition to residents of military bases who wish to send their children to the local public schools. This Office worked with York and Fairfax Counties in lawsuits brought by the federal government challenging this policy. The federal government has dropped its challenge to the statutes at present and has appropriated...
funds for tuition; however, this challenge may be reasserted in the future.

The Education attorneys have begun reviewing the legal and operational relationships of the foundations affiliated with the Commonwealth's public colleges and universities. The examination is intended to assist the Commonwealth in anticipating and dealing with the legal problems associated with these relationships so important to the Commonwealth and the educational institutions.

Environmental matters of significance throughout the Commonwealth were also handled by attorneys in this Division during the preceding year. An important case concerning hazardous wastes was Environmental Defense Fund, Inc., et al., and the Commonwealth of Virginia, ex rel. State Board of Health v. James P. Lamphier, et al. In this matter, the Commonwealth prevailed in the first decision rendered by a federal court sitting in Virginia under the Federal Resource Conservation Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act. The Commonwealth obtained an injunction against the defendant authorizing entry onto his property to identify the nature of the hazardous wastes placed on the property and the extent of the threat they pose to the environment.

In another hazardous waste matter, this Division has been deeply involved in resolving legal issues arising from acidic waste water runoff into the Piney River in Nelson County. The runoff is the result of a cooperas waste pile on property operated by the American Cyanamid Company in the 1950's and 1960's. This Office is currently pursuing litigation against American Cyanamid, U.S. Titanium, and other private parties to obtain and finance permanent restoration of this ravaged property.

Judicial Affairs Division

Two primary aims of the reorganization of the Office of the Attorney General were to strengthen representation of the Commonwealth in civil litigation and to improve the Opinion process of the Office. The latter is crucial to the development of a uniform interpretation of the law of the Commonwealth. To those ends, I have created a new Division, Judicial Affairs, to draw together attorneys with similar responsibilities into one coordinated group.

Within that Division, I placed special emphasis on the formation of a responsive Civil Litigation Section, made up of courtroom specialists who can be ready on short notice to represent the Commonwealth in specialized and highly complicated cases arising across Virginia. This section will handle complex litigation previously handled by specially-appointed outside counsel at substantial cost to the Commonwealth such as the legislative redistricting cases. Additional litigation capability will also be needed to handle increased demands on this Office expected as a result of the Tort Claims Act which became effective July 1, 1982.

Of the over seventy-five cases already being handled by the new Civil Litigation Section, several warrant brief
The first series of cases challenging the 1981 legislative redistricting was amicably settled following enactment of Chapter 1 of the Acts of Assembly, Special Session of 1982. In a second series of cases challenging Chapter 1 on federal and State constitutional grounds, the three-judge district court granted the Commonwealth's motion for summary judgment on the federal claims and adopted the Commonwealth's argument that State claims should be decided in Virginia courts. Suits filed by six counties attacking the redistricting plan are still pending in the federal district court.

Members of my civil litigation staff are presently negotiating a possible settlement in United States v. Commonwealth, et al., a suit brought by the federal government in 1976, alleging employment discrimination by the Virginia State Police. If a proposed settlement is advisable, I will submit my recommendation to you for approval at the appropriate time.

One of the important statutory responsibilities of the Office of the Attorney General is the research of legal issues and the preparation of official Opinions. It is essential that the Office respond quickly and accurately to requests for legal advice, and, to meet that need, I have strengthened and reorganized the process, creating a new Opinions and Regulations Section, within the Division of Judicial Affairs. The Section reviews all Opinions prepared by the Office, researches and coordinates the study of complex legal issues, and contributes to the orderly conduct of State and local affairs by providing a uniform interpretation of the law. Already, it has substantially reduced the response time required in this function.

As I reviewed the Office during the transition period, it immediately became apparent that there was a need to improve the efficiency of State agency practices for recovery of delinquent accounts and other claims. Our survey indicated that the amount owed the Commonwealth in back debts and delinquent accounts totaled well over $140,000,000. In the reorganization of the Office, I established a centralized Claims Section, within the Division of Judicial Affairs to monitor agency practices and to develop a collections and litigation effort. This unit, which was authorized by the General Assembly, has already begun to scrutinize closely internal agency procedures. Legal assistance is also being provided to the State Treasurer to increase recoveries of abandoned bank accounts and other abandoned properties.

From July 1, 1981, to June 30, 1982, the Division of Consumer Counsel participated in approximately 90 proceedings before the Virginia State Corporation Commission and other administrative agencies and courts involving electric, gas, telephone, and water and sewer utilities. In representing the interests of Virginia utility customers, the Division presented expert testimony to the Commission in many of these cases.

The major electric utility rate case during this period was Virginia Electric and Power Company's request for $189,600,000 in additional rate revenues. The Division presented economic and accounting expert testimony showing
that the rate increase should be substantially reduced. The Commission awarded the company an increase of $131,800,000.

In addition, the Division submitted comments on behalf of the Attorney General regarding the proposed reorganization of American Telephone and Telegraph Company. Comments were filed with the United States District Court for the District of Columbia which has jurisdiction over the proposed settlement of antitrust litigation between AT&T and the United States Department of Justice. The comments state that the settlement should not be approved in its present form, because many questions affecting telephone service uses and State regulatory provisions are left unanswered by the proposal. Further hearings and argument will be held at later dates.

The Division will again participate in the annual State Corporation Commission hearing to determine rates for workmen's compensation insurance. As a result of the 1981 proceeding, these rates were reduced. The 1982 case requests an increase in rates of approximately 4% and will be heard by the Commission in July 1982.

The Division of Consumer Counsel also represented citizens of the Commonwealth in several cases involving the Virginia Consumer Protection Act. In each of the significant cases, attorneys from the Office were successful in their efforts to obtain greater protection for Virginia consumers. A major case worthy of note is Commonwealth of Virginia v. Fedders Corporation in which this Office was successful in negotiating an Assurance of Voluntary Compliance from Fedders. The case involved defective heat pumps and air conditioners marketed in Virginia in the names of Fedders, Airtemp and Climatrol. In the settlement, Fedders agreed to make inspections, repairs, and, in some cases, restitution, at company expense. While the total number of affected consumers is not complete, relief will be afforded to more than 1,200 citizens who have contacted this Office pursuant to the terms of the settlement.

The Antitrust Section within the Judicial Affairs Division has also conducted a series of major cases during the year. The section has represented the Commonwealth in the case alleging that Mid-Atlantic Toyota dealers had violated price fixing antitrust laws. If the Commonwealth is successful in litigation or settlement of this very complicated action, restitution and damages will be distributed to Virginia Toyota purchasers.

The Office has also recently completed a lengthy case involving allegations of price fixing in the distribution of ampicillin and various other penicillin type drugs. Recovery in the amount of $98,509.14 has been returned to the Commonwealth and several local health departments as a result of this Section's representation.

Finance and Transportation

The former Division of Transportation was reorganized in January to assume legal responsibilities associated with the Commonwealth's finance and administration. In the new organizational structure, the Division of Finance and
Transportation works directly with the Cabinet members representing those areas and the agencies within those secretarial responsibilities.

The Transportation Section, in cooperation with the Antitrust Section of my Office, and the United States Department of Justice, is currently investigating and, where appropriate, settling antitrust violations arising out of bid-rigging of highway construction contracts let by the Commonwealth. To date, there have been seven contract settlements negotiated whereby $1,800,000 was returned to the Commonwealth for damages incurred. Of this amount, $975,000 in settlements were paid to the Commonwealth in the fiscal year. Furthermore, we are presently negotiating with a number of other companies and will either reach settlement with these companies or file suit to recover the damages. It is anticipated that highway antitrust matters will continue to demand a significant amount of time and effort.

This Division supervised and, on occasion, participated in the disposition of 790 right-of-way condemnation cases for the Department of Highways and Transportation. There were 390 new condemnation cases instituted during this fiscal year and the Division supervised and reviewed the legal steps in the Department's acquisition of $18,000,000 worth of right-of-way property.

Numerous changes were made in the corporate income tax laws this year as a result of the federal Economic Recovery Tax Act of 1981. With respect to individual income taxes, the State Department of Taxation has stepped up its jeopardy assessment procedures in efforts to assess unreported income earned by those in the underground economy including income from embezzlement and other illicit operations. Both of these areas have required significant assistance from the attorneys assigned to the Finance Section. The Finance Section has also successfully defended a challenge to local tax collection procedures on federal constitutional grounds.

In the income tax area, a case is now pending in a lower court which could have a great financial impact on the Commonwealth. The issue involved is whether the Department of Taxation may require consolidation of the income of a domestic internal sales corporation with that of the parent corporation for corporate income tax purposes. Several corporations have brought cases against the Commonwealth that will be resolved based upon this case.

The Virginia Public Building Authority Act was enacted by the 1981 session of the General Assembly. As Attorney General, I brought a mandamus proceeding against the Comptroller in the Supreme Court of Virginia to sustain the constitutionality of the Act. The Finance Section has been involved in this case from the initial stages.

In the past year my Office, in cooperation with the Division of Motor Vehicles and State and federal prosecutors, has conducted an intensive campaign against odometer tampering by new and used car dealers in Virginia. As a result of one of the investigations conducted by the Office, a $115,000 criminal fine was imposed against a Newport News used car dealer on August 11, 1981, by the United States District Court for the Eastern District of Virginia. This is
the largest criminal fine ever imposed against a used car dealer in the United States for odometer fraud violations. A subsequent civil suit, Commonwealth of Virginia v. Hatchell, filed by this Office on behalf of 65 Virginia citizens, resulted in a negotiated recovery of $110,500, representing civil damages of $1,500 for each of the citizens and $13,000 to reimburse the Commonwealth for costs of the investigation and for attorneys' fees. According to the National Highway Traffic Safety Administration of the United States Department of Transportation, this settlement represents the largest consumer recovery for odometer tampering ever obtained in the United States.

In addition, the Office has aided in the criminal prosecution of several other car dealers for damages on behalf of defrauded consumers. Such criminal prosecutions have resulted in fines levied by State and federal courts totalling in excess of an additional $120,000, while the civil actions have resulted in recoveries totalling more than $15,000, with several more cases still pending.

The Division has continued to represent the Virginia Port Authority in its broad range of activities involving the management, improvement and expansion of Virginia's State-owned seaports. During the past year, this Office advised and represented the Authority in the financing of port improvements, including the acquisition of additional property at Portsmouth Marine Terminals and Newport News Terminals and the revenue bond financing of grain export facilities at Lambert's Point Docks in Norfolk. Significant efforts have been devoted to the development of the Authority's proposed coal export terminal on the Elizabeth River in Portsmouth, and this Office has continued to provide the Authority legal counsel in that endeavor.

On behalf of the Secretary of Transportation and the Virginia Port Authority, this Office has been instrumental in negotiating agreements for dredging the major shipping channels in Hampton Roads. As a result of these negotiations, an agreement was achieved with the United States Army Corps of Engineers for continued maintenance and advance maintenance dredging of the port.

Conclusion

This letter gives a brief overview of the efforts of the Office of the Attorney General to provide effective, efficient legal services to the institutions of government of the Commonwealth and to her officers, officials and citizens.

A central philosophy in providing that quality of legal services is my intention to prevent, as much as possible, legal controversies by anticipating them, and by offering the resources of the Office of the Attorney General to State and local government officials in a series of seminars, briefings, and training sessions dealing with legal issues such as the Virginia Conflict of Interests Act, the Virginia Freedom of Information Act, the Administrative Process Act, and the recent Supreme Court decision dealing with local government exemptions from antitrust requirements. By the
end of the fiscal year, more than a thousand State and local
government officials had attended one or more of these
seminars, and had received from this Office material to
explain the requirements of these laws as they relate to
government officials.

I believe that Virginia has been blessed with public
servants of the highest integrity and honesty; our efforts to
help these officials to become better acquainted with the
requirements of the law will allow the Commonwealth to
continue to be well-served by the efforts of all her
officials and officers of government.

While no document can cover all the duties and
responsibilities of the Office, this review serves as a guide
to our efforts to continue to meet our mandate as the
Department of Law for the Commonwealth of Virginia.

With kindest regards, I am

Sincerely,

Gerald L. Baliles
Attorney General
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<td>Karl E. Bren</td>
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<td>Cynthia Parker</td>
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<td>Jack Richardson</td>
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<td>Clerk/Messenger</td>
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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 1982

†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
Gerald L. Baliles ......................................... 1982-

†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.


Beamon v. Commonwealth. From Circuit Court, County of New Kent. Admissibility of incriminating statements. Affirmed.


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


Board of Supervisors of Buckingham County v. Weyl, et al. From Circuit Court, County of Buckingham. Petition to vacate an injunction granted by the circuit court. Injunction vacated.

Board of Supervisors of Fairfax County, et al v. Nassif. From Circuit Court, County of Fairfax. Appeal for real estate tax assessment purposes. Rent is to be used in capitalizing income for rental property valuation purposes. Reversed and remanded.


Cartwright v. Commonwealth. From Circuit Court, City of Norfolk. Conspiracy to commit murder and robbery. Single agreement to commit several crimes can support multiple convictions. Affirmed.


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

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. Affirmed.

Computran Systems and Broadway v. Harwood. From Circuit Court, City of Richmond, Division I. Construction contract claim. Appeal discontinued.

Coppola v. Warden. From Circuit Court, City of Newport News. Failure to timely object to jury instruction. Rules 3A:23(c) and 5:21. Affirmed.


Covey v. Virginia Employment Commission and Wilderness Road Truck Stop. From Circuit Court, County of Wythe. Unemployment insurance benefits. Petition denied.


Department of Highways and Transportation v. Sprouse. Eminent domain matter involving the effect on valuation of a covenant that the land be used as residential unless waived by former owner. Dismissed.


Dooley, et al. v. Ritchie, et al. From Circuit Court, City of Richmond, Division I. Appeal from dismissal of an action challenging the recovery of general relief payments from recipients by the Department of Social Services. Affirmed.

Driggs & Shirley Contracting v. Commonwealth. From Circuit Court, City of Richmond, Division I. Construction contract claim. Appeal denied.


Dunn v. Commonwealth. From Circuit Court, City of Charlottesville. Appellant challenged his conviction for arson and breaking and entering based on prosecutor's comment on defendant's failure to testify. Affirmed.


Godfrey v. Commonwealth. From Circuit Court, County of Culpeper. Circuit Court reversed State Health Department decision denying a septic tank permit. Reversed and dismissed.

Grant v. Commonwealth. From Circuit Court, City of Richmond, Division I. Revocation of imposition of sentence. Affirmed.
Green v. Commonwealth. From Circuit Court, City of Richmond, Division II. Validity of search and seizure, admissibility of confession of juvenile defendant, and sufficiency of evidence. Affirmed.


Highway Commissioner v. Linsly. From Circuit Court, County of Middlesex. Appeal of condemnation award. Affirmed.

Holloman v. Department of Taxation. From Circuit Court, City of Richmond, Division II. Whether sales of North Carolina hogs to Virginia packers are subject to the Virginia excise tax on slaughter hogs and feeder pigs. Petition for appeal denied.

Hudson v. Commonwealth. From Circuit Court, City of Alexandria. Admissibility of testimony of defendant's wife over objection on husband-wife privilege. Affirmed.


In re Anderson. From Circuit Court, City of Virginia Beach. Application for writ of mandamus against circuit court. Child custody case. Denied writ of mandamus.

In re Basile. Petition for a writ of prohibition. Writ denied.

In re Broadus. From Circuit Court, County of Hanover. Petition for writ of prohibition. Dismissed.


In re Freeman. From Circuit Court, County of Fairfax. Application for writ of prohibition to prevent State circuit court's enforcement of discovery subpoena. Application dismissed.

In re Pilcher. From Circuit Court, County of Hanover. Petition for writ of prohibition. Dismissed.


In re Williams, Jr. From Circuit Court, City of Portsmouth. Petition for writ of mandamus. Petition denied.

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. Affirmed.
Jones v. Superintendent. From Circuit Court, City of Danville. Pathological intoxication not a valid defense under Virginia law. Affirmed.


Midkiff v. Commonwealth. From Circuit Court, County of Henry. Appeal of the denial of a motion to enter an ASAP program under § 18.2-271.1. Affirmed.


Nearns v. Commonwealth. From Circuit Court, City of Richmond, Division I. Validity of habitual offender adjudication. Affirmed.


Patterson v. Commonwealth. From Circuit Court, City of Richmond, Division I. Whether trial court improperly limited use of preliminary hearing transcript in the defense effort to impeach prosecutrix' testimony. Affirmed.

Payne v. Warden. From Circuit Court, County of Arlington. Whether a preliminary hearing in a juvenile and domestic relations district court is jurisdictionally required when an adult, charged with an offense committed against a juvenile, is directly indicted by the grand jury. Affirmed.


Pike Electrical Contractors, Inc. v. Commissioner of Labor and Industry. From Circuit Court, County of Buckingham. Appeal of decision upholding OSHA citation. Affirmed.

Pugh v. Commonwealth. From Circuit Court, City of Buena Vista. Sufficiency of evidence to show malice in commission of second degree murder. Affirmed.


Ross v. Commonwealth. From Circuit Court, County of Arlington. Whether a preliminary hearing in a juvenile and domestic relations district court is jurisdictionally required when an adult, charged with an offense committed against a juvenile, is directly indicted by the grand jury. Affirmed.

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. Affirmed.


Smith v. Commonwealth. From Circuit Court, City of Richmond. Appeal dealing with the issue of revocation of a suspended imposition of sentence. Reversed.


Squire v. Commonwealth. From Circuit Court, City of Richmond. Appeal from a conviction of robbery, attempted rape and sodomy. Whether trial court committed error by permitting the prosecution to cross-examine defendant about his failure to mention his alibi to the investigating officer during an interview after Miranda warnings were given. Affirmed.


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

State Highway and Transportation Commissioner v. Gordon, et al. From Circuit Court, County of Prince Edward. Appeal of award of interest at the judgment rate of eight percent in a highway condemnation case. Decided in favor of the Commissioner.


Stover v. Commonwealth. From Circuit Court, City of Richmond. Appeal from a conviction of second degree murder and use of a firearm in the commission of a felony. Whether evidence produced at trial was sufficient to support a finding of guilt beyond a reasonable doubt. Reversed and dismissed.

Taylor v. Commonwealth. From Circuit Court, County of Louisa. The sufficiency of exigent circumstances and a search. Affirmed.


Virginia Employment Commission v. City of Virginia Beach and Guizzeti. From Circuit Court, City of Virginia Beach. Unemployment insurance benefits. Petition granted and later denied.
Virginia Employment Commission v. City of Virginia Beach School Board. From Circuit Court, City of Virginia Beach. Unemployment insurance benefits. Petition granted and later denied.


Wooden v. Commonwealth. From Circuit Court, County of Chesterfield. Felony murder rule. Felony murder of co-felon who was killed by the victim. Reversed and dismissed.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA


Addison v. Commonwealth. From Circuit Court, County of Culpeper. Lawfulness of defendant's "seizure" and "tainted" confessions. Qualifications of expert witness.

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.

Brady v. Virginia Employment Commission and Human Resource Institute of Norfolk, Inc. From Circuit Court, City of Norfolk. Unemployment insurance benefits.

Briley v. Superintendent. From Circuit Court, City of Richmond, Division I. Appeal from denial of petition for writ of habeas corpus. Effectiveness of counsel.

Brock v. Virginia Employment Commission and Virginia Department of Corrections. From Circuit Court, County of Isle of Wight. Unemployment insurance benefits.
Brown, et al. v. Lukhard, et al. From Circuit Court, City of Richmond. Appeal from summary judgment for defendants on issue of whether General Assembly's elimination of ADC funding for students between the ages of 18 and 21 was valid.

Burgess v. Commonwealth. From Circuit Court, County of Arlington. Right of defendant to have separate trial from co-defendant's trial.

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. Writ of error awarded; awaiting oral argument.

Cates v. Virginia Polytechnic Institute. From Circuit Court, City of Richmond, Division I. Appeal of Freedom of Information Act decision.

Chandler v. Division of Support Enforcement, Department of Welfare. From Circuit Court, County of Fairfax. Petition for writ of error.

Coleman v. Commonwealth. From Circuit Court, County of Buchanan. Death penalty case.

Commonwealth v. B. J. McAdams, Inc. From Circuit Court, City of Richmond, Division II. Appeal from decision that an interstate trucking company is not required to file and pay Virginia income taxes.

Commonwealth v. Brumfield. From Circuit Court, County of Pittsylvania. Appeal of a dismissal of an habitual proceeding under § 46.1-387.5.

Commonwealth v. Jenkins. From Circuit Court, County of Smyth. Action by the Commonwealth to recover value of services rendered by a State hospital.


Commonwealth v. Spotsylvania County. From Circuit Court, County of Spotsylvania. Appeal of order dismissing monetary claim against county.


Commonwealth v. Wellmore Coal Corp., et al. From Circuit Court, County of Buchanan. Appeal from decision exempting certain items from sales and use tax. Appellee assigned cross-error on decision taxing certain other items.
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.

Dade v. Commonwealth. From Circuit Court, County of Fairfax. Appeal involving the issue of pre-trial discovery.

Deal v. Commonwealth. From Circuit Court, County of Fairfax. Appeal of order dismissing suit against Commonwealth based on lower court's allegedly erroneous finding that Commonwealth could not be bound by decision of arbitrator.

Dotson v. Dalton, et al. From Circuit Court, City of Richmond, Division I. Suit alleging State constitutional violations in licensing statutes.

Dunn v. Commonwealth. From Circuit Court, County of Albemarle. Appeal from judgment in which petitioner was found guilty of grand larceny. Issue on review limited to whether value of goods stolen exceeded $100. Judgment reversed and remanded to circuit court for a new trial upon a charge of petit larceny.

Elliot v. Virginia Supplemental Retirement System. From Circuit Court, County of Campbell. Appeal from reversal of Supplemental Retirement System denial of disability benefits.


Fariss v. Commonwealth. From Circuit Court, City of Lynchburg. Issue of grievability.

Forbes v. Kenley. From Circuit Court, City of Chesapeake. Appeal of denial of septic tank permit.


Gunter v. Virginia Employment Commission and Danville School Board. From Circuit Court, City of Danville. Unemployment insurance benefits.

Highway Commissioner v. Sleeter. From Circuit Court, County of Loudoun. Appeal of condemnation award.

In the matter of Civil Investigative Demand Nos. H-10, H-11, H-12, H-13, H-14, H-15 and H-16. From Circuit Court, City of Richmond. Appeal from denial of petitions to set aside civil investigative demands in Virginia Highway Investigation as "oppressive, unreasonable and unconstitutional."

Jones v. Virginia Employment Commission and Luv'n Time. From Circuit Court, City of Alexandria. Unemployment insurance benefits.
Kenley v. Newport News General and Non-Sectarian Hospital Association. From Circuit Court, City of Newport News. Appeal from declaratory judgment that hospital does not need a certificate of public need to commence open heart surgery program.


Lightfoot v. Commonwealth. From Circuit Court, County of Chesterfield. Sufficiency of evidence to prove conspiracy to commit robbery.

Lomax v. Life of Virginia, et al. From Circuit Court, County of Amherst. Appeal from denial of death benefits.

Mahan, et al. v. National Conservative Political Action Committee. From Circuit Court, City of Richmond, Division I. Appeal from a declaratory judgment of the circuit court declaring § 24.1-23(8) unconstitutional as applied to the plaintiff NCPAC.


Mink v. Commonwealth. From Circuit Court, County of Wythe. Denial of right of inquiry. Denial of due process of law.

Mowbray v. Division of Motor Vehicles. From Circuit Court, County of Fairfax. Appeal of a denial of petition for restoration of driving privileges.

Myers v. Virginia State Bar, ex rel., Second District Committee. From Circuit Court, City of Norfolk. Appeal of attorney license revocation based on alleged excessive fees.

Petitioners to Quash Civil Investigative Demands, Nos. H-13, H-15 and H-16. From Circuit Court, City of Richmond. Appeal from denial of motion to seal court records in Virginia Highway investigation.

Rideout v. Virginia State Board of Funeral Directors and Embalmers. From Circuit Court, County of Isle of Wight. Petition for appeal of lower court ruling which upheld decision of Funeral Board to suspend appellant's license for fraud in the conduct of the funeral service profession.

Scott v. Dalton, et al. From Circuit Court, City of Richmond, Division I. Suit alleging State constitutional violations in licensing statutes.

Slominski v. Commonwealth. From Circuit Court, City of Williamsburg. Appeal from dismissal of appeal of Supplemental Retirement System decision to circuit court on grounds of untimely filing.


State Highway and Transportation Commissioner v. Cardinal Realty Company. From Circuit Court, County of Chesterfield. Whether § 33.1-125 permits the trial court to deny motion to invalidate.


State Highway and Transportation Commissioner v. Worrie. From Circuit Court, City of Norfolk. Appeal of award in highway condemnation case as an issue of evidence of damages.

Staton v. Life of Virginia, et al. From Circuit Court, County of Amherst. Appeal from denial of death benefits.

Stokes v. Hill and Bradbery. From Circuit Court, City of Petersburg. Appeal from adverse judgment on action to have § 46.1-421(b) declared unconstitutional.


Van Sant v. Commonwealth. From Circuit Court, County of Arlington. Appeal of convictions for assault and battery and obstructing justice. Waiver of right to counsel. Abuse of discretion in denying continuance. Denial of motion to grant retrial.

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 Real Estate Commission v. Bias. From Circuit Court, County of Albemarle. Appeal from reversal of Real Estate Commission disciplinary action.
Warren v. Coleman. From Circuit Court, City of Richmond. Appeal from preliminary injunction and declaratory judgment denying disclosure by the Attorney General of information obtained by civil investigative demands to the localities.

Williams v. Circuit Court of the City of Norfolk. Petition for a writ of mandamus compelling the appointment of a committee for a prisoner and other relief. Pending.

Wright v. Commonwealth. From Circuit Court, County of Chesterfield. Sufficiency of evidence to prove conspiracy to commit robbery.

Wright, T/A Wright Enterprises v. Frenk & Frenk. From Circuit Court, County of Fauquier. Amicus case involving payment awarded pursuant to Contractor Transaction Recovery Act.

CASES DECIDED IN THE SUPREME COURT OF THE UNITED STATES

Cooper v. Superintendent. Petition for a writ of certiorari to judgment of United States Fourth Circuit Court of Appeals. Whether greater sentence may be imposed by a jury at a retrial caused by prosecutor's error, and if speedy trial was denied by delay pending the retrial. Certiorari denied.


Romeo v. Youngberg. Amicus curiae brief filed on behalf of the defendants establishing standards for damage awards in 42 U.S.C. § 1983 suits filed by residents of mental retardation centers seeking to overturn decision of Third Circuit Court of Appeals regarding right to treatment in mental retardation facilities. Vacated.


Young v. Kenley. Petition for a writ of certiorari to the judgment of the United States Court of Appeals for the Fourth Circuit. Liability of State Health Department for attorney's fees in an employment discrimination suit. Certiorari denied.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES

Carswell v. Milgrim, et al. Petition for certiorari to review the judgment of the Virginia Supreme Court which refused a writ of error from the Circuit Court of Fairfax County.


The main headnote appears above the Opinion and in the Subject Index. Secondary headnotes are listed alphabetically in the Subject Index only.
ADMINISTRATIVE PROCESS ACT. THIRTY AND NINETY DAY PERIODS PROVIDED FOR IN § 9-6.14:9 TO RUN CONCURRENTLY.

July 10, 1981

The Honorable John R. Broadway, Jr.
Registrar of Regulations
Virginia Register Committee

In your letter of inquiry you indicate that the Administrative Process Act (the "Act") provides for the effective date of an agency regulation to be 30 days after the filing with the Registrar. The Act has been amended to provide for a 90 day period during which committees of the General Assembly may take action to defer the effective date of the regulation. You inquire whether the 30 and 90 day periods run concurrently so that the regulation would go into effect at the end of 90 days or whether the periods run consecutively so that 120 days would pass between filing and effective date.

In § 9-6.14:9 of the Code of Virginia (1950), as amended, it is provided that:

"No regulation except an emergency regulation shall be operative in less than thirty days after such adoption and the filing thereof in accordance with the Virginia Register Act, provided that in the case of any substantive regulation, such filing shall be deferred pending action as provided in subsection D hereof."

(Emphasis added.)

In indicating that it is the filing that is deferred, this section would seem to imply that the 30 day period never begins to run until the completion of procedures in subsection D. However, this is contradicted by the language of subsection D.

Subsection D provides that the Registrar shall provide copies of the regulation to the appropriate committees of the General Assembly, the House Appropriations Committee and the Senate Finance Committee. The subsection provides, in pertinent part:

"Any committee receiving such materials may, within ninety days of the mailing by the Registrar, meet, and with a majority of the members of said committee being present, direct upon simple majority vote that the effective date of the regulation or any part thereof be deferred...."  (Emphasis added.)

This subsection would seem to indicate that the filing is effective as of receipt by the Registrar and that only the effective date is postponed.

In that the statute is unclear on its face, the intent must be considered. See 17 M.J. Statutes § 35. The intent
here is clearly to allow the committees to study the proposed regulation and if it appears to be illegal or ill-advised, to defer its operation until the General Assembly as a whole has the opportunity to review it. If the 30 and 90 day periods are considered to run concurrently, the committees will have the full allotted time and should the committees decline to take further action, the regulation will go into effect without further delay. If the periods are regarded as running consecutively, the result is delay for the implementing agency with no apparent benefit to the public. It is, therefore, my opinion that the 30 and 90 day periods should be considered to run concurrently.

AGRICULTURE AND COMMERCE. AGRICULTURAL AND FORESTAL DISTRICT ACT. LAND ADDED TO EXISTING DISTRICT NEED NOT CONTAIN FIVE HUNDRED ACRES.

December 21, 1981

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You have asked whether § 15.1-1511 of the Code of Virginia (1950), as amended, requires that any contiguous parcel added to an existing agricultural forestal district must contain five hundred acres.

Section 15.1-1511 sets forth the requirements for establishing an agricultural district. One of the requirements is that the district must contain five hundred acres. See § 15.1-1511(A). Section 15.1-1511(B)(1)(iv)(c) provides that: "additional qualifying lands may be added to an already created district upon separate application pursuant to this chapter at any time following such creation...."

I am of the opinion that only the parcel initially establishing a district must contain five hundred acres. Additions may be of any size provided that the land otherwise qualifies for inclusion in a district and the procedures set forth in the law are followed upon each new application. Your question is, therefore, answered in the negative.

AGRICULTURE AND COMMERCE. CHIPPOKES PLANTATION FARM FOUNDATION MAY ESTABLISH INDEPENDENT ACCOUNT AND MANAGE ITS OWN INVESTMENTS, INSOFAR AS GIFTS AND DONATIONS TO FOUNDATION ARE CONCERNED. § 3.1-22.10C.

March 15, 1982

The Honorable J. Richard Andrews, Chairman
Chippokes Plantation Farm Foundation
This is in reply to your letter of February 26, 1982, in which you have asked the following questions relating to the Chippokes Plantation Farm Foundation (the "Foundation").

"1. Can the Foundation withdraw all funds from the State Treasury and maintain an independent account and investments?

2. If the Foundation cannot maintain its own checking account, can it make its own investments?

3. Is the Foundation required or does it have the option to use the State Treasury to manage its funds? If so, is the Foundation entitled to the interest on the funds? What charges, if any, may the Treasury make for providing this service?"

Chippokes Plantation was a gift to the Commonwealth by Mrs. Victor Stewart. The purpose of the gift was to establish a working farm to educate the public on the history and evolution of agriculture and rural living. The General Assembly created the Foundation to accomplish this purpose by enacting Ch. 4.2 of Title 3.1, §§ 3.1-22.6 through 3.1-22.12 of the Code of Virginia (1950), as amended. On January 30, 1980, this Office ruled that the Foundation was an instrumentality of the Commonwealth. See Report of the Attorney General (1979-1980) at 5.

The General Assembly has mandated that the farm be established, operated and maintained without any expense to the general fund of the Commonwealth. See § 3.1-22.10A. The Foundation, however, is empowered to establish the Chippokes Plantation Farm Foundation Fund. The fund is to be used "for the sole purpose of constructing the physical facilities and acquiring the agricultural equipment to be used in the model farm, and whenever necessary, to maintain the continued operation and well-being of the model farm...." See § 3.1-22.10A. The Foundation derives rental income from the farmer tenant who is responsible for the actual farming operations of the model farm. The Foundation is further empowered "[t]o accept, hold, administer and receive gifts and bequests of money, securities or other property of whatsoever character, absolutely or in trust, to the fund, for the purposes for which the Foundation is created...." See § 3.1-22.10C. Such gifts and bequests are deemed gifts to the Commonwealth and any income earned from such gifts or bequests are required to be deposited to the credit of the fund. See § 3.1-22.12.

Section 2.1-180 requires every State department, division, commission, institution or other agency owned or controlled by the State to deposit "public funds" to the credit of the State treasury. That section specifically provides, however, that it shall not apply to endowment funds or gifts to institutions owned or controlled by the State and income from such endowments.
Rents collected from the tenant are State revenues and must be paid promptly into the State treasury. See Art. X, § 7 of the Constitution of Virginia (1971); § 2.1-180; Report of the Attorney General (1949-1950) at 141. Donations and gifts, however, are not regarded as revenues and are not subject to such a requirement. Furthermore, § 3.1-22.10A authorizes the Foundation "[t]o establish, administer, manage, including the creation of reserves, and make expenditures from the Chippokes Plantation Farm Foundation Fund..." for certain limited purposes.

Therefore, I am of the opinion that the Foundation may establish an independent account and manage its own investments, insofar as gifts and donations are concerned. Of course, expenditures from the fund would be limited solely to those purposes authorized in § 3.1-22.10A. If the powers granted by §§ 3.1-22.10A and 3.1-22.10C are utilized, I suggest that you contact the Auditor of Public Accounts for assistance in implementing a proper system of accounts and control. See §§ 2.1-155 and 2.1-156.

While not required to do so, the Foundation may elect to deposit these gifts and bequests in a trust account maintained by the State Treasurer. If the Foundation's directors so elect, the State Treasurer is empowered to make all decisions relating to the investment of the fund. See §§ 2.1-186 and 2.1-187. Earnings on investments, including interest, will accrue to the credit of the fund. See § 3.1-22.12. Finally, I am not aware of any provision of law which would authorize the State Treasurer to assess a charge for investing the Chippokes Plantation Farm Foundation Fund.

AGRICULTURE AND COMMERCE. VIRGINIA SEED LAW. BOARD MAY NOT CREATE NEW CLASSIFICATION OF SEED FOR ONE ALREADY CREATED BY LEGISLATURE.

June 22, 1982

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

This is in reply to your recent letter in which you ask whether the Board of Agriculture and Consumer Services has the authority to establish seed classifications such as "undesirable kinds" or "undesirable crop seed" and place in these classifications seeds which fall within the definition of "noxious-weed seeds."

You have informed me that grass and turf specialists regard certain agricultural seeds, even seeds with commercial value, to be very objectionable when mixed with lawn and turf seeds. For example, incidental occurrence of a few broad-leaf grass seeds in a finer grass seed is objectionable because there are no herbicides which will selectively remove broad-leaf grasses.
Section 3.1-271(2) of the Virginia Seed Law authorizes the Board of Agriculture and Consumer Services "[t]o prescribe and establish, add to or subtract therefrom by rules and regulations prohibited and restricted noxious-weed seed lists." (Emphasis added.) Restricted noxious-weed seeds are "seeds of weeds which are very objectionable in fields, lawns and gardens in this State and are difficult to control by cultural practices commonly used." See § 3.1-263(9)(b). The objectionable agricultural seeds referred to in the second paragraph of this Opinion thus fall within the legislatively created definition of restricted noxious-weeds. Further, agricultural seeds are "the seeds of grass, forage, cereal and fiber crops, and any other kinds of seeds commonly recognized within this State as agricultural seeds, lawn seeds and mixtures of such seeds, and may include noxious-weed seeds...." (Emphasis added.) See § 3.1-263(3).

There is a maxim of statutory construction which states: "that which is expressed puts an end to that which is implied." See 2A Sutherland Statutory Construction at 123, n.1 (1973). Because the General Assembly has expressly provided for the regulation by the board of "restricted noxious-weed seeds" in § 3.1-271(2) within that classification, I find no implied authority for the board to create additional subclassifications to regulate seeds which fall within that classification which was created by the legislature.

ALCOHOLIC BEVERAGE CONTROL LAWS. BEER FRANCHISE ACT. SALE OF BEER TO FOREIGN VESSELS AND U. S. MERCHANT SHIPS FOR USE OUTSIDE OF CONTINENTAL BOUNDARIES DOES NOT VIOLATE ACT.

December 15, 1981

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

You have asked my opinion regarding application of the Beer Franchise Act, § 4-118.3, et seq., of the Code of Virginia (1950), as amended, to a licensed wholesaler who buys beer directly from a brewery for sale to foreign naval and merchant vessels, and also to United States merchant ships for use outside of the continental United States boundaries.

Section 4-118.6 prohibits a brewery from entering into more than one agreement for the sale of its brand or brands of beer by a wholesaler in any territory. "Territory" is defined as an "area of primary sales responsibility expressly or impliedly designated by any agreement between any beer wholesaler and brewery for the [sale of the] brand or brands of any brewer." See § 4-118.4(5). Sales territories under the Beer Franchise Act are, therefore, established by the agreement between the brewery and the wholesaler.
You have advised that the proposed sales to vessels would not conflict with a territory agreement established by the brewery and a distributor. The breweries' agreements establishing sales territories in this geographic area filed with the Virginia Alcoholic Beverage Control Commission, as required by § 4-118.6, do not make any specific reference to non-domestic sales, or sales to ships for use outside the United States.

Accordingly, I am of the opinion that the brewery's sale to the wholesaler for sale to vessels as described above would be permissible under the Beer Franchise Act.

ALCOHOLIC BEVERAGE CONTROL LAWS. LOCAL OPTION. PERSONS MAY POST AND PUBLISH NOTICE OF INTENT TO APPLY, AND APPLY FOR MIXED BEVERAGE LICENSE PRIOR TO DATE ON WHICH MIXED BEVERAGE LAWS BECOME EFFECTIVE.

December 7, 1981

The Honorable Robert W. Jeffrey, Chairman
Department of Alcoholic Beverage Control

You ask whether a person may post and publish notice of intent to apply and apply for a mixed beverage license after the mixed beverage law is adopted by local referendum held in accordance with § 4-98.12 of the Code of Virginia (1950), as amended, but prior to the date on which the mixed beverage laws become effective in the locality.

In my opinion, your question should be answered in the affirmative.

Section 4-98.12 reads in part as follows:

"The provisions of this chapter shall not become effective in any city or county until (a) a petition, signed by a number of registered voters of such city or county equal to ten per centum of the number of voters registered therein on the January one preceding the filing of the petition and in no event signed by less than one hundred registered voters of such city or county, is filed with the circuit court of such city or county, asking that a referendum be held on the question, 'May mixed alcoholic beverages be sold in (the name of such city or county) by restaurants licensed under chapter 1.1 (§ 4-98.1 et seq.) of Title 4 of the Code of Virginia?'; (b) following the filing of such petition, the court shall, by order entered of record in accordance with § 24.1-165, require the regular election officials of such city or county to open the polls and take the sense of the qualified voters on such question; and (c) a majority of the voters voting in such election shall have voted 'Yes.'"
The ballots shall be counted, returns made and canvassed as in other elections, and the results certified by the electoral board to the court ordering such election. Thereupon, such court shall enter an order proclaiming the results of such election and a duly certified copy of such order shall be transmitted to the Board and to the governing body of such city or county. This chapter shall become effective in such city or county thirty days following the entry of such order if a majority of the voters voting in such election have voted "Yes."

Under § 4-98.8, persons intending to apply for a mixed beverage license must comply with the procedural requirements of § 4-30. Thus, your inquiry is whether the notice and application required by § 4-30 can be posted and filed during the thirty day period after the referendum but before the mixed beverage law becomes effective in the locality.

Though generally any act done under a law prior to its effective date is null and void, the Supreme Court of Virginia has recognized that this rule has exceptions. Burks v. Commonwealth, 126 Va. 763, 101 S.E. 230 (1919). The Burks case involved a State law relating to the taking of fish from rivers and streams in Rockbridge County. The statute provided that it became effective in a county only after adoption and ratification by the board of supervisors. The county board passed an ordinance ratifying the act prior to the effective date of the State law. In upholding the validity of the ordinance, the court stated:

"The question upon which the whole case depends is whether the board of supervisors could validly adopt and ratify the act of 1914 before the same actually took effect as a law. It is argued on behalf of the defendants that the action of the board on June 1, 1914, was null and void, and that their subsequent action in 1916, being merely an amendment to a void proceeding, could not have the effect of validating the original adoption and ratification.

It is undoubtedly true as a general proposition of law that until the time arrives for a statute to take effect, all acts purporting to have been done under it are null and void. 36 Cyc. 1192, and cases cited. It is also true that a void act cannot be made the subject of a mere amendment. [Citing authorities]. We do not think, however, that these propositions apply to the question under consideration, and while we have not found and have not been referred to any decision or other authority directly in point, we are unable to give our assent to the contention that the first action of the board of supervisors was void. There is nothing in the act to indicate any intention on the part of the legislature to require the board to wait until the law would inevitably become effective before signifying approval of its terms, and we perceive no reason or
principle which would require such a course. The evident purpose of the legislature was to make the action of the board a condition precedent to the effectiveness of the act; and it was left optional with the board whether the law should come into force at the end of ninety days from its passage, or at a later period, or should remain entirely dormant. If it was to become effective at the end of ninety days from its passage, the more promptly the board acted the better opportunity the public would have to respect its terms. This view seems reasonable and just, and is in accord with the modern trend of legislation regarding the time when laws, other than emergency laws, shall take effect." (Cited authorities omitted). 126 Va. at 767-768. (Emphasis added.)

This Office has previously construed Burks as holding, in effect, "that the new law may be looked to for the purpose of taking such actions as are necessary to make it fully effective on the day it becomes law." See Report of the Attorney General (1951-1952) at 64. A prior Opinion of this Office held that signatures of qualified voters obtained pursuant to § 4-98.12 prior to the effective date of Ch. 1.1 of Title 4 would be valid for filing with the court for purposes of asking that a referendum be held. See Report of the Attorney General (1967-1968) at 7.

It is my conclusion that the Burks rationale is applicable here. Following entry of the court order proclaiming a favorable vote in a referendum, the mixed beverage law inevitably becomes effective in the locality after thirty days. No further action is required to be taken by the Virginia Alcoholic Beverage Control Commission or by the governing body of the locality. There is nothing in § 4-98.12 or 4-30 to indicate any intent of the General Assembly to require license applicants to wait until the act is effective prior to posting and publishing notice of intent to apply and applying for a license.

This conclusion is consistent with prior rulings of this Office in analogous contexts. In an Opinion to the Honorable Oliver D. Rudy, Commonwealth's Attorney for Chesterfield County, dated September 15, 1972, and found in Report of the Attorney General (1972-1973) at 527, it was held that a board of zoning appeals had the authority to consider and act upon all applications for use permits for multi-family dwellings that had been filed, advertised and set for public hearing prior to passage of the zoning ordinance. Similarly, applications for voter registration may be taken during the thirty day period prior to a primary and general election, but the names may not be registered or posted until the registration books are reopened. See Report of the Attorney General (1971-1972) at 192.

I am, therefore, of the opinion that applicants may post, publish and apply for a mixed beverage license within the thirty day period following entry of the court order
certifying a favorable vote in a referendum under § 4-98.12 and prior to the effective date of the mixed beverage law in the locality. The Virginia Alcoholic Beverage Control Commission, however, is not empowered to grant the license applied for until the mixed beverage law has become effective. See § 4-98.2(a).

ALCOHOLIC BEVERAGE CONTROL LAWS. PROPOSED REGULATION REGARDING PRICE INCREASE NOTICES BY BREWERIES AND WINERIES MAY VIOLATE SHERMAN ACT.

July 27, 1981

Mr. Robert W. Jeffrey, Commissioner
Department of Alcoholic Beverage Control

I have received your request for an opinion regarding the legality under the antitrust laws of proposed ABC Regulation § 57.1, which would require breweries and wineries to give wholesalers 20 days notice of price changes.

At an ABC Commission (hereinafter the "Commission") hearing on May 27, 1980, this Office advised that the former Regulation § 54.1, which provided for 30-day notice of price increases by breweries, wineries, vintners, and importers was invalid in light of the Supreme Court's opinion in California Retail Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. 97 (1980) (Transcript of hearing, p. 83). Midcal decided two important legal issues. The case articulated a test for determining whether state action will be immune from the antitrust laws under the doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943). In addition, the case decided that regulation of alcoholic beverages by the states is not automatically protected from Sherman Act scrutiny by the Twenty-first Amendment. A "balancing" test is applied to determine whether the state's regulatory interest will outweigh the federal antitrust laws in a particular case. 445 U.S. at 106-110.

If Virginia's beer and wine wholesalers agreed among themselves to press for a uniform price notice provision with breweries, wineries, vintners, and importers, the agreement might be interpreted as a per se violation of § 1 of the Sherman Act and § 59.1-9.5 of the Code of Virginia (1950), as amended, the Virginia Antitrust Act. The reason for this is the impact of such uniform terms on price formation in the alcoholic beverage market. Since the Supreme Court's decision in United States v. Socony-Vacuum Oil Company, 310 U.S. 150 (1940), it has been apparent that any attempt to influence price is per se illegal.

On its face, a 20-day price notice provision may seem unrelated to the process of price formation, but it is well settled that even an indirect effect on price is sufficient to subject an agreement to scrutiny under the antitrust laws.
"An agreement that interferes with the setting of price by free market forces is illegal on its face. United States v.
Container Corp., 393 U.S. 333, 89 S.Ct. 150, 21 L.Ed.2d 526
(1969). The per se rule applies even when the restraint on
prices is somewhat indirect." West Texas Utilities Co. v.
1979).

Agreements which affect pricing activity sufficiently to
invoke the per se rule share three characteristics: "First,
the practices examined are related to the market in such a
way that if they have any effect at all they will have an
effect on price formation. Second, they lack any significant
degree of integration of functions among the competitors.
Third, the arrangements are not ones which help to make or
improve a market by facilitating trading, or exchanging
information, or standardizing product, or the like, and which
thus may aid competition." L. Sullivan, Handbook of the Law

The second question raised is whether otherwise illegal
activity would be shielded from attack by the "State action"
immunity. Under Midcal, the State must: (1) clearly express
an intention to displace competitive activity, and
(2) actively supervise the system which has displaced the
free market. 445 U.S. at 105. Since the Commission's repeal
of the 30-day notice provision last spring, the General
Assembly has passed House Joint Resolution 238, which
expresses the sense of the General Assembly that posting
regulations be considered. The Resolution is insufficient to
shield the Commission from antitrust scrutiny under the State
action exemption. The expression of policy to displace
competition must be made by the State in its sovereign
(1975). A resolution passed by the legislature does not
carry the weight of law. Newport News Firefighters'
1113, 1115 (E.D. Va. 1969). Even though it may express the
sense of the legislature, House Joint Resolution 238 does not
express the sovereign will in the manner envisaged by the
United States Supreme Court.

It could be argued that even if Regulation § 57.1 is not
protected "State action," the Twenty-first Amendment bars
application of the Sherman Act. As noted above, Midcal makes
it clear that the Twenty-first Amendment is not an absolute
shield. Since that Amendment and the Commerce Clause are
parts of the same Constitution, the "competing state and
federal interests can be reconciled only after careful
scrutiny of those concerns in a 'concrete case.'" 445 U.S.
at 110. I do not believe that the Commission has been
presented with a situation compelling enough to run the risk
of exposure to antitrust liability.

At the May 12, 1981, public hearing, various industry
groups appeared in response to the proposed Regulation
§ 57.1. The Virginia Beer Wholesalers Association ("VBWA"),
by counsel, stated that certain market abuses would occur absent a sufficient price increase notice provision. A two-page summary of a confidential survey conducted by the VBWA was presented in support of the proposition.

Even if I assume that the statistics are accurate, they do not present a situation compelling enough to warrant intervention by the Commission. First, of the 55 wholesalers who responded, only eight (10% of the survey population) had experienced less than 30 days' prior notice of price increases, "ranging anywhere from two weeks prior to delivery to receiving retroactive price increases." (VBWA Survey Summary, p. 2). The exact number who allegedly received retroactive notice was not specified, although one Northern Virginia wholesaler did state that he had received notice after the effective date. (Transcript, p. 90). Counsel for the two largest domestic breweries stated that their clients adhered to a 30-day policy (Transcript pp. 77, 82-83) and counsel for the United States Brewers Association stated that most national breweries have such a policy period. (Transcript, p. 95). Counsel for VBWA admitted that there was no "rampant problem." (Transcript, p. 88). Finally, the record shows that the proposed 30-day notice period is not dictated by predatory policies of suppliers, but is simply a price protection measure to aid wholesalers in meeting the free market contractual demands of their retailers. (Transcript, pp. 79-81, 86-87, 91-92.)

The three-day notice provision of current Regulation § 57(b) does not apply to wineries, vintners or wine importers. The Virginia Wine Wholesalers Association ("VWWA") joined in the VBWA's request to the Commission to adopt Regulation § 57.1. Although the VWWA appeared, by counsel, at the hearing, there was no testimony offered to support the need for the Regulation. A confidential survey was made of the wine wholesalers, but its results were inconclusive. (Transcript, p. 80). Counsel for the VWWA stipulated that apparent retroactive increases may have been due to a delay in the mail which resulted in an increase taking effect prior to actual receipt, as opposed to an intentional act. (Transcript, p. 80). The larger wineries are complying with proper notification procedures. (Transcript, p. 82). It is my opinion that the record does not contain the required type or quantum of evidence to substantiate the need for the addition of wine suppliers to the price increase notification regulation in light of the federal policy favoring open competition.

I wish to make it clear that my conclusions do not leave the wholesalers without a remedy. Predatory or discriminatory pricing activity is illegal under federal and State antitrust laws, even without any protection that would be afforded by the proposed regulation. Moreover, § 57(a) of the current regulations, enacted in 1980, also condemns such activity. Virginia law provides a complete system of rights and remedies which are available to businessmen for the adjustment of their contractual relations.
The Regulation provides that: "Section 57.1. Price increases by breweries, wineries, vintners and importers. - No brewery, winery, vintner, beer importer or wine importer shall increase the prices charged any person holding a wholesale beer or wine license for beer, beverages or wine except by written notice to the wholesaler signed by an authorized officer or agent of the brewery, winery, vintner, beer importer or wine importer, which notice shall contain the amount and effective date of the increase. A copy of such notice shall be sent to the Commission and shall be treated as confidential financial information. No increase shall take effect prior to 20 calendar days following the date on which the notice is postmarked; provided, however, that upon written request of a brewery, winery, vintner, beer importer or wine importer, the Commission may for good cause shown permit the implementation of an increase within such shorter period as the Commission may deem appropriate under the circumstances."

ALCOHOLIC BEVERAGE CONTROL LAWS. TOWN ORDINANCE PROHIBITING SALE AND CONSUMPTION OF ALCOHOLIC BEVERAGES IN PUBLIC DANCE HALLS DIRECTLY CONFLICTS WITH STATE LAW.

May 4, 1982

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for the County of Tazewell

This is in response to your recent request for my opinion on the following two questions:

(1) Whether § 9-8 of Ch. 9 of the Tazewell Town Code which provides that "[n]o alcoholic beverage... shall be sold, served or consumed on the premises occupied by a public dance hall" is in conflict with § 4-96 of the Code of Virginia (1950), as amended?

(2) Whether a certain establishment in the town constitutes a public dance hall under § 18.2-433?

Section 1-13.17 prohibits local governments from enacting ordinances "inconsistent with" State law. Section 4-96 provides:

"No county, city or town shall, except as otherwise provided in § 4-38 [local licenses and taxes] or 4-97 [Sunday sales], pass or adopt any ordinance or resolution regulating or prohibiting the manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia. And all local acts, including charter provisions and ordinances of cities and towns, inconsistent with any of the provisions of
The Supreme Court of Virginia has recently addressed a similar question concerning the harmonization of a local ordinance with § 4-96 in Loudoun County v. Pumphrey, 221 Va. 205, 269 S.E.2d 361 (1980). Loudoun County had adopted an ordinance requiring a minimum refund value on every nonrefillable beverage container. By definition, "beverage," as defined in the Loudoun ordinance, included "beer and other malt beverages" as well as soft drinks. Finding a direct conflict between the ordinance and § 4-96 because the ordinance regulated the bottling of alcoholic beverages was contrary to § 4-96, the court invalidated the ordinance insofar as it related to beer and other malt beverage containers. 221 Va. at 207.

The Loudoun County case was distinguished by the court in City of Norfolk v. Tiny House, Inc., 222 Va. 414, 281 S.E.2d 836 (1981). The Tiny House case concerned a Norfolk ordinance regulating the location of certain "adult uses"—a term which included any establishment selling alcoholic beverages for on-premises consumption and which required a retail on-premises license from the ABC Commission. Rejecting the argument that the General Assembly, by enacting Title 4 of the Code, had precluded local governments from using zoning as a means of controlling the location and concentration of licensed establishments, the court held "that the ABC Commission's exclusive authority to license and regulate the sale and purchase of alcoholic beverages in Virginia does not preclude a municipality from utilizing valid zoning ordinances to regulate the location of an establishment selling such alcoholic beverages." 222 Va. at 423.

I am constrained to conclude that your inquiry is controlled by the Loudoun County decision. The Town of Tazewell, by enacting § 9-8 of Ch. 9, has not attempted to regulate the location of dance halls as it might under the Tiny House decision; rather, that section of the town ordinance prohibits the possession, sale, use and drinking of alcoholic beverages in dance halls. That action is, therefore, inconsistent with § 4-96.

Your remaining question is whether an establishment in Tazewell is a public dance hall as defined in § 18.2-433. Under that section, a public dance hall "shall be construed to mean any place open to the general public where dancing is permitted...."

You have advised that the establishment, which is licensed to sell alcoholic beverages, sponsors dances on a regular basis. Admission thereto is gained by a membership card sold for $2.50 which must be purchased at least twenty-four hours prior to the dance. You also state that the proprietor sells the membership cards without reference to any particular group or organization.
A public dance hall must be "open to the general public." "Public" is defined as "the body of the people at large; the community at large, without reference to the geographical limits of any...city, town, or county; the people." Black's Law Dictionary 1104 (5th ed. 1979). "General" refers to that which is "open or available to all, as opposed to select...." Id. at 614.

Under the facts presented, I am of the opinion that the establishment in question is a public dance hall within the meaning of § 18.2-433. While admission is limited to card holders, the membership cards are available to the community at large as opposed to a select group or particular organization. I do not perceive any difference in such cases to purchasing a ticket for admission at the door. I do not believe the General Assembly intended that the charging of a membership fee, where the fee can be paid by any member of the general public, would preclude localities from regulating establishments where dancing is permitted.

1The ordinance was also found to be inconsistent with Regulation § 32(d) of the ABC Commission which prohibits deposits on disposable bottles containing alcoholic beverages. 221 Va. at 207.

ANNEXATION. ELECTIONS. § 15.1-1054 PROVIDES FOR ELECTION OF CITY COUNCIL ON FIRST TUESDAY IN MAY FOLLOWING EFFECTIVE DATE OF ANNEXATION. CANDIDATES FOR UNEXPIRED STAGGERED TERMS MUST DECLARE WHICH UNEXPIRED TERM THEY SEEK.

May 21, 1982

The Honorable Ann P. Palamar
Commonwealth's Attorney for the City of Fredericksburg

You have asked several questions concerning the effect a proposed annexation will have upon city council and elections for city council. You have advised that the City of Fredericksburg and Spotsylvania County have reached an agreement providing for the annexation of an area of the county which would increase the population of the city by 2,800 persons, an amount which is in excess of five percent of the city's total population. You further advise that the city has adopted an ordinance pursuant to § 15.1-1034 of the Code of Virginia (1950), as amended, to initiate the proceedings to effectuate the annexation. Because of the number of people to be annexed, the proposed annexation is subject to the provisions of § 15.1-1054 which reads in pertinent part:

"Notwithstanding any provision of law to the contrary there shall be an election for members of council on the first Tuesday in May following the effective date of annexation. If council members are chosen on an at
large basis the election shall be held for the unexpired portion of the term of each council member whose term extends beyond the July first or September first, whichever date by law applies to such council terms, immediately following the effective date of annexation...."

You advise that the city charter for the City of Fredericksburg provides for a city council of eleven members including the mayor, all of whom shall be elected at large, and that the annexation agreement provides that the annexation shall become effective on January 1, 1983. In May 1983 five members of the council will have approximately three years remaining in their terms and five members and the mayor will have approximately one year remaining in their terms.

In light of the foregoing, you have requested my opinion on the following questions:

"1. If the proposed annexation is approved and becomes effective on January 1, 1983, are all members of the city council, including the mayor, to be elected at a special election on the first Tuesday in May, 1983?

2. If the proposed annexation is approved and becomes effective on January 1, 1983, will each candidate seeking office at the election on the first Tuesday in May, 1983, in the special election, have to declare which unexpired term (1 year or 3 years) he or she is seeking? Phrased in another manner, the question becomes, how does one determine which candidates who are elected shall serve the unexpired one (1) year terms and which candidates shall serve the unexpired three (3) year terms?

3. If the City Council of the City of Fredericksburg chose to ask the General Assembly for a charter amendment, and if such charter amendment were passed as a special measure by the Virginia General Assembly so that it could be in effect prior to May, 1983, could the staggering of terms of mayor and city council be established from July 1, 1983, with half the council serving a two (2) year term and half the council serving a four (4) year term?"

Questions 1 and 2 have been previously answered in the affirmative by an Opinion of this Office dated February 12, 1979, addressed to the Honorable J. Paul Councill, Jr., Member, House of Delegates. See Report of the Attorney General (1978-1979) at 94. I concur in the conclusions expressed therein, and, accordingly, am of the opinion that the special election contemplated by § 15.1-1054 must be held on the first Tuesday in May 1983, and that each candidate seeking office, whether or not the incumbent, must declare which unexpired term he or she is seeking.
Your third question is likewise answered in the affirmative. If the General Assembly were to enact an amendment to the charter of the City of Fredericksburg which would be effective prior to May 1983, expressly referring to the specific law dealing with the special subject of annexation as provided in § 15.1-1054, that subsequent special act would supersede such a general statute on a specific subject pursuant to the general rules on statutory construction.

1In the event such a statute is passed, I call your attention to the requirements of the federal Voting Rights Act which requires approval of statutes affecting voting rights prior to implementation of such statutes.

APPEAL. §§ 16.1-106 AND 16.1-107 APPLICABLE TO APPEALS OF CUSTODY OR NONSUPPORT MATTERS FROM JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT.

October 12, 1981

The Honorable Janice P. Delp, Clerk
Juvenile and Domestic Relations District Court

You have asked whether § 16.1-107 of the Code of Virginia (1950), as amended, which deals with the posting of a bond and the payment of a writ tax and costs for an appeal from a court not or record, applies to an appeal of a civil custody or nonsupport matter from a juvenile and domestic relations district court. If so, you then asked whether those requirements, in effect, deny indigent appellants access to a circuit court.

Appeals from a juvenile and domestic relations district court are governed by § 16.1-296. With respect to criminal nonsupport matters, § 16.1-296 provides "where an appeal is taken by any person on a charge of nonsupport, the procedure shall be as is provided for appeals in prosecutions under chapter 5...of Title 20 of the Code...." Section 16.1-296 further provides that "In all other cases on appeal, proceedings in the circuit court shall conform to the equity practice...." Sections 16.1-106 and 16.1-107 are expressly applicable to all appeals from a court not of record where the amount in controversy exceeds fifty dollars or when the case involves the constitutionality of a statute of the Commonwealth or municipal ordinance. Juvenile and domestic relations district courts are courts not of record. See § 16.1-69.5. I, therefore, conclude that the bond, writ tax, and costs provisions of § 16.1-107 would be applicable to an appeal of a civil nonsupport or custody matter otherwise appealable under § 16.1-106. This Office has rendered previous Opinions holding that assessment of a writ tax and costs under § 16.1-107 in appeal of nonsupport or custody matters from a juvenile and domestic relations district court

It is my opinion that the requirements of § 16.1-107 would not unconstitutionally deny indigent appellants access to a circuit court. Section 14.1-183 permits a court to inquire into the possible indigency of an individual and allows for an appeal without the payment of fees or costs if the indigency of the appellant is properly established. Greer v. Dillard, 213 Va. 477, 193 S.E.2d 668 (1973). Section 14.1-183, however, speaks only to waiver of fees and costs and does not provide for waiver of any bond required pursuant to § 16.1-107. Greer v. Dillard, id. Nevertheless, similar statutes requiring appeal bonds have been found to be constitutionally valid as applied to indigents since they do not restrict or deny the "right" of appeal, but instead regulate the manner of exercising the right. Reed v. Dolan, 195 Colo. 197, 577 P.2d 284 (1978); State, ex rel. Reece v. Gies, 156 W.Va. 729, 198 S.E.2d 211 (1973); Wolf v. Fuller, 30 Conn. 527, 298 A.2d 244 (1972); 4A C.J.S. Appeal and Error § 502(b).

ARREST. GENERAL DISTRICT COURT MAY SET AMOUNT OF BOND WHEN ISSUING CAPIAS.

September 8, 1981

The Honorable Donald H. Sandie, Chief Judge
Portsmouth General District Court

You ask whether it is appropriate for a general district court to set the amount and type of bond on a capias issued for the failure of a person to appear.

Section 19.2-122 of the Code of Virginia (1950), as amended, authorizes a court, by general or special order, to set the amount of bond on an attachment at a sum of not less than $200.2 A capias for failure to appear is in my opinion different from a normal arrest warrant. Generally, when an arrest warrant is issued the court is not involved in the issuing process, whereas it is the court which issues or directs the issuance of the capias for the failure to appear. When a person fails to appear in response to legal process, the orderly conduct of court affairs is interrupted, and the judicial proceeding may have to cease. In such circumstances, it is my opinion that a court may set the amount of bond for the capias.

The legislature has provided that when a person is admitted to bail, the terms thereof shall be such as will be reasonably calculated to insure the presence of the accused. See § 19.2-121. The legislature has also set forth a number of alternatives which may be utilized in fixing the terms of the bond, e.g., requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof. See § 19.2-123. In my judgment a realistic
assessment of what terms should be imposed upon the bond can only be made when the person is brought before a judicial officer.\(^3\)

In summary, it is my opinion that in the special circumstances of a capias for failure to appear the court may set the amount of bond, but the terms of the bond should be fixed by the judicial officer before whom the person is brought. In fixing the terms of the bond the judicial officer should give appropriate consideration to the fact that the person has already failed to appear at court proceedings. See § 19.2-123.

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\(^1\)A capias is a writ of attachment or arrest. *Black's Law Dictionary* 261 (4th ed. 1968).

\(^2\)Rule 3A:9(b)(1), *Rules of the Supreme Court of Virginia*, authorizes the court to fix the amount of bail on a capias where there is an indictment or information. This Rule places no limitation on the amount of bail the court may fix.

\(^3\)Judicial officer, for purposes of the bail statutes, includes magistrates, judges, clerks of court and any justice of the Virginia Supreme Court. See § 19.2-119.

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**ARREST. MAGISTRATE MAY ISSUE CAPIAS RETURNABLE TO COURT OF LOWER LIMITED JURISDICTION IN CASES WHERE SURETY WISHES TO SURRENDER PRINCIPAL.**

April 20, 1982

The Honorable Charles J. Colgan
Member, Senate of Virginia

You have asked whether § 19.2-45(4) of the Code of Virginia (1950), as amended, grants authority to a magistrate to issue a capias at the request of a surety for the arrest of his principal in accordance with the authority granted the surety by § 19.2-149.

Section 19.2-149 provides, in pertinent part, as follows:

"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; in addition to the above authority, upon the application of the surety, the court, or the clerk thereof, before which the recognizance was taken, or before which such principal's appearance is required, shall issue a capias for the arrest of such principal, and such capias may be executed by such surety, or his
authorized agent, or by any sheriff, sergeant or police officer, and the person executing such capias shall deliver such principal and such capias to the sheriff or jailer of the county or the sheriff, sergeant or jailer of the city in which the appearance of such principal is required...." (Emphasis added.)

Section 19.2-45(4) grants to a magistrate "[t]he same power to issue warrants and subpoenas within such county or city as is conferred upon district courts..." and provides that such "attachments, warrants and subpoenas" shall be returnable before a district court or any other court of limited jurisdiction continued in operation pursuant to § 16.1-70.1.

A capias is a writ of attachment or arrest, and a warrant includes any process directing the arrest of a person. See Black's Law Dictionary, 261, 1756 (4th ed. 1968). In my opinion, therefore, the provisions of § 19.2-45(4) empower a magistrate to issue a capias in the same manner as a district court, or a clerk thereof, is empowered to do pursuant to § 19.2-149, when the capias is returnable to a district court. If the principal's appearance is required by a court of record, the capias is issued by that court, or the clerk thereof, and the principal is delivered to the sheriff, sergeant, or jailor.

ARREST. MAGISTRATE MAY NOT ISSUE WARRANT WHERE JUVENILE COURT IS OPEN AND SPECIFIED OFFICERS CAN BE REACHED AND ARE AVAILABLE.

April 8, 1982

The Honorable Benjamin L. Campbell, Judge
Juvenile and Domestic Relations District Court

You have referred to § 16.1-256 of the Code of Virginia (1950), as amended, and asked whether telephone authority is sufficient to permit a magistrate to issue a warrant of arrest for a juvenile when the juvenile and domestic relations district court is not open, but the judge, intake officer, or clerk thereof has been reached. You specifically inquire if it is necessary for such officer to come to the magistrate's office and direct in person that a warrant be issued, or whether this can be accomplished by a telephone call to the magistrate wherein he is directed to issue the warrant. You point out that the statute provides, if the judge, intake officer, or clerk cannot be reached or cannot arrive within one hour, a magistrate is authorized to issue the warrant himself pursuant to the provisions of the section.

Section 16.1-256, provides, in pertinent part, as follows:
"No warrant of arrest shall be issued for any child by a magistrate, except as follows:

3. For a child known or alleged to be between the ages of fifteen and eighteen years, upon a finding of probable cause to believe that the child is in need of services or is a delinquent, when the court is not open, the judge, intake officer and clerk of the juvenile and domestic relations district court are not reasonably available and the criteria for detention or shelter care set forth in § 16.1-248 have been satisfied. For purposes of this section, the phrase 'not reasonably available' shall mean that the judge, intake officer or clerk of the juvenile and domestic relations district court could not be reached after the appearance by the juvenile before a magistrate or could not arrive within one hour after he was contacted."

I am of the opinion the statutory provision must be interpreted to require one of the officials to personally take action, unless they are not "reasonably available" (as defined by the Code section in question). This is a statute of limitation upon the issuance of a warrant by a magistrate. The section does not grant authority to the officer to authorize the magistrate, by telephone, to issue the warrant, but clearly contemplates that the officer, if reached and available, personally act in accordance with the authority given him in § 16.1-246, relating to the taking of a child into immediate custody.

It is my opinion, therefore, in the circumstances you describe, that the magistrate is not authorized to issue the warrant on the basis of a telephone call from the judge, intake officer or clerk.

ATTORNEYS. CONSTITUTIONAL VALIDITY OF VIRGINIA'S RESIDENCY REQUIREMENT FOR APPLICANTS FOR BAR EXAMINATION IS UNCERTAIN.

January 6, 1982

The Honorable J. Sloan Kuykendall, President
Virginia Board of Bar Examiners

You have inquired whether Virginia's residency requirement for applicants for the bar examination violates the Constitution of the United States.

Section 54-60 of the Code of Virginia (1950), as amended, requires that an applicant certify that he is a Virginia resident at the time of application, and that he intends to be a resident at the time of the examination. Rule 1A:1 of the Rules of the Supreme Court of Virginia, which requires that an attorney be a Virginia resident to be admitted to the bar, has withstood challenge on equal protection grounds. Brown v. Supreme Court of Virginia, 359 F.Supp. 549 (E.D. Va); aff'd mem., 414 U.S. 1034 (1973).
Historically, such residence requirements have withstood constitutional challenges asserting a deprivation of equal protection of the law as guaranteed by the Fourteenth Amendment. In order to respond to your question, it is necessary to consider issues raised in more recent litigation and the rationale for the decisions.

Recent Cases

The Supreme Court relied on the privileges and immunities clause of Art. IV of the Constitution in striking down an Alaska statute conditioning employment in Alaskan oil fields to residents of Alaska. Hicklin v. Orbeck, 437 U.S. 518 (1978). The decision held in general terms that the purpose of the privileges and immunities clause is to prohibit a state from imposing discriminatory burdens on nonresidents and that an employment preference was such a burden.

Following Hicklin, courts in several states have declared that residency requirements imposed as a prerequisite to taking a bar examination violate the privileges and immunities clause. Strauss v. Alabama State Bar, 520 F.Supp. 173 (N.D. Ala. 1981); Sheley v. Alaska Bar Association, 630 P.2d 640 (Alas. 1980); Gordon v. Committee on Character and Fitness, 397 N.E.2d 1309 (N.Y. 1979). One case, Canfield v. Wisconsin Board of Attorneys Professional Competence, 490 F.Supp. 1286 (W.D. Wis. 1980), declined to strike down a requirement that one become a resident within 60 days of taking the bar examination. The court stated that it felt bound by the Supreme Court's summary affirmance in a case challenging a residency requirement on Fourteenth Amendment grounds where the trial court had considered and rejected a privileges and immunities argument, Wilson v. Wilson, 416 F.Supp. 984 (D. Ore. 1976), aff'd mem., 430 U.S. 975 (1977). Recently, Canfield was vacated and remanded without opinion, 645 F.2d 76 (7th Cir. 1981).

The United States Court of Appeals for the Fourth Circuit in Golden v. Board of Law Examiners, 614 F.2d 943 (4th Cir. 1980), declined to rule whether requiring residence at the time of admission violated the privileges and immunities clause. The court held that since the applicant had not passed the examination, she lacked standing to challenge the admission requirement. Id. at 945. The trial court had found a sufficient justification for the Maryland requirement of residence at the time of registering and at the time of taking the examination. Golden v. Board of Law Examiners, 452 F.Supp. 1082 (D. Md. 1978). In rejecting the argument that the rule violated the privileges and immunities clause, the trial court relied on a Fourth Circuit decision, Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974), which held that the right to practice law was not a right guaranteed under that clause, 452 F.Supp. at 1093, n. 18. The opinion in Hawkins antedated Hicklin, supra, in which the Supreme Court held that employment was such a right.
Rationale of Decisions

All of the courts to consider the privileges and immunities argument agree that the applicable test is that set forth in *Toomer v. Witsell*, 334 U.S. 385, 395-396 (1948), which permitted disparities between residents and nonresidents where a direct adjunct of a state's sovereignty or fundamental state activities were implicated. See *Sheley*, supra, 620 P.2d at 642. Each of the decisions striking down the residence requirement found that the denial of employment to the nonresident constituted a violation of the privileges and immunities clause, and the state's interest in regulating the character and fitness of attorneys could be satisfied in other less drastic ways. Only the Maryland trial court found the state's interest to be adequate to justify the residency requirement.

Conclusion

In my opinion, none of the foregoing precedents are binding in Virginia. However, merely noting that the Virginia statute has not been struck down does not address the question whether a change in the law should be anticipated. The decisions striking down the requirement of residency as a prerequisite to taking the bar examination do cast some doubt on the constitutional viability of the Virginia statute. It would seem appropriate for the legislature to examine whether the requirement is a reasonable means of furthering the State's interest in determining the character and fitness of attorneys, without imposing undue burdens on nonresidents.

Changing a law in anticipation of constitutional adjudication involves delicate judgments. Yet, not being alert to potential infirmity of this law may result in the compromise of important State interests if the judiciary does invalidate the State law. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Consumers Union v. American Bar Association*, 433 U.S. 917 (1977).

June 29, 1982

The Honorable Andrew G. Conlyn, Judge
General District Court

In your recent letter you asked a question concerning Rule 3D:5 of the Rules of the Supreme Court of Virginia, adopted on February 17, 1982, to be effective July 1, 1982. Rule 3D:5 provides that: "No judgment for plaintiff shall be granted in any case, except on motion of the plaintiff or plaintiff's attorney." You have asked whether an agent of a corporation may appear on its behalf to move for judgment when the defendant is in default. You also asked whether it makes a difference if the agent is salaried or paid on commission. Finally, you asked, if an agent cannot appear, then what officer of the corporation would have to appear.

It is clear that a corporation is incapable of personal appearance and, therefore, must rely on the acts of its officers and agents, duly appointed under § 13.1-45 of the Code of Virginia (1950), as amended, to function. Whether an agent or officer who is not an attorney may appear on behalf of a plaintiff corporation under Rule 3D:5 will depend on a determination of whether such an appearance constitutes the unauthorized practice of law.

The Virginia Supreme Court has outlined what constitutes the unauthorized practice of law. See Unauthorized Practice of Law ("UPL") Advisory Opinion Rules 6.1-1 through 6.1-5. The practice of law has been defined, in relevant part, as follows:

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

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(3) One undertakes, with or without compensation, to represent the interest of another before a[n]y tribunal, [judicial, administrative, or executive] otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly...employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such presentation by such employee or expert does not involve the examination of witnesses or preparation of pleadings." 221 Va. 381, 382, 383 (1981).

Specifically, practice before tribunals by non-lawyers is restricted by UPL Rule 6.1-1, Unauthorized Practice Rule ("UPR") 1-101(A), which provides that:

"(A) A non-lawyer, with or without compensation, shall not represent the interest of another before a tribunal, judicial, administrative or executive, established under the Constitution or laws of the Commonwealth of Virginia, otherwise than in the presentation of facts,
figures or factual conclusions, as distinguished from legal conclusions...

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(B) 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." 221 Va. 381, 386 (1981).

In addition, UPL Rule 6.1-1, Unauthorized Practice Consideration ("UPC") 1-3, provides that:

"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." 221 Va. 381, 385 (1981).

Because Rule 3D:5 provides that judgment may only be obtained by motion in person, it is my conclusion that neither an officer nor an agent of the corporation, whether salaried or paid on commission, if non-lawyers, may appear and move for judgment on behalf of the corporation. To do so would constitute the unauthorized practice of law. Moving for judgment in general district court cannot be included within the definition of "present[ing] facts, figures or factual conclusions." Making such a motion can be said to involve legal conclusions and, therefore, falls directly in the path of UPL Rule 6.1-1. See Culpeper National Bank v. Tidewater Improvement Co., 119 Va. 73, 89 S.E. 118 (1916). If an agent or officer is an attorney, then they may appear on behalf of the corporation under Rule 3D:5 to move for judgment.

ATTORNEYS. ETHICS. DEFENSE OF CRIMINAL CASES BY COMMONWEALTH'S ATTORNEYS, COUNTY ATTORNEYS, CITY ATTORNEYS OR TOWN ATTORNEYS.

May 26, 1982

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

You have requested my opinion as to the economic effect on competition of proposed Formal Legal Ethics Opinion No.
188. This Opinion is required by Part 6, Section IV, ¶ 10(e)(iii) of the Rules of the Supreme Court of Virginia.

Opinion No. 188 concerns the defense of criminal cases by Commonwealth's attorneys, county attorneys, city attorneys and town attorneys. Parts I and II of the opinion hold that it is improper for a Commonwealth's attorney to defend criminal cases in courts in which he prosecutes, in any federal court in the Commonwealth, and in courts where he does not prosecute, except under certain circumstances. It should be pointed out that this position has long been held by the Virginia State Bar. See Legal Ethics Opinion No. 5 (August 19, 1943) and Opinion No. 2 (1958). Additionally, § 15.1-50.1 of the Code of Virginia (1950), as amended, provides that Commonwealth's attorneys in counties having a population in excess of 35,000 are prohibited from private practice. Therefore, given the long-standing position of the State Bar and the provisions of § 15.1-50.1, Sections I and II of Opinion No. 188 would have no new economic effect on competition, nor provide any new restraints on competition.

Part III of Opinion No. 188 provides that it is improper for a county attorney, city attorney or town attorney to defend criminal cases involving ordinances of such county, city or town. Part IV provides that a county, city or town attorney may defend criminal cases in the courts having jurisdiction over such county, city or town under certain circumstances. This Office is not advised on the current practice by such officers, nor are we advised as to the number of attorneys that would be affected by this opinion. In the absence of a survey, the Attorney General is not in a position to assess the economic impact on competition of the restraints imposed on county attorneys, city attorneys and town attorneys in Part III. I do point out, however, that Part IV of the opinion provides no restraint on competition as it authorizes attorneys to enter the legal marketplace. In either event, I am of the opinion that neither Part III nor Part IV of Opinion No. 188 would pose significant adverse impacts on competition.

ATTORNEYS. LEGAL ETHICS. PURSUANT TO § 38.1-733.1, ATTORNEY REPRESENTING CLIENT IN REAL ESTATE TRANSACTION PRECLUDED FROM SERVING AS COMPENSATED AGENT FOR TITLE INSURANCE COMPANY, BUT NOT BARRED FROM REPRESENTING CLIENT WHILE MAINTAINING AN INTEREST IN TITLE INSURANCE COMPANY OR AGENCY.

January 15, 1982

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 proposed Legal Ethics Opinion No. 187. This opinion addresses the question of whether an attorney may conduct a real estate title search for a client
and procure for that client title insurance through an agency or company in which the attorney has an ownership interest. The opinion also addresses the question of whether an attorney may conduct a real estate title search for a client and procure for that client title insurance from a company for which the attorney is a licensed agent.

The Standing Committee on Legal Ethics has answered both questions affirmatively, concluding that an attorney is not absolutely barred by the Virginia Code of Professional Responsibility from representing a client, while maintaining an interest in a title insurance company or agency, or while serving as a compensated agent for a title insurance company.

These conclusions, however, must be questioned in light of § 38.1-733.1 of the Code of Virginia (1950), as amended, which sets forth a statutory prohibition against payment or receipt of title insurance kickbacks, rebates, commissions and other payments.²

Pursuant to § 38.1-733.1(A), the attorney would appear to be precluded from serving as a compensated agent for a title insurance company. Under § 38.1-733(C), it would appear that an attorney is not absolutely barred from representing a client while maintaining an interest in a title insurance company or agency. If, however, the attorney can legally maintain such an interest and represent a client in a real estate transaction, the attorney should, at the outset of the attorney-client relationship, make a full disclosure of the interests and influences which might affect the advice given by the lawyer to the client.

Ultimately, the client retains the prerogative to instruct the lawyer with which company to place the client's title insurance or, in the alternative, to inform the lawyer that the client will not use his professional services. There is no evidence that conditions in the marketplace restrict the availability of other attorneys to a client who prefers title insurance to be placed with a company in which the attorney is not interested.

For the above reasons, I recommend that the Council of the Virginia State Bar direct a reconsideration of this matter.

²Section 38.1-733.1 provides: "A. No person or entity selling real property, or performing services as a real estate agent, attorney or lender, which services are incident to or a part of any real estate settlement or sale, shall pay or receive, directly or indirectly, any kickback, rebate, commission or other payment in connection with the issuance of title insurance for any real property which is a part of
such sale or settlement; nor shall any title insurance company, agency or agent make any such payment. The provisions of this section shall not apply to federally insured lenders, holding companies to which they belong, or subsidiaries of such lenders or holding companies.

B. Any person or entity violating the provisions of this section shall be guilty of a misdemeanor and subject to a fine of not more than one thousand dollars or imprisonment for not more than six months, or both, in the discretion of the court.

C. No persons or entity shall be in violation of this section solely by reason of ownership of stock in a bona fide title insurance company, agency, or agent. For purposes of this section, and in addition to any other statutory or regulatory requirements, a bona fide title insurance company, agency or agent is defined to be a company, agency or agent that passes upon and makes title insurance underwriting decisions on title risks, including the issuance of title insurance policies or binders and endorsements."

ATTORNEYS. SCHOOLS. COMPETITION ADVERSELY AFFECTED BY PROHIBITING NON-LAWYERS FROM REPRESENTATION OF HANDICAPPED CHILDREN IN ADMINISTRATIVE HEARINGS UNDER EDUCATION FOR HANDICAPPED ACT.

October 5, 1981

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

In accordance with your request, I am submitting the following comments and analysis of the economic effect on competition of the proposed Unauthorized Practice of Law ("UPL") Advisory Opinion concerning representation in "due process" hearings under the Education for All Handicapped Children Act of 1975 ("Act") (P.L. 94-142; 20 U.S.C. § 1401, et seq.).

The proposed UPL Advisory Opinion concludes first that the Supreme Court of Virginia has the residual power under Sperry v. Florida, 373 U.S. 379 (1963), to regulate the practice of law in connection with "due process" hearings conducted under the Act because the Act does not explicitly preempt that power. Secondly, the Advisory Opinion concludes that a non-lawyer is not entitled to represent a party in a "due process" hearing or in an appeal under the Act because of the "due process" nature of these hearings and the danger that the administrative record, if developed without the assistance of an attorney, may prejudice the unrepresented party's interests on appeal.

Federal Supremacy

The Advisory Opinion correctly concludes that the Act does not by its terms preempt the power of state Supreme Courts or Bar Associations to scrutinize the qualifications...
of representatives in hearings under the Act. The Act itself does not explicitly state that representation of parties by nonattorneys is permitted. Where representation by nonattorneys has been the intent of Congress and administrative agencies administering various other federal funding programs, explicit provisions have been made in those programs. See 45 C.F.R. §§ 205.10a, 205.10a1(ii), 205.10a2(iii) relating to Public Assistance Program hearings; 8 C.F.R. § 292.1(a) relating to Immigration and Naturalization deportation hearings.

In this instance, however, the federal Department of Education itself has issued interpretive opinions indicating that the determination of who may represent parties under the Act was to be made by each state under its own state law. See Policy Letter to Carole Van Lieu from Bureau of Education for the Handicapped ("BEH"), (1977) 2 Educ. for Handicapped L. Rep. (CRR) 211:129 (Attachment A). Further, the federal Department of Education has held that non-lawyer representatives are "recognized" in the federal regulations as appropriate representatives in hearings under the Act, but has noted that formal procedures to determine their qualifications for representation have not been established by that federal agency. See BEH Policy Letter to George S. Bellas, Esq., (1979) 2 Educ. for Handicapped L. Rep. (CRR) 211:131 (Attachment B).

Recently, for example, the federal Department of Education has required that the Washington Department of Public Instruction, as a condition to maintaining federal funding under the Act, rescind a Declaratory Ruling which the state had issued limiting representation at hearings under the Act to members of the Washington State Bar Association. See (1981) 3 Educ. for Handicapped L. Rep. (CRR) AC 147-148 (May 15, 1981). In light of this interpretation and action by the federal Department of Education it is likely that Virginia's program under the Act may be scrutinized and subjected to corrective action if the proposed UPL Advisory Opinion were adopted and implemented.

The Conclusion of the Proposed UPL Advisory Opinion

In addition to the statements in the proposed opinion, some additional factors appear relevant in assessing the competitive impact. The current experience of the Virginia Department of Education is that in approximately half of the administrative hearings conducted in school divisions and by State reviewing officers during the last year, neither the parents of the child nor the school division was represented by an attorney. Others were represented by non-lawyers. It is the current practice of the Virginia Department of Education to require that hearing officers and State level reviewing officers be attorneys and to encourage these hearing officers to gather from the parties all of the information which they have available to them. The rules of evidence do not apply in these "due process" hearings.
Hearing officers determine the procedures to be followed in a particular proceeding. Hearings may be very informal.

The court is required when an appeal is taken to hear additional evidence at the request of any party, in addition to receiving the record of the administrative hearings, and to render a decision based on the preponderance of the evidence. 20 U.S.C. § 1415(e)(2). This language is codified in § 22.1-214 of the Code of Virginia (1950), as amended.

Commentators have urged that, because of the importance of the "due process" hearing mechanism to the overall effectiveness of the program for educating a handicapped child, access should be readily available to those parties concerned about the program for each child. See "Enforcing the Right to an 'Appropriate' Education: The Education For All Handicapped Children Act of 1975," 92 Harv. L.Rev. 1103-1127, 1111 (1979). Access is particularly important because one thrust of the Act is to encourage parental involvement and interest in the ongoing program for the handicapped child. It has been held that some parents may forego requesting a "due process" hearing, however, because they cannot afford the cost of an attorney. See Lora v. Board of Educ., 456 F.Supp. 1211, 1227 (E.D. N.Y. 1978).

Adoption of the proposed UPL Advisory Opinion will limit competition by prohibiting non-lawyers from representing handicapped children at the hearing required by the Act. Since it appears that in almost half of the administrative hearings held last year neither party has been represented by an attorney, adoption of the proposed opinion will be likely to substantially increase costs to the parties to these proceedings. It is undoubtedly true that the parties would be better served by having counsel knowledgeable about the issues in these hearings. However, I have no specific indication from those hearings in Virginia in which non-lawyer representatives have been involved that such representation has brought any harm to the public or the participants.

My conclusion, therefore, is that there is an adverse effect on competition, without a factual showing of a need to limit representation to attorneys. Adoption of the rule would be likely to incur federal objections which could lead to withdrawal of approval of Virginia's funding.

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1The Declaratory Ruling, 1-80 (June 4, 1980), entitled "Re Special Education Hearings - Representation by Nonattorneys and Out-of-State Licensed Attorneys," concluded:

"1. Only members of the Washington State Bar Association and 'Rule 9 Legal Interns' may represent parents or school districts in due process hearings. [A 'Rule 9 Legal Intern' is an advanced student attending an approved law school; such interns must practice under the supervision of an active member of the bar.] Out-of-State attorneys may
also practice if they either (a) reside and practice out-of-State, or (b) reside or practice within the State, act on behalf of an indigent, and serve as a salaried employee of a nonprofit organization formed for the purpose of protecting the rights of parents or students.

2. Anyone may represent him or herself.

3. Anyone may represent a parent, child, or school district in informal settlement or mediation conferences conducted separate and apart from due process hearings."

The Act refers to an "impartial due process hearing" as the means for parents to present complaints about their child's handicap identification, evaluation and placement. 20 U.S.C. §§ 1415(b)(1)(E) and 1415(b)(2). This type of hearing is not held to determine any protected constitutional rights which would distinguish it from other forms of administrative hearings. Section 22.1-214 mandates that the Board of Education "prescribe procedures to afford due process..." in resolving disputes.

AUCTION SALES. S.B. 348, ESTABLISHING AUCTIONEERS' LICENSE ACT, DOES NOT EXEMPT PERSON ACTING UNDER POWER OF ATTORNEY FROM ITS LICENSING PROVISIONS.

May 21, 1982

The Honorable Virgil H. Goode, Jr.
Member, Senate of Virginia

This is in reply to your letter in which you ask if someone, whether an attorney or not, can lawfully sell real estate at auction under a power of attorney without first having to be licensed and treated as an auctioneer once S.B. 348 (Ch. 538 [1982] Acts of Assembly) establishing the Auctioneer's License Act, takes effect on July 1.1

The bill in question provides under § 54-824.10 of the Code of Virginia (1950), as amended, that "[n]o person shall sell at auction for compensation without first being licensed as an auctioneer or apprentice auctioneer under this chapter....." The bill also provides exemptions under § 54-824.3 to which the licensing provisions do not apply.2

In your question, the person with the power of attorney clearly plans on selling real estate by auction. I will assume for purposes of your question that the person will receive compensation. Thus, unless an exemption is provided, the person in question would be performing an act specifically reserved for licensed auctioneers by the General Assembly. Several of the exemptions may be applicable to persons who act under a power of attorney, but in each exemption an additional requirement is found. For example, the person must be acting as a guardian or as a trustee under a trust agreement. No exemption pertains simply to persons acting pursuant to a power of attorney. To allow exemptions not specifically provided by the General Assembly would be to circumvent the legislative attempt to regulate sales at
auction and the further legislative requirement that those persons who sell at auctions meet certain qualifications. The maxim expressio unius est exclusio alterius applies. "The enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded." 2A D. Sands, Sutherland Statutory Construction 123 (4th ed. 1973).

In light of the foregoing, it is my opinion that a person, whether an attorney or not, acting solely under a power of attorney and not otherwise exempted, must comply with the licensing requirements of S.B. 348 in order to sell real estate at auction for compensation.

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1The substantive provisions of the Act pertaining to licensure are contained in §§ 54-824.1 through 54-824.21 and are found in Ch. 20.1, Art. I of Title 54.
2Among these exemptions are the following:
   "1. Any person who, as owner or lessor, shall perform any of the acts of an auctioneer with reference to property which he owns or leases, if such acts are performed in the regular course of or incident to the management of such property and the investment therein;
   2. Any person who is acting as a receiver, trustee in bankruptcy, guardian, administrator, or executor, or any person acting under order of a court;
   3. A trustee acting under a trust agreement, deed of trust, or will...."

BANKING AND FINANCE. "CONTRACT FOR THE LOAN OF MONEY" DEFINED.

May 5, 1982

The Honorable Joseph A. Gallagher, Judge
Prince William General District Court

This is in reply to your letter requesting an Opinion of the meaning to be given the phrase "contract for the loan of money" as that term is used in § 6.1-330.101 of the Code of Virginia (1950), as amended. You specifically inquired regarding its meaning, as it relates to credit purchases by means of credit cards and installment sale contracts, in the following situations or transactions:

"1. Credit sale of consumer goods or services charged to a bank or other central charge credit account.

2. Credit sale of consumer goods or services charged to a credit account with the retail merchant.

3. Sale of consumer goods on an installment sales contract (e.g. sale of automobile) wherein:
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a. Seller retains contract and collects monthly installment payments or

b. Seller assigns contract to a commercial bank or other lender who collects monthly installment payments."

I will address the transactions you have described seriatim.

1. The use of a bank credit card to pay for the purchase of consumer goods or services indicates that the bank will pay the supplier on behalf of the cardholder. The cardholder, by his application for and use of the card, agrees to repay the bank the money paid on his behalf. Additionally, some issuers of bank cards provide for users to withdraw money from machines or present the card for cash advances. The deferred payment feature of a credit card transaction involves the forbearance of a debt (i.e., a loan), by the issuing bank. In cases of purchases for goods and services, the elimination of the transfer of the money to the cardholder and his subsequent transfer to the supplier does not remove the transaction from the category of a loan of money. Accordingly, I am of the opinion that the credit sale of consumer goods or services charged to a bank or other central charge credit account is a loan of money from the bank to the cardholder.

2. A retail merchant may extend credit to customers and evidence such extension by issuing a credit card. The retail merchant thereby indicates his willingness to receive full payment for the purchased goods at a time in the future rather than at the time of a purchase. He has not made a loan of money to the cardholder, but rather has extended credit to him to pay for the goods at a later time. The use of the card is a convenient substitute for the separate contract at time of purchase, or on open account. The credit sale of consumer goods or services charged to a credit account with a retail merchant, therefore, is not a loan of money.

I am of the opinion that the conclusion expressed to your second question applies equally to question three.

It has been held that "the bona fide sale of property under a contract providing for payment of the purchase price, in whole or in part, in the future, in one or more installments, is in no sense a loan...." Peterson v. Philco Finance Corp., 91 Idaho 644, 428 P.2d 961 (1967). Thus, an installment sales contract would not be considered a contract for or a loan of money.

Assigning or selling such an installment sales contract to a lender does not convert it to a loan of money. "The purchase of conditional sales contracts is not a loan of money either in the ordinary or legal sense." General Elec. Credit Corp. v. Oregon State Tax Commission, 231 Or. 570, 373 P.2d 974 (1962). Cf. O'Connell v. Public Utility District

I am, therefore, of the opinion that as used in § 6.1-330.10, "contract for the loan of money" includes transactions involving a bank credit card, but does not include transactions using a retailer's credit card or installment sales contract.

1Section 6.1-330.10 reads as follows: "The judgment rate of interest shall be ten per centum per annum, except that a money judgment entered in an action arising from a contract for the loan of money shall carry interest at the rate lawfully charged on such contract, or at ten per centum per annum, whichever is higher."

BINGO. BREAKOPEN TICKET BINGO GAME NOT ONE OF PERMISSIBLE ACTIVITIES DEFINED IN § 18.2-340.1.

May 11, 1982

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

You have asked about the legality of a newly introduced game, reportedly called "bingo," played with breakopen tickets. Your inquiry focuses specifically on a prepackaged ticket which the retail supplier, Best Bingo Supply, described as Form #1777. The information which you have provided indicates that this game is operated by individually selling breakopen tickets for a small sum of money. On one side of each ticket or card is a perforated window flap which is opened to reveal whether the player is an instant winner of some sum of money. When the flap is opened, it reveals a standard bingo card of five vertical rows with each row having five numbered squares. Winning cards are determined by the preprinted appearance of the word "bingo" and the name of the prescribed order or type of bingo (i.e., vertical bingo, horizontal bingo, etc.) in the center space and the card also displays the prescribed winning combination of marked numbers. Losing cards do not display a winning combination of numbers or have the word "bingo" printed in the center square.

You question whether this seemingly "instant bingo" type of game falls within the "regular bingo" definition, or the "instant bingo" definition contained in § 18.2-340.1 of the Code of Virginia (1950), as amended.

For the reasons hereinafter stated, I am of the opinion that the game does not constitute either permissible form of bingo.

Section 18.2-340.1(2) defines "bingo" as follows:
"a specific game of chance played with individual cards having randomly numbered squares ranging from one to seventy-five, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random. Such cards shall have five vertical rows headed respectively by the letters B.I.N.G.O., with each row having five randomly numbered squares."

Section 18.2-340.1(4) defines "instant bingo" as follows:

"a specific game of chance played by the random selection of one or more individually prepacked cards, with winners being determined by the preprinted appearance of the letters B.I.N.G.O. in any prescribed order on the reverse side of such card."

If the game in question does not fall under one of these definitions, then it is not a permissible activity under the bingo and raffle laws.

The game ticket in this case does not fall within the definition of instant bingo under § 18.2-340.1(4) because the ticket has numbers and not letters as prescribed in the statutory definition, and the letters B.I.N.G.O. are not to be found on the reverse side of these breakopen tickets.

It is also my opinion that the breakopen ticket does not fall within the general definition of bingo found in § 18.2-340.1(2), because the prizes are not awarded on the basis of "designated numbers on such cards conforming to a predetermined pattern of numbers selected at random." The winning numbers are not "selected at random" as in hard card bingo, but instead the winning numbers are printed on the ticket by a machine, which has been programmed to print certain winning numbers on a certain number of tickets.

Thus, I conclude that the game in question is not a permissible activity under Virginia's bingo and raffle laws.

BINGO. JACKPOTS. NUMBER PER SESSION OF PLAY.

August 7, 1981

The Honorable Ralph L. Axselle, Jr.
Member, House of Delegates

You ask whether the 1981 amendments to the bingo laws will allow for more than one jackpot per session of bingo.

In an Opinion to the Honorable James A. Cales, Jr., Commonwealth's Attorney for the City of Portsmouth, dated November 13, 1979, found in Report of the Attorney General (1979-1980) at 50, it was concluded that only one jackpot may be awarded per session of bingo and its value could not
exceed $1,000. The 1981 session of the General Assembly amended the bingo laws by, among other things, adding a definition of "jackpot." It is noteworthy, however, that the General Assembly did not amend § 18.2-340.9(G) to indicate that more than one jackpot could be awarded per session of bingo.

It has been repeatedly held that a construction given a statute by public officials charged with its administration and enforcement is given weight by a court, and when such construction has continued without change, the legislature which is presumed to be cognizant of such construction, will be presumed to have acquiesced in that construction. Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965). In the instant situation, while the General Assembly added a statutory definition of what constituted a "jackpot," no action was taken to delineate whether more than one jackpot could be offered per session.

Therefore, I must conclude that the legislature continues to acquiesce in the interpretation provided in the Cales Opinion. Otherwise, a jackpot would be nothing more than a special bingo game and the limits on prizes for special bingo games is already $100. Thus, it is my opinion that the recent statutory changes enacted by the General Assembly in the bingo laws will have no effect on this Office's prior conclusion that only one jackpot may be awarded per session of bingo.

1 House Bill 1052 (Ch. 273), passed by the 1981 session of the General Assembly and effective July 1, 1981, amended § 18.2-340.1 of the Code of Virginia (1950), as amended, by adding the following definition: "'Jackpot' means a bingo card played as a part of a bingo game defined in § 18.2-340.1(2) in which all numbers on the card are covered, each number being selected at random, and with no free or 'wild' numbers."

2 See § 18.2-340.9(G)(ii).

BINGO. NUMBER OF "JACKPOTS" ALLOWED PER SESSION OF BINGO.

April 26, 1982

The Honorable W. Edward Meeks, III
Commonwealth's Attorney for Amherst County

You have asked whether the 1981 amendments to Art. 1.1 of Ch. 8 of Title 18.2 of the Code of Virginia (1950), as amended, pertaining to bingo and raffles will allow more than one jackpot per session of bingo. This question has been answered in the negative in an Opinion to the Honorable Ralph L. Axselle, Jr., Member, House of Delegates, dated August 7, 1981, a copy of which is enclosed.
In your second inquiry, you have asked several questions concerning whether the following described game constitutes one or two games:

"A game is played by one or more local organizations by which a particular pattern is formed on the card and then a prize of $100.00 is paid, then a second game is played using the same card in which the number calling from the first game continues until someone has completely filled the card at which time a second prize is paid."

It is my opinion that this scenario constitutes two separate games which are actually being played at the same time. The second game is a "jackpot" as defined by § 18.2-340.1(5), if all the randomly selected numbers on the bingo card are covered as a part of the game and there are no free or "wild" numbers.

As indicated in the Opinion to Delegate Axselle, only one jackpot may be awarded per session of bingo and its value may not exceed $1,000. In the instant situation, the second game would constitute the only jackpot that could be awarded in any one session of bingo play.

BINGO. RAFFLES. RAFFLE OF REAL PROPERTY AND USE OF PROCEEDS TO PAY FOR PROPERTY. § 18.2-340.9(A).

November 17, 1981

The Honorable Anthony P. Giorno  
County Attorney for Patrick County

You have asked several questions concerning the propriety of a proposed raffle of land. As outlined in your letter, the proposed raffle is described in the following manner:

"The Patrick County Jaycees, Inc., an organization operated exclusively for religious, charitable, community or educational purposes, has taken an option on 2,000 acres of land in Patrick County, Virginia. The land is valued at approximately $300.00 per acre. The Jaycees propose to sell 1,000 raffle tickets at $1,000 each, with the prize being the aforementioned acres of land. If the club sells at least 200 tickets, the raffle will be held on a date certain; if less than the requisite number of tickets are sold, the option would lapse and the raffle would be cancelled. Assuming, however, that the raffle was held, the Jaycees would use the proceeds of the raffle to complete the purchase of the land, and then, by separate deed, convey the property to the winner.

The Jaycees would be assisted in the advertising and conducting of the raffle by a local real estate broker
who would answer public inquiries about the land. The Jaycees would pay for the costs of advertising, printing, etc. Brokers fee would be paid by the present owner of the land, from proceeds which would be paid to the owner by the Jaycees."

You first ask whether land valued at approximately $600,000 constitutes a "reasonable and proper" prize under § 18.2-340.9(A) of the Code of Virginia (1950), as amended.

Section 18.2-340.9(A) provides, in part:

"Except for reasonable and proper operating costs and prizes, no part of the gross receipts derived by an organization...may be used for any purpose other than those lawful religious, charitable, community or educational purposes...."

It is my opinion that "reasonable and proper" does not refer to "prizes," but rather, was intended to modify only the word "costs." The General Assembly, in essence, has already determined the reasonable and proper limits on bingo prizes in § 18.2-340.9(G). As to limits on the value of prizes for raffles, this Office has previously concluded that the legislature did not intend to limit the amount of prizes awarded in raffles. See Opinion to the Honorable William G. Broaddus, County Attorney for Henrico County, dated November 5, 1979, found in Report of the Attorney General (1979-1980) at 53.

You also ask whether it is proper to use the proceeds of the raffle to purchase the land. In this regard, you ask whether it would make any difference if the organization qualified to conduct the raffle executed a deed of trust for the property and in turn received a deed to the property. Then, after the raffle, the proceeds were used to satisfy this deed of trust, thus enabling the organization to deliver clear title to the winner of the raffle.

As indicated above, § 18.2-340.9(A) exempts prizes from the prohibition against the use of the proceeds for any purpose other than those specific purposes for which the organization was chartered. Accordingly, I must conclude that it is proper as a general rule to use the proceeds of the raffle to purchase the land. Also, it would make no difference if this was done by means of a deed of trust arrangement. However, I would warn that these organizations should be careful not to condition the purchase of the property on the success of the raffle. If the property owner is hesitant to allow his property to be raffled unless he is assured of receiving its full value, the raffle could run afoul of other prohibitions set out in § 18.2-340.9(E). The raffle should not merely be a joint enterprise between the owner and the organization. Rather, in keeping with the spirit of the bingo and raffle provisions, it should be a legitimate fund raising activity for the qualified organization and not a convenient method for property owners
to sell their property. A deed of trust arrangement does not present these problems because once a deed of trust is executed, the organization is obligated to purchase the land whether or not the raffle was a success. The money which the property owner receives for his property is not predicated upon the success of the raffle's ticket sales. However, the option arrangement described in your factual situation presents exactly these very problems. I am of the opinion that any arrangement whereby the property owner can condition the use of his property as a prize in the raffle would be impermissible.

Finally, you ask whether it is proper to use the local real estate broker as described in your factual situation to assist in this proposed raffle. It is my opinion that if his participation consists merely of answering inquiries dealing with the land, this would be permissible. However, if he were to participate in any way in the advertising, organizing, or conduct of the raffle itself, including ticket distribution to prospective purchasers, this would be prohibited under §§ 18.2-340.9(B) and 18.2-340.9(E).

Section 18.2-340.9(G) provides in part: "No organization shall award any prize money or any merchandise valued in excess of the following amounts: (i) no door prize shall exceed twenty-five dollars, (ii) no regular bingo or special bingo game shall exceed one hundred dollars, and (iii) no jackpot of any nature whatsoever shall exceed one thousand dollars...."

Section 18.2-340.9(E) provides in part: "No person, except a bona fide member of any such organization who shall have been a member of such organization for at least ninety days prior to such participation, shall participate in the management, operation or conduct of any bingo game or raffle, and no person shall receive any remuneration for participating in the management, operation or conduct of any such game or raffle...."

Section 18.2-340.9(B) provides in part: "No organization shall enter into a contract with, or otherwise employ for compensation any person, firm, association, organization, partnership, or corporation of any classification whatsoever for the purpose of organizing, managing or conducting bingo games or raffles...."

BINGO. WHETHER LOCAL CLUB IS "ORGANIZATION," DEFINED IN § 18.2-340.1, QUALIFIED TO CONDUCT BINGO GAMES.

April 9, 1982

The Honorable T. A. Emerson
County Attorney for Prince William County
You have asked whether a local swimming and recreation club (hereinafter referred to as "Club") is qualified to conduct bingo games in the Commonwealth.

The conduct of bingo games and raffles is governed by the provisions of §§ 18.2-340.1 through 18.2-340.13 of the Code of Virginia (1950), as amended. Only those organizations defined in § 18.2-340.11 may conduct bingo games and raffles. Among the specified organizations so defined are those "operated exclusively for religious, charitable, community or educational purposes...." (Emphasis added.)

The Club's articles of incorporation indicate that it is a non-stock corporation organized for the purpose of providing "a swimming pool and recreational facilities for the use of members of the Corporation, their families and guests...." Further, the articles of incorporation limit membership in the Club to 500 members. While there is some indication that the Club does engage in occasional community service activities, it appears from the information provided that the Club functions essentially as a private organization for the benefit of its members. It appears that the Club does not meet the requirement of being organized exclusively for religious, educational, charitable or more specifically, community purposes.

I note, however, that the ultimate decision of whether an organization is a qualified "organization" under the provisions of § 18.2-340.1 is vested in the governing body of the city, town or county granting the permit required by §§ 18.2-340.2 and 18.2-340.3. Of course, that decision is subject to judicial review.

1"The following words shall have the following meanings:
1. 'Organization' means any one of the following:
   (a) A voluntary fire department or rescue squad or auxiliary unit thereof which has been recognized by an ordinance or resolution of the political subdivision where the voluntary fire department or rescue squad is located as being a part of the safety program of such political subdivision.
   (b) An organization operated exclusively for religious, charitable, community or educational purposes; an association of war veterans or auxiliary units thereof organized in the United States, or a fraternal association operating under the lodge system."
August 24, 1981

The Honorable Larry G. Elder
Commonwealth's Attorney for Dinwiddie County

You have asked my opinion concerning the application of § 15.1-540 of the Code of Virginia (1950), as amended, which describes voting procedures to be followed by a board of supervisors.

You first ask whether a motion needs to be seconded under § 15.1-540. I find no such requirement in the statute. See, also, Opinion to the Honorable John N. Lampros, Commonwealth's Attorney for Roanoke County, dated October 2, 1972, found in Report of the Attorney General (1972-1973) at 38 (not required even if Roberts Rules adopted).

Accordingly, it is my opinion that there need be no second in order for a motion to be effective.

You next ask whether abstentions count as negative votes under § 15.1-540. The statute provides that all questions submitted to the board for decision shall be determined by a majority of the supervisors voting on any such question.

Accordingly, it is my opinion that abstentions do not count as negative votes under § 15.1-540. This result is consistent with prior Opinions. See Opinion to the Honorable Ralph L. Axselle, Jr., Member, House of Delegates, dated July 12, 1978, found in Report of the Attorney General (1978-1979) at 203, and Opinion to the Honorable J. Paul Councill, Jr., dated March 2, 1978, found in Report of the Attorney General (1977-1978) at 40.1

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1See, also, § 15.1-1249 with respect to water and sewer authorities. Section 15.1-1249 provides that members of an authority shall be selected in the manner provided by the ordinance or resolution creating the authority.


BONDS. REVENUE BONDS. TOLL ROADS MAY BE FINANCED BY ART. X, § 9(c).

February 24, 1982

The Honorable John Watkins
Member, House of Delegates

You have asked for my opinion whether the General Assembly may authorize the creation of debt in the form of revenue bonds in accordance with Art. X, § 9(c) of the Constitution of Virginia (1971) (the "Constitution") to
finance a project consisting of the extension of Powhite Parkway, a toll road facility. You enclosed a copy of proposed legislation in which it is proposed that the State Highway and Transportation Commission will construct, operate and maintain the toll road facility. The user tolls will provide revenue which will defray the costs of construction and operation. The Chesterfield County Toll Road Authority established by Ch. 619 [1980] Acts of Assembly 896, would not participate in the proposed project.

In response to your question, I am aware of nothing in the Constitution which would prohibit the use of 9(c) bonds for the extension of the Powhite Parkway. This Office has previously expressed the view that such capital projects by an agency administered solely by the executive department of the Commonwealth may be financed by such revenue bonds. See Report of the Attorney General (1970-1971) at 40. There are several conditions to be met, however, before the debt authorized by Art. X, § 9(c) may be incurred.

The first step is to obtain responsible engineering and economic estimates from which the Governor may certify in writing to the Auditor of Public Accounts that:

1. the anticipated net revenues from the project to be pledged to the payment of principal and interest on the debt will be sufficient to:
   a. meet such payments as the same become due, and
   b. provide such reserves as the law authorizing such debt may require; and
2. the project otherwise complies with the requirements of Art. X, § 9(c).

The General Assembly must then authorize the debt by an affirmative vote of two-thirds of the members elected to each house. The Governor must then recertify in writing to the Auditor of Public Accounts that the requirements are met before the debt is actually incurred.

I assume that the amount of the debt would be within the limits prescribed by the Constitution.

CHILD ABUSE. STATUTORY DUTY TO REPORT SUSPECTED CASES OF CHILD ABUSE AND NEGLECT. PHYSICIAN-PATIENT RELATIONSHIP.

February 23, 1982

The Honorable Frank D. Harris
Commonwealth's Attorney for the County of Mecklenburg

This is in reply to your letter of February 12, 1982, in which you ask whether psychiatrists are required to report suspected child abuse and neglect cases and whether the
physician-patient privilege would prohibit a psychiatrist from testifying in suspected child abuse and neglect cases.

Section 63.1-248.3 of the Code of Virginia (1950), as amended, imposes a duty upon any person licensed to practice medicine or any of the healing arts to report any child suspected of being abused or neglected immediately to the local department of welfare. Section 63.1-248.11 further provides that, in any legal proceeding resulting from the filing of such a report, the physician-patient privilege shall not apply. A psychiatrist clearly is involved in the "practice of medicine" and "the healing arts" as those terms are defined in § 54-273. Therefore, I am of the opinion that a psychiatrist would be required to make a report of suspected child abuse or neglect in accordance with § 63.1-248.3 and that the physician-patient privilege would not prohibit the psychiatrist from testifying in any legal proceeding resulting from the filing of such a report. See Report of the Attorney General (1975-1976) at 41.

CITIES. CHARTER. CHESAPEAKE CITY CHARTER DOES NOT EXEMPT LITERARY FUND LOANS FROM DEBT LIMITS.

September 28, 1981

The Honorable V. Thomas Forehand, Jr.
Member, House of Delegates

You have asked whether loans made from the Literary Fund (hereinafter "Fund") to the School Board of the City of Chesapeake constitute bonds or notes issued by the City of Chesapeake subject to the annual limitation on issuance contained in its charter.1

Some cities have chosen specifically to exempt school board indebtedness from the general limitations on the indebtedness set forth in their charters, and thereby avoid referenda on Fund loans. This Office has upheld those provisions, as well as their application to Fund loans. When cities have chosen this course, their charter provisions exempting the school board are clear and specific. See Reports of the Attorney General (1957-1958) at 240, (1971-1972) at 355, (1977-1978) at 236. Implicit in the Opinions of this Office which considered those charter provisions was the judgment that, absent such charter provisions exempting school board loans from limitations on indebtedness, school board loans were subject to such limitations. Upon examination of the charter provisions for the City of Chesapeake, I find no specific exemption of the school board from the annual limitation of indebtedness.

Accordingly, it is my opinion that the annual limitation on indebtedness which may be incurred without a referendum, as set forth in § 6.05 of the Charter for the City of Chesapeake, does include bonds and notes issued to secure loans to the school board from the Fund.
Article VIII, § 8 of the Constitution of Virginia (1971) establishes the Fund which is held and administered by the State Board of Education ("State Board") for school funding purposes. The General Assembly has authorized the State Board to make loans to school divisions. See § 22.1-146 of the Code of Virginia (1950), as amended. Conversely, school boards are authorized to borrow money from the Fund. See § 22.1-153.

A loan from the Fund must be evidenced by bonds or notes from the school board payable to the Commonwealth for the benefit of the Fund. The governing body of the jurisdiction to which the school board responds is required to include in its levies and appropriate to the school board monies sufficient to meet the loan from the Fund. See § 22.1-158. Failure of the governing body to provide in its levies and appropriations for the repayment of a loan from the Fund is cause for removing its members from office. See § 22.1-158. Bonds and notes of the school board held by the Fund constitute a binding indebtedness of the corresponding local jurisdiction and a lien on all funds and income of that corresponding county, city or town. See § 22.1-161. See Reports of the Attorney General (1960-1961) at 268, (1974-1975) at 346; County of Henrico v. City of Richmond, 177 Va. 754, 15 S.E.2d 309 (1941).

Under § 115-a of the 1902 Constitution of Virginia, it was held that county school boards were not required to obtain voter approval for loans from the Fund nor for the issuance of bonds securing those loans. See Board of Supervisors of King and Queen County v. Cox, 155 Va. 687, 156 S.E. 755 (1931). This holding was based in part on the view that loans from the Fund were essentially repayments to counties of funds which they had relinquished to the State Board and that the State Board had the primary responsibility for determining the appropriateness and prudence of the loan in meeting local educational needs. See Board of Supervisors of King and Queen County v. Cox, supra; Almond v. Gilmer, 188 Va. 1, 49 S.E.2d 431 (1948). The present Constitution of Virginia continues this holding only insofar as it provides that loans from the Fund to counties need not be subject to referendum unless required by the General Assembly. See Art. VII, § 10(b); II A. E. Howard, Commentaries on The Constitution of Virginia 871-873 (1974). Section 15.1-185 of the Code now specifically provides that voter approval for Fund loans to counties is unnecessary.

The current Constitution and the Code neither explicitly exempt cities from, nor bind them to, referendum requirements for Fund loans. The Constitution does provide several categories of city indebtedness which are not subject to debt limitations. Fund loans are not included in those categories. See Art. VII, § 10(a). The borrowing powers of cities under the present Constitution are prescribed either by general law or by special act. See II A. E. Howard, supra, 871, n. 44. Thus, cities may elect to proceed under either the Public Finance Act (§§ 15.1-170 to 15.1-227) or
the provisions of their city charter. See § 15.1-171; Harper v. City Council of the City of Richmond, 220 Va. 727, 261 S.E.2d 560 (1980); Falls Church Taxpayers League v. City of Falls Church, 203 Va. 604, 125 S.E.2d 817 (1962). In determining the powers and duties of cities when general statutory provisions conflict with charter provisions, their charter provisions, rather than the provisions in general laws, prevail. See § 15.1-840. Therefore, the charter provisions are of paramount importance.

1The Charter for the City of Chesapeake, § 6.05, Ch. 717 [1980] Acts of Assembly, provides:

"No bonds or notes of the city shall be issued until their issuance shall have been authorized by a majority of the qualified voters of the city voting on the question at an election held for the purpose in the manner provided by general law, except as follows: *** (C) The council may authorize the issuance of bonds or notes in any calendar year in an amount not to exceed four million five hundred thousand dollars, provided that the amount of such bonds or notes together with existing indebtedness of the city, as determined in the manner set forth in Section 10(a) of Article VII of the Constitution, shall not exceed eight percent of the assessed valuation of real estate in the city subject to taxation, as shown by the last preceding assessment for taxes. Such bonds or notes shall be authorized by an ordinance adopted by the affirmative vote of two-thirds of all members of the council...."

2A similar scheme is provided in the statutory provisions permitting school boards to obtain loans from the Virginia Supplemental Retirement System. See § 15.1-228. Bonds are issued by the school board to the Virginia Supplemental Retirement System in the name of the county, city or town. See § 15.1-230. For the payment of the bonds, the full faith and credit of the county, city or town is pledged. See § 15.1-230.

CITIES. COMMUNITY ANTENNA TELEVISION SYSTEM. CLASSIFICATION AUTHORITY. NONRESIDENT SURCHARGE.

November 5, 1981

The Honorable John H. Rust, Jr.
Member, House of Delegates

You have asked whether the City of Manassas Park may adopt an ordinance regulating a cable television system franchise granted by the city which provides that extensions of the system made outside the corporate limits of the city shall carry a $1.00 surcharge to be added to the monthly rate of customers residing outside the city. The surcharge provision also requires the franchisee to pass this surcharge directly through to the city on a quarterly basis to reimburse the city "for costs of administration and
regulation of the Cable Television System." The franchisee's receipts generated from customers located outside the corporate limits of the city are excluded from the revenue base used to calculate the franchisee's franchise fee. You ask whether the nonresident surcharge may be legally imposed under the circumstances described.

Section 15.1-23.1 of the Code of Virginia (1950), as amended, provides that localities may regulate community antenna systems, including authority to establish fees and rates,1 and also authorizes the governing body to define the area of operation of a system. See Report of the Attorney General (1971-1972) at 27. The Code is silent with regard to the standards by which fees are to be determined, but implicit in laws authorizing such charges is the general requirement of reasonableness. See Reports of the Attorney General (1976-1977) at 219; (1975-1976) at 423.

Customers who are similarly situated must be charged equally. Customers differently situated, however, may be charged different charges, so long as the charges are reasonable and related to differences in costs of providing services to the different classes of customers. Commonwealth v. VEPCO, 211 Va. 758, 773, 180 S.E.2d 675, 686 (1971); Report of the Attorney General (1977-1978) at 500. For example, where a system consists of both existing and newly constructed facilities with different bond retirement schedules and maintenance upkeep costs, imposition of different user rates for customers using new as opposed to old facilities is permissible. See Report of the Attorney General (1976-1977) at 219.

Classification of customers for rate purposes may be based on the locality in which the service is furnished where circumstances exist justifying such classification. 64 Am.Jur.2d Public Utilities §§ 117, 120 (1972); 61 A.L.R.3d 1236, 1263 (1975). Where a system is supported in part by taxes paid by city residents, customers who live outside the city and enjoy all the benefits of a system regulated by the city may be required to pay a rate differential. See Louisville & Jefferson Co. M.S.D. v. Town of Strathmoor Village, et al., 211 S.E.2d 122, 126-127 (Ky. 1948). There must, however, be factors which demonstrate that the rate differential has a reasonable basis. City of Texarkana v. Wiggins, 246 S.W.2d 622 (Tex. 1952). Unless clear and convincing evidence demonstrates that an ordinance is unreasonable or arbitrary, the ordinance must be upheld. Sheek v. City of Newport News, 214 Va. 288, 199 S.E.2d 519 (1973). If the question is fairly debatable, courts will not substitute their judgment for that of the legislative body. Id., Wagner v. Bristol Belt Line Railway Co., 108 Va. 594, 62 S.E. 391 (1908); Capitol Cable, Inc. v. Topeka, 495 P.2d 885 (Kan. 1972).

I, therefore, conclude that the City of Manassas Park may legally charge nonresidents of the city a different rate for cable television service, so long as the differential in
rate is reasonably related to actual differences in costs of providing service to non-residents. Whether the $1.00 surcharge Manassas Park proposes is justifiable will, of course, depend upon the specific cost factors of providing service to nonresidents as compared with service provided residents.

1"The governing body of any...city...may license, franchise or issue certificates of public convenience and necessity to one or more community antenna television systems, and impose a tax thereon; may regulate such systems, including the establishment of fees and rates...." (Emphasis added.)

CITIES. ECONOMIC GROWTH SHARING AGREEMENT DOES NOT REQUIRE CITY REFERENDUM.

April 27, 1982

The Honorable Thomas J. Michie, Jr.
Member, Senate of Virginia

This is in reply to your inquiries regarding the proposed economic growth sharing agreement between the City of Charlottesville (the "City") and Albemarle County (the "County").

The proposed agreement provides that the City and County will share in economic growth of the area designated in the agreement through an annual payment from one jurisdiction to the other. The payment will be determined by a formula which will include as factors real estate tax base, population and tax rate statistics from the two jurisdictions for the previous year. It is anticipated that the agreement will result in annual payments by the County to the City during the foreseeable future, even though it is possible that in future years the flow of payments may be reversed.

Under Section III of the proposed agreement, the City agrees, with certain exceptions, that during the life of the agreement it will not initiate annexation proceedings against the County and that it will oppose any annexation proceedings which may be filed by other parties. Under Section IV, both the City and the County agree that, with certain exceptions, "neither jurisdiction will, during the life of this agreement, impose or increase any tax that would affect residents of the other jurisdiction if the other jurisdiction is not legally empowered to enact that tax at the same rate and in the same manner." This particular provision is specifically intended to restrict "commuter" or payroll taxes.

Section VI provides that the agreement shall remain in effect until 1) the City and County are consolidated, 2) the concept of independent cities presently existing in Virginia
is altered by State law in such a manner that real property in the City becomes a part of the County's tax base, or 3) the City and the County agree to cancel or change the agreement. The agreement is otherwise perpetual, as no other means of termination is provided.

The statutory basis enabling the two localities to enter into the agreement is Ch. 26.1 (§§ 15.1-1166 through 15.1-1167) of Title 15.1 of the Code of Virginia (1950), as amended. The provisions of that chapter are part of the legislative response to the problem of annexation which has long plagued Virginia's counties and cities. Indeed, in adopting § 15.1-1166, the General Assembly stated that it recognized "that approaches other than territorial expansion of cities can be beneficial to both counties and cities of the Commonwealth...." The remaining provisions of that chapter provide the alternative approach contemplated in the above quoted portion of § 15.1-1166. Because of its remedial nature, the statute "requires a liberal interpretation to meet those cases which are clearly within the spirit or reason of the law, provided such an interpretation is not inconsistent with the language of the statute." Richmond v. Metropolitan Authority, 210 Va. 645, 648, 172 S.E.2d 83 (1970).

Your first inquiry is whether the proposed agreement will be binding on the City in the absence of a City referendum. You note that it is conceivable, though not likely, that the formula at some future time may require the City to pay funds to the County rather than vice-versa. For the reasons hereinafter stated, I am of the opinion that no such City referendum is required. Section 15.1-1167 specifies that such an agreement shall be approved by resolution adopted by a majority vote of the members of the governing body of each County and City participating in the agreement. The Code provisions do not require that the City first hold a referendum before its governing body considers the resolution.

A second source to be considered in determining whether a referendum is required is the Constitution of Virginia. Section 10(b) of Art. VII of the Constitution of Virginia (1971) provides in pertinent part:

"(b) No debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt...[certain exceptions listed] unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt."
In my opinion, a city is not a "county" or "regional government" or "district thereof" for purposes of this section. Article VII, § 10(b) is, therefore, inapplicable to the City and no referendum is required under it.

Your second inquiry is whether the agreement is invalid because it is without time limitation. I note that a related question, whether the present governing bodies may bind their successors, is also raised by the agreement.


Furthermore, without express statutory or charter authority, the governing body of a municipal corporation may not, by contract, bind its successors either to forego or to exercise their governmental powers, although it may do so in merely proprietary matters. Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 812, 14 S.E. 665,666 (1892). See, generally, 63 C.J.S. Municipal Corporations § 987 at 549 (1950). The power to annex is clearly a governmental and not a proprietary function. Pitzer v. City of Abilene, 323 S.W.2d 623, 626 (Ct.Civ.App.Tex. 1959). The power to tax is similarly governmental. City of Louisville v. Fiscal Court of Jefferson County, 623 S.W.2d 219 (Ky. 1981).

The question is therefore presented whether § 15.1-1166 expressly, necessarily, or, by fair implication, authorizes this agreement, which purports to be perpetual and to bind successor governing bodies. The statute provides in pertinent part:

"Recognizing that approaches other than territorial expansion of cities can be beneficial to both counties and cities of the Commonwealth, the following provisions are made:

A. Any county or city may enter voluntarily into agreement with any other county or city, or combination thereof, whereby such cities included in the agreement will relinquish their authority to initiate annexation petitions under § 15.1-1033 with respect to all or a portion of the county or counties included in such agreement in exchange for fiscal arrangements to share in the benefits of the economic growth of their jurisdictions." (Emphasis added.)
Section 15.1-1167 provides that the "terms and conditions" of the plan or agreement shall be determined by the governing bodies.

Virginia follows the Dillon Rule of strict construction concerning the legislative powers of local governing bodies. Under that rule, a city may exercise powers expressly granted, powers necessarily or fairly implied in or incident to the powers expressly granted, and those essential to the declared objects of the municipality. City of Richmond v. Hanes, 203 Va. 102, 108; 122 S.E.2d 895, 899 (1961). The powers of a municipal corporation are to be strictly construed; where there is doubt, the doubt is to be resolved against the existence of the power. Id. at 108; Charles Tabler T/A Foodarama Supermarket, et al. v. Board of Supervisors of Fairfax County, et al., 221 Va. 200, 202; 269 S.E.2d 358, 359 (1980).

Section 15.1-1166 provides that the city entering into such an agreement will "relinquish" its authority to initiate annexation petitions. The term "relinquish" is defined as "[t]o abandon, to give up, to surrender, to renounce some right or thing." Black's Law Dictionary 1161 (5th ed. 1979). It is defined more fully in the Webster Encyclopedic Dictionary 708 (1967) as follows: "To give up the possession or occupancy of; to withdraw from; to leave; to abandon; to give up the pursuit or practice of; to desist from; to renounce a claim to."

The Code provision does not specify whether the relinquishment may be permanent. As previously noted, however, § 15.1-1167 vests in governing bodies the authority to specify the terms and conditions of the agreement.

Because § 15.1-1166 does not limit "relinquish" to a time less than perpetual and remembering the liberal construction to be accorded this statute in order to achieve its legislative goals, it is fair to imply that the governing body of the City has the power to relinquish permanently its authority to initiate annexation petitions. Clearly that interpretation is not inconsistent with the language of the statute. Moreover, had the legislature intended that the relinquishment be only for a specified period of time, undoubtedly it would have so specified or used a term such as "suspend" which implies a limited period of time rather than "relinquish" which fairly implies permanence. Accordingly, I conclude that it may be fairly implied that relinquishment of annexation authority pursuant to § 15.1-1166 may be permanent. Thus, I am of the opinion that the agreement is not invalid due to the absence of a time limitation.

1In reaching this conclusion, I note that the General Assembly has used unequivocal language in other statutes where rights are permanently divested. See § 15.1-1058.1 ("Upon the execution of such an agreement...the town shall
permanently renounce its right to become a city."); § 15.1-1058.5 ("A final order...shall operate permanently to divest the town of its rights to become a city."); and § 15.1-977.22:2 ("Duration of immunity.--After a county...is once granted immunity as provided by this chapter, it shall thereafter retain it."). The distinction between those provisions and § 15.1-1166 is that under §§ 15.1-1166 and 15.1-1167 the governing body of the city, with the concurrence of the county, has the prerogative to determine whether relinquishment of its annexation authority is to be perpetual or for a shorter period of time.

CITIES. MUNICIPAL UTILITIES. ORDINANCES. CITY OF ROANOKE MAY EXTEND WATER LINES TO PROVIDE CITY WATER SERVICE AND IMPOSE ASSESSMENT ON ABUTTING PROPERTY OWNERS. ASSESSMENT MUST BE DONE PURSUANT TO ENACTMENT OF ORDINANCE AS PROVIDED IN CITY CHARTER.

May 21, 1982

The Honorable Clifton A. Woodrum
Member, House of Delegates

This is in reply to your letter dated May 11, 1982, which reads in pertinent part as follows:

"Under the facts as given me, a group of residents on a street located in the City of Roanoke do not receive city water service. It is my understanding that a majority, although not 3/4, of the residents desire that the City of Roanoke extend water lines down their street to provide for city water service."

Based upon the foregoing factual situation you have made the following inquiries:

1. Does the City of Roanoke have the authority to extend the water lines in question and impose an assessment on the abutting owners, whether or not they consent?

2. Does the City of Roanoke, through its city council, have the authority to act without adopting a local ordinance?

Section 15.1-239 of the Code of Virginia (1950), as amended, authorizes a city to impose taxes or assessments upon abutting property owners for the construction, replacement or enlargement of water lines and other public improvements. Under § 15.1-240, these improvements may be ordered by the city council pursuant to: (1) an agreement between the city and the abutting landowners, (2) a petition of not less than three fourths of the landowners affected by the improvement, or (3) by a two-thirds vote of all members elected to city council. Prior to council's making a decision, it must afford the abutting landowners an opportunity to be heard in favor of or against the
improvements in question. Accordingly, I am of the opinion that the City of Roanoke may make the extension of the water lines in question and impose an assessment upon the abutting property owners in accordance with the methods as outlined in § 15.1-240. However, because of the provisions of § 15.1-239, no assessment may be in excess of the peculiar benefits resulting from the improvements to the abutting properties.3

Turning to your second question, §§ 15.1-239 and 15.1-240 do not indicate whether the actions to be taken are to be done pursuant to an ordinance or resolution by the governing body of the locality. However, § 12 of the Roanoke City Charter (Ch. 216 [1952] Acts of Assembly 274) provides that the authorization of any public improvement by the city must be done by ordinance only.4 Therefore, I am of the opinion that public improvements undertaken by the city pursuant to §§ 15.1-239 and 15.1-240 must be pursuant to ordinance.

1Section 15.1-239 reads in pertinent part as follows: "In addition to the foregoing, the governing body of any city or town may impose taxes or assessments upon abutting property owners for the construction, replacement or enlargement of sidewalks, waterlines, sanitary sewers or storm water sewers... provided that such taxes or assessments shall not be in excess of the peculiar benefits resulting from the improvements to such abutting property owners."

2Methods 2 and 3 require that the cost of the improvements be defrayed in whole or in part by local tax assessment.

3For a definition of the term "peculiar benefit," see Report of the Attorney General (1980-1981) at 91, citing Southern Railway Co. v. City of Richmond, 175 Va. 308, 8 S.E.2d 271 (1940) and other cases. In the Southern Railway case, the Virginia Supreme Court defined the term as "the difference in the value of the lot with and without... the improvement. 175 Va. at 316.

4Section 12 of the Roanoke City Charter reads in pertinent part as follows: "In authorizing the making of any public improvements... the council shall act only by ordinance...."

CIVIL PROCEDURE. JURISDICTION UNDER LONG ARM STATUTE EXTENDS TO RESIDENTS OF VIRGINIA.

May 5, 1982

The Honorable Franklin J. Jenkins, Judge
Goochland County General District Court

This is in reply to your letter in which you present inquiries regarding Virginia's Long Arm Statute, § 8.01-328, et seq., of the Code of Virginia (1950), as amended.
You inquire first whether the Long Arm Statute provides for jurisdiction over Virginia residents. While the purpose of the Long Arm Statute is to provide jurisdiction over nonresidents, I am of the opinion that the Long Arm Statute extends to residents as well as nonresidents. See § 8.01-328.1A which provides jurisdiction over any "person" who performs specified acts, and § 8.01-328 which defines "person" to include any individual "whether or not a citizen or domiciliary of this State...."

Your second inquiry is whether service of process on the Secretary of the Commonwealth under § 8.01-329A is valid against a person whose last known address is in Virginia, where the party seeking service has been unable to locate the person to be served after exercising due diligence. Sections 8.01-329A and 8.01-329A1 provide:

"A. When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§ 8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a nonresident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the 'Secretary,' who, for this purpose, shall be deemed to be the statutory agent of such person.

A1. When service is to be made on the Secretary, the party seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served."

There is an apparent conflict between these two subsections. Subsection A appears to provide for service of process only over a "nonresident party," while subsection A1(ii) contemplates service on the Secretary of the Commonwealth in any case where the party to be served, resident or nonresident, cannot be located.

In my opinion, subsection A1(ii) is controlling. Subsection A1 was added in 1979, and is the most recent expression of the General Assembly on this point. It is therefore my opinion that service of process on the Secretary of the Commonwealth under the circumstances you describe is valid.

Your third inquiry is whether mailing a civil warrant to the Secretary of the Commonwealth, by certified mail with return receipt, constitutes proper service of process on the
Secretary under § 8.01-329B. That section provides, in pertinent part:

"Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with a copy of the affidavit called for in paragraph A1 hereof and the fee prescribed in § 14.1-103 in the office of the Secretary in the city of Richmond, Virginia...."

In my opinion, service is adequate where process is left in the office of the Secretary by certified mail with return receipt, along with the required fee and affidavit.

Your fourth inquiry is whether the Long Arm Statute provides personal jurisdiction over a person who has signed a promissory bank note. Although you have not specifically stated so, I assume the note was signed in Virginia with a bank doing business in Virginia. Assuming this to be true, it is my opinion that this constitutes "[t]ransacting any business in this State" for the purposes of § 8.01-328.1A1 and personal jurisdiction may therefore be exercised. A single act may constitute "transacting business" under the Long Arm Statute. Danville Plywood Corporation v. Plain and Fancy Kitchens, Inc., 218 Va. 533, 238 S.E.2d 800 (1977); Willis v. Semmes, Bowen and Semmes, 441 F.Supp. 1235 (E.D. Va. 1977). Making a contract may be such an act, where the contract has a substantial connection with the State. McGhee v. International Life Insurance Co., 355 U.S. 220 (1957); Viers v. Mounts, 466 F.Supp. 187 (W.D. Va. 1979). Furthermore, where a person deals with a Virginia bank, he evidences his intent to enjoy the benefits and protections of Virginia law. See Carmichael v. Snyder, 209 Va. 451, 164 S.E.2d 703 (1968).

CLERKS. CIRCUIT COURT CLERK MUST FILE ADMINISTRATIVE SUPPORT LIEN AGAINST INDIVIDUAL WORKING IN THAT JURISDICTION BUT RESIDING IN ANOTHER.

January 13, 1982

The Honorable William L. Lukhard, Commissioner
Department of Welfare

You have asked whether a circuit court clerk may refuse to file an administrative support lien against an absent responsible person as described in § 63.1-254 of the Code of Virginia (1950), as amended, where that individual is working in that jurisdiction but living in a neighboring one.

Section 63.1-254 provides that an administrative support lien attaches to the debtor's real or personal property when filed with the clerk of the circuit court where the property is located. If a support lien is filed pursuant to § 63.1-254 in the jurisdiction where wages are owed to the debtor, the lien may be enforced against such wages. See
$ 63.1-256. 2  Section 17-59 requires circuit court clerks to record and index all writings authorized by law to be recorded. Section 17-61 also provides that a lien which affects both real and personal property shall be recorded in the deed book and indexed in the general index book and the miscellaneous lien book. I am therefore of the opinion that a circuit court clerk is required to file an administrative support lien upon request when the absent responsible person works in that jurisdiction but resides in another.

Section 63.1-254 states as follows: "Twenty-one days after receipt or refusal of notice of debt under provisions of $ 63.1-252, or twenty-one days after service of notice of debt, or as otherwise appropriate under the provisions of $ 63.1-253, a lien may be asserted by the Director upon the real or personal property of the debtor. The claim of the Department for a support debt, not paid when due, shall be a lien against all property of the debtor with priority of a secured creditor...The lien shall attach to all real and personal property of the debtor on the date of filing of such statement with the clerk of the circuit court of the jurisdiction in which such property is located.

Whenever a support lien has been filed and there is in the possession of any person, firm, corporation, association, political subdivision or department of the State having notice of such lien any property which may be subject to the support lien, such property shall not be paid over, released, sold, transferred, encumbered or conveyed, except as provided for by the exemptions contained in § 63.1-261, unless a written release or waiver signed by the Director has been delivered to such person, firm, corporation, association, political subdivision or department of the State or unless a determination has been made in a hearing pursuant to § 63.1-253 or by a court ordering release of such support lien on the basis that no debt exists or that the debt has been satisfied."

Section 63.1-256 states, in part, as follows: "After service of a notice of debt as provided for in § 63.1-252 stating a support debt accrued and/or accruing based upon subrogation to or assignment of the amount required to be paid under any court order or final decree of divorce, or whenever a support lien has been filed pursuant to § 63.1-254, the Director is hereby authorized to issue to any person, firm, corporation, association, political subdivision or department of the State, an order to withhold and deliver property of any kind including, but not restricted to, earnings which are due, owing, or belonging to the debtor, when the Director has reason to believe that there is in the possession of such person, firm, corporation, association, political subdivision or department of the State, property which is due, owing, or belonging to such debtor...." (Emphasis added.)
CLERKS. CIRCUIT COURT CLERKS NOT AUTHORIZED TO COLLECT FIVE DOLLAR FEE IN TRAFFIC VIOLATION APPEALS.

March 4, 1982

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

You have inquired whether the clerk of a circuit court has the authority to collect a five dollar fee for the Division of Motor Vehicles from defendants convicted of traffic violations.

Prior to 1979, § 14.1-123(3a) of the Code of Virginia (1950), as amended, provided that the fees to be taxed as costs by clerks of district courts included a fee of fifteen dollars, which was to include the fee prescribed in § 46.1-413 and the assessment of five dollars for reportable violations to the Division of Motor Vehicles. That provision for the five dollar assessment has been repealed. Chapter 594 [1979] Acts of Assembly 854. The amended § 14.1-123(3a) now provides for taxing fifteen dollars in traffic cases, without reference to the five dollar assessment for the Division of Motor Vehicles being included. Consequently, the clerk of the district court now taxes ten dollars in misdemeanor cases, except in offenses involving traffic violations, and fifteen dollars in traffic violation cases.

Section 14.1-112 provides for the fees to be charged by clerks of circuit courts. That section makes no distinction between traffic violations and any other misdemeanor cases, and it contains no authorization for the collection of a five dollar fee for the Division of Motor Vehicles.

In view of the above, it is my opinion that a clerk of a circuit court has no authority to collect any fee for the Division of Motor Vehicles from defendants convicted of traffic violations.

CLERKS. COMPENSATION. SALARY IN COUNTY EXECUTIVE FORM OF GOVERNMENT MAY BE SUPPLEMENTED.

October 27, 1981

The Honorable David T. Stitt
County Attorney for Fairfax County

You have asked whether § 14.1-143.1 of the Code of Virginia (1950), as amended, and its antecedent provision, § 14.1-143, impose a maximum on the total compensation payable to the Clerk of the Circuit Court of Fairfax County, notwithstanding the apparent authority to supplement granted by § 14.1-11.4. Fairfax County operates under the county executive form of government as provided in Title 15.1, Ch. 13, Art. 2, § 15.1-588, et seq. Section 15.1-619 abolishes the fee system of compensating the clerk of the
circuit court under county executive governments and requires the county, in lieu thereof, to set a salary.

The Supreme Court of Virginia has found that the provisions of Title 14.1, Ch. 2, Art. 2, which existed prior to the enactment of §14.1-143.1 (Ch. 630 [1981] Acts of Assembly 1322) pertained principally to compensation for fee officers and did not apply to the salary set for the clerk of the circuit court in a county executive form of government. Board of Supervisors of Albemarle County v. Marshall, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975). Thus, it is my opinion that the now repealed §14.1-143 did not prevent the Fairfax County Board of Supervisors from setting a salary for the clerk of the circuit court above the salary which the clerk would otherwise receive if such clerk were compensated on a fee basis.

The introduction of §14.1-143.1 by the 1981 General Assembly carried with it the repeal of thirteen sections of Art. 3, Ch. 2, of Title 14.1. The General Assembly also added in §14.1-143.1 a provision dissimilar to any of the repealed sections which reads as follows:

"In any county or city operating under provisions of law which authorize the governing body to fix the compensation of the clerk on a salary basis, such clerk shall receive such salary as shall be allowed by the governing body but such salary may not exceed the maximum amount that would be allowed under the provisions of this section if such clerk were compensated on a fee basis." (Emphasis added.)

This paragraph follows two paragraphs which set limits on the total annual compensation, exclusive of expenses, for clerks of circuit courts who are compensated on a fee basis.

Section 14.1-11.4, however, authorizes the local governing body of the county, in its discretion, to "supplement the compensation of the...clerk of the circuit court...above the salary...established in this title, in such amounts as it may deem expedient...." (Emphasis added.) The Albemarle County case was based, in part, upon the principle that "[r]epeal of a statute by implication is not favored, and, indeed, there is a presumption against a legislative intent to repeal 'where express terms are not used, or the later statute does not amend the former. (Citation omitted.)" Thus, the enactment of §14.1-143.1 should not be construed as repealing §14.1-11.4 by implication. "If apparently conflicting statutes can be harmonized and effect given to both of them, they will be so construed. (Citation omitted.)" Albemarle County at 761.

Because both §§ 14.1-11.4 and 14.1-143.1 must be given effect, I conclude that: (1) the Fairfax County Board of Supervisors may set a salary not in excess of that which would be allowed under §14.1-143.1 if the Clerk of the Circuit Court of Fairfax County were compensated on a fee
basis, and (2) the board may, under § 14.1-11.4, supplement
the compensation of the clerk above the salary set in accordance with the limitation imposed by § 14.1-143.1. Moreover, it is clear that § 14.1-164.1 empowers the board of supervisors to fix an annual allowance for a clerk acting as the clerk to the board of supervisors in an amount not to exceed $7,500. These statutes read in pari materia require me to conclude that the total compensation payable to the Clerk of the Circuit Court of Fairfax County is not limited to the salary prescribed by § 14.1-143.1.

CLERKS. DEEDS. INDEXING CONVEYANCE OF SEPARATE PARCELS TO SEPARATE GRANTEES.

March 5, 1982

The Honorable Shelby J. Marshall, Clerk
Circuit Court of Albemarle County

You have asked whether a deed with one grantor conveying one parcel of land to one grantee and a second parcel of land to a second grantee, unrelated to the first grantee, was properly indexed under § 17-79 of the Code of Virginia (1950), as amended, when it was indexed on the grantor's index showing the grantor conveying only to the first grantee and on the grantee's index showing both grantees receiving from the grantor.

Section 17-79 provides, in part, that "[t]he clerk shall enter therein daily with pen and ink or typewriter all instruments admitted to record, indexing each instrument in the names of all parties appearing therein who are thereby shown to be affected by the instrument...." The main purpose of the requirement that recorded instruments be indexed is to apprise third persons, who acquire or seek to acquire some interest or right in property, of the existence of the instrument. Fulkerson v. Taylor, 102 Va. 314, 46 S.E. 309 (1904). S. Farhame, A Virginia Title Examiner's Manual, Ch. 35 (2d ed. rev. 1973). The object of the recordation statute is not to encumber the index with full information, but to give notice to the interested party of the source of full information. Fulkerson v. Taylor, supra. Section 17-79 does not prescribe the precise manner in which the clerk must index the instruments. It merely requires that the names of all parties who are affected by the instrument be shown in the index.

Because there is no legal requirement that the index describe the property being transferred, the single reference to the first grantee in the grantor's index is sufficient to alert third parties of the transaction, regardless of which parcel is being searched. Indexing the second transaction in the grantor's index would not give more significant information to the examiner of title. An examiner of the title of either grantee will be alerted to the deed by the listing of each grantee in the grantee's index.
By indexing the first transaction in the grantor index and both transactions in the grantee index, all parties who are affected by the deed are indexed as required by § 17-79. Accordingly, I am of the opinion that the deed was properly indexed. This does not, however, prevent a clerk from showing both grantees in the grantor's index in the circumstances in which you describe where the deed conveys separate parcels to separate unrelated grantees. The clerk may also wish to list the grantor on successive lines for each grantee.

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**CLERKS, DIVORCE, VIRGINIA FREEDOM OF INFORMATION ACT.**

CLERK OF CIRCUIT COURT NOT AUTHORIZED, ABSENT COURT ORDER, TO DENY PUBLIC ACCESS TO PAPERS FILED IN SUITS FOR DIVORCE NOTWITHSTANDING SENSITIVITY OF SUCH PAPERS.

January 13, 1982

The Honorable Robert P. Crouch, Jr.
Clerk, Circuit Court of Henry County

You ask whether the clerk of a circuit court is authorized, absent a court order, to deny public access to papers filed with the circuit court in suits for divorce, because of the potential sensitivity of such papers, for the parties and their families.

Section 20-99 of the Code of Virginia (1950), as amended, provides that in most respects a suit for divorce shall be instituted and conducted as other suits in equity. I find no statute generally applicable to suits in equity that authorizes the clerk of a circuit court, absent a court order, to deny public access to papers filed with the circuit court.1

Section 20-124 provides that upon motion of a party to any suit for divorce, the court may order the record thereof to be sealed and withheld from public inspection and thereafter the same shall only be opened to the parties, their respective attorneys, and to such other persons as the judge of such court at his discretion decides have a proper interest therein.

Sections 20-99 and 20-124 must be read in accordance with the accepted principle of statutory construction that mention of one thing implies exclusion of another.2 Section 20-99 provides that suits for divorce are to be instituted and conducted much as other suits in equity. Section 20-124 deals specifically with sequestration of court records in suits for divorce, and authority to sequester is expressly conferred on the court. The clear implication is that the clerk of the circuit court has no authority, absent a court order, to sequester records in suits for divorce.

Further, under the Virginia Freedom of Information Act,3 a circuit court is an agency of the State, or in the State,
supported wholly or principally by public funds. See § 2.1-341(a). A circuit court is therefore a public body under § 2.1-341(e).4 Under § 2.1-342(a), except as otherwise provided by law, all official records shall be open to inspection and copying during the regular office hours of the custodian of such records.

Section 2.1-342(b)(5) provides an exemption, for records compiled specifically for use in litigation and material furnished in confidence with respect thereto. This exemption, however, relates primarily to public bodies which may become parties to litigation, not to bodies whose public function is to preside over litigation between other parties.5

Accordingly, it is my opinion that the clerk of a circuit court is not authorized, absent a court order, to deny public access to papers filed with the circuit court in suits for divorce, notwithstanding the potential sensitivity of such papers for the parties to such suits, and their families.6

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1 See § 17-43 (records and papers of every court shall be open to inspection by any person, except in cases in which it is otherwise specially provided).

2 See, for example, Opinion to the Honorable Basil C. Burke, Jr., Judge, Sixteenth Judicial District, dated April 28, 1977, found in Report of the Attorney General (1976-1977) at 222 (court records on commitment of mentally ill persons open to public inspection, absent court order sealing records).

3 Specific exceptions include: § 16.1-307 (in juvenile proceedings in circuit court, clerk directed to maintain separate files, to be open for inspection only per § 16.1-305); § 63.1-235 (in adoption cases, authority conferred on clerk of court, with approval of judge entered of record).

4 See, for example, Opinion to the Honorable Terrell Don Hutto, Director, Department of Corrections, dated March 13, 1981, found in Report of the Attorney General (1980-1981) at 209 (statute, limiting things to be done in a particular manner, implies they are not to be done otherwise).

5 See Chapter 21 of Title 2.1 (§§ 2.1-340 to 2.1-346.1).

6 See, for example, Opinion to the Honorable Edward E. Willey, Member, Senate of Virginia, dated October 13, 1972, found in Report of the Attorney General (1972-1973) at 487 (applicable to judicial branch of government - Virginia Judicial Conference of Courts of Record).

7 See Opinion to the Honorable Elmo G. Cross, Jr., Member, Senate of Virginia, dated January 15, 1980, found in Report of the Attorney General (1979-1980) at 377 (judge's notes concerning cases over which he presides need not be disclosed).

8 Section 2.1-344(a)(3) authorizes closed meetings to protect the privacy of individuals in certain personal matters, and § 2.1-342(b)(11) provides an exemption for
certain records of lawful closed meetings, but your inquiry does not concern closed meetings and related records.

CLERKS. FINES AND COSTS IN CRIMINAL PROSECUTION. PROPER TO CHARGE INTEREST.

June 22, 1982

The Honorable J. Curtis Fruit, Clerk
Circuit Court for the City of Virginia Beach

You have asked whether it is proper for a clerk to charge interest on unpaid court costs taxed to a defendant in a criminal case in accordance with the holding of a prior Opinion of this Office to the Honorable Charles E. King, Jr., Clerk, Circuit Court of Gloucester County, dated August 4, 1978, and found in Report of the Attorney General (1978-1979) at 142. You agree with the holding of the Opinion that interest must be applied to fines but you question that portion of the Opinion which holds that interest accrues on costs. In support of your position, you have furnished a legal memorandum.

As your memorandum correctly observes, it was long the law of the Commonwealth that interest not be allowed on court costs. In the case of Scott v. Doughty, 130 Va. 523, 107 S.E. 729 (1921), the court said: "The allowance of costs depends entirely upon statute, no costs being allowed in any case at common law. [Citation omitted.] There is no statute in Virginia allowing interest on costs." Id. at 526-527, 107 S.E. at 730. It is upon these and other similar authorities that your memorandum relies for the proposition that costs are not themselves a part of the judgment and, in the absence of statutory authority, they do not earn interest.

The critical language of § 19.2-340 of the Code of Virginia (1950), as amended, reads as follows:

"Fines imposed and costs taxed in a criminal prosecution for committing an offense against the State shall constitute a judgment in favor of the Commonwealth, and, if not paid at the time they are imposed, execution may issue thereon in the same manner as upon any other monetary judgment." (Emphasis added.)

Therefore, by operation of statute, costs taxed are no longer a mere incident of the judgment entered in a criminal conviction, but the costs themselves are merged into and constitute a money judgment just as any other money judgment. When the costs themselves are reduced to a money judgment, an entirely different set of circumstances exists from the former situation in which the costs were a mere appendage to the judgment.

The law in Virginia does not bar interest on a judgment for costs. Shipman v. Fletcher, 95 Va. 585, 29 S.E. 325
Indeed, the party receiving an award of costs is not prevented "from obtaining judgment upon it, in order that he may render it an interest-bearing debt, and increase the security for its payment." Id. at 590, 29 S.E. 327. The Scott case, supra, does not bar postjudgment interest on costs. Rather, the rule of that case is that no interest may be allowed on costs before they are reduced to judgment. Id. at 527, 107 S.E. 730.

Accordingly, because § 19.2-340 expressly provides that an award of costs shall constitute a judgment, it is my opinion that the King Opinion is correctly reasoned and that interest accrues on the judgment for costs taxed against a convicted criminal defendant in accordance with § 19.2-340.

As additional support for this conclusion, I note that in 1979, the first session of the General Assembly following the issuance of the King Opinion, S.B. 587 and H.B. 1657 (copies enclosed) were introduced to reverse the result of the King Opinion by adding to § 19.2-340 the phrase "except that such judgment shall not bear interest." The bills failed to pass. Therefore, unless and until the General Assembly amends § 19.2-340 to provide that interest shall not be calculated on the judgment for costs, I must conclude that clerks are obligated to continue collecting interest on costs taxed against convicted criminal defendants.

CLERKS. JUDGMENT LIEN DOCKET BOOK. AUTHENTICATED ABSTRACTS. CLERK TO ENTER BUT NOT REQUIRED TO DETERMINE VALIDITY OF JUDGMENTS.

August 27, 1981

The Honorable Shelby J. Marshall, Clerk
Circuit Court of Albemarle County

You have asked whether or not a certified copy of a civil warrant in debt constitutes an authenticated abstract of a judgment within the meaning of § 8.01-446 of the Code of Virginia (1950), as amended.

A civil warrant in debt can, under the proper circumstances, constitute an abstract of judgment. Those proper circumstances are enumerated in § 8.01-449:

"In the judgment docket there shall be stated in separate columns the date and amount of the judgment, the time from which it bears interest, the costs, the names of all the parties thereto, the alternative value of any specific property recovered by it, the date and the time of docketing it, the amount and date of any credits thereon, the court by which it was rendered, and when paid off or discharged in whole or in part, the time thereof, and by whom such payment or discharge was made, when there is more than one defendant. And in case of a judgment or decree by confession, the clerk
shall also enter in such docket the time of day at which the same was confessed, or at which the same was received in his office to be entered of record. There shall also be shown on such book the name of plaintiff's attorney, if any, the date of each execution in the order made, the nature thereof, when returnable, and the officer's return thereon."

It is necessary that each civil warrant in debt that is requested to be docketed be scrutinized to see if all the information required by § 8.01-449 is listed. If it does not contain all of the necessary information, then it does not constitute an abstract of judgment within the meaning of § 8.01-446.

The second part of your question deals with "authentication." If a written document is what its proponent claims it to be, then that document is authentic. In other words, the issue is whether the document is genuine. Generally, certified copies of public records give rise to a strong presumption of authenticity.

It is my opinion that a copy of a civil warrant in debt that contains the information specified in § 8.01-449, and is certified as true and correct by a person authorized to make such certifications is an authenticated abstract of judgment. Accordingly, such a document should be docketed in the judgment lien book.

CLERKS. RECORD RETENTION. FINANCING STATEMENTS MAY BE DESTROYED ONE YEAR AFTER EFFECTIVENESS HAS LAPSED.

March 24, 1982

The Honorable J. Curtis Fruit, Clerk
Circuit Court of the City of Virginia Beach

You have asked how long a financing statement covering fixtures to real estate filed in your office under Title 8.9 (Uniform Commercial Code-Secured Transactions) of the Code of Virginia remains effective and you have asked whether such a document may be destroyed after it loses its effectiveness.

"[A] filed financing statement is effective for a period of five years from the date of filing...unless a continuation statement is filed prior to the lapse." Section 8.9-403(2). Your letter requests that my response assume that "no continuation or termination statement has been received [by your office]." Section 8.9-403(2) is applicable to financing statements covering fixtures to real estate. It should be noted that a mortgage may also be effective as a financing statement filed as a fixture filing. Section 8.9-402(6)." "A real estate mortgage which is effective as a fixture filing under subsection (6) of § 8.9-402 remains effective as a fixture filing until the mortgage is released or satisfied
of record or its effectiveness otherwise terminates as to the real estate." Section 8.9-403(6).

Procedures for the destruction of financing statements which no longer remain effective were set forth in a prior Opinion of this Office to the Honorable James E. Hoofnagle, Clerk, Circuit Court of Fairfax County, dated May 9, 1978, and found in Report of the Attorney General (1977-1978) at 59. That Opinion followed § 8.9-403(3) which provides that the clerk "may remove a lapsed statement from the files along with the index thereto and destroy it immediately if he has retained a microfilm or other photographic record, magnetic tape or security record, or in other cases after one year after the lapse."

The procedures of § 8.9-403(3) for destruction of financing statements are not applicable to mortgages which may be effective as a fixture filing under § 8.9-402(6). While such mortgages may have the attributes of financing statements, they are not, in themselves, financing statements and, therefore, § 8.9-403(3) is not applicable.

1Section 8.9-402(6) recites five separate conditions which must be met before a mortgage can become "effective as a financing statement filed as a fixture filing...."

COLLEGES AND UNIVERSITIES. BORROWER WHO LEAVES STATE FORFEITS LOAN FORGIVENESS PROVISIONS OF TUITION ASSISTANCE GRANT ACT AND COLLEGE SCHOLARSHIP ASSISTANCE ACT.

June 11, 1982

The Honorable Gordon K. Davies, Director
State Council of Higher Education

You ask whether a former student who has reestablished residence in the Commonwealth after a period of non-residence may be reinstated to the privileges provided in §§ 23-38.15(c2) and 23-38.49(d) of the Code of Virginia (1950), as amended. These statutes permit a borrower to earn forgiveness of his scholastic loans under certain conditions, provided the borrower resides in, and is a domiciliary of Virginia.

The Tuition Assistance Grant Act, § 23-38.11, et seq., and the College Scholarship Assistance Act, § 23-38.45, et seq., establish grant and loan programs for bona fide residents of the Commonwealth who are full-time undergraduate or graduate students attending accredited public and private institutions in the Commonwealth. Both of these programs are administered by the State Council of Higher Education. Loans can be repaid in money or by actions beneficial to, or of service to, the Commonwealth, §§ 23-38.15(a), 23-38.49(b). Both programs stipulate that residence in the Commonwealth is
an action or service which will cancel the loans at a rate set by statute. Both the Tuition Grant Assistance Act and the College Scholarship Assistance Act expressly provide, however, that leaving the Commonwealth, for any reason other than the pursuit of six years of full-time undergraduate or graduate study, requires the recipient to repay the outstanding balance in money.

When the recipient leaves the Commonwealth to reside elsewhere, except for specifically permitted reasons, the balance of the loan or loans not previously repaid as authorized by law shall become due forthwith and repayable in money in accordance with the specified schedule. See §§ 23-38.15(c3) and 23-38.49(e).

Words of a statute must be given their ordinary meaning unless a contrary meaning is clearly intended. Report of the Attorney General (1980-1981) at 180; McCarron v. Commonwealth 169 Va. 387, 394, 193 S.E. 509, 412 (1937). The statutes are devoid of any language upon which a reinstatement of the cancellation privileges, once lost, can be based. In addition, 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 clearly granted by statute. See Report of the Attorney General (1980-1981) at 210. The statutes include no mention of reinstating the cancellation privileges when the recipient returns to Virginia.

Accordingly, I am of the opinion that the State Council of Higher Education may not administratively reinstate the privilege of loan cancellation by residence within the Commonwealth once that privilege has been lost.

COLLEGES AND UNIVERSITIES. CONSIDERED "PUBLIC CORPORATIONS."

January 29, 1982

The Honorable Madison E. Marye
Member, Senate of Virginia

You ask if all of the colleges and universities of the Commonwealth are public corporations. You also ask if this Office has previously rendered an official Opinion answering your question.

Unlike private corporations, public corporations are created by government for public, governmental purposes. Public corporations exist for the benefit of the public at large, and private individuals have no proprietary interest therein. Black's Law Dictionary 410 (Revised 4th ed. 1968); Wambersie v. Orange Humane Society, 84 Va. 446, 5 S.E. 25 (1888). This Office has not previously opined officially on whether Virginia's institutions of higher education are public corporations; however, for the reasons set forth herein, I am of the opinion that such institutions constitute public corporations.
Legislation establishing and governing the public institutions of higher education in the Commonwealth is set forth in Title 23 of the Code of Virginia (1950), as amended. An examination of the enabling legislation for each institution reflects that each has been statutorily accorded separate corporate status. They are administered and managed by boards of visitors whose members are generally appointed by the Governor and confirmed by the General Assembly.

The separate corporate status notwithstanding, the respective institutions remain under the control of the Virginia General Assembly and may exercise only such powers as expressly conferred or necessarily implied. Batcheller v. Commonwealth, 176 Va. 109, 10 S.E.2d 529 (1940). See Report of the Attorney General (1961-1962) at 242. Their property is owned by the Commonwealth, and acquisition or disposition thereof must be in accordance with existing legislation. See, e.g., §§ 23-4.1 and 2.1-512. And, they enjoy the full reach of the Commonwealth's sovereign immunity. See Report of the Attorney General (1976-1977) at 51. Furthermore, they are dependent upon appropriations from the General Assembly for their capital outlay projects and operational expenses and are required to make periodic reports to the State Council of Higher Education regarding their condition and progress. See, e.g., §§ 23-1; 23-1.1, 23-9.6:1. These institutions exist for the singular purpose of providing higher education opportunities to the people of Virginia.

The Virginia Supreme Court has long recognized that such institutions are public corporations, not created for private ends, purposes or functions. Phillips v. University of Virginia, 97 Va. 472, 34 S.E. 66 (1899); Frazier v. V.M.I., 81 Va. 59 (1885); James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980). See, also, Hartigan v. Board of Regents, 47 W.Va. 14, 38 S.E. 698 (1901).

Accordingly, it is my view that the several public institutions of higher education in the Commonwealth of Virginia are public corporations, but nonetheless subject to the control of the Virginia General Assembly.

REPORT OF THE ATTORNEY GENERAL

COLLEGES AND UNIVERSITIES. CONTRACT FOR FIRE PROTECTION SERVICES BETWEEN STATE UNIVERSITY AND CITY ARE GOVERNED BY § 58-16.2 RATHER THAN § 27-2.1.

December 10, 1981

Dr. Thomas A. Graves, Jr., President
The College of William and Mary

You ask whether the City of Williamsburg is bound by a standard of reasonableness in computing the charges in a contract for fire protection pursuant to § 27-2.1 of the Code of Virginia (1950), as amended.¹

It is my view that the charge imposed under § 27-2.1 should bear a reasonable relationship to the actual cost of the service rendered. A charge bearing absolutely no relationship to the actual cost incurred would be an absurdity. It is well settled that such a statutory construction is to be avoided. Simpson v. Simpson, 162 Va. 621, 175 S.E. 320 (1934). Furthermore, it is well recognized that the powers of local governing bodies in Virginia are limited to those conferred expressly by statutory law or by necessary implication. Commonwealth v. Arlington County Board, 217 Va. 558, 232 S.E.2d 30 (1977); Board of Supervisors of Fairfax County v. Horne, 216 Va. 173, 215 S.E.2d 453 (1975); 13B M.J. Municipal Corporations § 25-26 (1978). Although the statute vests sole discretion in the locality, it neither expressly nor impliedly grants the locality the right to charge a rate unreasonably disproportionate to the services to be performed or the cost incurred.

It is a general rule of statutory construction that a statute should be construed so as to reach a harmonious and consistent relationship with other statutes. Section 58-16.2, for example, permits a locality to impose a service charge on State property for services provided, including fire protection, and said charge may not exceed the actual cost incurred. The rule of reason must underscore the exercise of discretion by responsible governing bodies.

On its face, § 27-2.1 provides a mechanism whereby a State agency may contract with a locality for fire service. The true thrust of this statute, however, appears to be to continue unabated the usual immunities whenever the localities' firefighters put out conflagrations on property outside their jurisdictions.

On the other hand, the General Assembly has had frequent occasion to consider the proper manner in which to recompense the localities for their delivery of fire, refuse and police services to various State agencies. Newly amended § 58-16.2 sets forth in detail the manner in which such charges are to be computed. The language in § 58-16.2 is phrased in the most compelling terms, and leaves no doubt that the legislature intended this to be the sole mechanism for
reimbursement for fire, refuse and police protection. A specific statute supersedes a general statute insofar as there is a conflict. City of Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); 17 M.J. Statutes § 101 (1979). Additionally, the specific statute, § 58-16.2, was enacted subsequent to § 27-2.1, the general grant of authority. To opine that an arrangement under § 27-2.1 may be contracted in addition to or in lieu of § 58-16.2 would be to ignore the obvious will of the General Assembly.

In my opinion, therefore, § 58-16.2 controls the manner in which the city and the college must provide and pay for fire protection services.

Section 27-2.1 states as follows: "Contracts for fire protection for federal and State property.--Any county, city or town may contract with the federal or State governments to provide fire service to federal or State property located within or without the boundaries of the county, city or town.

In the absence of a written contract, any acts performed and all expenditures made by a county, city or town in providing fire protection to property owned by the federal government shall be deemed conclusively to be for a public and governmental purpose and all of the immunities from liability enjoyed by a county, city or town when acting through its fire fighters for a public or governmental purpose within or without its territorial limits shall be enjoyed by it to the same extent when such county, city or town is so acting, under the provisions of this section, or under other lawful authority.

The fire fighters of any county, city or town when acting hereunder, or under other lawful authority, shall have all of the immunities from liability and exemptions from laws, ordinances and regulations, and shall have all of the pension, relief, disability, workmen's compensation and other benefits enjoyed by them while performing their respective duties.

The amount of compensation to the county, city or town pursuant to the contract shall be a matter within the sole discretion of the governing body of the county, city or town."

COLLEGES AND UNIVERSITIES. § 23-7 APPLICABILITY TO MILITARY SPOUSES.

September 11, 1981

The Honorable A. Joe Canada, Jr.
Member, Senate of Virginia

You ask under what circumstances the spouse of a member of the armed forces of the United States may receive in-State tuition rates at our public colleges and universities.
Entitlement to in-State tuition would arise if the person claiming it establishes Virginia domicile or is able to comply with specific statutory provisions for spouses of members of the armed forces.

Your question is governed in general terms by § 23-7 of the Code of Virginia (1950), as amended, which requires each student to prove that he or she "has been domiciled in Virginia for a period of at least one year immediately prior to the commencement of the term, semester or quarter for which any such reduced tuition charge is sought."

Establishing Domicile

Domicile is regarded as residence in Virginia with the unqualified intention of remaining in Virginia for the period immediately after leaving the institution and indefinitely thereafter. In effect, it is the residence which the student convincingly establishes as "home." Once domicile is established, the student will remain a Virginia domicile even though residing temporarily in another jurisdiction unless the student has abandoned Virginia domicile. See Report of the Attorney General (1975-1976) at 290. The burden is on the student to prove convincingly that the requisite domiciliary intent has existed continuously throughout the one-year period. Section 23-7(F). It is the institution's responsibility to assess all of the relevant facts bearing upon the student's intent and residential history.

Pursuant to § 23-7(G), this Office, with the assistance of the State Council of Higher Education, has provided each institution with detailed guidelines to assist them in properly evaluating each student's case. A vast array of facts may be relevant in a particular case; for example, voting residence, employment history, plans upon graduation, income tax payments, place of residence, etc. The mere fact that a student lives, works, pays taxes and votes in Virginia does not conclusively establish Virginia domicile. See Report of the Attorney General (1976-1977) at 30. However, in most cases, a student presenting the above facts will be considered domiciled in Virginia, as the foregoing is strong evidence that the student's home is in fact Virginia.

The mere fact that the student resides on a military base will not operate to automatically disqualify the student for in-State rates. 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). Nor does the student conclusively assume the domicile of the military spouse. Section 23-7(D). Under § 23-7, the student may establish a domicile independent of his or her spouse.

Statutory Provision

The General Assembly has additionally provided a limited exception to the domicile test in the case of students who
are not members of the armed forces and whose spouse is a member of the armed forces. Section 23-7(E) provides:

"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." (Emphasis added.)

A wife unable to establish domicile in Virginia may still be able to qualify for in-State rates under the above exception.

\[1\] For example, the student might maintain a home in another state, and intends to remain in Virginia temporarily until the military spouse completes a definite tour of duty in Virginia.

COLLEGES AND UNIVERSITIES. VIRGINIA MILITARY INSTITUTE'S MALE ONLY ADMISSIONS POLICY.

October 14, 1981

The Honorable Floyd C. Bagley
Member, House of Delegates

You ask whether § 23-1051 of the Code of Virginia (1950), as amended, violates statutory or constitutional law for its express exclusion of women from the State cadet scholarship program at Virginia Military Institute (the "Institute").

The Institute was originally established in 1839 as the nation's first state military college. It presently is one of several State-supported institutions of higher education in the Commonwealth offering a choice of majors in the general fields of engineering, liberal arts and science. The Institute is at all times subject to the control of the Virginia General Assembly. Section 23-92, et seq.
The General Assembly has empowered the board of visitors with discretion to establish admission requirements for prospective cadets. Section 23-104. Since its inception in 1839, the Institute has limited admission to males. As a consequence, only males are eligible for appointment to the Institute as "State cadets" under § 23-105.

Statutory Law

Section 23-105 does not violate any existing federal statutory law.

The United States Congress has provided that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance...." 20 U.S.C. § 1681; Title IX of the Educational Amendments of 1972. The Congress has specifically exempted from the broad reach of this statute any "institution whose primary purpose is the training of individuals for the military services..." or any "public institution of undergraduate higher education which is an institution that traditionally and continuously from its establishment has had a policy of admitting only students of one sex."3

Accordingly, both law-making bodies, the Virginia General Assembly and the United States Congress, have seen fit not to proscribe the said admission policy of the Institute. The question remains whether either the Federal or Virginia Constitution require the Institute to become coeducational, and coincident therewith, permit written to be considered as "State cadets" under § 23-105.4

United States Constitution

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no State "shall deny to any person within its jurisdiction the equal protection of the laws." Its manifest purpose is to prevent unlawful discrimination by governmental authority. However, not all discrimination is prohibited. States may treat different classes of persons in different ways so long as the disparate treatment satisfies the appropriate constitutional standard.5

In 1954, the United States Supreme Court held that the exclusion of Negroes from public schools solely on account of race was unconstitutional, even though equal facilities were provided in separate facilities. Brown v. Board of Education, 347 U.S. 483 (1954). The underlying assumption was that Negroes could never achieve equality in separate but equal facilities. The court has yet to affirmatively decide whether the constitution permits separate, but equal, schools segregated on the basis of sex. In the reported case law, the court has given tacit approval to single sex schools where equal educational opportunity was available to the

Under the current state of law, the Institute's exclusion of women appears constitutional in view of the fact that the State system of higher education provides women with an equal opportunity for an education in programs offered only to men at the Institute.7 Furthermore, adequate military training for women can be obtained in ROTC programs offered at other public colleges and universities.8 The General Assembly should continue to closely monitor the operations of its higher education system to assure to its citizens the continuation of equal educational opportunities.

Finally, I recognize that tradition is not sufficient by itself to support otherwise unconstitutional policies, yet it is a factor that must be given due consideration. See, e.g., Committee For Public Education v. Nyquist, 413 U.S. 756 (1973). The Institute's policy has found long-standing acceptance in both the Congress and the Virginia General Assembly. Due deference must be accorded the legislative judgment that this policy substantially furthers significant and important governmental objectives.

Virginia Constitution

Article I, § 11 of the Constitution of Virginia (1971) provides in pertinent part that citizens of the Commonwealth shall be free from governmental discrimination upon the basis of sex, "except that the mere separation of the sexes shall not be considered discrimination."

The foregoing exception has yet to be interpreted by our Virginia Supreme Court to the given circumstances, but the clear language manifestly permits equal public school facilities separated on the basis of sex. In any event, our court has held that the protection afforded by the Virginia Constitution is no broader than that of the United States Constitution. Archer and Johnson v. Mayes, 213 Va. 633, 194 S.E.2d 707 (1973). And, as previously noted, in view of the existing broad system of public higher education offered in Virginia, the policy should pass constitutional muster under the current posture of the law. Classifications on sex which are patently arbitrary and unreasonable and bear no [for
emphasis] relationship to the State objective only offend the Virginia provision. Archer, supra.

Accordingly, I am of the view that the longstanding admissions policy of the Institute, and specifically § 23-105, does not violate the Virginia Constitution.

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1Section 23-105 authorizes the Board of Visitors for the Virginia Military Institute to: "admit annually as State cadets, free of charge for board and tuition, upon evidence of fair moral character, not less than fifty young men, who shall be not less than sixteen nor more than twenty-five years of age; one of whom shall be selected from each of the senatorial districts as at present constituted, and the other fourteen from the State at large...."

No cadet may be admitted as a "State cadet" whose financial condition or that of his parents permit him to pay the board and tuition fees. Section 23-106. In return for the financial assistance, "State cadets" are obliged upon graduation to serve two years in specified public service; e.g., teaching in the public schools of the Commonwealth, enlistment in the national guard, or service in the United States armed services. Section 23-107.

Although the Institute's program is not exclusively designed to produce military officers, approximately 85% of its alumni serve an initial tour of active duty in the armed forces. Military training is provided by the reserve officer training corps conducted by the United States armed forces. All cadets who are citizens of the United States must enlist in the ROTC program. If offered at graduation, a commission in the armed forces must be accepted with obligation for active duty.

2Congress has also enacted the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701, et seq., which, inter alia, bars sex segregated school systems. This legislation does not apply to an institution of higher education. 20 U.S.C. § 1720.

In the early history of our country, single-sex schools were the rule, and not the exception. Such schools are now the exception. See Comment, Single-Sex Public Schools, 1977 Duke L.J. 259; and Babcock, Sex Discrimination and the Law, 1035, n.20 (1975). Presently, there are at least four other male-only military colleges: Texas A & M, North Georgia, The Citadel, and Norwich, a private institution. The military academies, Navy, Air Force and Army, were Congressionally directed in 1975 to admit women commencing with the 1976 class. See § 803(a) of Pub.L. 94-106.

It is still unsettled what standard would be applicable to this case. Under the traditional equal protection analysis, sex discrimination need only be rationally related to a legitimate governmental purpose. Under such a test, substantial deference is accorded to the legislative classification. Reed v. Reed, 404 U.S. 71 (1974). However, recent cases indicate a more heightened judicial scrutiny of sex discrimination requiring the classification to be
substantially related to an important governmental purpose. Craig v. Boren, 429 U.S. 190 (1976); Personnel Administration of Mass. v. Feeney, 442 U.S. 256, 273 (1979). This issue is purely academic for purposes of this Opinion since § 23-105 can be justified under either standard.

6 It is noteworthy that the court refused to extend its order to the Institute on the record before it because of its peculiar military characteristics.

7 Contra Hogan v. Mississippi University for Women, 646 F.2d 1116 (5th Cir. 1981), rejecting the theory that equality of opportunity must be measured on a system-wide basis. Hogan is a departure from the traditional approach and did not involve a military school.

8 In Virginia, there are approximately 17 public and 9 private institutions of higher education which admit women into ROTC programs.

COMMISSIONERS OF REVENUE. PUBLIC OFFICERS. RESIDENCY REQUIREMENTS. DEPUTY COMMISSIONER OF REVENUE SUBJECT TO RESIDENCY REQUIREMENTS OF § 15.1-51.

May 13, 1982

The Honorable Darrell G. Jennings
Commissioner of the Revenue for Carroll County

This is in reply to your letter dated April 28, 1982, in which you inquire if a deputy commissioner of revenue may continue to serve as such, or in any other capacity in your office when she no longer is a resident of the county.

Section 15.1-51 of the Code of Virginia (1950), as amended, imposes a residency requirement on county officers with certain exceptions.1 Section 15.1-52 provides that if any officer of a county, city, district or town becomes a nonresident of that locality, that office thereby becomes vacated.2

This Office has previously ruled that deputy commissioners of revenue are public officers and are subject to the residency requirements of § 15.1-51. See Report of the Attorney General (1975-1976) at 50. Therefore, I am of the opinion that the deputy commissioner of revenue in question may not serve in that capacity when she no longer resides in the county.

The residency requirements of § 15.1-51 apply to officers of the county only. An employee of the county would not be subject to the residency requirements. Therefore, while the person in question may not serve as an officer of the county for the reasons stated, that person could be hired in some other capacity as an employee.
Section 15.1-51 reads, in pertinent part, as follows:
"Every county officer, except deputy clerks of circuit courts, shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county...."

Section 15.1-52 reads as follows: "If any officer, required by the preceding section (§ 15.1-51) to be a resident at the time of his election or appointment of the county, city, district or town for which he is elected or appointed, or of the city wherein the courthouse of such county is or in a city wholly within the boundaries of such county, remove therefrom, except from the county to such city or from such city to the county; or in case a nonresident who has been elected Commonwealth's attorney remove from the county or county seat of the county in which he resided when elected, except to the county in which he is elected, his office shall be deemed vacant."

COMMONWEALTH'S ATTORNEYS. APPOINTMENT OF SPECIAL PROSECUTOR. COMPENSATION.

March 23, 1982

The Honorable C. Phillips Ferguson
Commonwealth's Attorney for the City of Suffolk

You have asked several questions concerning appointment of a special prosecutor to act for you in prosecuting criminal cases in which you disqualify yourself because either your father or brother serves as defense counsel.

You first ask what, if any, steps you should take to secure appointment of a special prosecutor and, secondly, who is authorized by law to make such an appointment. Section 19.2-155 of the Code of Virginia (1950), as amended, provides:

"If the attorney for the Commonwealth of any county or city is connected by blood or marriage with the accused, or is so situated with respect to such accused as to render it improper, in his opinion, concurred in by the judge, for him to act, or if such attorney for the Commonwealth of any county or city is unable to act, or to attend to his official duties as attorney for the Commonwealth, due to sickness, disability or other reason of a temporary nature, then upon notification by such attorney for the Commonwealth, or upon the certificate of his attending physician, or the clerk of the court, which fact shall be entered of record, the judge of the circuit court shall appoint an attorney-at-law for such case or cases, term or terms of
court, or period or periods of time, as may be necessary or desirable, and the same to be forthwith entered of record. Such attorney-at-law shall act in place of, and otherwise perform the duties and exercise the powers of, such disqualified or disabled attorney for the Commonwealth, in regard to such case or cases, for the term or terms of the court, or the period or periods of time, for which the appointment and designation is made, or until the disqualified or disabled attorney for the Commonwealth shall again be able to attend to his duties as such.

The attorney-at-law so appointed shall receive such compensation as the judge of the circuit court in which the case is tried or the service is rendered deems reasonable, in addition to his actual expenses for the time that he is actually engaged, such compensation and expenses to be paid by the State." (Emphasis added.)

Section 19.2-155 is applicable to cases when you are unable to prosecute because of the involvement in the case of either your brother or father as defense counsel. Under that statute, you are obligated to notify the judge of the circuit court of your inability to prosecute. The circuit court judge is then empowered to make the appointment of a special prosecutor.

You also ask whether a special prosecutor may be paid for his time and expenses in handling cases for which he is appointed. Section 19.2-155 provides that the "attorney-at-law" appointed to replace a disqualified or disabled Commonwealth's attorney shall receive his actual expenses and "such compensation as the judge...deems reasonable...." I, therefore, conclude that an attorney appointed to act as special prosecutor under the provisions of § 19.2-155 shall be compensated for his expenses and may be compensated for his time in connection with such service. The amount of such compensation shall be determined by the judge of the circuit court. See § 19.2-155.

Your final question is whether another full-time Commonwealth's attorney, appointed to act as special prosecutor in a jurisdiction other than his own, may be compensated for his time and expenses in addition to his normal salary. Section 19.2-155 provides for appointment of "an attorney-at-law" as special prosecutor. Nothing contained in § 19.2-155 prevents appointment of another full-time Commonwealth's attorney as special prosecutor. See Report of the Attorney General (1976-1977) at 38. In such cases, the Commonwealth's attorney, acting as special prosecutor, may be compensated for his time and expenses as stated above in addition to his normal salary.1

1Section 15.1-821 provides that Commonwealth's attorneys in cities with a population in excess of 35,000 shall devote
full-time to their duties and shall not engage in the private practice of law. Where a Commonwealth's attorney serves as special prosecutor appointed under § 19.2-155 he is not engaged in the private practice of law in contravention of the provisions of § 15.1-821. See Report of the Attorney General (1976-1977) at 38.

COMMONWEALTH'S ATTORNEYS. MAY PROSECUTE CLASS 4 MISDEMEANORS AND TRAFFIC OFFENSES. PUNISHABLE BY MAXIMUM FINE OF LESS THAN $500 AND NO JAIL SENTENCE.

August 27, 1981

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You ask whether a Commonwealth's attorney has the discretionary authority to prosecute misdemeanors and other violations which carry a fine of $500 or less, in light of § 15.1-8.1B of the Code of Virginia (1950), as amended. Section 15.1-8.1B enumerates the duties of a Commonwealth's attorney, and provides for the discretionary prosecution of "Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of five hundred dollars or more, or both...."

It is my opinion that the language in § 15.1-8.1B does not preclude a Commonwealth's attorney from prosecuting offenses carrying a fine of $500 or less. The statute specifically includes Class 3 misdemeanors, which carry a penalty of not more than $500, and no jail sentence. See § 18.2-11. Although Class 4 misdemeanors, which carry a maximum fine of $100, are not explicitly included in § 15.1-8.1B, the language of that section is not exclusionary. The Commonwealth's attorney's duties are prefaced by the word "including," which, when read expansively does not indicate that the enumerated duties are exclusive.

It is unlikely that the legislature has designated certain offenses as misdemeanors and assigned penalties for them, while providing no mechanism for their enforcement. Unreasonable results must not be reached by too strict adherence to a literal interpretation of the law. Martz v. Rockingham, 111 Va. 445, 69 S.E. 321 (1910). If a statute is subject to two constructions, the one should be adopted which gives it a sensible operation. Polesky v. Northern Virginia Construction Co., 196 Va. 532, 84 S.E.2d 443 (1954).

You further ask whether traffic offenses punishable by a maximum fine of less than $500 and no jail sentence may be prosecuted by the Commonwealth's attorney absent a request by the judge trying the case. By the same reasoning above, the statute enumerating the duties and the offenses over which Commonwealth's attorneys have the discretionary authority to prosecute, § 15.1-8.1B, does not prohibit a Commonwealth's
attorney from prosecuting these traffic offenses. There is a common law basis for permitting Commonwealth's attorneys "to prosecute all offenses against the authority of the State committed within his county...." Cherry v. Commonwealth, 78 Va. 375, 379 (1884). If requested by the judge to prosecute a traffic offense, the Commonwealth's attorney is, of course, required to do so by § 46.1-413.2. The Commonwealth's attorney has no duty, however, to prosecute violations of local traffic ordinances. See Opinion to the Honorable Robert L. Gilliam, III, Commonwealth's Attorney for Westmoreland County, dated June 25, 1973, found in Report of the Attorney General (1972-1973) at 92.

COMMONWEALTH'S ATTORNEYS REQUIRE TO RESIST APPEALS FILED UNDER § 37.1-67.6.

August 27, 1981

The Honorable William G. Petty
Commonwealth's Attorney for the City of Lynchburg

You have asked whether an attorney for the Commonwealth has any obligation to defend an appeal to the circuit court filed by a person who has been involuntarily committed to a State mental hospital pursuant to § 37.1-67.3 of the Code of Virginia (1950), as amended. You call to my attention the provisions of § 37.1-104.2 but suggest that since an appeal is a civil proceeding to which no director is a party, the provisions of § 37.1-104.2 do not apply. You suggest that the parties seeking the commitment should employ counsel to defend the appeal.

Section 37.1-67.6 establishes the appeal procedure to be followed by a person who has been involuntarily committed under § 37.1-67.3. Section 37.1-67.6 provides for appointment of counsel to represent the person committed but does not indicate who should defend the commitment appealed. Section 37.1-104.2, however, provides as follows:

"In any case to test the legality of the detention of such person whether by habeas corpus or otherwise, the attorney for the Commonwealth of the county or city in which the hearing is had shall on request of the director of the hospital or other institution having or claiming custody of such person represent the Commonwealth in opposition to any such petition, appeal or procedure for the discharge of such person from custody." (Emphasis added.)

The provisions of § 37.1-104.2 indicate that the General Assembly intended that the attorney for the Commonwealth appear in any proceeding seeking a person's discharge from a mental health facility when the director of the facility so requests. The statute does not require that the hospital director be a party to the appeal.
Civil commitment of the mentally ill is not strictly a civil dispute between private parties. While it is true that many petitions for commitment are filed by family members, many are also filed by law enforcement officials, community mental health and social service workers, and in the case of recommitment, employees of State mental health facilities. In any commitment, the Commonwealth has a legitimate interest in providing care and treatment to those who are unable to care for themselves due to mental illness. Under its police power, the Commonwealth has the authority to protect the community from the dangers of some who are mentally ill. Addington v. Texas, 441 U.S. 418, 426 (1979). By enacting § 37.1-104.2, the General Assembly has assigned attorneys for the Commonwealth responsibility for protecting the interests of the Commonwealth in these situations.

Accordingly, in my opinion, the attorney for the Commonwealth is required to defend a commitment appeal filed pursuant to § 37.1-67.6 when defense is requested by the director of a State mental hospital.

COMMUNITY ANTENNA TELEVISION SYSTEMS. COUNTIES NOT EXEMPT FROM ANTITRUST LIABILITY.

February 16, 1982

The Honorable David T. Stitt
County Attorney for the County of Fairfax

This is in reply to your letter of February 8, 1982, in which you asked whether a county is exempt from antitrust liability when it grants a community antenna television system franchise to one applicant but refuses or fails to grant additional franchises to other applicants who wish to compete with the county's franchisee.

In Community Communications Co., Inc. v. City of Boulder, Record No. 80-1350 (U.S.S.C. Jan. 13, 1982), the United States Supreme Court held that political subdivisions of states are not exempt from antitrust scrutiny unless their actions are mandated by the state or are taken in furtherance or implementation of clearly articulated and affirmatively expressed state policy.

The only legislation currently in force which addresses the powers of counties to grant community antenna television system franchises is found in § 15.1-23.1 of the Code of Virginia (1950), as amended, which provides in part:

"The governing body of any county...may license, franchise or issue certificates of public convenience and necessity to one or more community antenna television systems...."

Section 15.1-23.1 neither mandates county action nor articulates an affirmatively expressed State policy favoring
mandating the number of community antenna television systems operating in any geographical area. Therefore, § 15.1-23.1 is not sufficient to provide counties with the exemption from antitrust liability generally afforded states. Such an exemption could only be accomplished by additional action of the General Assembly.

COMPENSATION BOARD. SALARIES OF INCUMBENT SHERIFFS SERVING POPULATIONS REDUCED BY CENSUS MAY NOT BE LOWERED.

June 14, 1982

The Honorable J. T. Shropshire, Chairman Compensation Board

You have asked whether the 1981-82 salary of a local constitutional officer who serves a population which decreased according to the 1980 United States Decennial Census should have been set at (1) the statutory amount for the older, higher population, (2) the statutory amount for the newer, lower population, or (3) the amount approved for his 1980-81 salary.

For purposes of illustration, you have given the following example involving the office of a local sheriff. According to the 1970 United States Decennial Census the population of one Virginia city was 19,659. According to estimates furnished by the Tayloe-Murphy Institute and accepted by the Compensation Board under the authority of § 14.1-61 of the Code of Virginia (1950), as amended, the population of the jurisdiction as of July 1, 1978, had risen to 20,700. This higher figure was available to and was utilized by the Compensation Board in setting the salary of the sheriff for the fiscal year 1980-81 because the results of the 1980 United States Decennial Census were not made final until after July 1, 1980. The new census figures indicated a reduction in population of the jurisdiction to 19,042. The Compensation Board set the sheriff's salary for the 1981-82 fiscal year based upon the more recent lower figure from the 1980 census.

The salaries established for sheriffs by the General Assembly in § 14.1-73 were increased both in 1980 and in 1981 as shown in the following table:

<table>
<thead>
<tr>
<th>Amendment to § 14.1-73</th>
<th>Population</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ch. 588 [1980] Acts of Assembly 827</td>
<td>10,001-20,000</td>
<td>$20,500</td>
</tr>
<tr>
<td>Ch. 383 [1981] Acts of Assembly 488</td>
<td>10,001-20,000</td>
<td>$24,000</td>
</tr>
<tr>
<td></td>
<td>20,001-40,000</td>
<td>$22,500</td>
</tr>
<tr>
<td></td>
<td>20,001-40,000</td>
<td>$26,500</td>
</tr>
</tbody>
</table>

In accordance with these population facts and statutory salary scales, the Compensation Board fixed the salary of the
The 1980 amendment to § 14.1-73 included as the last sentence, "No salary shall be reduced by reason of a change of population during the terms in which the incumbent sheriff on July one, nineteen hundred eighty continues in the office." The sheriff has suggested that this language entitles him to have had his 1981-82 salary set at $26,500, that is, at the figure currently approved for sheriffs serving populations of 20,001 to 40,000 inhabitants despite a 1980 census figure which indicates a population of 19,042 for his jurisdiction.

The use of figures produced by the Tayloe-Murphy Institute between United States Decennial Censuses is a matter within the discretion of the Compensation Board. Such figures may be used to increase the population attributed to a jurisdiction but may not be used to decrease such population. See Report of the Attorney General (1979-1980) at 98. However, § 14.1-61 requires that "the population of each county and city shall be according to the last preceding United States census." Thus, United States Decennial Census figures supersede any interim population figures upon which the Compensation Board has relied for a different result.

The provision of § 14.1-73 quoted above which protects the sheriff holding office on July 1, 1980, from a reduction in salary by reason of a change in population during the terms of his incumbency does not maintain the sheriff in the higher population bracket for purposes of setting his annual salary. The protection afforded the sheriff merely prevents him from being paid less than he received in the fiscal year prior to the first fiscal year for which final United States Decennial Census figures are available. In the example given, the sheriff is guaranteed by § 14.1-73 of receiving a salary no less than $22,500 for the remainder of his incumbency. In fact, because the salary levels were stepped-up by the 1981 General Assembly, the salary figure for the lower population bracket still results in an amount in excess of his prior salary for 1980-81.

In light of the foregoing, I am of the opinion that the salary of the sheriff has not been "reduced by reason of a change of population" and the Compensation Board has complied with § 14.1-73.

Because of the peculiar circumstance that two successive sessions of the General Assembly granted significant step increases to salaries for sheriffs, the current salary for the lower population bracket exceeds the previous salary for the next higher population bracket. Had the salaries approved by the 1980 General Assembly remained unchanged, § 14.1-73 would have prevented the Compensation Board from reducing the salary of the sheriff to a figure less than $22,500 by reason of the fact that there was a reduction in
the population of the jurisdiction he served according to the 1980 United States Decennial Census.

CONSTITUTION. AMENDMENTS. ART. XII, § 1. PROPOSALS FOR AMENDMENT AGREED UPON IN 1982 SESSION MAY BE REFERRED TO 1984 SESSION OF GENERAL ASSEMBLY FOR CONSIDERATION.

January 28, 1982

The Honorable Gwendalyn F. Cody
Member, House of Delegates

This is in reply to your letter of January 25, 1982, which reads as follows:

"If a Constitutional Amendment is proposed by the 1982 session, may it be considered by the 1984 session of the General Assembly?"

Your inquiry is answered in the affirmative. The provision in Art. XII, § 1 of the Constitution of Virginia (1971) ("Constitution") for referring proposed amendments to the Constitution agreed upon by both houses of the General Assembly to the next regular session specifies the subsequent session as the "first regular session held after the next general election of members of the House of Delegates."

(Emphasis added.) The next general election of the members of the House of Delegates will be held in November 1983. Accordingly, I am of the opinion that an amendment to the Constitution proposed by the 1982 session of the General Assembly may be referred to the 1984 session of the General Assembly for consideration.

I am attaching a copy of my letter to the Honorable Hunter B. Andrews dated January 21, 1981. In that letter I expressed the opinion that an amendment proposed by the 1982 session cannot be referred to the 1983 regular session.

CONSTITUTION. ART. IV, § 7. NO LEGISLATIVE CONTINUITY MAY BE PROVIDED FOR BETWEEN TERMS OF GENERAL ASSEMBLY.

January 21, 1982

The Honorable Hunter B. Andrews
Member, Senate of Virginia

This is in response to your letter of January 7, 1982, requesting my Opinion as to whether the Fairfax County Board of Supervisors may adopt voluntary campaign guidelines applicable to the election of its members.

Based upon the first section of Virginia's Fair Election Practices Act, (§ 24.1-251, et seq., of the Code of Virginia (1950), as amended), Fairfax County's Board of Supervisors' elections may not be regulated by local law.
Section 24.1-251 provides in part that:

"The provisions of this chapter shall apply to all elections held within the Commonwealth except any election for members of the United States Congress, or any election for any town office, or any election for directors of soil and water conservation districts...Elections to which this chapter is applicable shall not be subject to further regulation by local law, and this chapter shall constitute the exclusive and entire fair election practices law of the Commonwealth." (Emphasis added.)

The foregoing language precludes further regulation by local law. One question presented here, however, is whether voluntary guidelines would be included in this prohibition. While the voluntary guidelines would not have the force of law, i.e., they could not be enforced by any agency, they would, nonetheless, have the effect of regulating election practices which are specifically regulated by statute.

Boards of supervisors have only those powers and duties fixed by statute and those conferred by necessary implication. Board of Supervisors of Fairfax County v. Horne, 216 Va. 1113, 215 S.E.2d 453 (1975). Since no express statutory authority is given to boards of supervisors to regulate local elections and none can be implied because of the express prohibition in § 24.1-251, the Fairfax County Board of Supervisors may not adopt these voluntary guidelines in an attempt to impose more rigid restrictions than are provided by general law on candidates for election to the board of supervisors.

CONSTITUTION. ART. XII, § 1. CONSTITUTIONAL AMENDMENTS AGREED TO DURING 1981 SESSION OF GENERAL ASSEMBLY MAY BE REFERRED TO 1982 SESSION FOR CONSIDERATION.

February 9, 1982

The Honorable Ralph L. "Bill" Axselle, Jr.
Member, House of Delegates

This is in reply to your letter of February 3, 1982, which has reference to my letter of January 21, 1982, to Senator Hunter B. Andrews, pertaining to proposed amendments to the Constitution of Virginia.

You first inquire as to when the General Assembly may consider proposals for amendment to the Constitution if the proposed amendment was first adopted during the 1981 session. Article XII, § 1 of the Constitution of Virginia (1971) provides that amendments to the Constitution initially agreed upon by both houses of the General Assembly shall be referred to the "first regular session held after the next general election of members of the House of Delegates." (Emphasis added.)
The "next general election" of the members of the House of Delegates following the 1981 regular session was November 1981. Accordingly, I am of the opinion that an amendment to the Constitution agreed upon by the 1981 session of the General Assembly may be referred to the 1982 session of the General Assembly for consideration.

You next inquire as to which subsequent session may amendments be referred if an amendment to the Constitution is proposed by the two houses of the General Assembly during the 1982 session. This was the inquiry raised by Senator Andrews, and, for the reason stated in my reply of January 21, 1982, I expressed the opinion that amendments proposed by the 1982 session may not be referred to the 1983 session of the General Assembly for consideration, inasmuch as that session would be held prior to the next "general election" of members of the House of Delegates. The November 1983 election will be the next regular election of members of the House of Delegates and the regular 1984 session will be the first regular session following that election.

You next inquire if an amendment to the Constitution is first proposed during the 1983 session, during what subsequent session or sessions may that amendment be referred for the necessary subsequent approval?

The next general election of members of the House of Delegates following the 1983 session will be held in November 1983. Accordingly, I am of the opinion that the amendments proposed to the Constitution during the 1983 session of the General Assembly may be referred to the 1984 regular session held after the November 1983 general election.

CONSTITUTION. ART. XII, § 1. CONSTITUTIONAL AMENDMENTS AGREED TO DURING 1982 SESSION OF GENERAL ASSEMBLY MAY NOT BE CONSIDERED BY 1983 SESSION.

January 21, 1982

The Honorable Hunter B. Andrews
Member, Senate of Virginia

This is in reply to your recent letter which reads as follows:

"Article XII, Section 1, of the Constitution of Virginia provides that an amendment to the Constitution is first proposed by agreement of the two houses of the General Assembly and then '...shall be...referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates....'"

As you know, the August 25, 1981, Interlocutory Order of the United States District Court (Eastern District of Virginia, Richmond Division) in Cosner,
et al. v. Dalton, et al., provided that members of the House elected in 1981 would serve a one-year term and that an election for the House in November 1982, is to be held unless otherwise provided by further court order.

On behalf of the Senate Privileges and Elections Committee which considers constitutional amendments, I am requesting your opinion on whether amendments proposed at the regular 1982 session may be referred to the 1983 regular session of the General Assembly if the Cosner court order continues in effect unmodified, and a November 1982, election is held for the House of Delegates."

The provision in Art. XII, § 1 of the Constitution of Virginia (1971) for referring proposed amendments to the Constitution agreed upon by both houses of the General Assembly to the next regular session specifies the subsequent session as the "first regular session held after the next general election of members of the House of Delegates...." (Emphasis added.) The probative question here is when the next general election of members of the House of Delegates will be held?

Article IV, § 3 provides for the election of members of the House of Delegates biennially by the voters of the several house districts on the Tuesday succeeding the first Monday in November. The current membership in the House of Delegates was elected at the November 1981, election as required by this constitutional mandate.

General and special elections are defined by §§ 24.1-1(5)(a) and 24.1-1(5)(c) of the Code of Virginia (1950), as amended, as follows:

"(5) Elections: (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;

***

(c) 'Special election' means any election, on any Tuesday other than a general or primary election, which is held pursuant to law to fill a vacancy in office or to submit to the qualified voters a measure or proposition for adoption or rejection, provided that a special election may also be held on the day of a general or primary election...." (Emphasis added.)

This Office has heretofore expressed the view that a "general election" is one held automatically on Tuesday after the first Monday in November and an election specially called constitutes a "special election" even though it be held on the same day as a general election. See Report of the Attorney General (1973-1974) at 149.
I am of the opinion that any House of Delegates election held in November 1982, pursuant to the mandate in Cosner v. Dalton, 522 F.Supp 350 (E.D. Va. 1981), will constitute a "special" election even though it may be scheduled on the same day in November as a general election might be held. The next general election of members of the House of Delegates as required by Art. IV, § 3 will be conducted in November 1983. Accordingly, I am of the opinion that an amendment to the Constitution proposed by the 1982 session of the General Assembly cannot be referred to the 1983 regular session of the General Assembly.

CONSTITUTION. CREDIT CLAUSE OF ART. X, § 10 DOES NOT PROHIBIT STATE-OWNED INDUSTRIAL ACCESS RAIL FACILITIES.

September 11, 1981

The Honorable V. Earl Dickinson
Member, House of Delegates


House Bill 1631 amends the Code of Virginia by adding § 56-451.2 which would provide State funding for the construction and improvement of railroad tracks and facilities, on public or private property, extending from existing railroad rights of way to tracks immediately adjacent to existing or proposed industries and industrial subdivisions. It provides that such industrial access tracks and facilities shall be owned by the Commonwealth for five years, after which they shall become the property of the landowners who, together with the using industries, shall bear the obligation and expense of future maintenance, relocation and removal. The Bill declares that construction of industrial access tracks with State funds is in the public interest and that § 56-451.2 is intended to be "comparable to the Industrial Access Road Fund, established pursuant to § 33.1-221." The only material difference in the amendment in the nature of a substitute is that the tracks and facilities would become the property of the landowners immediately upon construction.

Article X, § 10 of the Constitution provides, in part, that:

"Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation...nor shall the Commonwealth become a party to or become interested in any work of
internal improvement, except public roads and public parks, or engage in carrying on any such work...."

These provisions are known, respectively, as the credit clause and the internal improvements clause and are germane to your inquiry inasmuch as the State, by financing and constructing rail facilities, might be viewed as lending its credit to private enterprise or becoming interested in a work of internal improvement which the Constitution seeks to prohibit.

The purpose of both the credit clause and internal improvements clause is to prevent the State from incurring financial obligations in vast sums through speculative financing of private transportation facilities, such as railroads, turnpikes and canals, which resulted in significant losses of State funds during the nineteenth century. See Almond v. Day, 197 Va. 782, 787-788, 91 S.E.2d 660 (1956). Nevertheless, the Supreme Court has refrained from categorically disapproving State participation in ventures which a literal reading of Art. X, § 10 might indicate are impermissible. In so doing, the court has focused its attention on the underlying purpose of the State's financial commitment, holding that the performance of a proper governmental function for the public good is not necessarily precluded because it may incidentally benefit a private enterprise or assume the appearance of a proprietary venture. See II A. E. Howard Commentaries on the Constitution of Virginia 1126-1135 (1974), and Opinion to the Honorable Jerry K. Emrich, County Attorney for Arlington County, dated December 21, 1978, and found in Report of the Attorney General (1978-1979) at 53.

As a general rule, the credit clause and internal improvements clause are not violated where the State is performing a governmental function in furtherance of a public purpose, notwithstanding the incidental benefit or profit which may accrue to private interests. "[T]here is nothing in the history of [Art. X, § 10] to suggest that its purpose was to restrict or limit the State in the exercise of its governmental functions." Almond v. Day, 199 Va. 1, 7, 97 S.E.2d 824, 829 (1957) (Emphasis added by the court in Harrison v. Day, 200 Va. 764, 772, 107 S.E.2d 594, 599 (1959)).

Traditionally, the State's ownership and operation of port and harbor facilities, which include railroads, has been upheld under Art. X, § 10. Harrison v. Day, 200 Va. 764, supra; Harrison v. Day, 202 Va. 967, 121 S.E.2d 615 (1961). In the first of those Harrison v. Day cases, legislative authority for the State to develop port facilities was held not to violate the internal improvements clause. In the second of those Harrison v. Day cases, the Virginia Port Authority purchased marine terminals from the Norfolk and Western Railway which it leased back to the Railway as the terminal operator. The court held the lease did not violate the credit clause, observing that the intent of the
legislature in permitting the arrangement was "not to promote the private business of the Railway, but to obtain modern and efficient general cargo port facilities." Id. at 972, 121 S.E.2d at 618. In Harrison v. Day, 200 Va. 750, 107 S.E.2d 585 (1959), the court, holding that development of a produce market was a governmental function, said: "Clearly, you may have an 'internal improvement,' according to the literal meaning of the term, which does not fall within the constitutional prohibition." Id. at 755, 107 S.E.2d at 588.

Publicly owned rail facilities have been expressly held to meet the governmental function-public purpose test. Board of Supervisors of Fairfax County v. Massey, 210 Va. 253, 169 S.E.2d 556 (1969). In that case, Fairfax County and the City of Falls Church agreed to underwrite their proportionate share of deficits incurred in the operation of a passenger rail service operated by the Washington Metropolitan Area Transit Authority. The court held that such railway projects were in the interest of health, safety and public welfare, and constituted "a governmental function for public purposes." Id. at 262, 169 S.E.2d at 562. Although this case decided only the issue of a credit clause violation, the court's decisions on the several prohibitive clauses of Act. X, § 10 indicate that it has uniformly applied the test to each clause.

The apparent and declared intent of H.B. 1631 is to facilitate industrial development which the court has found to constitute a proper governmental function. Fairfax County Industrial Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966). The Bill states that this means of facilitating industrial development is in the public interest and purpose. A declaration by the General Assembly of a governmental purpose is presumed to be correct and entitled to great weight. Harrison v. Day, 202 Va. 967, supra; Hunter v. Norfolk Redevelopment and Housing Authority, 195 Va. 326, 78 S.E.2d 893 (1953); City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120 (1950). The court stated in Fairfax County Industrial Development Authority v. Coyner, supra, at 357, 150 S.E.2d at 93:

"Courts cannot interfere with what the General Assembly has declared to be a public purpose and thus a function of government unless the judicial mind conceives that the legislative determination is without reasonable relation to the public interest or welfare and is beyond the scope of legitimate government...."

The rule of law is that every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature. Almond v. Gilmer, 188 Va. 822, 51 S.E.2d 272 (1949); City of Roanoke v. Michael's Bakery Corp., 180 Va. 132, 18 S.E.2d 788 (1942); Hunton v. Commonwealth, 166 Va. 229, 183 S.E. 873 (1936). If enacted, H.B. 1631 or the amended version thereof would be presumed constitutional and could be overturned only if found to be plainly in violation of the Constitution. Button v. Day, 205 Va. 629, 139 S.E.2d
enactment of the Bill would constitute a legislative construction of Art. X, § 10 that the Bill is not prohibited by the Constitution; that construction would be entitled to great weight. Almond v. Gilmer, supra.

Nevertheless, the Bill in one respect departs from a fundamental aspect of the governmental endeavors which the Supreme Court has sustained as constitutional under Art. X, § 10: public ownership. While the Bill does not permit construction of rail facilities on railroad rights of way, it permits their construction on private property and mandates subsequent private ownership. In this regard, I consider the Bill lacking in a factor critical to the issue of whether the animating purpose of the legislation is to benefit the public or private interests. See Button v. Day, 208 Va. 494, 158 S.E.2d 735 (1968).

Therefore, I am of the opinion that H.B. 1631 and the amendment in the nature of a substitute are unconstitutional as written. The infirmity in both Bills can be cured by altering the language regarding ownership of the track and facilities constructed with such funds to provide that they shall be owned by the Commonwealth in fee simple. With this change, it is my opinion that the legislation will meet the governmental function-public purpose test and will not be in violation of Art. X, § 10 of the Constitution.

CONSTITUTION. ELECTIONS. CITIES. REAPPORTIONMENT. CITY WHICH HAS "QUALIFICATION DISTRICTS" UNDER CHAPTER NOT REQUIRED TO REAPPORTION SUCH DISTRICTS UNDER ART. VII, § 5 OF CONSTITUTION WHERE CHARTER PROVIDES FOR ALL CANDIDATES TO BE ELECTED AT LARGE.

December 30, 1981

The Honorable George W. Grayson
Member, House of Delegates

You ask, whether the City of Poquoson, which has "qualification districts" under its charter, is required to reapportion such districts under Art. VII, § 5 of the Virginia Constitution (1971). Article VII, § 5 provides that, if the members of the governing body of a city are elected by district, the governing body shall periodically reapportion the representation in the governing body among the districts.

Article III, § 2 of the city charter provides that the city council shall consist of seven members, and the city shall be divided into three precincts. Each such precinct is entitled to two representatives on the council, and one representative is elected at-large, who is the mayor.1
Article III, § 3 of the charter provides that any citizen who is a qualified voter and a city resident may become a candidate from the precinct in which he votes and resides. A candidate for representative at large may qualify irrespective of the precinct in which he votes and resides.

Article III, § 4 of the charter provides that all candidates shall be voted on by all precincts. The candidate at large receiving the highest number of votes shall be mayor. The two candidates from each of the precincts receiving the highest number of votes from the city at large shall be elected as councilmen.

Article III, § 11 of the charter provides that in the event a councilman who has been elected from a certain precinct moves his residence to another precinct within the city, such councilman shall continue to serve in office until his term expires.

The precincts provided for in the city charter are different from the election districts contemplated by Art. VII, § 5 of the Virginia Constitution and the general law of Virginia. The districts mentioned in Art. VII, § 5 are concerned with representation in proportion to the population of the districts. So are the districts mentioned in § 15.1-37.5 of the Code of Virginia (1950), as amended.

To be sure, Art. III, § 2 of the charter speaks of each city precinct being entitled to two "representatives" on the council, but Art. III, § 4 of the charter provides that all candidates shall be voted on by all precincts, and that the two candidates from each of the precincts receiving the highest number of votes from the city at large shall be elected as councilmen.

The net effect of Art. III, § 4 is that candidates receiving the highest number of votes in their "home" precinct may not be elected to "represent" that precinct. Instead, the "representatives" for that precinct may be elected by voters resident in the other two precincts.

Therefore, the "representation" contemplated by the city charter does not constitute representation confined to the population found in a separate precinct. Representation under the charter is representation of the population of the city at large. As noted in Art. III, § 3 of the charter, the precincts relate only to "qualification" of the candidates. The precincts do not relate to the election of the candidates, and the members of the governing body are not elected by district.

Accordingly, it is my opinion that, where a city has "qualification districts" under its charter, the city is not required to reapportion such districts under Art. VII, § 5 of the Virginia Constitution, where the charter provides for all candidates to be elected at large.


At some point in time, population imbalances between the districts could become so great that they would need to be adjusted under other provisions of State or federal law. This would be the case even though reapportionment is not required within the time period specified in Art. VII, § 5. Any such adjustments presumably will need to be precleared with the Department of Justice under the Voting Rights Act of 1965.

CONSTITUTIONAL LAW. FREEDOM OF SPEECH, DOOR-TO-DOOR DISTRIBUTION OF CAMPAIGN LITERATURE GENERALLY ALLOWED.

February 23, 1982

The Honorable Gladys B. Keating
Member, House of Delegates

This is in reply to your recent letter requesting clarification for one of your constituents regarding distribution of campaign literature in a townhouse type condominium.

We are not advised of the particular law or ordinance complained of, but I will offer the applicable guidelines which normally govern in such instances.

As a general rule, under the constitutional guarantee of freedom of speech and the press, political literature may be distributed from door-to-door, but this right must be equated with a concurrent right of others to reject the material, and the right of the individual to be free to choose whether to exclude others from his residence. Whether it is a proper subject for governmental regulation or limitation depends on the circumstances and objectives to which the governmental action is directed. Martin v. Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). In that case, the U.S. Supreme Court held a city ordinance unconstitutionally restrictive which proscribed the ringing of door bells, or otherwise summoning the inmate of any residence to the door for the purpose of receiving handbills, circulars or other advertisements.
Section 18.2-119 of the Code of Virginia (1950), as amended, prohibits a person from entering on the land, building or premises of another after being advised not to do so by the owner, lessee, custodian or other person lawfully in charge thereof or where a sign has been posted to that effect where it may reasonably be seen. By that statute, the General Assembly has safeguarded the respective rights of the parties from situations of unwanted intrusions.

There is no Virginia statute which prohibits door-to-door distribution of political literature for informational purposes. Any attempt to regulate this practice by statute or ordinance would have to be narrowly drawn to avoid an overly broad prohibition such as that ruled unconstitutional in Martin v. Struthers, supra.

CONSTITUTIONAL LAW. GENERAL ASSEMBLY. ART. III, § 1 CANNOT BE STRICTLY CONSTRUED BUT NONE OF THREE BRANCHES OF GOVERNMENT SHOULD EXERCISE POWERS OF ANY OTHER BRANCH SO FAR AS IS PRACTICABLE.

February 15, 1982

The Honorable J. Samuel Glasscock
Member, House of Delegates

You have asked whether under the process set out in § 9-6.14:9 of the Code of Virginia (1950), as amended, the General Assembly may, consistent with the Constitution of Virginia (1971), defer, modify, or annul a State agency's regulations that are properly promulgated pursuant to a valid legislative grant of authority.

The statute in question provides a procedure for the submission of agency regulations to the appropriate legislative committee for review prior to such regulations taking effect. Proposed regulations are transmitted to the committee of each house of the General Assembly to which the Registrar of Regulations believes it to be properly referable. The committee meets within ninety days of such referral, and a majority of the members may vote to defer the effective date of the regulation. The regulation is then submitted to the General Assembly. The committee is to prepare a joint resolution expressing the sense of the General Assembly that all or any part of the regulation should be modified or nullified. Approval of the resolution permanently defers the effect of the regulation in the form adopted by the agency. Any rule or regulation, regardless of when adopted, becomes null and void when the General Assembly adopts the resolution declaring it null and void. No rule or regulation having substantially the same object shall thereafter be adopted unless and until the General Assembly repeals the resolution.

In considering this question, I note that Art. III of the Constitution of Virginia, which mandates the division of
powers, authorizes the General Assembly to create administrative agencies with such authority and duties as the General Assembly may prescribe. An agency, for purposes of this Opinion, is defined as a "unit of the State government," § 9-6.14:4, and is generally regarded as being a part of the executive branch of government, unless specifically designated as a part of the legislative or judicial branches. See § 2.1-41.2.

Article III specifies that the three branches of government "shall be separate and distinct, so that none exercise the powers properly belonging to the others...." This doctrine of division of powers has existed in Virginia's constitutions since 1776. I Howard, Commentaries On The Constitution Of Virginia 435 (1974). This provision has not been interpreted as frequently as other parts of the Constitution, however, and I have not found any Virginia case that concerns any type of legislative oversight, such as is established in § 9.6-14:9. While the Supreme Court of Virginia has indicated that Art. III, § 1 is not to be strictly construed, the court has nevertheless stated that none of the three branches of government should exercise the powers of any other branch so far as that is practicable. Winchester & Strasburg Railroad Co. v. Commonwealth, 106 Va. 264, 268, 55 S.E. 692 (1906). The Supreme Court there stated:

"It is undoubtedly true that a sound and wise policy should keep these great departments of the government as separate and distinct from each other as practicable. But it is equally true that experience has shown that no government could be administered where an absolute and unqualified adherence to that maxim was enforced. The universal construction of this maxim in practice has been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent." Id. (Emphasis added.)

To determine whether a violation of this constitutional provision exists, Professor Howard in his Commentaries On The Constitution Of Virginia identified three factors the Supreme Court of Virginia apparently considers: (1) the danger of abuse, (2) the necessity, and (3) the propriety. Consideration of these three factors in relation to § 9-6.14:9 leads me to conclude that, if the statute were challenged, the court would very likely hold that the statute violates Art. III, § 1.

In the event of such a legal challenge, the court might well find that to allow the General Assembly to review valid regulations as contemplated in the statute would extend the power of the General Assembly to a degree which could well lead to an impermissible intrusion into the arena of authority exercised by the executive branch of government. Cf. Allen v. The Governor, 151 Va. 21, 144 S.E. 469 (1928),
which held, under the circumstances of that case, that the judicial department could not justify an invasion of the executive department. By applying the procedure in § 9-6.14:9, a simple majority of a quorum of a committee of the General Assembly may modify or nullify valid regulations, and, without public knowledge, thereby change existing rights, privileges and obligations created by such regulations. See § 9-6.14:9D2.

Likewise, consideration of the legal factors of necessity and propriety leads to the conclusion that a court would hold that the General Assembly may enact legislation, as contemplated in Art. III, but it may not appropriately enforce legislation. Compare Art. IV, §§ 1 and 14 with Art. V, §§ 1 and 7. It is the function of the General Assembly to confer powers and duties upon administrative agencies with appropriate standards, but the executive branch, under the supervision of the Governor, must execute and implement those powers and duties.

Aside from these three factors identified by Professor Howard as the basis of the Supreme Court determination, I am also impressed by the fact that Art. III makes specific reference to providing judicial review of "any finding, order, or judgment of such administrative agencies." Assuming, arguendo, that this language encompasses the regulations of an agency, it is significant that there is no mention of legislative review of regulations that could result in their delay or nullification. The absence of such a reference indicates that the General Assembly was not intended to have the overview authority conferred by § 9-6.14:9. Obviously, the General Assembly has the authority to repeal, revise or modify the powers it has conferred upon agencies, if such action is taken by a legislative bill.

My concern as to a court's likely conclusion is supported by the cases of State Ex Rel. Barker v. Manchin, W. Va., 279 S.E. 2d 622 (1981), and State v. A.L.I.V.E. Voluntary, Alaska, 606 P.2d 769 (1980). These cases concern statutes similar in concept to § 9-6.14:9, and their rationales support my conclusion, particularly the West Virginia case. But, see, Opinion of the Justices, N.H., 431 A.2d 783 (1981). Likewise, two federal courts of appeals have recently ruled that the Congress unconstitutionally arrogated to itself similar authority to intrude upon the powers of the executive branch of government. See Consumer Energy Council of America v. Federal Energy Regulatory Commission, No. 80-2184 (D.C. Cir. January 29, 1982); Chadha v. Immigration And Naturalization Service, 634 F.2d 408 (9th Cir. 1980), consideration of jurisdiction postponed until hearing on merits, 102 S.Ct. 87 (1981). Because the doctrine of separation of powers is a fundamental part of the federal constitution, the decisions of the two courts of appeals, by analogy, lend support to my conclusion.
More importantly and more impressive than the foregoing, however, is the concern that the statutory procedure in question impinges upon Art. IV, § 11. That section clearly specifies that "[n]o law shall be enacted except by bill...." (Emphasis added.) Section 9-6.14:9E provides, however, that, if the General Assembly passes a resolution nullifying certain regulations, "[n]o rule or regulation having substantially the same object shall thereafter be adopted unless and until the General Assembly repeals the resolution by recorded vote." (Emphasis added.) The "object" of any regulation is the same "object" of the statute that confers regulatory authority upon the administrative agency.

Accordingly, § 9-6.14:9E purports to permit the General Assembly, by resolution, to repeal, for all practical purposes, a statute that has conferred upon an agency the authority to regulate. To repeal or modify a statute requires a legislative act of equal dignity and import. Nothing less than another statute will suffice. Moran v. LaGuardia, 270 N.Y. 450, 1 N.E.2d 961 (1936). It is well settled that a statute cannot be amended by resolution. Newport News Fire Fighters Ass'n v. City of Newport News, 307 F.Supp. 1113 (E.D. Va. 1969); Opinion to the Honorable Adelard L. Brault, Member, Senate of Virginia, dated August 8, 1978, and found in Report of the Attorney General (1978-1979) at 110; 1 A. Sands, Sutherland Statutory Construction § 22.14, p. 141. I restated that view in my letter of February 9, 1982, to the Honorable Joseph V. Gartlan, Jr., Member, Senate of Virginia, a copy of which is herewith enclosed. Consequently, I entertain grave doubts that § 9-6.14:9 could survive a constitutional challenge.

In summary, I question the constitutionality of § 9-6.14:9, because it projects the legislative branch into the executive branch beyond constitutionally permissible limits. Moreover, the General Assembly cannot by statute confer upon agencies the power and responsibility to promulgate regulations, and then defer, modify or nullify those regulations by resolution. Consequently, I am of the opinion that § 9-6.14:9 as written violates both Art. III, § 1 and Art. IV, § 11 of the Constitution of Virginia.

CONSTITUTIONAL OFFICERS. PURCHASING PROCEDURES.
CONSTITUTIONAL OFFICERS OF CITY OF MARTINSVILLE MUST COMPLY WITH CENTRAL PURCHASING PROCEDURES ESTABLISHED BY CITY.
PURCHASING NEEDS OF OFFICER SHOULD BE DETERMINED BY THAT OFFICER.

May 24, 1982

The Honorable J. Ronnie Minter
Commissioner of the Revenue for the City of Martinsville

This is in reply to your letter dated May 12, 1982, in which you made the following inquiry: Do constitutional
officers of the City of Martinsville have to comply with the established purchasing procedures of the city?

Section 15.1-844 of the Code of Virginia (1950), as amended, provides that municipalities shall adopt systems for control and management of the resources and revenues of the municipality. The establishing of a central purchasing system by the city under its charter is in accord with the general provisions of § 15.1-844.

This Office has previously ruled that various provisions of the Code of Virginia require constitutional officers to comply with the purchasing procedures of the locality. See Report of the Attorney General (1975-1976) at 62. Based upon the reasoning in that Opinion, I am of the opinion that constitutional officers of the City of Martinsville must comply with the purchasing procedures established by the city. However, the purchasing needs of the officer should be determined by that officer.

1Section 15.1-844 reads as follows: "A municipal corporation shall provide for the control and management of the affairs of the municipality, and may prescribe and require the adoption and keeping of such books, records, accounts and systems of accounting by the departments, boards, commissions, courts or other agencies of the local government as may be necessary to give full and true accounts of the affairs, resources and revenues of the municipal corporation and the handling, use and disposal thereof."

2Chapter 12, § 1 of the Martinsville City Charter reads in pertinent part as follows: "[T]he City Council shall not later than July First, Nineteen Hundred and Fifty (1950), provide for a modern budget and accounting system, to be maintained on a current modern basis, which shall include a pre-audit, control and approval of all expenditures with appropriate records and reports. The officer in charge of this activity shall be the city manager or some qualified employee appointed by him."

COOPERATIVES. LOCALITIES DO NOT HAVE AUTHORITY TO REQUIRE THAT PROponent OF A RENTAL APARTMENT TO A COOPERATIVE SECURE SPECIAL USE PERMIT PRIOR TO CONVERSION IF STRUCTURE DOES NOT CONFORM TO PRESENT ZONING, LAND USE AND SITE PLAN REGULATIONS OF LOCALITY.

March 8, 1982

The Honorable Charles G. Flinn
Acting County Attorney for Arlington County
This is in reply to your recent letter in which you ask several questions regarding the authority of Arlington County to regulate the conversion of rental apartments to cooperatives.

You first ask whether § 55-79.43 of the Code of Virginia (1950), as amended, applies to conversion of apartments to cooperatives. That section of the Code permits a locality to require that the proponent of a proposed conversion of a rental apartment to a condominium secure a special use permit prior to conversion if the structure does not conform to the present zoning, land use and site plan regulations of the locality.

This Office has previously ruled, in an Opinion dated December 9, 1981, to the Honorable Wiley F. Mitchell, Jr., Member, Senate of Virginia, that § 55-79.43 does not apply to conversions of rental apartments to cooperatives (copy attached). I concur with that Opinion.

You next ask whether the county may require conversion cooperatives to conform to local zoning regulations independently of § 55-79.43. Section 15.1-492 provides that a nonconforming use may continue without compliance with local zoning regulations as long as the existing use continues. If, however, the legally existing nonconforming use is "enlarged, extended, reconstructed or structurally altered..." it must be made to conform with local land use regulations.

The legislative intent of the statutes enabling zoning ordinances "was to permit localities to enact only traditional zoning ordinances directed to physical characteristics...." Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 238, 198 S.E.2d 600, 602 (1973). The conversion of a rental apartment to a cooperative changes only the form of property ownership, not its use, and has no inherent effect on the physical characteristics of the property. I am, therefore, of the opinion that nonconforming rental apartments may not be required to conform to local zoning ordinances when they convert to cooperative ownership.

You next ask whether the county may enact a moratorium on cooperative conversions under the authority of its police power. The powers of county boards of supervisors in Virginia are limited to those conferred expressly or by necessary implication. This principle is a corollary to Dillon's Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable. Commonwealth v. Arlington County Board, 217 Va. 558, 573, 232 S.E.2d 30 (1977).

No provision of the Code of Virginia expressly authorizes a moratorium on the conversion of rental apartments to cooperatives. In order for such a moratorium
to be established, the county must have implied authority to do so. Questions of implied legislative authority are resolved by analyzing legislative intent. Tabler v. Board of Supervisors of Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980).

In similar situations the courts and this Office have ruled that localities lack implied authority to establish such moratoriums. In Board of Supervisors of Fairfax County v. Horne, 216 Va. 173, 122, 215 S.E.2d 453 (1975), the Supreme Court of Virginia noted that "there was no express or implied authority for the enactment by the Board of ordinances imposing a moratorium on the filing of site plans and preliminary subdivision plats...." In Report of the Attorney General (1978-1979) at 196, this Office opined that a county lacks authority to enact a moratorium on zoning changes. Because the county lacks express or implied authority to do so, I conclude that it may not enact a moratorium on the conversion of rental apartments to cooperatives.

You next ask whether the county may require that those persons or corporations converting rental apartments to cooperatives pay the relocation expenses of displaced tenants. The provision you suggest is frequently included by developers converting rental apartments into condominiums in a "relocation plan" to assist tenants in relocating from the building. Such a plan is permitted, but not required, to be filed in the public offering statement of a conversion condominium by § 55-79.94.

There is no similar provision of law applicable to the conversion of rental apartments to cooperatives. Lacking express or implied authority to impose this requirement, the county may not do so. A person or corporation converting rental apartments to cooperatives may, of course, pay the relocation costs of displaced tenants, but such a duty may not be mandated by the county.

You next ask whether Dillon's Rule applies "to cooperative conversions in such a way that conversions [of rental apartments to cooperatives] may not take place in the absence of specific enabling legislation or by necessary implication from existing enabling legislation." Dillon's Rule is a principle of statutory construction which is used to determine the extent of the police power which may be exercised by local governments. Dillon's Rule is not applicable to natural persons or private entities such as corporations. Dillon's Rule thus has no applicability to the question you pose. Furthermore, the Code of Virginia appears to contemplate cooperative forms of property ownership. See § 56-222.

You last ask whether Arlington County may seek a declaratory judgment action against a cooperative on the ground that the corporation lacks the authority to engage in a cooperative conversion. While the county may, of course,
institute legal action to prevent violation of local ordinances, State law, or the common law, I do not believe the county would have standing to bring an action such as you contemplate to restrain the perceived ultra vires act of a private corporation. Because, as I have noted above, the county presently has no authority to prevent the conversion of rental apartments to cooperatives, I am of the opinion it lacks standing to bring a lawsuit to contest the power of a private corporation to engage in a cooperative conversion. Such action should be brought by a private citizen or corporate entity whose legal interests are directly affected by the proposed conversion.

COSTS. CONVICTED DEFENDANT RESPONSIBLE FOR JURY COSTS IN MISDEMEANOR TRIAL FOR REFUSING TO SUBMIT TO TAKING OF SAMPLE OF HIS BLOOD OR BREATH TO DETERMINE ALCOHOLIC CONTENT IN VIOLATION OF § 18.2-268. 

May 27, 1982

The Honorable Michael M. Foreman, Clerk
Circuit Court for the City of Winchester

You have asked whether the costs of a jury trial in circuit court are to be charged to a defendant who, as a consequence of that trial, is convicted of refusing to submit to the taking of a sample of his blood or breath to determine the alcoholic content of his blood in violation of § 18.2-268 of the Code of Virginia (1950), as amended.

The Supreme Court of Virginia stated in Deaner v. Commonwealth, 210 Va. 285, 170 S.E.2d 199 (1969), that this type of proceeding under the Implied Consent Law was administrative and civil in nature even though certain of the prescribed procedures were similar to those used in criminal cases. For example, referring to the predecessor of § 18.2-268(p), the court noted that the "procedure for appeal and trial" is the same as provided by law for misdemeanors.

In the event that a defendant is found guilty of any misdemeanor in the circuit court, he is liable for the payment of all costs "incident to the prosecution." It is clear that the expenses incurred in compensating jurors for their services are properly chargeable to a convicted defendant who was tried by jury.

Consequently, because the prescribed procedures shall be the same as provided by law for misdemeanors, it is my opinion that costs pursuant to a jury conviction under § 18.2-268 should be assessed in the same manner "as provided by law for misdemeanors." Section 18.2-268(p). Therefore, the convicted defendant should bear the burden of reimbursing the public treasury for the costs of the jury.
Section 19.2-336 states in part: "In every criminal case the clerk of the circuit court in which the accused is found guilty...shall, as soon as may be, make up a statement of all the expenses incident to the prosecution...and execution for the amount of such expenses shall be issued and proceeded with...."

COUNTIES. APPROPRIATIONS. UNDER § 15.1-24, COUNTY MAY APPROPRIATE MONEY TO CHARITABLE ORGANIZATION PROVIDED APPROPRIATION IS TO BE USED FOR LAWFUL CHARITABLE PURPOSES.

May 4, 1982

The Honorable Frank Medico
Member, House of Delegates

This is in reply to your recent letter in which you made several inquiries concerning the following factual situation involving an organization operated under the auspices of a community action agency:

The organization received federal funds to help defray its operating expenses. An audit of the organization has revealed that it has not returned certain unused federal funds as required by law, and the organization owes federal and State withholding taxes. The audit indicates that these funds are missing or are unaccounted for. Poor recordkeeping has been blamed for the problem. Your letter does not indicate that any criminal actions were involved.

Your inquiries are as follows:

1. Are county officials authorized by State law to appropriate funds to cover the missing money mentioned in the foregoing situation?

2. If no such authority for the appropriation exists, what is the legal liability of persons who authorized such an appropriation?

3. What legal action can and should be taken against the organization responsible for spending money collected and held in trust for government agencies?

I assume the agency is a charitable organization located within the county's jurisdiction. If so, § 15.1-24 of the Code of Virginia (1950), as amended, provides that a county may appropriate funds to it. This Office has previously held that such appropriations are permissible. See Report of the Attorney General (1976-1977) at 22. If the funds appropriated are to be used for a charitable purpose, such an appropriation would be proper. Obviously, charitable organizations must make certain limited expenditures which are not charitable in nature, for example, payment of...
salaries, utility costs, office operations costs, etc. Those administrative items are necessary incidents to the ongoing operations of a charity, as the charity could not reasonably function without them. The funds which a county lawfully contributes to a charity pursuant to § 15.1-24 must be used generally for charitable purposes. This does not require, however, that the charity maintain the county contributed funds in a separate trust account and expend them only for purposes that are strictly charitable, as opposed to those purposes which are administrative incidents of the charity. Accordingly, I believe it is within the authority of a county to make contributions as authorized by § 15.1-24 to a charity which the charity intends to use for lawful, charitable objects, including administrative expenses.

The question remains whether, under the circumstances described, the appropriation was lawful. If the purpose of the county's appropriation was to permit employees of the organization to cover up wrongdoing relating to their handling of organization funds, then the appropriation would be contrary to law even though the new funds may ultimately be used for charitable purposes. Your letter does not contain any facts which permit me to conclude that such a wrongful purpose was present. If such a wrongful purpose was not present, then I am unaware of any other basis on which the appropriation may be declared unlawful.

In the event that evidence can be adduced to establish wrongdoing or criminal conduct, the Commonwealth's attorney would have the function of prosecuting. Recovery of funds owed the State or federal governments will be the function of the appropriate collection official.

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1 Section 15.1-24 reads in pertinent part as follows: "Counties, cities and towns of this Commonwealth are authorized to make appropriations of public funds, of personal property or of any real estate to any charitable institution or association, located within their respective limits; provided, such institution or association is not controlled in whole or in part by any church or sectarian society...."

2 I assume that the administrative expenses are reasonable in relation to the charitable objects undertaken by the organization.
November 17, 1981

The Honorable Clinton Miller
Member, House of Delegates

You ask whether § 15.1-37.4 of the Code of Virginia (1950), as amended, authorizes a "traditional form" county to organize its board of supervisors into a combination of county-wide and local election districts, without a change in form of government.¹

Section 15.1-37.4 provides that the governing body of every county shall be elected by the qualified voters of such county. Further, if the members, or any of the members, of the governing body are elected by districts, each such district shall be composed of contiguous and compact territory, and so constituted as to give representation in proportion to population. Also, § 15.1-37.4 provides that nothing therein shall preclude appointment of more than one member to a single district.

Section 15.1-37.4 was enacted in 1971, and has not been amended since. Prior to 1971, boards of supervisors in "traditional form" counties could be organized only on the basis of local election districts. In 1971, this Office issued three Opinions that § 15.1-37.4 authorized boards of supervisors in "traditional form" counties to be organized not only into local election districts, but also into one county-wide, multi-member district.²

The next question to arise was whether "traditional form" counties could combine this new authority with the long-standing authority for local districts. In Opinions issued in 1972 and 1973, this Office ruled that such a combination was authorized only with a change in form of government.

In the 1972 Opinion, this Office stated that under the "traditional form" of government, there is no authority for one member of a board of supervisors to be elected at large. The Opinion went on to note that with the "county board form", § 15.1-700 expressly authorizes one member of the board of supervisors to be elected at large, and the others from magisterial districts.³

In the 1973 Opinion, a "traditional form" county was able to provide for the creation of an election district consisting of the county as a whole in addition to four local districts, but the effect of such a change results in a conversion to the county board form of government, which conversion must be approved in a referendum under § 15.1-698.⁴

The 1972 and 1973 Opinions do not give explicit reasons for finding a lack of authority, but the Dillon Rule of strict construction appears to be the underlying rationale. Dillon's Rule states that local governments have only those
powers expressly granted, or necessarily implied from express powers, or essential and indispensable.  

Section 15.1-700 expressly provides, as to the "county board form," that the board of county supervisors shall consist of one member elected from the county at large, and one member from each magisterial district in the county. There is no such explicit authority in § 15.1-37.4 for adding a member at large in the "traditional form" county.  

At the same time, § 15.1-37.4 has express provisions that apply if the members, or any of the members, of the governing body are elected by districts. The implication of the phrase "or any of the members" is that § 15.1-37.4 contemplates combinations of county-wide and local election districts.  

Nonetheless, the 1972 and 1973 Opinions are of long standing, and the General Assembly appears to have adopted their conclusion, with the passage in 1979 of the text now found in subsection D of § 15.1-571.1. Section 15.1-571.1(D) provides that the governing body of Lunenburg County (a "traditional form" county) may, by resolution, increase the number of election districts by adding an at-large district, and that such increase shall not have the effect of altering the existing form of county government in such county.  

Accordingly, it is my opinion that § 15.1-37.4 does not authorize a "traditional form" county to organize its board of supervisors into a combination of county-wide and local election districts, without a change in form of government.  

Section 15.1-571.1(D), however, provides a legislative model, if the General Assembly wants to authorize such combinations, without a change in form of government, for additional "traditional form" counties.


Six forms of county government are authorized by general law in Virginia. The oldest and most prevalent is that known as the "traditional form." Statutory provisions relating to its organizational structure are found primarily in §§ 15.1-37.4 to 15.1-130, and §§ 15.1-527 to 15.1-558. See Opinion to the Honorable C. Richard Cranwell, Member, House of Delegates, dated October 26, 1977, found in Report of the Attorney General (1977-1978) at 146.  

2 See Opinion to the Honorable John Paul Causey, Commonwealth's Attorney for King William County, dated June 28, 1971, and Opinion to the Honorable Charles J. Ross, Clerk, Board of Supervisors, dated June 30, 1971, found in

See also Opinion to the Honorable Frank D. Harris, Commonwealth's Attorney for Mecklenburg County, dated July 2, 1971, found in Report of the Attorney General (1971-1972) at 92.

Compare Opinion to the Honorable Robert C. Oliver, Jr., Commonwealth's Attorney for Northampton County, dated January 22, 1976, found in Report of the Attorney General (1975-1976) at 23 (due to changes per 1971 Constitution, "traditional form" counties may convert local districts to multi-member districts).

3See Opinion to the Honorable Eva Mae Scott, Member, House of Delegates, dated September 18, 1972, found in Report of the Attorney General (1972-1973) at 116.

4See Opinion to the Honorable James T. Edmunds, Member, Senate of Virginia, dated March 6, 1973, found in Report of the Attorney General (1972-1973) at 169.


5See, for example, Tabler v. Fairfax County, 221 Va. 200, 269 S.E.2d 358 (1980).


6Compare § 22.1-36 (composition of school board in school divisions composed of a single county) which provides that, in addition to the school board members selected by districts, the governing body may authorize the school board selection commission to appoint no more than two members from the county at large.


7I have also reviewed the legislation recently enacted or amended in connection with the 1981 reapportionment, and I find nothing that affects your inquiry. See, for example, §§ 24.1-17 and 24.1-17.1.

COUNTIES. BOUNDARIES. FACT-FINDING BODY TO ASCERTAIN LOCATION.

May 26, 1982

The Honorable W. Tayloe Murphy, Jr.
Member, House of Delegates

This is in reply to your letter of May 14, 1982, regarding the location of the boundary line between Richmond and Essex Counties as it pertains to the Rappahannock River.
Section 15.1-1026 of the Code of Virginia (1950), as amended, provides:

"Whenever a doubt shall exist or dispute arise as to the true boundary line between any two counties...in this State, the circuit courts of the respective counties... whose boundary is thus in doubt or dispute may each appoint not less than three nor more than five commissioners, who shall be resident freeholders of their respective counties...a majority of those appointed for each county...being necessary to act, who shall meet and proceed to ascertain and establish the true line."

In Newport News v. Warwick County and York County, 191 Va. 591, 61 S.E.2d 871 (1950), the Virginia Supreme Court construed this statute and noted that relevant evidentiary information regarding the location of a boundary may include official maps and surveys, the understanding of the populations residing in the counties and current official interpretations of common law and statutory rules regarding the location of boundaries.

I am advised that the Virginia Department of Highways and Transportation indicates that bridge plans, federal surveys and State maps locate the boundary between Richmond and Essex Counties at the midstream of the Rappahannock River. As your letter indicated, however, common understanding may be different and that too may be relevant in this matter.

Because the precise location of the boundary line between Essex and Richmond Counties involves a question turning primarily upon facts peculiar to the area such as maps, surveys and common understanding, I recommend that the question be submitted to a fact-finding body established pursuant to § 15.1-1026.

COUNTIES. COUNTIES MAY NOT ENACT COMPREHENSIVE WELL ORDINANCE ESTABLISHING CONSTRUCTION STANDARDS AND CONTROLLING MANNER IN WHICH WELLS ARE INSTALLED.

July 13, 1981

The Honorable Frank M. Morton, III
County Attorney for James City County

You have posed the following questions:

1. May a county require through a permitting process that any individual/applicant, prior to installing a deep or shallow well, obtain a county permit and comply with a comprehensive county well ordinance?

2. May a county require as a condition precedent to subdivision approval that the applicant comply with the
following: a. construct a central water system, and b. dedicate such system to the county?

3. May a county enact a comprehensive well ordinance establishing construction standards and controlling the manner in which a well is installed in order to protect the public health and guarantee the quantity and quality of water supplied by domestic water supply systems?

I will first answer questions 1 and 3 which are related.

Questions 1 and 3 must be answered in the negative. The State has occupied the field of well and water supply regulation both from the standpoint of protecting groundwater resources and the public health, and from the standpoint of insuring statewide uniformity of building regulations.

The Groundwater Act of 1973, § 62.1-44.83, et seq., of the Code of Virginia (1950), as amended, authorizes the State Water Control Board to protect the groundwater resources. Section 62.1-44.92 provides that the State Water Control Board, in conjunction with the Health Department, shall:

"[A]dopt rules... (4) Prescribing and enforcing general standards, jointly with the Department and compatible with the purposes of this chapter, for the construction and maintenance of wells including their casings, screens, fittings, valves, meters and pumps...."

The State Water Control Board has adopted Rules and Standards for Water Wells. Rule 8 requires that the construction and maintenance of all water wells in Virginia "be in compliance with the applicable provisions of 'Standards for Water Wells'...and with applicable State Department of Health regulations." The Health Department has published its "Waterworks Regulations," § 8.03 of which sets standards for drinking water wells.

The Health Department has statutory authority to regulate wells used for public water supply. Section 32.1-169 provides that the Health Department:

"[S]hall have general supervision and control over all water supplies and waterworks in the Commonwealth insofar as the bacteriological, chemical, radiological and physical quality of waters furnished for drinking or domestic use may affect the public health and welfare and may require that all water supplies be pure water."

Section 32.1-172 provides in part that "No owner shall establish, construct or operate any waterworks or water supply in this Commonwealth without a written permit from the Commissioner...."

Section 32.1-167(7) defines "waterworks" to mean any system serving the public, at least 15 connections, or an
average of 25 individuals, and § 32.1-167(6) defines "water supply" to mean "water taken into a waterworks." Section 32.1-164(8)(6) gives the Health Department authority to prescribe "[s]tandards as to the adequacy of an approved water supply and the siting of wells prior to the issuance of a septic tank permit, provided that no permit shall be required for the installation of private wells." Sections 15.1-341 and 15.1-342 require that water supply wells serving more than three connections secure Health Department approval.

Private wells not used as a public water supply are subject to State control under § 1704.3 of the Uniform Statewide Building Code. That section provides that where private sources of water supply may be used, "the location, construction and testing of the water source shall be as approved by the local State Health Department." Under § 36-98 of the Code of Virginia, the Uniform Statewide Building Code supersedes building codes and regulations of the counties and other political subdivisions.

Your letter indicates that James City County is considering establishing a reservoir and interconnecting it with groundwater supplies, and that, therefore, it is essential to protect the groundwater from possible pollution due to faulty well installation. You suggest that § 15.1-510 may provide the county with authority for a well permit ordinance. Section 15.1-510 authorizes a county to adopt measures consistent with State law needed to prevent pollution of water that may endanger the health of county residents.

Local governments have only those powers expressly granted or necessarily implied from express powers. This principle, sometimes referred to as the "Dillon Rule" is the rule governing the powers of localities in Virginia. See Opinion to the Honorable George R. St. John, County Attorney for Albemarle County, dated August 21, 1979, found in Report of the Attorney General (1979-1980) at 406. I find no express authority authorizing localities to regulate wells through a permit process. Since State regulation of wells appears to be complete, the general language of § 15.1-510 is insufficient authority for a county to enforce its own regulations. I, therefore, conclude that a county has no authority to enact a comprehensive ordinance controlling well construction standards and installation.

Your second question was whether a county has the authority to require an applicant for approval of a subdivision to (1) construct a central water system, and (2) dedicate such system to the county.

Section 15.1-299 provides that any county which has adopted regulations under Ch. 11 of Title 15.1 (dealing with planning, subdivision of land and zoning) may also adopt regulations subject to the provisions of Ch. 3.1 of Title 62.1 (the State Water Control Law), to:
"[R]equire the water source to be an approved source of supply capable of furnishing the needs of the eventual inhabitants of such subdivision proposed to be served thereby. Such regulations also may include requirements as to the size and nature of the water and sewer and other utility mains, pipes, conduits, connections, pumping stations or other facilities installed or to be installed in connection with the proposed water or sewer systems." (Emphasis added.) Section 15.1-299.

This section authorizes regulations to require "an approved source of supply capable of furnishing the needs of the eventual inhabitants" of the proposed subdivision. Section 15.1-466 also grants authority to prescribe the extent and manner of installation of a water supply. It says that a subdivision ordinance shall provide:

"(e) For the extent to which and the manner in which streets shall be graded, graveled or otherwise improved and water and storm and sanitary sewer and other public utilities or other community facilities are to be installed...."

Regulations adopted under these provisions could require, as a condition precedent to issuing the subdivision permit, that an adequate water system be provided. I find no authority, however, to require that such system be dedicated to the county.

I am, therefore, of the opinion that a county has the authority to require that a subdivision applicant construct an approved water supply system as a condition precedent to subdivision approval, but that it lacks the authority to require the dedication of such system to the county.

1Since this section of the Groundwater Act does not concern certificates of groundwater right, permits or registration statements, its application is general and not limited by § 62.1-44.87.

COUNTIES, CITIES AND TOWNS. BUDGETS MAY BE AMENDED AFTER ADOPTION. PUBLIC NOTICE AND HEARING REQUIRED.

December 18, 1981

The Honorable Charles K. Trible
Auditor of Public Accounts

You have asked whether the governing body of a county, city or town may, under the provisions of general law, amend its budget once adopted. Section 15.1-160 of the Code of Virginia (1950), as amended, requires the governing body to adopt its budget not later than the first day of the fiscal
year. I am aware of no statutory provision either permitting or prohibiting an amendment to the budget.

Implied Power Under Dillon's Rule

It is well-settled that Dillon's Rule has been adopted in the Commonwealth. Commonwealth v. Arlington County Board, 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977). The rule states:

"'[A] municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incidental to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation and the power is denied.'" City of Richmond v. Board of Supervisors of Henrico County, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958) (quoting Dillon on Municipal Corporations).

This Office has previously held that "the implied power need not be absolutely indispensable, and it is sufficient if it is reasonably necessary to effectuate a power expressly granted." See Report of the Attorney General (1975-1976) at 62.

It is generally understood that a governmental budget is merely a planning document. See Report of the Attorney General (1970-1971) at 83. Budgeted monies may not be spent unless there is enacted an appropriation. See § 15.1-162. Changes in budgetary planning are, however, inevitable. I am, therefore, of the opinion that power to amend the budget is both reasonably necessary to effectuate and incidental to the express power to adopt the budget.

Manner of Exercising Implied Power

There is a virtual identity between the express and implied powers, the power to adopt and to amend a budget. The method by which the budget may be adopted is set forth in great detail in § 15.1-162 which prescribes in part that:

"A brief synopsis of the budget which...shall be for informative and fiscal planning purposes only, shall be published once in a newspaper having general circulation in the locality affected, and notice given of one or more public hearings, at least seven days prior to the date set for hearing, at which any citizen of the locality shall have the right to attend and state his views thereon...."

Where fully implied powers are exercised the "reasonable selection of method" rule is often applied to permit localities to select any reasonable manner of
exercising such implied powers. Commonwealth v. Arlington County Board, supra. I am persuaded, however, that this is not a proper case for the application of the "reasonable selection of method" rule because the Code provides very specific procedures for exercising the express power. Thus, I conclude that the exercise of the implied power to amend a budget must be performed in the same manner set out in § 15.1-162 for the adoption of the budget. This procedure includes, but is not limited to, notice published at least seven days prior to a public hearing held at least seven days before the effective date of the proposed amendments to the budget.

COUNTIES, CITIES AND TOWNS. HOSPITALS. COUNTY'S MAXIMUM LIABILITY FOR HOSPITAL COSTS IN PROGRAM LIMITED TO COUNTY'S BUDGET APPROPRIATION FOR PROGRAM.

September 28, 1981

The Honorable Frederick G. Boucher
Member, Senate of Virginia

You ask whether the maximum liability of a county participating in the program of hospital and outpatient treatment and care for indigent and medically indigent persons is limited to the county's budget appropriation for that program.¹

Sections 63.1-134 through 63.1-140 of the Code of Virginia (1950), as amended, provide for a State and locally funded program that permits counties and cities to certify eligible individuals for treatment and care at hospitals approved by the State Board of Welfare (the "Board"). Section 63.1-139 requires an authorizing agent for a county or city to determine eligibility of persons entitled to hospitalization or treatment at public expense. That statute also requires the Board to promulgate uniform eligibility standards for such hospitalization. Section 63.1-136 authorizes counties and cities to select hospitals approved by the Board and to contract with them for "the minimum service to be rendered, the length of stay of patients, the cost of services rendered, and other relevant matters." Section 63.1-137, which is the basis for your question, provides that all such contracts shall specify that in the event the patient requires hospitalization or treatment beyond the period initially authorized by the locality and the attending physician so notifies the locality before the expiration of the initially authorized length of stay, such additional hospitalization or treatment shall be provided at the expense of the locality. You inquire whether this latter statutory provision obligates localities to pay costs for treatment and care in excess of funds appropriated for the treatment program by the local governing body.

Procedures for the expenditure of public funds by a county are explicitly provided for in the Code. In order for
a county to participate in any program such as the SLH program, the county board of supervisors must first follow statutory procedure for the appropriation of monies to fund it. See § 15.1-159.8, et seq. Subsequent to that budgetary action, the board of supervisors must then receive and audit all claims against the county and then approve and order warrants to be issued in settlement of those claims found to be valid. See § 15.1-547. The county board of supervisors cannot legally approve the issuance of a warrant or warrants in excess of the funds appropriated for any programs. See § 15.1-549.

It is well settled that if two statutes are in apparent conflict, they should be construed so as to permit both to stand, giving force and effect to each. See Kirkpatrick v. Board of Supervisors of Arlington County, 146 Va. 113, 136 S.E. 186 (1926). Section 63.1-137, providing for liability of a county for additional hospitalization or treatment expenses must, therefore, be interpreted in conjunction with the statutory prohibition against board of supervisors' approval of warrants in excess of funds appropriated to the program. I am, therefore, of the opinion that the county's maximum liability for participating in the SLH program cannot exceed the appropriations for the program approved by its governing body.

1This program is commonly called the State and Local Hospitalization Program ("SLH") program.

COUNTIES, CITIES AND TOWNS. NO AUTHORITY TO REGULATE SALE OF HANDGUNS BEYOND THAT EXPRESSLY GRANTED BY STATUTE.

June 9, 1982

The Honorable Edward M. Holland
Member, Senate of Virginia

You have asked whether Virginia localities have authority to regulate the sale of handguns and the sale of ammunition for handguns by individuals and dealers.

In Kisley v. City of Falls Church, 212 Va. 693, 695, 187 S.E.2d 168 (1972), the Virginia Supreme Court reviewed a challenge to the city's authority to adopt an ordinance regulating massage parlors. In upholding the locality's authority to adopt the ordinance, the court held:

"A local legislative body, in the exercise of its police powers, may forbid the doing of an act where State legislation is silent on the subject, and there can be no conflict between a statute and an ordinance where there is no statute dealing with the same subject matter...." (Emphasis added.)
With respect to the sale of handguns, there are several State statutes which regulate or deal with that subject. For example, § 15.1-523 of the Code of Virginia (1950), as amended, permits counties to impose a license tax upon persons engaged in the sale of pistols and § 58-394 imposes a State license tax upon retail dealers who sell pistols. Section 15.1-524 authorizes counties to require sellers of handguns to furnish the clerks of the circuit courts with certain information regarding the sale of such weapons. Section 15.1-525 requires a permit for the sale or purchase of handguns in any county having a population density in excess of one thousand per square mile. Furthermore, § 18.2-309 prohibits the sale of pistols to any minor.

In a 1968 Opinion, this Office opined that counties did not have the authority to enact an ordinance requiring the registration of guns. Report of the Attorney General (1968-1969) at 53. The principal basis for the conclusion in that Opinion was that State legislation had preempted localities from enacting regulatory schemes not specifically already authorized. During the nearly fourteen years since that Opinion, the law has not been amended. Accordingly, based upon the foregoing authority, I conclude that except as specifically permitted by law, counties may not adopt ordinances regulating the sale of handguns.

With respect to the sale of ammunition, however, I can find no State statute which regulates that subject. Therefore, there is no basis for concluding that the State has preempted localities from regulating that subject by ordinance as it has with respect to the sale of handguns. Nevertheless, the question remains whether a county has the authority to adopt an ordinance regulating the sale of ammunition.

Section 15.1-510 provides that "[a]ny 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...." The Virginia Supreme Court, in Kisley v. City of Falls Church, supra, relied, in part, upon similar language in the city charter to conclude that Falls Church had authority to adopt ordinances regulating massage parlors. While § 15.1-510 must be read against the broad backdrop of Dillon's Rule, I believe that § 15.1-510 is sufficiently broad to permit localities to regulate the sale of ammunition in the absence of State legislation on the subject. Of course, the regulations may not be arbitrary or unreasonable. Cf., Kisley v. City of Falls Church, supra.

In summary, for the reasons stated above, I am of the opinion that a county may not regulate the sale of handguns except as specifically permitted by State statute, but it may regulate the sale of ammunition for handguns.
In Andrews v. Shepherd, 201 Va. 412, 415, 111 S.E.2d 279, 282 (1959), the Virginia Supreme Court observed that the construction of State statute by the Attorney General is persuasive and entitled to great weight. The court stated that the legislature can be presumed to be cognizant of such construction, and the court further indicated, in that case, that it was noteworthy that the General Assembly had met on two occasions since the date of the Opinion in question without adopting any amendments to change the Attorney General's construction.

COUNTIES, CITIES AND TOWNS. PLANNING COMMISSIONS. ZONING. GOVERNING BODY NOT AUTHORIZED TO EXEMPT LOCAL PUBLIC UTILITY COMMISSION FROM STATUTORY PLANNING PROCESS.

August 3, 1981

The Honorable Frank W. Nolen
Member, Senate of Virginia

You ask about the authority of a governing body to make changes in the planning process set forth in Ch. 11 (Planning, Subdivision of Land and Zoning) of Title 15.1 of the Code of Virginia (1950), as amended. You first ask whether, under §§ 15.1-446.1 and 15.1-456, a governing body is authorized to exempt a local public utility commission from the statutory planning process.

Section 15.1-446.1 provides that the local planning commission shall prepare and recommend a comprehensive plan for the physical development of the territory in its jurisdiction, and as of July 1, 1980, every governing body in this State shall adopt a comprehensive plan.

Such plan shall show the commission’s long-range recommendations for general development of the territory covered, and may include, but need not be limited to, the designation of areas for public development, such as public service areas, and community service facilities, such as public buildings, waterworks, sewage disposal or waste disposal, and the like.

Under § 15.1-456, whenever a comprehensive plan has been adopted by the governing body, the plan shall control the location, character and extent of each feature shown on the plan. Thereafter, unless already shown on the adopted master plan, no public utility facility, whether publicly or privately owned, shall be constructed, established or authorized, unless and until its location, character and extent have been approved as substantially in accord with the adopted comprehensive plan.

The adoption of a comprehensive plan is a mandatory duty of the governing body and such duty may be enforced in an
action in mandamus. The evident purpose of §§ 15.1-446.1 and 15.1-456 is to require planning that is comprehensive, compulsory, and generally free from exemptions. Furthermore, certain exemptions are provided by § 15.1-457, but the exemptions are expressly restricted to agencies of the Commonwealth.

Accordingly, I am of the opinion that, under §§ 15.1-446.1 and 15.1-456, a governing body is not authorized to exempt a local public utility commission from the statutory planning process.

You next ask whether a governing body may impose upon itself, by ordinance, a "high-vote" limitation for overruling the planning commission.

Section 15.1-456(b) provides that a majority vote of the governing body shall overrule the planning commission. You ask whether the governing body may, by ordinance, require of itself a two-thirds vote to overrule the commission.

Section 15.1-427.1 provides that the governing body shall create a local planning commission to promote the orderly development of the political subdivision and its environs, and such commissions shall serve primarily in an advisory capacity to the governing body.

The planning process, under § 15.1-427.1, is vested in the governing body, except as modified by such provisions as § 15.1-456(b). Any self-imposed limitation for overruling the commission amounts to an additional delegation of power to the commission which, under § 15.1-427.1, is to serve primarily in an advisory capacity.

Any delegation of legislative authority, to an advisory body or otherwise, must be authorized by statute. Section 15.1-456 authorizes no additional delegation to the planning commission, and I find no other authority for such a delegation.

Accordingly, I am of the opinion that a governing body may not impose upon itself, by ordinance, a "high-vote" limitation for overruling the planning commission.

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1 Your inquiry relates to a city with no special powers in its charter. Accordingly, your inquiry is to be answered under general law.
3 See Opinion to the Honorable Robert F. Ripley, Jr., Commonwealth's Attorney for York County, dated January 14, 1977, found in Report of the Attorney General (1976-1977) at...
237 (mandatory review of school sites, notwithstanding constitutional powers of school boards).

Compare Opinion to the Honorable Adelard L. Brault, Member, Senate of Virginia, dated October 14, 1976, found in Report of the Attorney General (1976-1977) at 193 (public uses required to comport with comprehensive plan, even though public property generally exempt from zoning).

See Opinion to the Honorable George R. St. John, County Attorney for Albemarle County, dated March 14, 1980, found in Report of the Attorney General (1979-1980) at 404 (University of Virginia exempt from mandatory compliance with comprehensive plan).

See Opinion to the Honorable George P. Beard, Jr., Member, House of Delegates, dated October 19, 1978, found in Report of the Attorney General (1978-1979) at 203 (under § 15.1-493, statutory procedure is mandatory, but role of planning commission is merely advisory).


Compare § 15.1-491(c) (discretion as to what body issues special exception or use permits), and § 15.1-21 (joint exercise of powers does not relieve political subdivisions of obligations or responsibilities imposed by law).

COUNTY ATTORNEY. MUST MEET RESIDENCY REQUIREMENTS OF § 15.1-51 ONLY IF HE IS COUNTY OFFICER.

February 23, 1982

The Honorable V. Earl Dickinson
Member, House of Delegates

You have inquired whether a county attorney must reside in the county in which he will serve. The answer to your inquiry is governed by the provisions of § 15.1-51 of the Code of Virginia (1950), as amended.

Section 15.1-51 provides, in pertinent part, as follows:

"Every county officer, except deputy clerks of circuit courts, shall, at the time of his election or appointment, have resided thirty days next preceding his election or appointment, either in the county for which he is elected or appointed, or in the city wherein the courthouse of the county is or in a city wholly within the boundaries of such county...." (Emphasis added.)

The answer to the question of whether the county attorney must reside in the county he will serve depends upon whether the county attorney is a county officer, as distinguished from an employee or independent contractor. If he is a county officer, he is subject to the residency requirements.
Whether the county attorney is classified as an officer is a factual question that involves several factors.¹

It is my opinion that a county attorney is required to abide by the residency requirements of § 15.1-51 only if he can be classified as a county officer.

¹Those factors include, but are not necessarily limited to, the following: (1) the official creation of the Office of County Attorney, (2) the requirement of an oath of office, and (3) a fixed term of office.

COURTS. RECORDS. INFORMATION CONCERNING PENDING CASES MAY BE RELEASED TO NEWS MEDIA OR OTHER THIRD PARTIES AND MUST GENERALLY BE OPEN TO INSPECTION.

December 21, 1981

The Honorable James H. Harvell, III
Chief Judge, Seventh Judicial District

You have asked a series of questions pertaining to a case of driving while under the influence of intoxicants presently before your court. These questions are based on an interpretation of certain federal regulations, a copy of which you have included with your letters, and which you received in March of 1976 as part of a "pamphlet." It appears from your letter that the pamphlet is a publication entitled "The Virginia Plan for Privacy & Security of Criminal History Record Information" published by the Virginia Division of Justice and Crime Prevention on March 16, 1976.

Before I can answer your questions, I must explain the status of the federal regulations and the "pamphlet" to which you have referred in your letter.

The copy of the federal regulations you have sent to me were promulgated by the United States Department of Justice, and are taken from vol. 40, pp. 22114-22116 of the Federal Register, dated May 20, 1975. The regulations therein have since been amended, on March 19, 1976 (41 F.R. 11714), and on June 13, 1980 (45 F.R. 40114). The current amended regulations may be found at 28 C.F.R. Part 20; I have enclosed a copy of those regulations for your information.

The pamphlet you refer to, the "Virginia Plan for Privacy & Security of Criminal History Record Information" does not have the status of a regulation or rule. It was developed as a plan for implementing, in Virginia, the federal regulations about which you are inquiring. Following publication of the plan, the Virginia General Assembly enacted legislation¹ which adopted most of the provisions of these federal regulations as State law; accordingly, most of
these provisions now apply to all criminal justice agencies in Virginia. Moreover, in accordance with the General Assembly's directions, regulations have now been promulgated by the Virginia Criminal Justice Services Commission which, in large part, parallel the provisions of the federal regulations and the Virginia Code concerning the dissemination of criminal history information records. I have enclosed a copy of these State regulations for your information.

As I understand them, the questions you have posed are these:

(1) May a trial court release information concerning pending cases to the news media or other third parties?

(2) Would the same rule apply to treatment reports received by the trial court in VASAP (Virginia Alcohol Safety Action Project) cases?

(3) Assuming that the answer to question number one is affirmative, when does information about a contemporaneous court proceeding become criminal history record information (which cannot be released under the Justice Department regulations you have furnished me).

(4) Do the Justice Department regulations apply only to final judgments recorded in a computerized criminal record system funded by grants from the United States Law Enforcement Assistance Administration?

(5) What effect do these federal regulations have on the computerized court systems project being conducted by the Office of the Executive Secretary of the Supreme Court of Virginia?

I will answer your questions seriatim.

(1) Yes, a trial court may release information concerning pending cases to the news media or other third parties. Section 20.20(c) of the federal regulations (28 C.F.R. at p. 241) provides that:

"(c) Nothing in these regulations prevents a criminal justice agency from disclosing to the public criminal history record information related to the offense for which an individual is currently within the criminal justice system."

Similar language appears in § 9-111.3.C of the Code of Virginia (1950), as amended, and at § 2.0 of the regulations issued by the Criminal Justice Services Commission.

Moreover, § 20.20(b) of the federal regulations provides a blanket exemption from the regulations for criminal history record information contained in court records of public judicial proceedings, and a similar exemption appears in
§ 9-111.3.B of the Code of Virginia and at § 2.0 of the State regulations.

These provisions are compatible with §17-43 of the Code, which provides that the records and papers of every court shall be open to inspection by any person. Thus, a court not only may release such information, but absent some other provision precluding dissemination, it must make such information available for public inspection.

(2) In my opinion the same rule would apply to treatment reports received by the court in VASAP cases, except to the extent that such reports might contain medical information of a confidential nature. The fact that an individual has been assigned to VASAP and is being treated under that program would mean that he remains within the criminal justice system (subject to further court action pending completion or failure to complete the program) so that the provisions discussed above would apply.

(3) This question is no longer relevant because the language of the federal regulation (and of the State laws and regulations) has been changed so that it no longer refers to information which is "reasonably contemporaneous" but refers instead to "information related to the offense for which an individual is currently within the criminal justice system."

(4) As I have explained above, the provisions of the federal regulations have, in large part, been incorporated into Virginia law. Therefore, these provisions apply to all criminal justice agencies in Virginia, not merely to those operating with federal grants. Moreover, they apply to all criminal history record information in Virginia, not merely to information recorded in a federally-funded computerized criminal record system.

(5) The provisions of the federal regulations, as incorporated into Virginia Law, do apply to the activities of the computerized court system project being conducted by the State Supreme Court. I presume that the Executive Secretary of the Supreme Court has taken action to assure compliance with those provisions.

\[1\text{Chapter 771 [1976] Acts of Assembly 1229.}\]

COURTS NOT OF RECORD. PLAINTIFF'S APPEARANCE REQUIRED IN PERSON IN COURT BEFORE ENTRY OF JUDGMENT UNDER § 16.1-88.

March 22, 1982

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County
This is in reply to your recent letter inquiring about Rule 3D:5 of the Rules of the Supreme Court of Virginia (effective July 1, 1982) and § 16.1-88 of the Code of Virginia (1950), as amended. Rule 3D:5 requires a motion to be made by the plaintiff or his attorney "in person in court" before judgment may be entered in the plaintiff's behalf in a civil action in general district court. You ask whether such a personal appearance is required where the defendant fails to file a proper response under § 16.1-88 and its related § 8.01-28.

Section 16.1-88 provides, in pertinent part, that in civil actions upon a contract or to enforce any other obligations for the payment of money filed in a court not of record, under oath with a copy of the account if any, the proceeding shall be governed by § 8.01-28. That section provides, in pertinent part, that, in the circumstances described and with proper service on the defendant, the plaintiff "shall be entitled to a judgment on such affidavit and statement of account without further evidence unless the defendant appears and pleads under oath denying that the plaintiff is entitled to recover...."

I am of the opinion that Rule 3D:5 does not conflict with the statutes. The statutes have the effect of entitling the plaintiff to a judgment "without further evidence" if the defendant fails to contradict the plaintiff's affidavit in the manner prescribed by statute. Rule 3D:5 requires the plaintiff or his attorney to appear in court and make a motion to obtain the judgment. The language of Rule 3D:5 requiring the motion to be made "in person in court" is too clear to permit any different interpretation.

CRIMINAL LAW. APPLICABILITY OF § 18.2-291(2) TO PERSONS CONVICTED OF CRIMES OF VIOLENCE WHO LATER HAVE THEIR POLITICAL DISABILITIES REMOVED AND FEDERAL RIGHTS TO POSSESS FIREARMS RESTORED.

April 15, 1982

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You have asked whether the presumption contained in § 18.2-291(2) of the Code of Virginia (1950), as amended, applies to individuals convicted of crimes of violence who subsequently have had their political disabilities removed and who also have had their federal rights to possess firearms restored. You have also asked whether the fact of possession of a machine gun by such a person would be sufficient to constitute probable cause under § 18.2-290.

Section 18.2-290 provides that the unlawful possession or use of a machine gun for an offensive or aggressive purpose is punishable as a Class 4 felony. Section 18.2-291, in part, states that the possession or use of a machine gun
"shall be presumed to be for an offensive or aggressive purpose...[w]hen the machine gun is in the possession of, or used by, a person who has been convicted of a crime of violence in any court of record, state or federal, of the United States of America...."

In *Riley v. Commonwealth*, 213 Va. 273, 191 S.E.2d 727 (1972), the Supreme Court of Virginia upheld the constitutionality of a presumption arising out of the possession of a sawed-off shotgun, which presumption was comparable to that in § 18.2-291(2). While characterizing the presumption as a rebuttable one, the court also held, however, that one in possession of a sawed-off shotgun who previously had been convicted of a crime of violence was "more likely than not in possession of the weapon for an unlawful, 'offensive or aggressive' purpose." 213 Va. at 276. Consistent with Riley, I believe that the presumption set forth in § 18.2-291(2) is a constitutionally valid rebuttable presumption.

It is my further view that this rebuttable presumption obtains in the case of an individual previously convicted of a crime of violence who thereafter has had his political disabilities removed by the Governor and his right to possess firearms reinstated by the federal government. By way of comparison, I note that § 18.2-308.2A makes it unlawful for any person who has been convicted of a felony involving the use of a firearm under any State or federal law to knowingly and intentionally possess or transport any handgun. Section 18.2-308.2B, however, specifically excepts from the provisions of this statute "any person who has been pardoned or whose political disabilities have been removed pursuant to article V, section 12 of the Constitution of Virginia." No comparable provision exists in § 18.2-291. In my opinion, the failure of § 18.2-291 to incorporate language comparable to that contained in § 18.2-308.2B is an indication that the legislature intended that § 18.2-291 apply to an individual whose political disabilities have been removed.

I also note that this Office has previously opined that an absolute pardon by the Governor does not, in and of itself, serve to require the destruction of criminal history record information. Citing *Prichard v. Battle*, 178 Va. 455, 17 S.E.2d 393 (1941), that opinion noted that an absolute pardon does not remove the fact of an individual's prior conviction. Similarly, under the circumstances you pose, the subsequent actions taken by the State and federal governments do not alter the fact that the individual previously suffered a conviction for a crime of violence. Under these conditions, I believe that the rebuttable presumption contained in § 18.2-291(2) would apply to such an individual.

In accordance with the above conclusions, I am of the opinion that probable cause under § 18.2-290 would be established by proof that an individual in possession of a machine gun previously had been convicted of a crime of
violence despite the fact that in the interim he had had his political disabilities removed by the Governor and also had had his federal right to possess firearms restored. While the rebuttable presumption in § 18.2-291(2) would arise in such an instance, such a defendant would, of course, have the right to present evidence to refute this presumption. Part of the evidence which he might seek to present would be the actions taken by the State and federal authorities in restoring certain of his civil rights.


CRIMINAL LAW. BOOK DESCRIBING HOW TO GROW MARIJUANA DOES NOT FALL WITHIN DEFINITION OF DRUG PARAPHERNALIA.

April 26, 1982

The Honorable Paul A. Sciortino
Commonwealth's Attorney for the City of Virginia Beach


As used in Art. 1.1, Title 18.2, drug paraphernalia is defined in part as "all equipment, products, and materials of any kind which are intended...for use in planting, propagating, cultivating, growing, harvesting...marijuana..." The examples of drug paraphernalia set forth in § 18.2-265.1 are kits, diluents or implements. The only reference to written materials is found in § 18.2-265.2, which details the types of evidence courts may consider in determining whether an object is drug paraphernalia. I also note that controlled paraphernalia set forth in § 54-524.109:1 relates to instruments or implements rather than written matter.

In my opinion, drug paraphernalia as defined in § 18.2-265.1 is limited to equipment, products and materials for use in planting, etc., marijuana, and does not encompass written materials such as the book to which you have referred.

I would call to your attention, however, that this book may fall within the prohibition of § 18.2-255.1.
CRIMINAL LAW. DRIVING UNDER INFLUENCE. CERTIFICATE BY
INDIVIDUAL CONDUCTING BREATH TEST UNDER § 18.2-268 NEED NOT
BE NOTARIZED IN ORDER TO BE DULY ATTESTED UNDER PROVISIONS
OF § 18.2-268(r1).

June 23, 1982

The Honorable James Michael Shull
Commonwealth's Attorney for Scott County

You have asked two questions pertaining to the
requirements of certificates issued by individuals conducting
breath tests under the provisions of § 18.2-268 of the Code
of Virginia (1950), as amended.

You attached a copy of a form identified as DCLS-FS-024,
supplied by Division of Consolidated Laboratory Services.
The form has spaces for the signatures of the breath test
operator and a notary public. Your first question is whether
it is necessary that the jurat (certificate by notary public)
on the form be completed in order to make the certificate
"duly attested," as required by § 18.2-268(r1). Your second
question is whether, in those instances where the jurat has
been completed by a magistrate, it can be considered "mere
surplusage" so that the magistrate need not be called to
testify as to the jurat.

The jurat in question contains the language "Subscribed
and sworn to before me...." However, as you have pointed
out, § 18.2-268(r1) requires only that the certificate be
"duly attested by the authorized individual conducting the
breath test..." in order to be admissible as evidence in
court. This Office has previously opined that § 18.2-268(r1)
prescribes no particular method of attestation and,
therefore, the certificate is "duly attested" as required by
that section, by certification or affirmation without the
administration of an oath. See Report of the Attorney
General (1977-1978) at 118. Because the purpose of the jurat
is to permit the attestation to be done under oath, it is my
opinion that the jurat need not be completed in order for the
certificate to be considered "duly attested" under the
provisions of § 18.2-268(r1). Thus, your first question is
answered in the negative.

In reply to your second question, it is my opinion that,
if the jurat has been completed, it may be considered
surplusage insofar as determining whether the certificate has
been "duly attested" under the provisions of § 18.2-268(r1).
Therefore, it is unnecessary to call the person who signed
the jurat (the magistrate in your case) as a witness.

Section 18.2-268(r1) provides, in pertinent part, that:
"Any individual conducting a breath test under the provisions
of this section and as authorized by the Division shall issue
a certificate which will indicate that the test was conducted
in accordance with the manufacturer's specifications, the equipment on which the breath test was conducted has been tested within the past six months and has been found to be accurate, the name of the accused, the date, the time the sample was taken from the accused, the alcoholic content of the sample, and by whom the sample was examined. The certificate, as provided for in this section, when duly attested by the authorized individual conducting the breath test, shall be admissible in any court in any criminal or civil proceeding as evidence of the facts therein stated and of the results of such analysis...." (Emphasis added.)

CRIMINAL LAW. DRIVING UNDER INFLUENCE. INDIVIDUAL SUSPECTED OF DRIVING UNDER INFLUENCE NOT ENTITLED TO BREATH TEST PRIOR TO ARREST IF BREATH TEST EQUIPMENT IS NOT AVAILABLE. NO OBLIGATION ON LAW ENFORCEMENT AGENCY TO PURCHASE SUCH EQUIPMENT.

August 31, 1981

The Honorable Joseph A. Gallagher, Judge
Thirty-First Judicial District

You have asked whether § 18.2-267(a) of the Code of Virginia (1950), as amended, which provides in pertinent part that "[a]ny person who is suspected of a violation of § 18.2-266 shall be entitled, if such equipment be available, to have his breath analyzed to determine the probable alcoholic content of his blood..." should be interpreted so as to imply a duty on law enforcement personnel to make such equipment available so that a suspect will not be deprived of his right to a "balloon test."

Section 18.2-2671 must be read in conjunction with § 18.2-268, Virginia's "implied consent law," which applies after the suspect has been placed under arrest.2 The breath analysis provided for in § 18.2-267 is to be administered prior to the suspect's arrest, and is really a tool to determine whether there is probable cause to charge the suspect with driving while intoxicated ("DWI"). That this is the purpose of this preliminary test is made clear by the provisions of § 18.2-267(e). The legislature apparently wanted to make available to the motorist, and to the law enforcement officer, a quick method of determining whether an arrest should be made for alcohol intoxication so that the time consuming steps involved in formally charging the suspect with DWI could be avoided in some cases.

The use of the preliminary analysis as a means of determining probable cause for a DWI arrest is not the sole method available to law enforcement personnel to aid in making such a determination. Law enforcement officers are trained to detect intoxication by observation of the behavior, speech and breath odor of the suspect. Various sobriety tests can be used to determine whether physical coordination and reactions have been impaired. Moreover, the
breath analysis authorized by § 18.2-267 measures only the alcohol content of the blood, while the provisions of § 18.2-266 apply equally to driving under the influence of any intoxicating substance, including legal and illegal drugs. Thus, an officer might well find probable cause for a DWI arrest even where a breath analysis gave a negative indication as to alcohol intoxication.

These factors, coupled with the fact that § 18.2-267(e) makes the results of the preliminary breath analysis inadmissible as evidence, would indicate that the provision for this breath test was not meant to be a constitutionally protected right but merely a privilege which might, in some cases, permit a suspect to avoid the process of arrest. The fact that the legislature granted the privilege only "if such equipment be available" would seem to support this conclusion. Such language is an express condition to the granting of the privilege.

Therefore, it is my opinion that your inquiry should be answered in the negative. There is no obligation to make equipment available to provide a preliminary breath test to those suspects who request it, even though there is an obligation to provide such test if the equipment is available. Whether to purchase such equipment is a determination which must be left to the discretion of local law enforcement agencies.

\[1\] Section 18.2-267 reads as follows: "Analysis of breath to determine alcoholic content of blood.--(a) Any person who is suspected of a violation of § 18.2-266 shall be entitled, if such equipment be available, to have his breath analyzed to determine the probable alcoholic content of his blood. Such breath may be analyzed by any police officer of the Commonwealth, or of any county, city or town, or by any member of the sheriff's department of any county, in the normal discharge of his duties.

(b) The Department of General Services, Division of Consolidated Laboratory Services, shall determine the proper method and equipment to be used in analyzing breath samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same.

(c) Any person who has been stopped by a police officer of the Commonwealth, or of any county, city or town, or by any member of the sheriff's department of any county and is suspected by such officer to be guilty of a violation of § 18.2-266, shall have the right to refuse to permit his breath to be so analyzed, and his failure to permit such analysis shall not be evidence in any prosecution under § 18.2-266, provided, however, that nothing in this section shall be construed as limiting in any manner the provisions of § 18.2-268.

(d) Whenever the breath sample so taken and analyzed indicates that there is alcohol present in the blood of the person from whom the breath was taken, the officer may charge
such person for the violation of § 18.2-266, or a similar ordinance of a county, city or town wherein the arrest is made. Any person so charged shall then be subject to the provisions of § 18.2-268, or of a similar ordinance of a county, city or town.

(e) The results of such breath analysis shall not be admitted into evidence in any prosecution under § 18.2-266, the purpose of this section being to permit a preliminary analysis of the alcoholic content of the blood of a person suspected of having violated the provisions of § 18.2-266.

(f) Police officers or members of any sheriff's department shall, upon stopping any person suspected of having violated the provisions of § 18.2-266, advise such person of his rights under the provisions of this section.

Section 18.2-268(b) provides: "Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this Commonwealth on and after January one, nineteen hundred seventy-three, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood, if such person is arrested for violation of § 18.2-266 or of a similar ordinance of any county, city or town within two hours of the alleged offense. Any person so arrested shall elect to have either the breath or blood sample taken, but not both. It shall not be a matter of defense that either test is not available."

CRIMINAL LAW. RECKLESS DRIVING. INDIVIDUAL WHO ATTEMPTS TO ELUDE PURSUING POLICE OFFICER IN HIS VEHICLE NOT GUILTY OF VIOLATION OF § 46.1-192.1 UNLESS OFFICER HAS GIVEN INDIVIDUAL VISIBLE OR AUDIBLE SIGNAL TO STOP. INDIVIDUAL MAY BE GUILTY OF RECKLESS DRIVING AS DEFINED AT § 46.1-189.

September 8, 1981

The Honorable Lawrence Janow, Judge
Juvenile and Domestic Relations District Court
Twenty-Fourth Judicial District

You have asked whether a driver who is aware that a police officer is in pursuit and who increases his speed to elude that police officer is guilty of a violation of § 46.1-192.1 of the Code of Virginia (1950), as amended, if the police officer has given no visible or audible signal to the driver to stop, other than turning his vehicle and pursuing the driver.

There is no definition of "visible or audible signal" in the motor vehicle code, but it seems self-evident that those terms were meant to include a siren and/or flashing lights on a police vehicle, a hand or voice signal from an officer on foot or in his vehicle, establishment of a roadblock, or any of a number of other types of indicators. It is my opinion that almost any signal, so long as it could be understood by
a driver to indicate that he must stop, would satisfy the statute.

The question you pose, however, assumes that no visible or audible signal is given. Under those circumstances, even assuming that the driver knew that he was being pursued, I am of the opinion that § 46.1-192.1 would not apply. A visible or audible signal is a prerequisite to prosecution under § 46.1-192.1; however, that is not to say that the driver could not be found guilty or reckless driving or some other offense. It is my opinion that a driver who purposely attempts to elude a pursuing police officer could be guilty of reckless driving under § 46.1-189, the general reckless driving rule, even if he is not guilty of a violation of any of the specific prohibitions of §§ 46.1-190 through 46.1-192.1.

Therefore, it is my opinion that your inquiry should be answered in the negative: a driver cannot be guilty of a violation of § 46.1-192.1 if the police officer has given him no visible or audible signal to stop, even if the driver is aware that the officer is pursuing him and increases his speed to elude him. However, it is also my opinion that such driver may be guilty of reckless driving as generally defined at § 46.1-189.

1Section 46.1-192.1 provides that: 
"[Reckless Driving]; disregarding signal to stop by police officers; penalties.--Any person who having received a visible or audible signal from any police officer to bring his motor vehicle to a stop, shall operate such motor vehicle in a wilful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle or endanger other property or person, or who shall increase his speed and attempt to escape or elude such police officer, shall be guilty of reckless driving...."

2Section 46.1-189 provides: "Irrespective of the maximum speeds herein provided, any 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; provided that the driving of a motor vehicle in violation of any speed limit provision of § 46.1-193 shall not of itself constitute ground for prosecution for reckless driving under this section."

CRIMINAL LAW. USE OF FIREARM IN COMMISSION OF FELONY. H.B. 2 WOULD REQUIRE THAT ONLY PERSON ACTUALLY HOLDING FIREARM COULD BE PROSECUTED UNDER § 18.2-53.1.

March 8, 1962

The Honorable Cliffton A. Woodrum
Member, House of Delegates
This is in reply to your letter of March 5, 1982, in which you inquired whether an amendment to H.B. 2, amending § 18.2-53.1 of the Code of Virginia (1950), as amended, which sets forth penalties for use or display of a firearm in the commission of certain felonies, would apply only to the person actually holding the firearm.

House Bill 2 reads in pertinent 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 [as a principal in the first degree] murder, rape, robbery, burglary, malicious wounding as defined in § 18.2-51, or abduction...."

The language in the brackets is the amending language about which you inquire.

The Supreme Court of Virginia has just recently had the opportunity to interpret § 18.2-53.1. In Cortner v. Commonwealth, 222 Va. 557, S.E.2d (1981), the defendant contended that because he did not actually hold the gun used in the robbery he should not have been convicted of using a firearm in the commission of a felony. In affirming the conviction, the Supreme Court referred to § 18.2-18 which permits in the case "of every felony, every principal in the second degree..." to be tried and convicted as if he were a principal in the first degree. The court concluded that "[a]lthough Cortner never actually possessed the gun used in the robberies, he acted in concert with Chears, who did display the weapon...." 222 Va. at 563.

CRIMINAL PROCEDURE. COURT-APPOINTED INTERPRETER. COURT MAY ORDER PUBLIC PAYMENT FOR INTERPRETER WHERE NECESSARY.

August 24, 1981

Mr. Fred P. Yates, Jr., Director
Virginia Council for the Deaf

You have asked whether local law enforcement agencies are responsible for the cost of providing a qualified interpreter when needed to successfully communicate with a deaf person being detained, under arrest, or awaiting trial.

Section 19.2-164 provides that in any criminal case in which a deaf person is the accused, an interpreter shall be appointed by the judge of the court in which the case is to be heard unless the accused first obtains an interpreter. It further provides:

"In either event the compensation of such interpreter shall be fixed by the court, and shall be paid from the general fund of the State treasury, as part of the
expense of trial, but such fee shall not be assessed as part of the costs...."

This Office has held that if an interpreter is needed for the defense of an indigent person, the expense of providing an interpreter prior to trial is payable out of the State treasury from the appropriation for criminal charges, on the certificate of the court finding such services to be necessary. See Report of the Attorney General (1965-1966) at 89. The procedure for obtaining such payments is set forth in § 19.2-332, which provides:

"Whenever in a criminal case an officer or other person renders any service required by law for which no specific compensation is provided, or whenever any other service has been rendered pursuant to the request or prior approval of the court, the court shall allow therefor such sum as it deems reasonable, including mileage at a rate provided by law, and such allowance shall be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court stating the nature of the service...."

There is no federal constitutional right to the appointment of an interpreter at public expense accorded to every deaf defendant. The appointment of an interpreter even at trial is, absent special State statutory provisions like § 19.2-164, within the sound discretion of the court. See U.S. v. Rodriguez, 424 F.2d 205 (4th Cir. 1970), cert. den. 400 U.S. 841, 27 L.Ed.2d 74, 91 S.Ct. 83 (1970).

In the situation involving the arrest or detention of a deaf person, the propriety and ultimate use to be made in criminal proceedings of any communications, interrogations and notices by law enforcement officials must depend on the operative facts in each case. See Annot., 80 A.L.R.2d 1084 (1961); Annot., 36 A.L.R.3d 276 (1971). For instance, a particular deaf person may be better able to communicate through the exchange of written messages than through an interpreter. Certainly, where statements or waivers by a criminal defendant are to be relied upon by the Commonwealth, the burden is upon the Commonwealth to show that the statement or waiver was, considering the totality of surrounding circumstances, intelligently and freely made. See White v. Commonwealth, 214 Va. 559, 203 S.E.2d 443 (1974). This burden attends not only where a deaf defendant is involved, but also where there exists any impediment to effective communication, such as a difference in language, or a defendant's limited intellectual ability. See Negron v. State of New York, 434 F.2d 386 (2d Cir. 1970).

As you have pointed out in your letter, federal regulations to assure nondiscrimination based on handicap in programs receiving federal financial assistance from the Department of Justice promote the use of interpreters for law enforcement agency communications with deaf persons. See 28 C.F.R. §§ 42.501 through 42.540. However, these regulations
concerning "auxiliary aids" for communication with the handicapped apply only to agencies which receive the federal financial assistance and which employ fifteen or more persons. See 28 C.F.R. 42.503(f). Many local law enforcement agencies are not encompassed within the portions of these federal regulations requiring interpreter services. These regulations, therefore, create no comprehensive right to interpreter services on behalf of deaf persons.

Accordingly, it is my opinion that local law enforcement agencies are not absolutely required in all instances to procure a sign language interpreter at public expense when a deaf person is arrested, detained or awaiting trial. It may well be that written communications with the deaf person are appropriate and satisfactory in view of the particular stage of the proceedings and use which will be made of the communications. Where communications without an interpreter will not suffice, or where the deaf person applies for the appointment of an interpreter, § 19.2-332 provides a mechanism for the approval of interpreter services by the court, and for the court-designated payment therefor from the State treasury. This mechanism can be used even for interpreter services rendered while the deaf person is under arrest, detention or awaiting trial.

1Sections 2.1-570 through 2.1-573 of the Code of Virginia (1950), as amended, provide that State agencies are responsible for obtaining and paying, through cooperation with the Council for the Deaf, a qualified interpreter when needed to communicate with a deaf person involved in agency proceedings or receiving services. However, counties, cities, towns and agencies thereof are exempted from this provision. Also § 63.1-85.4:1 provides for the employment of interpreters through the auspices of the Council for the Deaf, but only by State and local legislative bodies.

2This prior Opinion was based upon § 19.1-315, the basis of present § 19.2-332. See House Doc. No. 20, 1975 General Assembly, p. 125.

CRIMINAL PROCEDURE. DEFENDANT'S ADMISSION OF GUILT DURING TRIAL NOT TANTAMOUNT TO GUILTY PLEA. JUDGE MAY NOT TAKE CASE FROM JURY ABSENT EXPRESS WAIVER OF RIGHT TO JURY TRIAL.

June 28, 1982

The Honorable Lester E. Schlitz, Judge
Circuit Court of the City of Portsmouth

You have asked several questions in the context of the following factual situation:

1. defendant is indicted for forgery and uttering;
2. defendant has a past record for forgery and uttering;
3. defendant pleads not guilty and is tried by a jury;
4. after Commonwealth rests its case, defendant takes the stand and admits his guilt.

Your first question is whether the defendant's admission of guilt is tantamount to a change of his plea from not guilty to guilty, thus requiring the court to try the case. Article I, § 8 of the Constitution of Virginia (1971) provides in pertinent part that in case of a plea of guilty to a criminal charge "the court shall try the case."

It is my opinion that a defendant's admission of guilt during trial is not the same as changing a plea of not guilty to a plea of guilty. As stated by the Supreme Court of the United States, "[A] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction...." Boykin v. Alabama, 395 U.S. 238, 242 (1969). Even if facts are established that will assuredly result in a conviction, the burden of proof to establish the guilt of the accused beyond a reasonable doubt remains with the Commonwealth throughout the trial. Potts v. Commonwealth, 113 Va. 732, 734, 73 S.E. 470 (1912).

You also inquire whether the court may take the case from the jury in such a situation, conclude it and sentence the defendant. To be valid, a guilty plea requires that a defendant intentionally relinquish or abandon his right to a trial by jury. McCarthy v. United States, 394 U.S. 459, 466 (1969). The intentional relinquishment of the accused's right to a jury trial cannot be inferred from his factual admissions during the trial. Such a waiver of the right to trial by jury must be with the defendant's express consent. See Edwards v. Sasser, 462 F.Supp. 374, 377 (E.D. Va. 1979).

It is my opinion, therefore, that the judge cannot take the case from the jury and sentence the defendant in the factual situation which you present.

Your next question is, if the jury continues to hear such a case, whether the Commonwealth may offer evidence of the defendant's bad character, including his criminal record, for the purpose of guiding the jury in fixing sentence. Specific prior instances of wrong-doing may be introduced in the prosecution's case-in-chief to show intent, plan, scheme or motive, etc. See Kirkpatrick v. Commonwealth, 211 Va. 269, 176 S.E.2d 807 (1970). In addition, once the defendant has taken the stand, the prosecution may attack his character as part of the impeachment process. See Sadoski v. Commonwealth, 219 Va. 1069, 254 S.E.2d 100 (1979). Moreover, whether the accused testifies or not, when the defense has in some manner introduced evidence of the accused's good character, the Commonwealth may introduce evidence in rebuttal but not evidence of specific acts of bad conduct. See Land v. Commonwealth, 211 Va. 223, 176 S.E.2d 586 (1970).

Because there is no authority which permits the Commonwealth to offer evidence of the defendant's bad character, including his criminal record, except in the situations discussed above, I am of the opinion that the law does not permit the
You further inquire if the Commonwealth cannot show the defendant's past record for punishment purposes should the defendant be allowed to offer evidence in mitigation of punishment. As discussed at some length by the United States Court of Appeals for the Fourth Circuit in Vines v. Muncy, 553 F.2d 342 (4th Cir. 1977), it appears that under Virginia law a criminal defendant may introduce evidence in the hopes of mitigating the punishment which he anticipates receiving from a jury. "[T]he clear implication of most of the relevant Virginia decisions is that evidence going solely to the punishment issue--at least within reasonable limits--is admissible." Id. at 348. This Office has previously opined that, because punishment is a material issue for the jury in a criminal trial, an accused may present evidence relative to sentence; however, such evidence may be rebutted by the Commonwealth. See Report of the Attorney General (1976-1977) at 61.

Finally, you question whether it is permissible for a lawyer to request a trial by jury merely to "avoid the constitutional requirement that the Court try all cases in which there is a guilty plea and to avoid a bad criminal record from being considered in fixing punishment." Defense strategy, including the decision to enter a plea of not guilty, is a matter for the accused to decide with the advice of counsel. As long as the court is satisfied that the accused's plea of not guilty is knowingly and intelligently made, I am of the opinion that the court may not go behind the accused's decision for purposes of requiring that a contrary plea be entered.

CRIMINAL PROCEDURE. FAILURE OF COMMONWEALTH TO MOVE FOR FORFEITURE OF RECOGNIZANCE DURING DEFENDANT'S ABSCONDING FROM CUSTODY.

June 29, 1982

The Honorable Anthony P. Giorno
County Attorney for Patrick County

You have asked several questions regarding the forfeiture of bail and recognizances. First, you inquire whether § 19.2-143 of the Code of Virginia (1950), as amended, permits the forfeiture of a recognizance under the following circumstances: A defendant posted a cash bond guaranteeing his appearance at a preliminary hearing. He did not appear at the hearing and was not rearrested until four years later. In the interim, the Commonwealth made no attempt to have the recognizance forfeited. After defendant's rearrest, however, the Commonwealth moved for the forfeiture of the recognizance.
Section 19.2-143 in part provides that in the event a person fails to appear in adherence to the terms of his recognizance, then "a hearing shall be held...to show cause why said recognizance or any part thereof should not be forfeited...". The statute then goes on to provide, subject to certain qualifications, that if the court orders the forfeiture of the recognizance, it shall record or docket the finding of default. This recording or entering of the default has the effect of forfeiting the recognizance.

This Office has previously held that, pursuant to § 19.2-135, if a cash recognizance is given, the court may forfeit all or any part of the recognizance consistent with the above procedure. In view of the mandatory language used in § 19.2-143, that procedure must be employed prior to the forfeiture of the recognizance. It is my further view, however, that nothing in § 19.2-135 or 19.2-143 requires a court to give notice and conduct a hearing within any prescribed time subsequent to the defendant's failure to appear. I am aware of no statutory or constitutional duty imposed on the Commonwealth to seek forfeiture under § 19.2-143 at any particular point during a defendant's absconding from custody.

In the particular circumstances presented in your question, however, the Commonwealth did not attempt to move for forfeiture pursuant to § 19.2-143 until the defendant had already been returned to custody. Under these circumstances, I must conclude that a forfeiture of defendant's recognizance would be improper. Section 19.2-143 states that, after the court has conducted the show cause hearing and has found that the recognizance or a portion thereof should be forfeited, "the default shall be recorded therein, unless, the defendant...be brought before the court within thirty days of the findings of default...". This statute further provides that if a defendant appears before the court within twelve months of the findings of default, "the court shall remit part or all of any bond previously ordered forfeited by the courts." These provisions appear to provide no authority for the court to order the forfeiture of the recognizance if the defendant appears before the court within thirty days after the findings of default. The statute thus appears to provide for no sanctions against the present defendant, even though his return to the custody of the court was involuntary. While it may seem undesirable that such a defendant would avoid the forfeiture of his recognizance, I am obligated to construe § 19.2-143 as it is written. Accordingly, I conclude that a forfeiture in the present case which you present would be improper.

You next inquire whether the Commonwealth may appeal a general district court's refusal to order the forfeiture of a recognizance or its decision to forfeit only a minimal amount of the recognizance. If the matter is civil in nature, then an appeal would lie as in other civil cases. If the matter at hand is criminal in nature, however, then no appeal is permissible because, under § 19.2-317 and Art. VI, § 1 of the
Constitution of Virginia (1971), an appeal by the Commonwealth in a criminal case is allowed only where the case involves the violation of a law relating to State revenue. It is my opinion that the matter is civil in nature and that, therefore, § 19.2-317 and Art. VI, § 1 are not applicable.

The Supreme Court of Virginia in Collins v. Commonwealth, 145 Va. 468, 134 S.E. 688 (1926), pointed out that, while the taking of a recognizance arises out of a matter which is criminal in nature, "the execution of the bond and the effort of the Commonwealth to collect a debt due by reason of the forfeiture of the recognizance is a matter purely civil...." 145 Va. at 471. It is my view that the actual entry of an order of forfeiture is civil in nature as well. While there is no Virginia decision precisely on point, the general weight of authority holds that a proceeding for forfeiture of bail is civil in nature even though it arises out of a criminal proceeding. Thus, I conclude that the Commonwealth may properly appeal a district court's decision concerning the forfeiture of a recognizance.


Criminal Procedure. Habitual Offender Convicted Under § 46.1-387.8 Not Eligible for Community Diversion Under § 53-128.16, et seq.

July 2, 1981

The Honorable Percy Thornton, Jr., Judge  
Circuit Court of Prince William County

You have asked whether a person sentenced as an habitual offender under § 46.1-387.8 of the Code of Virginia (1950), as amended, can be considered for community diversion under the provisions of § 53-128.16, et seq. (Community Diversion Incentive Acts). The latter sections permit localities to provide sentencing alternatives for certain nonviolent offenders.
Section 46.1-387.8 provides that a person who operates a motor vehicle after being adjudged an habitual offender "shall be punished by confinement in the penitentiary not less than one nor more than five years...and no portion of such sentence shall be suspended..." except in emergencies requiring such operation to save life or limb. Clearly, the statute requires a mandatory sentence of one year unless the facts of a particular case fit within the specified "emergency" category.

Prior Opinions have held that this mandatory sentence must be imposed despite other general statutes permitting flexibility in sentencing alternatives. See Report of the Attorney General (1974-1975) at 284. I find no language in the Community Diversion Incentive Acts creating an exception to the mandatory sentencing provisions of § 46.1-387.8. I note that § 53-128.17 specifically requires that community diversion programs not be utilized in lieu of supervised probation. Such admonition would apply with even greater force in cases calling for mandatory sentences. Accordingly, I am of the opinion that an individual convicted under § 46.1-387.8 is not eligible for community diversion pursuant to § 53-128.16, et seq., unless the court determines that the "apparent extreme emergency" exception is applicable.

CRIMINAL PROCEDURE. RESTITUTION. AMOUNT APPEARING IN JUDGMENT ORDER MAY NOT BE DOCKETED IN JUDGMENT LIEN DOCKET BOOK OF CIRCUIT COURT.

September 29, 1981

The Honorable James F. Tobey, Clerk
Circuit Court of the City of Salem

You have asked whether an amount appearing in a judgment order as restitution to be paid by a criminal defendant under §§ 19.2-305 and 19.2-305.1 of the Code of Virginia (1950), as amended, may be docketed in the judgment lien docket of the circuit court and, if so, whether interest should be charged thereon as on any other judgment.

Under §§ 19.2-305 and 19.2-305.1 restitution is, or may be required as, a condition for awarding probation or suspending sentence after conviction of a criminal offense. Section 19.2-303 permits a court after conviction of a criminal offense to suspend imposition of a criminal sentence in whole or in part and to place the defendant on probation. Under § 19.2-305 the court may require that restitution be made for any damage or loss caused by the offense for which the defendant was convicted. Some restitution is a mandatory condition of probation or suspension of sentence under § 19.2-305.1 for most crimes which result in damage or loss to property. Under this latter statute the court is required to include in its judgment order the amount and terms of the restitution required. The defendant's unreasonable failure to comply with the order of restitution will result in
revocation of probation or imposition of the suspended sentence. See § 19.2-305.1(D).

Under § 8.01-446 only judgments for money are to be docketed in the judgment lien docket book. Restitution under §§ 19.2-305 and 19.2-305.1 is not a judgment for money within the meaning of § 8.01-446 as might be awarded in a civil action against the defendant and the amount of such restitution may not, therefore, be entered in the judgment lien book. Nor is there any statutory authority for docketing the amount of restitution as a part of costs, fees or fines on which execution may later issue. See § 19.2-328, et seq. and § 14.1-85, et seq. As restitution is not a judgment for money nor includable as a part of costs, no amount of interest is chargeable thereon, other than as stated in the judgment order as part of the terms of restitution itself.

CRIMINAL PROCEDURE. § 18.2-465.1 DOES NOT REQUIRE EMPLOYER TO PAY EMPLOYEE WAGES FOR TIME MISSED BECAUSE OF JURY DUTY.

October 26, 1981

The Honorable Edna D. Barber Commonwealth's Attorney for Northumberland County

You ask whether § 18.2-465.1 of the Code of Virginia (1950), as amended, requires an employer to pay an employee wages for those days missed because of jury duty and, if so, whether the amount so paid is properly reduced by the compensation received for the jury service.

Section 18.2-465.1 provides in part that in the event a person is summoned for jury duty he may not be discharged from employment, nor may he be made "to use sick leave or vacation time, as a result of his absence from employment due to such jury duty...." The statute, however, is silent with respect to the payment of wages in connection with such jury duty. Section 18.2-465.1 is a penal statute and must be strictly construed.1 Therefore, in my opinion the statute does not require such compensation. My conclusion is reinforced by the fact that § 18.2-465.1 at one point prior to its enactment in its present form specifically prohibited employees from being "deprived of pay."

As a matter of policy, it would seem that an employee in discharging a civic duty such as jury service should be paid by his employer for those days missed from work. Otherwise, the employee either would have to take annual leave (in contravention of § 18.2-465.1) or be limited to the amounts of money set forth in § 14.1-195.1.2 On the other hand, it would seem an improper windfall for the employee to receive his normal income for days missed without any reduction to reflect the compensation received pursuant to § 14.1-195.1. In this regard, I note that Rule 10.8 of the Rules of the Administration of the Virginia Personnel Act provides that a
State employee who is compensated for jury service is to be paid only the difference between such compensation and his regular salary for the period of absence. These policy considerations, however, must be addressed by the legislature.

1See, e.g., Commonwealth v. Malbon, 195 Va. 368, 78 S.E.2d 683 (1953).

2Section 14.1-195.1 states in part: "Every person summoned as a juror in a civil or criminal case shall be entitled to fifteen dollars for each day of attendance upon the court as well as daily mileage for travel to and from court...and other necessary and reasonable costs as the court may direct."


CRIMINAL PROCEDURE. TIME SERVED FOR INVALID CONVICTION MAY BE CREDITED AGAINST SUBSEQUENT CONVICTION.

April 27, 1982

The Honorable Howard P. Anderson, Jr.
Commonwealth's Attorney for Halifax County

You have inquired whether the time served by a criminal defendant under a now invalid burglary conviction, can be credited against the defendant's subsequent conviction for grand larceny. Both the burglary and larceny charges arose from the same criminal transaction.

In my opinion, the time served by the defendant because of the invalid conviction should be credited against his subsequent sentence. In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court held that time served under a voided conviction must apply to a subsequent sentence when the defendant is retried for the same offense. The crediting of time served has also been required where a prisoner is serving consecutive sentences for several convictions and one of the convictions is invalidated. Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966); Morris v. Superintendent of the Virginia State Penitentiary, 212 Va. 656, 187 S.E.2d 200 (1972). Accordingly, a recordkeeping adjustment is all that is required to implement the credit allowance for time served on the invalid burglary conviction.

1A defendant is not entitled to credit when a period of regained freedom intervened between the time served on the invalid conviction and the commission of the second offense. For policy reasons, it would be "unthinkable to lend support
to any judicial decision which permits the establishment of a line of credit for future crimes." Miller v. Cox, 443 F.2d 1019, 1021 (4th Cir. 1971). In the case before us, the larceny conviction was not based on a subsequent crime, but was a second offense arising from the same transaction as the burglary charge.

CRIMINAL PROCEDURE. VENUE. WELFARE FRAUD CASES TO BE PROSECUTED IN JURISDICTION WHERE ASSISTANCE WAS REQUESTED.

February 10, 1982

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

This is in reply to your letter of February 2, 1982, in which you ask the proper venue for the prosecution of welfare fraud cases. You state that the City of Salem does not have a local department of public welfare or social services and that its residents attain such assistance or services from the Roanoke County Department of Public Welfare pursuant to an agreement between the City of Salem and the County of Roanoke. The county's Department of Public Welfare is geographically located in Salem.

Generally, venue for a criminal prosecution lies where the offense was committed. See § 19.2-244 of the Code of Virginia (1950), as amended. However, the General Assembly may provide a different venue. See Howell v. Commonwealth, 187 Va. 34, 46 S.E.2d 37 (1948). The venue for welfare fraud cases is provided in § 63.1-124, which states in part:

"[t]rial for violations of this section shall be in the county or city from whose department of public welfare or social services assistance was sought or obtained."

Applying the venue requirements found in § 63.1-124 to the particular facts outlined above, I am of the opinion that the proper venue for welfare fraud cases which occur at the Roanoke County Department of Public Welfare is in the Circuit Court of Roanoke County, even though the local department is geographically located in the City of Salem.

DEFINITIONS. "PEACE OFFICER" AS USED IN § 18.2-174 INCLUDES AGENTS OF FEDERAL BUREAU OF INVESTIGATION.

May 4, 1982

The Honorable E. Bruce Harvey
Commonwealth's Attorney for Campbell County

This is in reply to your recent letter in which you inquired whether an agent of the Federal Bureau of Investigation ("FBI") could be defined as a "peace officer" under § 18.2-174 of the Code of Virginia (1950), as amended.
Section 18.2-174 prohibits the impersonation of a sheriff, marshal, police officer or peace officer.\(^1\) Previous Opinions of this Office have defined the terms "police officer" and/or "peace officer" as one who performs services critical to public safety in the investigation and detection of serious crimes—a person trained, equipped and actually engaged in the detection of persons suspected of crime.\(^2\)

Given the duties performed by FBI agents, I am of the opinion that the term "peace officer" as used in § 18.2-174 includes FBI agents.

\(^1\)Section 18.2-174 reads as follows: "Any person who shall falsely assume or exercise the functions, powers, duties and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or who shall falsely assume or pretend to be any such officer, shall be deemed guilty of a Class I misdemeanor."


DIVORCE. RETROSPECTIVE LANGUAGE IN § 20-91(9)(B) WILL BE APPLICABLE TO SUBSECTION 9(A) AS AMENDED IN H.B. 484, ENACTED BY 1982 GENERAL ASSEMBLY.

May 6, 1982

The Honorable Clifton A. Woodrum
Member, House of Delegates

You asked whether the language in § 20-91(9)(b)\(^1\) of the Code of Virginia (1950), as amended, will be applicable to the amendment to § 20-91(9)(a), as provided in H.B. 484 enacted by the 1982 session of the General Assembly.

Section 20-91(9)(a) presently provides that either party to a marriage can file for divorce when the husband and wife have lived separate and apart without cohabitation and interruption for one year. The amendment contained in H.B. 484, which is effective July 1, 1982, will amend that section to permit either party to file for divorce when the husband and wife have entered into a separation agreement, have no children and have lived separate and apart without cohabitation and interruption for six months. Section 20-91(9)(b) provides that § 20-91(9) applies whether the separation commenced prior to the enactment of subsection (9) or thereafter. Your inquiry, therefore, is whether parties who have separated prior to July 1, 1982, entered into a separation agreement and have no minor children may take advantage of the amendment contained in H.B. 484 in order to file for divorce after having lived separate and apart for six months.
Generally, statutes are not given retrospective effect except where such an effect was intended by the legislature. Commonwealth v. United Cigarette Machine Co., 120 Va. 835, 845, 92 S.E. 901, 904 (1917). The initial separation provision in § 20-91(9) was enacted in 1960 and provided for a period of three years. See Ch. 108 [1960] Acts of Assembly 121. There was no explicit retrospective language added to § 20-91(9) until 1970. See Ch. 311 [1970] Acts of Assembly 409. However, the initial separation provision was found to be retrospective legislation that was constitutional. Hagen v. Hagen, 205 Va. 791, 796, 139 S.E.2d 821, 825 (1965).

Furthermore, it is a basic rule of statutory construction that statutes are passed as a whole, and that each section of the statute should be considered in conjunction with every other section so as to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953).

Therefore, I am of the opinion that the retrospective language in § 20-91(9)(b) will be applicable to subsection 9(a) as amended in H.B. 484, and that parties to a marriage who have lived separate and apart for six months, with a separation agreement and no children, may take advantage of the amendment even though a part or all of the six months of separation occurred prior to July 1, 1982.

Section 20-91(9)(b) provides in pertinent part, as follows: "This subsection (9) shall apply whether the separation commenced prior to its enactment or shall commence thereafter...."

DIVORCE. § 20-91(9)(A) AS AMENDED IN H.B. 484 AND RETROSPECTIVE LANGUAGE IN § 20-91(9)(B) WILL BE APPLICABLE TO § 20-121.02.

June 29, 1982

The Honorable John H. Rust, Jr.
Member, House of Delegates

You have asked whether the amendment to § 20-91(9)(a) of the Code of Virginia (1950), as amended, as provided in H.B. 484, enacted by the 1982 session of the General Assembly, and the language of § 20-91(9)(b) will be applicable to § 20-121.02.

Section 20-121.02 presently provides that where certain specified grounds for divorce in a bill of complaint are alleged, either party may move the court for a divorce on the grounds set out in § 20-91(9), if the statutory period set out in that section has elapsed, and it is not necessary for an amended bill of complaint to be filed. Section 20-91(9)(a) presently provides that either party to a marriage can file for divorce when the husband and wife have
lived separate and apart without cohabitation and interruption for one year. The amendment contained in H.B. 484, which is effective July 1, 1982, will amend that section to permit either party to file for divorce when the husband and wife have entered into a separation agreement, have no children and have lived separate and apart without cohabitation and interruption for six months. Section 20-91(9)(b) provides that § 20-91(9) applies whether the separation commenced prior to the enactment of subsection (9) or thereafter. Your inquiry, therefore, is whether either party involved in a divorce proceeding based on one of the grounds specified in § 20-121.02 may take advantage of the amendment contained in H.B. 484 and move the court for a divorce on the grounds set out in § 20-91(9) without filing an amended complaint, if they have lived separate and apart for six months, entered into a separation agreement and have no minor children.

Recently, I rendered an Opinion that the retrospective language in § 20-91(9)(b) would be applicable to subsection (9)(a) as amended in H.B. 484 even though a portion or all of the six months of separation occurred prior to July 1, 1982. See Opinion to the Honorable Clifton A. Woodrum, Member, House of Delegates, dated May 6, 1982, a copy of which is enclosed. As stated therein, it is a basic rule of statutory construction that statutes are passed as a whole, and that each section of the statute should be considered in conjunction with every other section so as to produce a harmonious result. Commonwealth v. Jones, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953).

Therefore, I am of the opinion that where a married couple has separated prior to July 1, 1982, and one of the parties has filed for divorce based on one of the grounds specified in § 20-121.02, either party may take advantage of the amendment contained in H.B. 484, without filing an amended complaint, and move the court for a divorce based on § 20-91(9), after having lived separate and apart for six months, if they have no minor children and have a separation agreement.

Section 20-91(9)(b) provides, in pertinent part, as follows: "This subsection (9) shall apply whether the separation commenced prior to its enactment or shall commence thereafter...."

DOG LAWS. CLAIMS FOR LIVESTOCK KILLED BY DOGS NOT PAYABLE FROM GENERAL FUND.

August 28, 1981

The Honorable Charles D. Barrell
County Attorney for Culpeper County
You have asked whether the 1981 amendment to § 29-213.25 of the Code of Virginia (1950), as amended, requires a local jurisdiction to compensate any owner of livestock or poultry killed or injured by a dog out of the general fund of the county. Section 29-213.25 provides for compensation to owners of livestock or poultry killed or injured by dogs. Compensation is to be made out of the "dog fund" created through collection of dog license fees. See §§ 29-213.11 and 29-213.25. Prior to the 1981 amendment, § 29-213.25 provided that any person who had livestock or poultry killed or injured by dogs was entitled to compensation from the dog fund if the claimant followed the procedures set out by the statute or by a locally adopted ordinance. The statute further provided "that...[i]f 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." Chapter 301 [1981] Acts of Assembly amended § 29-213.25, deleting this latter provision.

Under the provisions of § 29-213.32, local governing bodies are not required to supplement the dog fund from the general fund to ensure that funds are available in the dog fund to pay livestock claims. See §§ 29-213.31 and 29-213.32. The 1981 amendment to § 29-213.25 does not alter the provisions of § 29-213.32 which gives localities complete discretion regarding whether to supplement the dog fund from the general fund for payment of livestock claims.

It is, therefore, my opinion that the 1981 amendment to § 29-213.25 does not require a local jurisdiction to pay livestock claims out of the general fund where the dog fund moneys are insufficient.

**DOG LAWS. IMPOUNDMENT CHARGES. ACTUAL EXPENSES MAY BE RECOVERED THROUGH SEPARATE FEES KEYED TO NONRECURRING AND RECURRING EXPENSES.**

September 29, 1981

The Honorable Paul M. Mahoney  
County Attorney for Montgomery County


Section 29-213.19, as so amended, provides that in the event any dog confined thereunder is claimed by its rightful owner, the owner "shall only be charged with the actual expenses incurred in keeping the dog impounded."

You ask whether these actual expenses may be charged in the form of two separate fees, one being a fee of $7.00 for the first day, the other being a fee of $2.50 for each day after the first.
The $2.50 fee is called a daily board fee and represents the recurring expenses for keeping a dog impounded after the first day. You state that the $7.00 fee is called an initial impoundment fee, and includes the daily board fee for the first day, plus $4.50 extra to cover the nonrecurring initial expenses for keeping the dog impounded.

The initial fee is a charge to the rightful owner, so it is a charge covered by the actual expenses limitation of § 29-213.19. At the same time, so long as the initial fee represents actual expenses of keeping the dog impounded, the initial fee is not contrary to § 29-213.19 merely because it is different from, and greater than, the daily board fee.

The distinction between recurring and nonrecurring expenses is well recognized in both accounting and law, and nonrecurring expenses may ordinarily be recovered either as a one-time charge, or on some allocated basis. Under § 29-213.19, there is no prohibition against recovery of nonrecurring expenses as a one-time charge.

Accordingly, it is my opinion that the actual expenses incurred in keeping a dog impounded may be recovered, under § 29-213.19, in the form of two separate fees, the higher fee for the first day including nonrecurring expenses, and the lower fee for subsequent days representing recurring expenses.2

1"Field costs" of the animal warden do not qualify under § 29-213.19, however. Such expenses are not a necessary incident of keeping a dog impounded. Dogs may be brought to the pound by citizens and other law-enforcement officers, as well as by the animal warden. Compare Opinion to the Honorable William S. Burroughs, Jr., Commonwealth's Attorney for Arlington County, dated March 4, 1975, found in Report of the Attorney General (1974-1975) at 11.

2I note that Ch. 549 [1981] Acts of Assembly, enacted after Ch. 507, may authorize local governing bodies to adopt local animal control ordinances which are more stringent than the Virginia Dog Laws of 1977. See § 29-213.17:1(C).

This Opinion does not address what charges might be recovered from the rightful owner under a more stringent local animal control ordinance. Compare Opinion to the Honorable G. Hugh Turner, Treasurer of Franklin County, dated October 30, 1969, found in Report of the Attorney General (1969-1970) at 113.

DRUGS. FIRST OFFENDER WHO TAKES ADVANTAGE OF PROBATION AND DISCHARGE PROVISIONS OF § 18.2-251 MAY NOT HAVE RECORD EXPUNGED.
January 15, 1982

The Honorable Fred W. Bateman, Judge
Seventh Judicial Circuit

You have asked whether a first offender, whose charge of unlawful possession of marijuana is treated according to the probation and discharge provisions of § 18.2-251 of the Code of Virginia (1950), as amended, can have his record expunged under § 19.2-392.2.

Section 18.2-251 permits the court in certain drug possession cases to defer an adjudication of guilt, and ultimately dismiss the charges, conditional upon the offender's fulfillment of probation terms. Such a dismissal is "a conviction only for the purposes of applying this section in subsequent proceedings." It is, therefore, necessary to maintain a record of dismissals under § 18.2-251, since they may operate as convictions for the purpose of determining first offender status in subsequent drug possession cases.

Although § 19.2-392.2 states that police and court records may be expunged in cases "disposed of by acquittal or being otherwise dismissed," it is my opinion that this section does not apply to the conditional dismissal designed by § 18.2-251. Cf. Opinion to the Honorable Jose R. Davila, Jr., Judge, General District Court, Thirteenth Judicial District, dated November 23, 1977, and found in Report of the Attorney General (1977-1978) at 95. Otherwise, expunged dismissals could not operate to prevent subsequent offenses from being treated as first offenses under § 18.2-251.

January 12, 1982

The Honorable John H. Chichester
Member, Senate of Virginia

You ask whether it is legally permissible for a local school board to offer students subject to expulsion for substance abuse infractions, a counseling program operated by the local Substance Abuse Services Agency (the "Agency"), as an alternative to expulsion. The program is, I understand, an educational and counseling regimen which involves both the child and the parents. A fee is charged by the Agency which is scaled to the income level and ability of the parents to pay. Those who are below a certain minimum income level are charged nothing for the service.

Under the plan envisioned by the local school board, no fee would be charged by the school board for reference to the Agency. The only fee imposed would be the Agency fee noted above. Failure to pay the fee by those whom the Agency
The $2.50 fee is called a daily board fee and represents the recurring expenses for keeping a dog impounded after the first day. You state that the $7.00 fee is called an initial impoundment fee, and includes the daily board fee for the first day, plus $4.50 extra to cover the nonrecurring initial expenses for keeping the dog impounded.

The initial fee is a charge to the rightful owner, so it is a charge covered by the actual expenses limitation of § 29-213.19. At the same time, so long as the initial fee represents actual expenses of keeping the dog impounded, the initial fee is not contrary to § 29-213.19 merely because it is different from, and greater than, the daily board fee.

The distinction between recurring and nonrecurring expenses is well recognized in both accounting and law, and nonrecurring expenses may ordinarily be recovered either as a one-time charge, or on some allocated basis. Under § 29-213.19, there is no prohibition against recovery of nonrecurring expenses as a one-time charge.

Accordingly, it is my opinion that the actual expenses incurred in keeping a dog impounded may be recovered, under § 29-213.19, in the form of two separate fees, the higher fee for the first day including nonrecurring expenses, and the lower fee for subsequent days representing recurring expenses.1

1"Field costs" of the animal warden do not qualify under § 29-213.19, however. Such expenses are not a necessary incident of keeping a dog impounded. Dogs may be brought to the pound by citizens and other law-enforcement officers, as well as by the animal warden. Compare Opinion to the Honorable William S. Burroughs, Jr., Commonwealth's Attorney for Arlington County, dated March 4, 1975, found in Report of the Attorney General (1974-1975) at 11.

2I note that Ch. 549 [1981] Acts of Assembly, enacted after Ch. 507, may authorize local governing bodies to adopt local animal control ordinances which are more stringent than the Virginia Dog Laws of 1977. See § 29-213.17:1(C).

This Opinion does not address what charges might be recovered from the rightful owner under a more stringent local animal control ordinance. Compare Opinion to the Honorable G. Hugh Turner, Treasurer of Franklin County, dated October 30, 1969, found in Report of the Attorney General (1969-1970) at 113.

DRUGS. FIRST OFFENDER WHO TAKES ADVANTAGE OF PROBATION AND DISCHARGE PROVISIONS OF § 18.2-251 MAY NOT HAVE RECORD EXPUNGED.
January 15, 1982

The Honorable Fred W. Bateman, Judge
Seventh Judicial Circuit

You have asked whether a first offender, whose charge of unlawful possession of marijuana is treated according to the probation and discharge provisions of § 18.2-251 of the Code of Virginia (1950), as amended, can have his record expunged under § 19.2-392.2.

Section 18.2-251 permits the court in certain drug possession cases to defer an adjudication of guilt, and ultimately dismiss the charges, conditional upon the offender's fulfillment of probation terms. Such a dismissal is "a conviction only for the purposes of applying this section in subsequent proceedings." It is, therefore, necessary to maintain a record of dismissals under § 18.2-251, since they may operate as convictions for the purpose of determining first offender status in subsequent drug possession cases.

Although § 19.2-392.2 states that police and court records may be expunged in cases "disposed of by acquittal or being otherwise dismissed," it is my opinion that this section does not apply to the conditional dismissal designed by § 18.2-251. Cf. Opinion to the Honorable Jose R. Davila, Jr., Judge, General District Court, Thirteenth Judicial District, dated November 23, 1977, and found in Report of the Attorney General (1977-1978) at 95. Otherwise, expunged dismissals could not operate to prevent subsequent offenses from being treated as first offenses under § 18.2-251.

January 12, 1982

The Honorable John H. Chichester
Member, Senate of Virginia

You ask whether it is legally permissible for a local school board to offer students subject to expulsion for substance abuse infractions, a counseling program operated by the local Substance Abuse Services Agency (the "Agency"), as an alternative to expulsion. The program is, I understand, an educational and counseling regimen which involves both the child and the parents. A fee is charged by the Agency which is scaled to the income level and ability of the parents to pay. Those who are below a certain minimum income level are charged nothing for the service.

Under the plan envisioned by the local school board, no fee would be charged by the school board for reference to the Agency. The only fee imposed would be the Agency fee noted above. Failure to pay the fee by those whom the Agency
determined were able to pay would result in their exclusion from the program and, therefore, their expulsion from school. Consequently, although the charge for the counseling program is not levied directly by the local school board, it must be scrutinized as an indirect charge by the board.

The General Assembly has the responsibility of providing a system of free public elementary and secondary education. See Art. VIII, § 1 of the Constitution of Virginia (1971). To effectuate this provision, the General Assembly has provided that fees may not be charged by school divisions except in specified circumstances. Section 22.1-6 of the Code of Virginia (1950), as amended, currently provides:

"Except as provided in this title or as permitted by regulation of the Board of Education, no fees or charges may be levied on any pupil by any school board. No pupil's scholastic report card or diploma shall be withheld because of nonpayment of any such fee or charge."

Certain charges, such as those for the cost of consumable materials and workbooks, are permitted by law. See § 22.1-253. Also, the Board of Education (hereafter "Board") by regulation permits school boards to charge fees for certain ancillary and optional services or items. These regulations reflect prior Opinions of this Office which have held that it is permissible to charge fees for optional instruction in the use of musical instruments and for the optional rental of student lockers. See Reports of the Attorney General (1976-1977) at 248; (1964-1965) at 294. See, also, Annot., 41 A.L.R.3d 752 (1972).

Nothing in Title 22.1 or the regulations of the Board permit charges by local school divisions for substance abuse counseling. Instruction concerning drugs and drug abuse is required by law to be given in the public schools. See § 22.1-206. The Board has promulgated regulations to effectuate this requirement in the health education program which, among other things, oblige the public schools to:

"Create a climate whereby students may seek and receive counseling about substance abuse and related problems without fear of reprisal." Regulations Regarding Substance Abuse, State Board of Education, p. 103.

It is my opinion, based on the absence of statutory or regulatory authority for the charges envisioned in your request, that the payment of such charges may not be made a condition to the continued school enrollment of a student who is otherwise entitled under Art. VIII, § 1 to a free public education.

This does not mean that local school divisions are powerless to refer students subject to expulsion for substance abuse infractions to counseling. It may be that a student subject to expulsion voluntarily decides to commence
counseling at an agency specializing in substance abuse problems. Also, § 22.1-279 provides that when a student under the age of 18 is expelled, the school board shall notify the appropriate officer or employee of the school the student attended. That officer then may develop a plan of services for the expelled student and contact any public agency where the student resides to determine if the agency can provide appropriate services for the student.

Current statutory provisions encourage school divisions to refer students expelled for substance abuse to a counseling agency. However, the proposed counseling program and payment of fees may not be imposed unless and until authorized by statute or the Board.

1Current regulations of the Board regarding student fees and charges provide:

"No fees or charges except as noted below may be levied on any pupil by any school board unless authorized by the Board of Education; further, no pupil's scholastic report card or diploma shall be withheld because of non-payment of any such fee or charge.

Fees may be charged for:
- Class dues
- Voluntary student activities
- Night school classes
- Postgraduate classes
- Summer school
- Rental textbooks
- Musical instruments used in regularly scheduled instructional classes
- Library fees

Nothing in this regulation shall be construed to prohibit the school board of any county, city, or town from making supplies, services or materials available to pupils at cost. Nor is it a violation to make a charge for a field trip or any educational related program that is not a required activity. Deposits may be required when return of the item used results in a return of the fees deposited."

Regulations Regarding Fees and Charges, State Board of Education.

EDUCATION. STATE BOARD OF EDUCATION MAY PAY BASIC SCHOOL AID ON BASIS OF STUDENT COUNT WHICH INCLUDES CHILDREN ON MILITARY RESERVATIONS.

August 3, 1981

S. John Davis, Ph.D.
Superintendent of Public Instruction
Department of Education

You have asked whether the State Board of Education may approve Basic School Aid Payments to the local school
divisions, pursuant to § 22.1-99 of the Code of Virginia (1950), as amended, for school age children whose parents are not Virginia domiciliaries, but who reside on military reservations in Virginia.

This inquiry obviously arises because Ch. 341 [1981] Acts of Assembly changed the extent of the educational benefits previously available to residents of military reservations. Prior to the enactment of Ch. 341, residents of military reservations were statutorily presumed to be residents of the school district surrounding or contiguous to the military reservation. As a result, the benefits of a free public education were gratuitously extended by the General Assembly to the children of such residents. See Reports of the Attorney General (1932-1933) at 137; (1942-1943) at 212. Chapter 341 abrogated the statutory presumption applicable to children living on military or naval reservations. Additionally, Ch. 341 amended § 22.1-5 to provide that such children could be charged tuition.

One of the statutory duties of the Superintendent of Public Instruction is to apportion the State funds appropriated for public school purposes. See § 22.1-99. These apportioned funds are made available, in the form of Basic School Aid Payments, to the local school divisions on the basis of a formula which has as one of its crucial components the "average daily membership" (ADM) of the school age population in the school division. See Ch. 760 [1980] Acts of Assembly, Item 186, 1259. Despite the recent amendments by Ch. 341 removing the children of non-domiciliary residents of military reservations from those groups of persons eligible for a free public education, no amendment was made in the 1981 session in the ADM component of the Basic School Aid Formula. Also, no amendment was made in the appropriations which the Superintendent of Public Instruction must apportion to the school division largely on the basis of the ADM.

In the exercise of legislative discretion, the General Assembly is presumed to be cognizant at the time it enacts amendatory language of all those legislative acts which relate to or are affected by the provisions they amend. See Greer v. Dillard, 213 Va. 477, 193 S.E.2d 668 (1973). In accordance with the general rule that a statute should be read as a whole, the amendments which are made by the General Assembly must be read together with those provisions which remain intact, so that effect is given to each part. See Williams' Adm'r v. Dean, 144 Va. 831, 131 S.E. 1 (1925). Amendatory acts do not change existing law further than is expressly declared or necessarily implied. See 1A Sutherland, Statutory Construction, § 22.30 (4th ed., 1972). This is particularly true where the acts concerned are independent of each other in form. Supra. Moreover, the amendment of statutes by implication is strongly disfavored. Supra.
As previously noted, the statutory provisions relating to the appropriation of funds for Basic School Aid Payments are contained in the Appropriations Act for the current biennium. See Ch. 760 [1980] Acts of Assembly, Item 186, 1259. They are completely distinct in form from the amended provisions contained in §§ 22.1-3 and 22.1-5. The General Assembly included no provision in the amendatory language of Ch. 341 to relate that language to Basic School Aid Payments. In fact, the General Assembly left intact the appropriations from which Basic School Aid Payments would be made for the remainder of the biennium (i.e., the 1981-1982 school term). According to information which you have supplied to this Office for consideration with your inquiry, the appropriations for Basic School Aid Payments which were made in 1980 by the General Assembly were made on the basis of ADM figures which included children of non-domiciliary residents of military reservations. In view of all these factors it must be assumed, consistent with the previously stated rules of statutory construction, that had the General Assembly intended that Basic School Aid Payments be adjusted to exclude those children affected by the amendments in Ch. 341 it would have amended expressly the Appropriations Act to accomplish that result. Moreover, this Office previously has held that amendment of the Appropriations Act may not be accomplished by a means other than such express amendatory legislation. See Report of the Attorney General (1979-1980) at 304.

Accordingly, it is my opinion that Ch. 341 did not alter the power of the Superintendent of Public Instruction to apportion, and the State Board of Education to approve under § 22.1-99, for the remaining term of the biennium, Basic School Aid Payments based upon the ADM which includes school age children of non-domiciliary residents of military reservations in Virginia. Your question is therefore answered affirmatively. However, since it is within the plenary power of the General Assembly to determine the extent to which Basic School Aid Payments in the next biennium can be made for such children, you and the State Board of Education must await direction from the General Assembly, through legislation or appropriations, as to how Basic School Aid Payments are to be apportioned in the next biennium.

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1Section 22.1-3 provided in pertinent part: "The public schools in each school division shall be free to each person of school age who resides within the school division; ***

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...." (Emphasis added.)
Section 22.1-5(A) now provides: "The following persons may, in the discretion of the school board of a school division and pursuant to regulations adopted by the school board, be admitted into the public schools of the division and may, in the discretion of the school board, be charged tuition:

(5) Persons of school age who reside on a military or naval reservation located wholly or partly within the geographical boundaries of the school division and who are not domiciled residents of the Commonwealth of Virginia; provided, however, that no person of school age residing on a military or naval reservation located wholly or partly within the geographical boundaries of the school division may be charged tuition if federal funds provided under P.L. 874 of 1950, commonly known as Impact Aid, shall fund such students at not less than fifty percent of the total per capita cost of education, exclusive of capital outlay and debt service, for elementary or secondary pupils, as the case may be, of such school division."

ELECTIONS. ABSENTEE BALLOTS. REGISTRAR NOT REQUIRED TO HONOR REQUEST OF ONE PERSON TO SEND APPLICATION FOR ABSENTEE BALLOT TO THIRD PARTY.

February 3, 1982

The Honorable Alfred D. Swersky, Chairman
Alexandria Electoral Board

This is in reply to your letter of January 20, 1982, requesting an Opinion as to whether the general registrar must honor a request from a person to forward an application for an absentee ballot to a third party.

Section 24.1-228.1 provides in part that "it shall be the duty of such registrars to furnish application forms, in person or by mail, to any person requesting the same."

In a prior Opinion, this Office held that "while any person may obtain an application form for an absentee ballot either in person or by mail, such applications may be validly returned [to the registrar] only in the manner prescribed in § 24.1-228 [now § 24.1-228.1] and not by persons other than the voter himself." (Emphasis in original.) See Report of the Attorney General (1973-1974) at 140, 141.

I am of the opinion that the registrar is not required to honor a request of one person to send an application form for an absentee ballot to a third party. While it is clear that anyone may request the application form, the statute only requires the registrar to furnish the form to the person requesting the same.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS. COUNTIES, CITIES AND TOWNS. REAPPORTIONMENT. GOVERNING BODY ELECTED QUADRENNIALLY. INCREASE IN NUMBER OF ELECTION DISTRICTS. NO IMMEDIATE VACANCY IN ADDED DISTRICTS UNDER § 24.1-17.1.

October 26, 1981

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

You ask whether a decennial reapportionment, under Art. VII, § 5 of the Virginia Constitution (1971) and § 15.1-37.5 of the Code of Virginia (1950), of a board of supervisors elected quadrennially, under § 24.1-88(a), in which the number of magisterial or election districts is increased, effective pursuant to § 24.1-17.1, creates an immediate vacancy in the added districts in January 1982 to be filled under § 24.1-76.1, without waiting for the general election scheduled for November 1983, under §§ 24.1-17 and 24.1-88(a).

Article VII, § 5 provides that when members of the governing body of a county are elected by district, the governing body may, in a manner provided by law, increase or diminish the number of districts, and shall in 1971 and every ten years thereafter, reapportion the representation in the governing body among the districts in a manner provided by law.

Section 15.1-37.5 provides that in a county electing members of its governing body from districts, the governing body in 1971 and every ten years thereafter shall reapportion representation by altering the boundaries of the districts, including increasing or diminishing the number of districts, in order to give, as nearly as practicable, representation on the basis of population.

Section 24.1-17.1 provides that the decennial reapportionment measures required by Art. VII, § 5, shall be effective at midnight, December 31, of the year in which the reapportionment occurs, subject, however, to the provisions of § 24.1-17 regarding elections and the filling of vacancies.

Section 24.1-76.1, the statute ordinarily applicable to vacancies in the governing body of counties, provides that when a vacancy occurs, the vacancy shall be filled by the remaining members of such body within thirty days, but the person appointed shall hold office only until the qualified voters shall fill the same by election. Section 24.1-76.1 also provides that upon occurrence of the vacancy, a writ of election shall issue to fill the vacancy in accordance with §§ 24.1-76 and 24.1-163.

As noted above, § 24.1-17.1 provides that all decennial reapportionment measures shall be effective subject to the provisions of § 24.1-17 regarding elections and the filling
of vacancies. Section 24.1-17 provides that elections for
the governing bodies of counties, following decennial
reapportionment required by Art. VII, § 5, shall be at the
general election held next preceding the expiration of the
term of the office. Further, under § 24.1-17, no elections
shall be called to elect members from the districts
established by such reapportionment prior to such time;
however, vacancies in the office of a member of a county
governing body elected biennially shall be filled from the
districts so established. See § 24.1-88(b)(iii).

Prior to enactment of § 24.1-17 in 1976, any
reapportionment (decennial or otherwise) required all
incumbent supervisors to vacate their office as soon as
possible after the effective date of redistricting. Section
24.1-17 was added to change this result as to decennial
reapportionments. Section 24.1-17 aids continuity
of government where a decennial reapportionment comes midway
between quadrennial elections, for example, as specified in
§ 24.1-88(a). The effect then of § 24.1-17 is to preserve
for a limited time the representation provided for old
districts, and to defer for a limited time the representation
provided for new districts.

Accordingly, it is my opinion that a decennial
reapportionment, under Art. VII, § 5, and § 15.1-37.5, of a
board of supervisors elected quadrennially, under
§ 24.1-88(a), in which the number of magisterial or election
districts is increased, effective pursuant to § 24.1-17.1,
does not create an immediate vacancy in the added districts
in January 1982.

1Compare § 15.1-571.1 (boundaries of magisterial or
election districts).
2See Opinion to the Honorable Robert C. Oliver, Jr.,
Commonwealth's Attorney for Northampton County, dated
January 22, 1976, found in Report of the Attorney General
(1975-1976) at 23. Compare Opinion to the Honorable James F.
Andrews, Commonwealth's Attorney for Dinwiddie County, dated
May 5, 1972, found in Report of the Attorney General
(1971-1972) at 13 (absent statute, existing positions on
board of supervisors become vacant, by force of law, after
redistricting).
3See Opinion to the Honorable C. Richard Cranwell, Member,
House of Delegates, dated December 21, 1976, found in Report

ELECTIONS. ELECTORAL BOARD. FEDERAL, STATE AND LOCAL
EMPLOYEES AND ELECTED OFFICIALS PROHIBITED FROM SERVING.

May 4, 1982

The Honorable Madison E. Marye
Member, Senate of Virginia
This is in reply to your letter of April 19, 1982, requesting an Opinion whether there are any exceptions to the provisions of § 24.1-33 of the Code of Virginia (1950), as amended, which states:

"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 an officer of election."

This language reflects amendments to the Code adopted in 1971 in order to conform to the language of Art. II, § 8 of the Constitution of Virginia (1971). Previous constitutional and statutory provisions had prohibited only officers and employees of the federal government and elected officials of State and local governments from being appointed as election officials. The amendments to the Code and Constitution provide for disqualification of all holders of offices or posts of profit or emolument, as well as employees of the governments of the Commonwealth and counties, cities and towns, elected officials of such governments, and officers and employees of the United States. Previous Opinions of this Office have addressed specific instances and have held that such office holding was prohibited.

Consequently, I am of the opinion that § 24.1-33 and Art. II, § 8 prohibit any person who is an employee or elected official under the governments of the United States, the Commonwealth, or any county, city or town, from being appointed as a registrar, officer of election or member of an electoral board.

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2The new constitution, of which Art. II, § 8 is a part, became effective July 1, 1971.
5This disqualification would not exclude a retired service person who draws a pension. That is, the phrase "office or post of profit or emolument" would not be read to include retirement pay from the federal or State governments. See A. Howard, Commentaries on the Constitution of Virginia, 428, note 15 (1974).
April 16, 1982

The Honorable Craig E. Teller
Commonwealth's Attorney for Carroll County

This is in response to your recent letter in which you inquire of the legality of a filing fee assessed by the Carroll County Republican Committee on candidates who will participate in a portion of that party's selection process to determine which candidate the party will nominate for the office of Treasurer of Carroll County.

It is my understanding that the office of Treasurer of Carroll County will be filled at the general election to be held in November 1983. As part of the process to determine which candidate it will support, the Republican Party will hold a "primary" in October 1982. The party will then select its nominee in 1983 by one of the methods prescribed by Title 24.1 of the Code of Virginia (1950), as amended. The apparent purpose of the October 1982 "primary" is to narrow the field of those seeking the office.

In order to participate as a candidate in the October 1982 process, a person must pay a filing fee of six percent of the annual salary of the office of treasurer. You have asked whether the six percent filing fee requirement violates § 24.1-198.

Section 24.1-198 provides, in pertinent part, that every "candidate for any office at any primary shall, before he files his declaration of candidacy, pay a fee equal to two per centum of one year's minimum salary attached to the office for which he is candidate in effect in the year in which he files." The provisions of that section are clear and apply to "any primary." The question thus becomes whether the Republican Party's October process is a primary to which § 24.1-198 is applicable.

For purposes of the election laws of the Commonwealth, § 24.1-1(5)(b) defines "primary" as "an election held for the purpose of nominating candidates as nominees of political parties for election to offices, and for the purpose of electing persons as members of the committees of political parties." Section 24.1-174 provides that primaries shall be held in either March or June, depending upon the date of the general election, and § 24.1-172 provides, in part, that a party selecting a nominee by a method other than direct primary shall only do so within thirty-two days preceding the regular primary date.

The election which the Carroll County Republican Committee will hold in October 1982 is not a primary as that term is used in the election laws of the Code of Virginia. It has no legal or binding effect. Indeed, there is no obligation upon Carroll County to make the election machinery available for the purpose in question. Accordingly, because § 24.1-198 is applicable only to primaries, and certain other
elections not here relevant, I am of the opinion that the Republican Committee is not limited by the two percent filing fee provision contained in § 24.1-198 when that party holds the October election which you have described.

This Opinion should not be construed as a ruling on the desirability or propriety of the plan. I have only answered the question of whether the filing fee violates § 24.1-198.

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1Due to the unique circumstances pertaining to the statewide redistricting for the House of Delegates, the General Assembly has passed legislation permitting primaries to be held in September to determine candidates for the November 1982, special election for the House of Delegates. See Ch. 55 [1982] Acts of Assembly. As a general proposition, however, primaries permitted by State law are held only in March and June.

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ELECTIONS: GENERAL REGISTRAR. BOARD OF SUPERVISORS MAY NOT CHANGE OFFICE HOURS OF GENERAL REGISTRAR. SUCH AUTHORITY RESTS WITH EITHER STATE BOARD OF ELECTIONS, GENERAL REGISTRAR, OR ELECTORAL BOARD.

June 16, 1982

The Honorable Salkeld Stamper, Chairman
Stafford County Electoral Board

This is in response to your letter dated May 31, 1982, in which you made the following inquiry:

"[D]o[es] the Supervisors of Stafford County have the authority to change, or order changed, the dates and time the registrar's office is to be open to register qualified voters?"

According to the facts as you have presented them, normal days of service for the Stafford County registrar have been set as Monday through Friday 8:30 a.m.-4:30 p.m., holidays excepted. You advise that the Stafford County Board of Supervisors ordered the registrar's office to be open on the Memorial Day holiday.

Section 24.1-43 of the Code of Virginia (1950), as amended, provides in pertinent part, "Normal days of service per week for each general registrar shall be determined by the State Board of Elections...."

Section 24.1-49 provides in pertinent part as follows:

"The office of each general registrar shall be open a minimum of one day per week or pursuant to § 24.1-43...***
Additional hours, if any, that the office is to be open for registration of qualified voters may be determined and set by the general registrar or the electoral board. The general registrar or electoral board may set other times and places in public places for registration...."

The relevant statutes, §§ 24.1-43 and 24.1-49, are clear and unambiguous as to what body or official is to set the office hours for the general registrar. Such authority rests with either the State Board of Elections, the general registrar, or the electoral board. Therefore, I am of the opinion that the Board of Supervisors of Stafford County was without authority to change the office hours of the general registrar to require that the registrar's office be open on a day or at times differing from the days or times designated in accordance with law.

ELECTIONS. MEMBER OF ADVISORY BOARD WHO RECEIVES NO COMPENSATION OR EMOLUMENT OF OFFICE MAY SERVE AS MEMBER OF ELECTORAL BOARD, REGISTRAR, OR OFFICER OF ELECTION.

February 23, 1982

The Honorable James B. Murray  
Member, House of Delegates

You have inquired whether § 24.1-33 of the Code of Virginia (1950), as amended, prohibits a citizen who serves as an appointee to an advisory board, and receives no compensation from any governmental agency, from serving as a member of an electoral board, or as registrar, or as an officer of election. You further inquired whether the answer to your inquiry depends upon whether the person serves in the capacity as a member of the electoral board or as an officer of election.

Section 24.1-33 prohibits appointment to an electoral board or to the position of registrar, or officer of election of any person who "holds any office or post of profit or emolument..." with the federal, State, or local governments. 1 Article II, § 8 of the Constitution of Virginia (1971) contains the same prohibition. The phrase "of profit or emolument" modifies both "office" and "post." Assuming the citizen appointee does not receive any compensation or emolument from the advisory board on which he serves, I am of the opinion that he would not be prohibited from serving as a member of the electoral board, or as registrar, or officer of election. The provisions of § 24.1-33 concerning an "elective office of profit or trust" are not applicable because, in the situation which you present, the office is filled by appointment rather than popular election.

1Section 24.1-33 provides 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 an officer of election."

**ELECTIONS. PERSON EMPLOYED AS FULL-TIME PROFESSOR BY STATE UNIVERSITY NOT HOLDING "OFFICE" UNDER ART. VII OF CONSTITUTION. PROFESSOR CAN RUN FOR OFFICE OF CITY SHERIFF.**

September 22, 1981

The Honorable John H. Martin, Sheriff
City of Falls Church

You ask whether a professor employed full time by a State university may simultaneously campaign for and be elected to the position of sheriff, thereby receiving compensation from both positions.

Article VII, § 4 of the Constitution of Virginia (1971), creates the office of sheriff. Article VII, § 6 and § 15.1-50 of the Code of Virginia (1950), as amended, prohibits a person from holding both the office of sheriff and another constitutional office authorized by Art. VII. A professor at a State university, however, does not hold an "office" within the meaning of Art. VII. Nor does such a position constitute a salaried "office" under the government of the Commonwealth or within the meaning of § 15.1-50. See Report of the Attorney General (1970-1971) at 60.¹

The foregoing presumes that the State university in question has no policy prohibiting outside employment or barring compensation during such times as the professor is performing the duties of sheriff.

election. The provisions of § 24.1-33 concerning an "elective office of profit or trust" are not applicable because, in the situation which you present, the office is filled by appointment rather than popular election.

¹Prior Opinions of this Office have held it permissible for a person to simultaneously serve as a professor and a member of the General Assembly, and as a member of a board of supervisors. See Reports of the Attorney General (1978-1979) at 47, (1972-1973) at 212, and (1970-1971) at 60.

**ELECTIONS. POLITICAL ACTION COMMITTEES. CORPORATIONS. BANKS. CORPORATIONS ORGANIZED UNDER STATE LAW MAY CONTRIBUTE FUNDS TO POLITICAL ACTION COMMITTEES, WHICH MAKE CONTRIBUTIONS TO CANDIDATES FOR STATE OFFICES ONLY. NATIONAL BANKS MAY NOT CONTRIBUTE TO POLITICAL ACTION COMMITTEES IN REGARD TO ANY ELECTION.**
April 27, 1982

The Honorable Franklin P. Hall
Member, House of Delegates

This is in reply to your recent letter in which you made the following inquiry:

"Is it permissible for corporations, including corporations organized in Virginia and those organized outside of Virginia, to contribute funds to a political action committee organized in Virginia, which contributes to candidates for Virginia statewide office only, including but not limited to candidates for the State legislature. Are there any restrictions or laws applicable thereto, and if so, what are they?"

Section 24.1-254.2 of the Code of Virginia (1950), as amended, which is part of the Fair Elections Practices Act § 24.1-251, et seq. (the "Act"), permits the establishment of political action committees. Under the provisions of § 24.1-254.2, any stock or nonstock corporation, labor organization, membership organization, or cooperative may establish such committees and expend and solicit contributions for political purposes, subject to certain prohibitions. Such expenditures and solicitation of funds are subject to all the provisions of the Act.

I find no prohibition in State law against corporations contributing money to political action committees. However, there are certain federal statutes that do limit and/or prohibit such contributions. The Federal Election Campaign Act, 2 U.S.C. § 431, et seq., prohibits corporations from contributing to certain election campaigns. Section 441b prohibits national banks, labor organizations, and corporations established under federal law from contributing to any election campaign. The term "any election" has been interpreted to include elections for state as well as federal office. United States v. Clifford, 409 F.Supp. 1070 (1976, E.D.N.Y.).

Therefore, I am of the opinion that corporations established under State law may contribute to political action committees if the committees expend and solicit money for State elective offices only. I am also of the opinion that national banks may not contribute to the political action committees in regard to any election. This prohibition does not extend to individuals affiliated with or employed by such organizations. Those individuals are free to make contributions subject to the same restrictions that govern individuals generally.

1Section 24.1-254.2 reads in pertinent part as follows: B.1. "No political action committee shall make a contribution or expenditure by utilizing money or anything of value
secured by physical force, job discrimination, financial reprisal, or threat of force, or as a condition of employment.

2. Any person soliciting a contribution to such a political action committee shall, at the time of such solicitation, inform the person being solicited of (i) his right to refuse to contribute without any reprisal; and (ii) the political purposes of such political action committee.

Section 441b(a) of the Federal Election Campaign Act reads as follows: "It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section."

ELECTIONS. REGISTRATION. NORMAL DAYS OF SERVICE FOR GENERAL REGISTRAR. AUTHORITY OF STATE BOARD SUPERSEDES AUTHORITY OF LOCAL BOARD.

October 12, 1981

The Honorable W. E. Richard, Jr., Secretary
City of Franklin Electoral Board

You ask whether a local electoral board has authority, under § 24.1-49 of the Code of Virginia (1950), as amended, to determine that the office of the general registrar shall be open only one day per week, when the State Board of Elections has determined, under § 24.1-43, that the normal days of service for the general registrar shall be two days per week.1

Section 24.1-49 provides that the office of each general registrar shall be open a minimum of one day per week or pursuant to § 24.1-43. Section 24.1-43 provides that the normal days of service per week for each general registrar shall be determined by the State Board of Elections.
You have been kind enough to cite a 1973 Opinion of this Office for the proposition that under § 24.1-49, the number of days worked by the registrar is within the sole discretion of the local electoral board (as opposed to the local governing body). As you point out, however, the wording of § 24.1-49 has since been amended, and the discretion which was once expressly vested in the local electoral board is now expressly vested in the State Board of Elections.

Section 24.1-49 does contain a partial limitation on the discretion of the State Board of Elections, but only to the extent of the stated minimum of one day per week. Section 24.1-49 does not limit the State Board of Election's discretion if it determines that the normal days of service for the general registrar shall be more than the minimum of one day per week.

Accordingly, it is my opinion that a local electoral board does not have authority, under § 24.1-49, to determine that the office of the general registrar shall be open only one day per week, when the State Board of Elections has determined, under § 24.1-43, that the normal days of service for the general registrar shall be two days per week.

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1. I am advised that the determination of the State Board of Elections was made pursuant to Ch. 601 [1981] Acts of Assembly, directing the State Board of Elections to develop and implement a compensation plan for general registrars. See Ch. 601, Item 74 at 975.


3. See Ch. 515 [1975] Acts of Assembly, which deletes in § 24.1-49 the language "as may be ordered by the electoral board..." and adds the language "a minimum of one day per week or pursuant to § 24.1-43."

EMINENT DOMAIN. § 62.1-148, ET SEQ., DOES NOT EMPOWER COUNTY TO EXERCISE POWER OF CONDEMNATION WITHIN COUNTY IN AID OF STATE FLOOD CONTROL PROJECT IN SISTER STATE.

May 4, 1982

The Honorable Craig E. Teller
Commonwealth's Attorney for Carroll County

You have asked whether the Carroll County Board of Supervisors may exercise the power of eminent domain to take by condemnation approximately 26 acres of private property in Carroll County which will be flooded as a result of the construction of a dam in North Carolina.

Your letter indicates that the Surry County, North Carolina, Watershed Improvement Commission is in the process
of obtaining federal funds for the dam's construction. The
North Carolina Commission has requested the Carroll County
Board of Supervisors to commit itself to taking the subject
26 acres pursuant to § 62.1-148, et seq., of the Code of
Virginia (1950), as amended. You further note that Carroll
County will indirectly benefit from this flood control
project in that many of its citizens are employed in the
flood prone area in North Carolina. In addition you suggest
that the county may obtain some incidental recreational use
after the 26 acre portion of the lake is created in the
county. The primary purpose of the project, however, is to
protect Mt. Airy, North Carolina, from the flooding of
Lovill's Creek. Such flooding has not occurred in Carroll
County, Virginia.

Section 62.1-148 empowers a county to adopt resolutions
or ordinances

"as may be required giving it[s] assurances to the
Secretary of the Army or the Chief of Engineers of the
United States Army for the fulfillment of the required
items of local cooperation as expressed in acts of
Congress...as conditions precedent to the accomplishment
of river and harbor and flood control projects of the
United States, when it shall appear, and is determined
by such local governing body that any such project will
accrue to the general or special benefit of such county,
city or town...."

Your inquiry notes that the subject flood control
project is located in North Carolina. You and the Soil
Conservation Service of the United States Department of
Agriculture have informed me further that the subject project
is not a flood control project of the United States, but a
local project in Surry County, North Carolina, to be financed
with federal funds pursuant to the Watershed Protection and
Because Carroll County has not been asked for its assurances
for the fulfillment of the required items of local
cooperation by the Secretary of the Army or the Chief of
Engineers of the United States Army, as conditions precedent
to the accomplishment of a United States flood control
project, I am of the opinion that § 62.1-148 is inapplicable
to the situation you present.

The question thus becomes whether Carroll County
possesses the power of eminent domain sufficient to condemn
the 26 acres in Virginia which will be flooded as a result of
the dam construction in North Carolina. Based upon the facts
you have presented, I am of the opinion that Carroll County
cannot lawfully exercise the power of eminent domain for this
purpose.

Section 25-232 states in pertinent part:

"If...the governing body of any county, for the purpose
of opening, constructing, repairing or maintaining a
road or any other public purpose authorized by law...cannot...agree on terms of purchase with those entitled to any land...necessary to be taken and used for the purposes of...such county...it may acquire title to such land...by condemnation under the provisions of chapter 1.1 of this title...."

Section 15.1-317 empowers counties to exercise the power of eminent domain for the condemnation of land for the opening, constructing, repairing or maintaining of roads and "for other public purposes." Finally, § 15.1-276 defines the term "public uses" mentioned in Art. I, § 11 of the Virginia Constitution (1971) as embracing all uses necessary for public purposes. Reading these three statutes together, it appears that Carroll County may exercise the power of eminent domain if the land to be taken is necessary for a public purpose which will accrue to the benefit of the people of Carroll County. See Light v. City of Danville, 168 Va. 181, 190 S.E. 276 (1937).

In several cases, the Virginia Supreme Court has indicated that a use can be considered public only where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare, which, on account of their peculiar character, it is proper for the government to provide. Light, supra, at 208-209; Jeter v. Vinton-Roanoke Water Co., 114 Va. 769, 781-782, 76 S.E. 921 (1913); 6B M.J. Eminent Domain § 19 (1976). Because you indicate that the primary purpose of the flood control project is to protect Mt. Airy, North Carolina, from flooding and will provide only incidental benefits to the people of Carroll County, I am of the opinion that it would be an improper exercise of the power of eminent domain for the Carroll County Board of Supervisors to condemn the 26 acres of county land in question. See Nichols on Eminent Domain, § 2.112[3] (1980).

Notwithstanding the foregoing, I note that § 15.1-526 empowers the county to construct, maintain and operate parks, recreation areas and swimming pools and to acquire the necessary land to do so by condemnation. Given this power, if the board of supervisors were to find that a recreational area would benefit the people of the county and that the location of such area coincided with the 26 acres which will be flooded as a result of the subject dam and that public necessity supports the taking, I am of the opinion that the Carroll County Board of Supervisors could lawfully condemn the land for this stated public purpose.

Accordingly, I am of the opinion that § 62.1-148, et seq., does not empower the county to condemn property in aid of a state flood control project in North Carolina. I find no other authority to condemn the subject property if the primary purpose of such action is to benefit the citizens of North Carolina. If, however, the county identifies a public use for the property which will primarily benefit the
county's citizens, such as the establishment of a recreational area, then the county may lawfully exercise its power of eminent domain.

In reaching this conclusion, I am not unmindful of the need for interstate cooperation. Indeed, such is a highly desired goal. Nevertheless, in rendering Opinions, my duty is to interpret the law of Virginia; and, the limitations described above are too clear to be misunderstood.

ESCHEATS. IN INITIATING ESCEAT PROCEEDINGS, "KNOWN" AS USED IN § 55-171 SHALL INCLUDE CONSTRUCTIVE AS WELL AS ACTUAL KNOWLEDGE REGARDING LAND "TO WHICH NO PERSON IS KNOWN TO BE ENTITLED."

February 23, 1982

The Honorable Glenn B. McClanan
Member, House of Delegates

This is in reply to your recent letter requesting an opinion as to the meaning to be given the word "known" as it appears as the sixth word following (2) in § 55-171 of the Code of Virginia (1950), as amended.

The purpose of this section is to provide a starting point for escheat proceedings. To do this, the Code requires that the commissioner of the revenue shall furnish to the escheator of his county or city "a list of all lands within his district...(2) to which no person is known by the Commissioner to be entitled...." Section 55-171.

As you are aware, the word "known" can have different meanings, depending on the context in which it is used. Following are constructions that have been given which are appropriate to consider. Section 55-171 implies that the list given to the escheator is of lands with "unknown owners." The New Jersey Court has held that one claiming title to realty is not an "unknown owner" if through the exercise of reasonable diligence, his existence could have been ascertained. Manning v. Kasdin, 97 N.J. Super. 406, 235 A.2d 219 (1967). The Florida Court has held that "unknown," within the meaning of the statute authorizing publication, means "unknown after due and reasonable inquiry." Smetal Corporation v. West Lake Inv. Co., 126 Fla. 595, 172 So. 58, 70 (1937).

The West Virginia Supreme Court has held that "known persons" (interested in land sought to be sold for the benefit of a school fund), in the absence of actual knowledge, include such persons as the records of the county in which the land is situated show to have such interest. Bennett v. Greer Gas Coal Co., 127 W.Va. 184, 32 S.E.2d 51, 56. The Attorney General of Virginia has indicated in a
prior Opinion that "[i]f the ownership of the parcels in question cannot be ascertained by an investigation of the records available in the clerk's office, it would be appropriate to seek to have them declared escheated to the State." See Report of the Attorney General (1975-1976) at 125, 126.

Statutes which entail forfeitures are to be strictly construed against the imposition of the penalty or the enforcement of the forfeiture. Dennis v. Robertson, 123 Va. 456, 96 S.E. 802 (1918). "In its most comprehensive scope, escheat means the reversion or forfeiture of property to the government upon the happening of some chance event or default." 27 Am.Jur.2d Escheat § 1 (1966). Therefore, construction of § 55-171 must be such that a forfeiture can be avoided and the broadest definition be given to the word "known." It shall be deemed to be constructive as well as actual knowledge, and due diligence to ascertain the owner or owners of such land shall include, but not be limited to, inspection of the premises, inspection of the records in the clerk's office in the county or city in which the land is located, inspection of tax records and any other inquiry deemed to be reasonable.

ESCHEATS. TERM OF OFFICE OF ESCHEATORS. AMENDMENTS OF 1982 GENERAL ASSEMBLY PROVIDE THAT ESCHEATORS SHALL SERVE AT PLEASURE OF GOVERNOR.

May 27, 1982

The Honorable G. Steven Agee  
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion whether, under the 1982 amendments to §§ 55-168 and 55-169 of the Code of Virginia (1950), as amended, escheators now in office are subject to reappointment or whether they continue in office until they resign or are removed for cause.

Chapter 437 [1982] Acts of Assembly amends § 55-168 to provide that escheators serve at the pleasure of the Governor. Section 55-169 was amended to delete the last sentence which provides for removal by the Governor for misbehavior, incapacity or neglect of official duty.

It is well established in Virginia that, when no restrictions have been imposed, the legislature may create and abolish offices as it may regard them as necessary or superfluous. Lipscomb v. Nuckols, 161 Va. 936, 172 S.E. 886 (1934). "'The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office.'" Sinclair v. Young, 100 Va. 284, 291, 40 S.E. 907 (1902).
Chapter 437 does not contain any limitations upon its applicability or any indication that it will not apply to escheators presently in office. Accordingly, giving the statute its plain meaning, I am of the opinion that all escheators in office on the effective date of the 1982 amendments shall serve at the pleasure of the Governor.

FAIR ELECTIONS PRACTICES ACT. LOCALITIES NOT TO FURTHER REGULATE BOARD OF SUPERVISORS' ELECTIONS EVEN IF ONLY BY VOLUNTARY GUIDELINES.

January 21, 1982

The Honorable Hunter B. Andrews
Member, Senate of Virginia

This is in reply to your recent letter which reads as follows:

"Article IV, Section 7, of the Constitution of Virginia provides '....The houses may jointly provide for legislative continuity between sessions occurring during the term for which members of the House of Delegates are elected....'."

Under the Interlocutory Order in the case of Cosner, et al. v. Dalton, et al., the members of the House of Delegates elected November 3, 1981, were elected for a one-year term, which term would expire January 12, 1983. Beginning in 1972, under the new Constitution, by a joint resolution the House of Delegates and the Senate have provided for carry-over bills from the even year to the odd year.

It is submitted under the Cosner case members of the House of Delegates will be elected for a second one-year term at the general election on November 2, 1982, to take office on January 12, 1983.

In view of the referred to section of the Constitution and the Cosner v. Dalton case, may the two houses of the General Assembly provide, as heretofore, for carry-over legislation from the 1982 session to the 1983 session?"

As you indicate, both the House of Delegates and the Senate have provided for carry-over bills from the even year to the odd year by joint resolution and in their respective rules. Heretofore, such a practice posed no problem since Art. IV, § 3, of the Constitution of Virginia (1971) provides for a two year term for members of the House of Delegates. The current terms, however, have been limited to one year by the federal court in the case of Cosner v. Dalton, 522 F.Supp. 315 (E.D. Va. 1981). The order provides in part, as follows:
"The General Assembly of Virginia may provide by law on or before February 1, 1982, whether the members of the House of Delegates elected in 1982 shall serve for a term of one or two years. If the General Assembly does not exercise this option, the term of members of the House of Delegates elected in 1982 shall be for one year to begin as presently provided by law."

I assume for purposes of this letter that the General Assembly will not exercise the option.

The authority contained in Art. IV, § 7 for legislative continuity between the sessions is limited to sessions occurring during the term for which members of the House of Delegates are elected. Consequently, I am of the opinion that the current session of the General Assembly is not authorized to provide for carry-over bills from the current session to the 1983 session.

FINES AND COSTS. GENERAL DISTRICT COURTS. ATTORNEYS. NO AUTHORITY TO HIRE PRIVATE ATTORNEYS, ON CONTINGENT-FEE BASIS TO COLLECT FINES LEVIED FOR VIOLATIONS OF LAWS OF COMMONWEALTH.

August 24, 1981

The Honorable Bernard S. Cohen
Member, House of Delegates

You ask whether private attorneys may be engaged on a contingent-fee basis to collect fines levied in general district courts for violations of the laws of the Commonwealth.1

Under § 19.2-340, when a statute prescribes a fine, the fine is normally to the Commonwealth. Further, under § 19.2-340, such fines constitute a judgment in favor of the Commonwealth, and, if not paid when imposed, execution may issue thereon in the same manner as upon any other monetary judgment.2

Under § 19.2-345, a monthly return of warrants and summonses in criminal and traffic cases disposed of in district court in the preceding month is made to the clerk of the circuit court. Under § 19.2-346, the clerk of the circuit court shall, when necessary, issue execution or other process upon fines remaining unpaid, as though such fines had been imposed in his court.3

Under § 19.2-348, the Commonwealth's attorney shall superintend the issuing of executions or judgments of fines going to the Commonwealth in the circuit court of his county or city.

Under § 19.2-349, the clerk of the circuit court, upon request, is to report fines imposed in his court which remain
unsatisfied, and it shall be the duty of the Commonwealth's attorney to make inquiries into why such fines remain unsatisfied, and if it appears that any such fines may be satisfied, the Commonwealth's attorney shall forthwith cause proceedings to be instituted for their collection and satisfaction.

Sections 19.2-348 and 19.2-349 are statutory grants of exclusive authority to Commonwealth's attorneys to institute proceedings to collect fines, costs and forfeitures which have been imposed by the courts.\(^4\)

Under § 15.1-8.1(B), the Commonwealth's attorney (and any assistants) shall be a part of the department of law enforcement of the county or city in which elected or appointed, and have the duties and powers imposed by general law, including certain duties as to prosecutions, and shall enforce all forfeitures, and carry out all duties imposed by § 2.1-356.\(^5\)

Under § 15.1-9, every county and city may, with the approval of the Compensation Board, provide for employing such assistants to the Commonwealth's attorney as in the opinion of the governing body may be required. Such assistants shall be appointed by the Commonwealth's attorney.

Under §§ 19.2-349 and 15.1-8.1(B), the duty to cause proceedings to be instituted for the collection and satisfaction of fines is placed upon the Commonwealth's attorney. The authority of the Commonwealth's attorney to engage additional counsel as assistants is stated in § 15.1-9.

I find no statutory authority, however, for special counsel to be engaged for the collection and satisfaction of fines by the Commonwealth.\(^6\) By way of contrast, I do find statutory authority for special counsel to be engaged for other purposes.\(^7\)

Accordingly, in the absence of express statutory authority, I am of the opinion that private attorneys may not be engaged on a contingent-fee basis to collect fines levied in general district courts for violations of the laws of the Commonwealth.\(^8\)

Legislation permitting such action appears to be one way of increasing the effectiveness of collecting fines. The law presently provides for collection by Commonwealth's attorneys. But the large amounts of uncollected fines suggest that additional means are desirable.

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\(^1\)Your inquiry relates, as well, to fines for violations of city, town or county ordinances.
Under § 16.1-69.48(b) of the Code of Virginia (1950), as amended, fines for such violations are paid into the treasury of the city, town or county whose ordinance has been violated. The collection of such fines, therefore, may involve charter and ordinance provisions.

Fines for violations of the laws of the Commonwealth are paid under § 16.1-69.48(b), into the State treasury, and the collection process is governed by statute.

Compare Opinion to the Honorable Robert N. Baldwin, Executive Secretary, Supreme Court of Virginia, dated July 9, 1976, found in Report of the Attorney General (1976-1977) at 83 (fines collected in district court are to be remitted to clerk of circuit court for distribution between Commonwealth and locality).

2 Compare Opinion to the Honorable Charles E. King, Jr., Clerk, Circuit Court of Gloucester County, dated August 4, 1978, found in Report of the Attorney General (1978-1979) at 142 (fines in criminal prosecutions bear interest like any other money judgment in favor of Commonwealth).

3 See Opinion to the Honorable Fred E. Martin, Jr., Judge, Norfolk General District Court, dated August 24, 1976, found in Report of the Attorney General (1976-1977) at 81 (district court can make no collections after return of warrant to circuit court).


5 See also, § 15.1-822 (special duties of Commonwealth's attorney of a city).

6 I am advised, however, of a pilot project where a Commonwealth's attorney has hired an assistant whose primary duties involve proceedings for the collection and satisfaction of fines. If the project "pays for itself" the practice may become more widespread.

7 See § 15.1-507 (governing body of county may employ special counsel in suits affecting county property), and Opinion to the Honorable Kenneth B. Rollins, Member, House of Delegates, dated October 7, 1974, found in Report of the Attorney General (1974-1975) at 25 (no implied power to employ special counsel except as authorized by statute).

See § 19.2-155 (disqualification or temporary disability of Commonwealth's attorney - appointment of substitute by judge of circuit court), and § 19.2-156 (prolonged absence of Commonwealth's attorney - appointment of acting Commonwealth's attorney by circuit judge).

See § 58-1016 (authority of governing body to employ special counsel for collection of taxes); and Opinion to the Honorable H. Ronnie Montgomery, Commonwealth's Attorney for Lee County, dated April 9, 1974, found in Report of the Attorney General (1973-1974) at 352.

8 I am advised that many unpaid fines arise from unpaid checks given for motor vehicle offenses. Resort to
§ 19.2-353.2 (notification to Division of Motor Vehicles) may assist in collecting this type of unpaid fine.

See, also, §§ 58-19.6 through 58-19.21 (Setoff Debt Collection Act) enacted in 1981 (permissible setoffs against State income tax refunds).

FIREARMS. COURT MAY RESTRICT PERMIT TO CARRY CONCEALED WEAPONS.

August 7, 1981

The Honorable A. Joe Canada, Jr.
Member, Senate of Virginia

You ask whether a permit to carry a concealed weapon may be issued containing restrictions, such as, for use only during certain hours and at certain times.

Section 18.2-308 of the Code of Virginia (1950), as amended, authorizes police officers, sheriffs and their deputies to carry concealed weapons at all times, and authorizes other specifically enumerated persons to carry a concealed weapon while in the discharge of their official duties. This statute further authorizes a circuit court to issue a permit to carry a specific type of concealed weapon if the court finds the applicant to be of good character and has demonstrated a need to carry such concealed weapon.

Section 18.2-308 is silent as to whether the court may place restrictions on a permit for a concealed weapon. The legislature has, however, placed restrictions on when certain persons may carry a concealed weapon, and I am not aware of any reason why a court could not impose similar restrictions. The statute allows the court to grant a permit in its discretion upon a finding of a demonstrated need. Such a need may not exist at all times and all places, and in my opinion a court may place restrictions upon a permit to carry a concealed weapon which would still enable the applicant to meet the demonstrated need.

FIREMEN. DUTY TO SERVE UNDER § 27-11. TO SUCH EXTENT, FIRE COMPANY MAY NOT ELECT NOT TO PROVIDE FIRE PROTECTION.

August 7, 1981

The Honorable Kevin G. Miller
Member, House of Delegates

You ask whether a fire company organized with the approval of a town governing body, under §§ 27-8, 27-8.1 and 27-9 of the Code of Virginia (1950), as amended, may elect, in connection with a dispute between the company and the town, not to provide fire protection within the town.1
Section 27-8 provides that any number of persons, not less than twenty, may form themselves into a company for extinguishing fires. Section 27-8.1 provides that a "fire company" is a volunteer fire-fighting organization organized pursuant to § 27-8 with the approval of the local governing body.

Section 27-9 provides that a writing stating the formation of such company, with the names of the members subscribed, shall be recorded in court. Thereafter, the members may make regulations for effecting the company's objects, consistent with the laws of the State, the ordinances of the town, and the bylaws of the fire department.

Under § 27-11, every member of a company so organized shall, upon any alarm of fire, attend according to such ordinances or bylaws, or company regulations, and endeavor to extinguish such fire.

I am not advised as to how the town, department or company provides for attendance of members upon alarm of fire.

Nevertheless, in the absence of some contrary provision, I am of the opinion that members of a fire company organized under §§ 27-8, 27-8.1 and 27-9, are obligated, upon alarm of fire, to attend and endeavor to extinguish the fire. To such extent, a fire company may not elect, in connection with a dispute between the company and the town, not to provide fire protection within the town.

Your inquiry raises two questions: a) the company's "duty to serve" within the town, and b) the company's "power to serve" outside the town. The "duty to serve" within the town is addressed in the body of this Opinion.

As for the "power to serve," I have consulted the charter of "The Elkton Volunteer Fire Company and Emergency Squad, Incorporated" (S.C.C. #158412), which appears to be the company in question. According to Art. II, the company's purposes include protection against "such fires, accidents and emergencies as may occur in the Town of Elkton and the general vicinity thereof." (Emphasis added.) Further, according to Art. III, active members "must reside permanently in the Town of Elkton or the surrounding community." (Emphasis added.)

Accordingly, the company has the corporate power to serve the vicinity outside Elkton, and may even have the "duty" to do so, provided it has organized itself under §§ 27-8, 27-8.1 and 27-9 to serve this unincorporated area. Under § 27-8, two or more companies may be formed in a county, especially when the companies use separate fire stations.

2See Opinion to the Honorable William W. Bennett, Jr., Commonwealth's Attorney for Halifax County, dated March 10,
1978, found in Report of the Attorney General (1977-1978) at 453 (although a fire company is not an instrumentality of a town, the company is subject to control by the local governing body).

3 Under Art. III of the charter, cited above, active members of the company "must agree to promptly respond to all alarms and report to the Fire Hall." Section 27-11 refers to the company's "regulations," but not to its corporate charter.

FIREMEN. PUBLIC OFFICERS. COMPATIBILITY. CHIEF AND OFFICERS OF FIRE COMPANY WHO ARE CHIEF AND OFFICERS OF TOWN FIRE DEPARTMENT ARE PROHIBITED FROM SERVING ON TOWN COUNCIL.

October 12, 1981

The Honorable Clinton Miller
Member, House of Delegates

You ask whether the chief, or any other member of a fire company, as defined in § 27-8.1 of the Code of Virginia (1950), as amended, is prohibited under Art. VII, § 6 of the Virginia Constitution (1971), or §§ 15.1-50 or 15.1-800, from serving as a member of a town council, when the fire company is part of the town's fire department under §§ 27-6.1 and 27-13.

Article VII, § 6 contains two prohibitions. The first prohibition states that no person shall at the same time hold more than one office mentioned in Art. VII. The second prohibition states 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.

The first prohibition in Art. VII, § 6 has a statutory counterpart in § 15.1-50, which provides that no person holding the office of councilman shall hold any other office mentioned in Art. VII at the same time. The second prohibition in Art. VII, § 6 has a statutory counterpart in § 15.1-800, which provides that 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 appointment.

Under § 27-13, the governing body of a town has authority to appoint a chief and other officers of a fire company, as defined in § 27-8.1. In the present situation, the chief and other officers of the fire company have also been appointed as chief and officers of the town's fire department, under § 27-6.1. Therefore, under § 27-6.1, the chief and officers of the fire company have become public officers of the town.

The first prohibition in Art. VII, § 6, and its counterpart in § 15.1-50, does not prevent the chief and other officers of the fire department from serving as members.
of the town council, because the chief and other officers do not fill offices mentioned in Art. VII.3

The second prohibition in Art. VII, § 6 does prevent the chief and other officers of the fire department from serving as members of the town council, because the chief and other officers hold public offices filled by the governing body. The prohibition in § 15.1-800 is to the same effect.4

Accordingly, it is my opinion that the chief and other officers of a fire company who are chief and officers of a town's fire department under §§ 27-6.1 and 27-13 are prohibited from serving as members of the town council.

1See Opinion to the Honorable Adelard L. Brault, Member, Senate of Virginia, dated December 18, 1979, found in Report of the Attorney General (1979-1980) at 171.
2I am advised that the town charter also treats the chief and officers as public officers of the town. See Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated September 15, 1980 (public officer status as determined by charter) (copy enclosed).

The other members of the fire company have not become public officers, however, so the prohibitions discussed herein do not apply to such members. See Opinion to the Honorable Kevin G. Miller, Member, House of Delegates, dated September 15, 1980 (police privates not public officers) (copy enclosed).

This Opinion does not reach the question whether the chief and other officers of a fire company are public officers if they are not officers of the fire department as well.


The second prohibition in Art. VII, § 6 contains an exception where a member of a governing body may be named a member of some other board, commission or body as permitted by general law. See, for example, § 15.1-437 (one member of local planning commission may be member of governing body). I find no such general law that is applicable to fire departments or fire companies.

GAMBLING. BINGO. PROCEEDS. CANNOT BE USED TO HELP CONDUCT CONVENTION OF NATIONAL MEMBERSHIP OF ORGANIZATION.

August 7, 1981

The Honorable Robert C. Scott
Member, House of Delegates
You have asked whether an organization qualified to conduct bingo games may use the proceeds from those games to help conduct a convention of its national membership in order to further its charitable and community purposes. I am of the opinion that qualified organizations may not use their bingo proceeds in such a manner.

Section 18.2-340.9(A) of the Code of Virginia (1950), as amended, prohibits the use of such proceeds "for any purpose other than those lawful religious, charitable, community or educational purposes for which the organization is specifically chartered or organized." In a recent Opinion to the Honorable Peter K. Babalas, Member, Senate of Virginia, dated June 24, 1981 (copy attached), I noted that the language of § 18.2-340.9(A) should not be considered as a carte blanche to use the bingo and/or raffle proceeds in just any fashion. Further, in an Opinion to the Honorable John E. Kloch, Commonwealth's Attorney for the City of Alexandria, dated September 19, 1980 (copy attached), it was recognized that the Code provisions dealing with bingo, §§ 18.2-340.1 through 18.2-340.12, were enacted to strictly regulate bingo and raffle games.

It could conceivably be argued that almost anything an organization does or pays for, no matter how tenuous, could technically be connected in some manner to the religious, educational, charitable or community purposes for which it was chartered or organized. However, if such an argument was correct, then there would be no need for the audit and reporting provisions of §§ 18.2-340.5 through 18.2-340.7. Rather, it seems clear that the legislature intended not only that the records of bingo and raffle proceeds be given close scrutiny but that the use of such proceeds also be given close scrutiny. See financial report form contained in § 18.2-340.6(D).

With these general considerations in mind, it is my opinion that the connection between using bingo proceeds to hold a national convention, even as you say, to further charitable and community purposes, and those lawful religious, charitable, community or educational purposes for which the organization was chartered or organized is too tenuous to say that it complies with the reason and spirit of § 18.2-340.9(A). However, this Office has previously said that organizations such as churches may pay for their sanctuary with bingo proceeds. I believe this is a prime example of not only a permissible use but also the more direct connection between the use of the proceeds and the purposes of the organization that was intended under § 18.2-340.9(A). Otherwise, the potential for abuse would be too great.

Therefore, I must conclude that the use of proceeds in the manner which you suggest is prohibited.
Since that Opinion was issued, the General Assembly has added § 18.2-340.13 to the bingo provisions. See Ch. 274 [1981] Acts of Assembly.


GAMBLING. CONSIDERATION UNDER § 18.2-325 PRESENT WHEN PARTICIPANTS PAY TO PLAY VIDEO GAMES, THEREBY BECOMING ELIGIBLE FOR PRIZE.

June 22, 1982

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

You have asked whether a particular promotional campaign violates Virginia's anti-gambling statutes. As outlined in your letter, the proposed promotional campaign is described as follows:

"A businessman who operates a video game room in the City of Salem wishes to conduct a promotional campaign wherein he will award a prize or prizes to an individual whose name is drawn from a pool of names compiled during the course of the promotional campaign. This pool of names will consist of those individuals who play the video games during a given period of the campaign, for instance, a week, and score the highest number of points on a given video game. To play a game, the player must either insert a coin or a metal token which he purchases from the game room operator... The ultimate prize winner will be selected by chance drawing his or her name from the pool of the highest scorers during the given period of time. The prize or prizes to be awarded the winner will be set out prior to the start of the promotional campaign and will in no way be contingent on the number of participants or the profits derived during the course of the campaign."

In determining whether an activity constitutes illegal gambling as defined in § 18.2-325 of the Code of Virginia (1950), as amended, this Office normally has looked to see if the elements of prize, chance and consideration are present. See, e.g., Report of the Attorney General (1979-1980) at 227, n.2. In the instant factual situation, a prize is being given to the person whose name is randomly selected from a pool of names. Thus, prize and chance are clearly present.

With respect to the third element, consideration, both this Office and the Virginia Supreme Court have liberally construed "consideration" for the purpose of defining illegal gambling. See Report of the Attorney General (1979-1980) at 228. Inasmuch as eligibility for the prize drawing is
dependent on the participant's initially giving of something of value in order to play the game, I am of the opinion that the element of consideration is present. This conclusion is consistent with a 1980 Opinion of this Office holding that an incentive program in which a corporation placed in a pool the names of all employees purchasing saving bonds and then randomly selected from the pool the name of one employee who was awarded a prize constituted illegal gambling. See Report of the Attorney General (1979-1980) at 227.

Therefore, because the three elements, prize, chance and consideration are present, I must conclude that the promotional campaign which you have described would be in violation of Virginia's anti-gambling laws.

GAMBLING. ELEMENTS OF ILLEGAL GAMBLING UNDER § 18.2-325(1). EXISTENCE OF CONSIDERATION WHERE FREE GIFT OFFERED WITHOUT PURCHASE OBLIGATION.

March 15, 1982

The Honorable Ralph L. Axselle, Jr.
Member, House of Delegates

You have inquired whether a Virginia manufacturing concern may randomly select one of its customers or potential customers each year to receive an automobile free of charge as a promotion of the manufacturer's product. I am advised that the product in question is equipment for business use. As I understand the proposal, the manufacturer will not impose a purchase obligation upon the recipient as a condition precedent to receipt of the automobile. A prior purchaser of the manufacturer's product may be eligible to receive the automobile.

The first question which arises in connection with your inquiry is whether the promotion of the manufacturer's product in this manner constitutes illegal gambling under § 18.2-325(1) of the Code of Virginia (1950), as amended. An activity may constitute illegal gambling under that section when the elements of the prize, chance, and consideration are present together. See Report of the Attorney General (1979-1980) at 227, 228. On the facts presented in your letter, the elements of prize and chance are clearly present. Under § 18.2-332, no consideration is deemed to have been given in various situations as long as "no charge is made to, paid by, or any purchase required of him [the customer] in connection therewith." On its face, the promotion proposed by the manufacturer appears to impose no purchase obligation upon the recipient of the automobile, and thus, no consideration is present. However, if the promotion is operated in such a manner as to require a purchase in connection therewith, then consideration would be present and the promotion may constitute illegal gambling. I also note for your information that the Supreme Court of Virginia has taken a "road view of activities which constitutes..."

If the activity you describe involves the offer of a free automobile to an agent or employee of a business organization in order to induce the principal or employer to purchase the equipment, the promotion could be in the nature of a personal bonus to the agent or employee for procuring the sale of the equipment to the business. Both the offering and acceptance of such a bonus would be prohibited as a class 3 misdemeanor by §§ 18.2-444(3) and 18.2-444(4).

GAMBLING. MERE SUBMITAL OF ENTRY BLANK DOES NOT CONSTITUTE CONSIDERATION UNDER § 18.2-325.

June 28, 1982

The Honorable H. N. Osborne
Commonwealth's Attorney for Giles County

You have asked several questions concerning the legality of a promotional scheme, described in your letter as follows:

"A Cable Television Company operating in our county wishes to offer as a promotion, hotel accommodations and tickets to the World's Fair in Knoxville, Tennessee. Entry blanks will be mailed to all cable customers and will be available to all who request them from the cable office. Entry on blank 3x5 cards will also be accepted. No purchase of any type or subscription to the cable services will be required. The winner will be picked by random drawing."

I will answer your questions in the order presented.

1. Is this a lottery, and if it is not, is there any illegal facet to it?

"Lottery" is generally defined as a generic term embracing all schemes for distribution of prizes by chance for consideration. See Report of the Attorney General (1979-1980) at 51. "Illegal gambling," as defined in § 18.2-325 of the Code of Virginia (1950), as amended, contains the same three basic elements. In the factual situation presented, prize and chance are obviously present. However, it appears that neither a pecuniary benefit will necessarily be derived by the cable television company from every contestant, nor will every contestant necessarily have to give up something of value to participate in the contest. Section 18.2-3322 provides that the mere submittal of an entry blank is not deemed to be consideration. Based on the facts presented, it is my opinion that, in the absence of the element of consideration, this promotional scheme is not a lottery, and, unless the contest is run in some fraudulent or
illegal manner or is in violation of § 18.2-242, it is also not illegal gambling as defined in § 18.2-325.

2. Is the return of an entry by mail which would, of course, require a stamp, be a consideration thus bringing the matter into a lottery category?

Section 18.2-332 provides "mailing or delivery of an entry blank..." is not deemed to be consideration. Therefore, your question must be answered in the negative.

3. Is there any filing requirement in the Commonwealth?

The only permissible form of lottery in Virginia is that defined in § 18.2-340.1(3) and conducted under the requirements found in §§ 18.2-340.1 through 18.2-340.13. While there are various types of filing requirements in connection with that specific exemption to the gambling laws in Virginia, see, e.g., § 18.2-340.2 (requirement of annual permit); § 18.2-340.4 (special permit); § 18.2-340.6 (filing of financial reports); § 18.2-340.13 (special permit). These requirements are inapplicable to your factual situation, because it does not appear to be a lottery.

4. Are there any time limits prescribed?

I know of no time limit on a promotional contest.

5. Do the parties have to offer a cash equivalent to the prize?

I am not aware of any statutory requirement that a cash equivalent to the prize be offered in a contest or promotional scheme such as the one you have described.

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1Section 18.2-325(1) defines "illegal gambling" as follows: "The making, placing or receipt, of any bet or wager in this State of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this State, shall constitute illegal gambling."

2Section 18.2-332 provides, in part: "[N]o consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith."

3Section 18.2-242 provides, in part: "No retail establishment in this State shall use any game, contest, lottery or other scheme or device, whereby a person or persons may receive gifts, prizes or gratuities as determined
by chance for the purpose of promoting, furthering or advertising the sale of any product or products having both a federal and State excise tax placed upon it, and the fact that no purchase is required in order to participate in such game, contest, lottery or scheme shall not exclude such game, contest, lottery or scheme from the provisions of this section."

GAME AND INLAND FISHERIES. DAMAGE STAMPS. § 29-92.5
PROHIBITS COUNTIES FROM PAYING CLAIMS FROM DAMAGE STAMP FUNDS TO LANDOWNERS WHO DO NOT ALLOW HUNTING OF BIG GAME EXCEPT BY CLOSE FRIENDS AND RELATIVES.

August 17, 1981

The Honorable William L. Heartwell, III
County Attorney for Botetourt County

You have asked whether the newly-revised damage stamp law, § 29-92.1, et seq., of the Code of Virginia (1950), as amended, permits a county having a damage stamp ordinance to make payments from its damage stamp fund to landowners who restrict big game hunting on their land to family and close friends.

Prior to its revision, the damage stamp statute expressly precluded payments "to any person who shall prohibit hunting on his land by the general public." A previous Opinion construing that version of the damage stamp law concluded that posting of land did not per se constitute a prohibition of hunting by the general public precluding damage fund payments to a landowner. See Report of the Attorney General (1974-1975) at 190. Nonetheless, that Opinion left little doubt that the term "general public" in the earlier damage stamp law referred to the hunting public in general.

In 1977, the General Assembly amended the above-mentioned provision of the damage stamp law, changing "hunting by the general public" to "hunting of big game by licensed hunters." Thus, as amended, the statute provides that to be eligible for damage fund payments a landowner shall not prohibit big game hunting by licensed hunters. See § 29-92.5. I conclude that the present law requires that a landowner permit big game hunting by a broader sector of the public than the landowner's family and close friends in order to be eligible for damage fund payments. This interpretation is consistent with the primary purpose of a damage stamp law--to assess the hunting public a fee, thereby creating a fund to repay landowners for damage done by big game hunters or by the game they hunt.

The damage stamp law does not, however, require a landowner to allow every licensed hunter to enter his land upon demand. Hunting without permission remains illegal under § 18.2-132 and written permission is needed to hunt on
posted property under § 18.2-134. A landowner who refuses permission to hunt in a particular case, for good reason, would not necessarily be ineligible to file damage claims against a county fund.

I conclude, therefore, that landowners who restrict hunting on their land by closing it to all but relatives and close friends are not eligible for county damage fund payments.

GAME AND INLAND FISHERIES. GAME WARDENS MAY NOT EXERCISE GENERAL POLICE POWERS EXCEPT ON PROPERTIES OWNED OR CONTROLLED BY COMMISSION OR PURSUANT TO § 29-32.1.

February 11, 1982

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

This is in reply to your letter of February 4, 1982, in which you ask whether game wardens may exercise general police powers in the enforcement of the general criminal laws of the Commonwealth as set forth in Title 18.2 of the Code of Virginia (1950), as amended.

Section 29-32 of the Code provides that game wardens are vested with authority to enforce specifically the hunting, trapping and inland fish laws, and, further, with general police powers on properties owned or controlled by the Commission of Game and Inland Fisheries (the "Commission"). Section 29-32.1 authorizes game wardens to enforce certain laws therein specified.

It is my opinion, therefore, that game wardens may not enforce the general criminal laws of the Commonwealth, except on properties owned or controlled by the Commission or as permitted by § 29-32.1.

GAME AND INLAND FISHERIES. TERM "POSTED PROPERTY" AS USED IN § 18.2-134 MAY BE DEFINED AS PROPERTY UPON WHICH SIGNS OR POSTERS HAVE BEEN PLACED ADVISING THAT HUNTING, FISHING OR TRAPPING IS PROHIBITED ON PROPERTY.

April 22, 1982

The Honorable William P. Hay, Jr., Judge
Prince Edward County General District Court

You have asked to be advised if there is a legal definition of the term "posting of property" as used in § 18.2-134 of the Code of Virginia (1950), as amended.

Section 18.2-134 reads as follows:
"Trespass on posted property.--Any person who goes on the lands, waters, ponds, boats or blinds of another, upon which signs or posters prohibiting hunting, fishing or trapping have been placed, to hunt, fish or trap except with the written consent of or in the presence of the owner or his agent shall be guilty of a misdemeanor and punished by a fine of not more than two hundred fifty dollars or by confinement in jail for not more than thirty days, either or both." (Emphasis added.)

The phrase "posting of property" does not appear in § 18.2-134. The phrase "posted property" is in the headline of the section. According to § 1-13.9, headlines are intended as "mere catch words to indicate the contents of the sections...." Although I am unaware of any statute or case in which the term "posted property" has been defined, one can find its meaning from the provisions of § 18.2-134 and that section's forerunners.

The crime of hunting on the lands of another, without permission of the owner, has been codified in some manner in Virginia for a great number of years. See § 3338, Code of 1919 and § 3305(50), Code of 1942. To constitute the crime under the section, it has always been necessary that adequate notice or warning be placed on the property to advise the hunter that hunting without permission is prohibited. The statutes have used the terms "shall post notices" (§ 3338), "signs or posters placed on such property" (§ 3305(50)) and more recently, "upon which signs or posters prohibiting hunting, fishing or trapping have been placed" (§ 18.2-134). Consequently, the terms "posted property" and "posting of property" have been generally accepted as being synonymous, despite the absence of such terms in the present statute.

I am, therefore, of the opinion that "posted property," as that phrase is used in the headline of § 18.2-134, may be defined as property upon which signs or posters have been placed advising that hunting, fishing or trapping is prohibited on the property.

GARNISHMENTS. "EARNINGS" FOR PURPOSES OF § 34-29 DOES NOT INCLUDE RENTAL VALUE OF APARTMENT FURNISHED FOR CONVENIENCE OF EMPLOYER.

July 10, 1981

The Honorable S. Lee Morris, Judge
Portsmouth General District Court

This is in reply to your recent inquiry whether the rental value of an apartment provided free of rent to an employee by and for the convenience of his or her employer is considered compensation for purposes of determining whether or not the employee's compensation exceeds the amount exempt from garnishment.
The Virginia garnishment statute, § 34-29 of the Code of Virginia (1950), as amended, is patterned after garnishment provisions in the Consumer Credit Protection Act, 15 U.S.C. §§ 1672-1674. There being no case authority in Virginia which indicates the scope of what is to be considered "earnings" under the § 34-29(d)(1) definition, the interpretations of the federal act are persuasive.

The United States Supreme Court has endorsed the view of the Second Circuit Court of Appeals that for purposes of 15 U.S.C. §§ 1672 and 1673, the term "earnings" is limited to periodic payments of compensation and does not include every asset that is traceable in some way to compensation. Kokoszka v. Belford, 417 U.S. 642, 651 (1974). The value of free rent is not in the form of a periodic payment to the employee as contemplated by either federal or Virginia statutes.

I am therefore of the opinion that the rental value of an apartment provided free of rent to an employee by and for the convenience of his or her employer must not be considered compensation for purposes of determining whether or not the employee's compensation exceeds the amount exempt from garnishment.

GARNISHMENTS. GARNISHMENT PROCEEDING AGAINST SPOUSE IS SEPARATE ACTION FROM ORIGINAL SUPPORT PROCEEDING BROUGHT UNDER REVISED UNIFORM ENFORCEMENT OF SUPPORT ACT. PLAINTIFF MUST PAY REQUIRED FILING FEES.

March 4, 1982

The Honorable Fred E. Martin, Jr., Judge
General District Court for the City of Norfolk

You have made an inquiry concerning the following factual situation:

(1) Plaintiff applied to the Norfolk Juvenile and Domestic Relations District Court for support from her ex-spouse in accordance with § 20-61 of the Code of Virginia (1950), as amended. In accordance with § 20-88.22:01, she was charged no fee to initiate the proceeding.
(2) A Kentucky court entered a support order in favor of the plaintiff and the plaintiff registered this foreign support order with the Norfolk Juvenile and Domestic Relations District Court under § 20-88.30:2. The juvenile and domestic relations court sent an abstract of that judgment to your court, the Norfolk General District Court.
(3) Plaintiff now seeks to initiate garnishment proceedings in your court, at no cost, on the basis that the garnishment proceeding is an extension of the original support proceeding.
You have asked whether the plaintiff should be allowed to initiate the garnishment proceeding without payment of a filing fee.

A proceeding in garnishment is an independent action separate from an execution of a judgment. See Butler v. Butler, 219 Va. 164, 247 S.E.2d 353 (1978), and Report of the Attorney General (1980-1981) at 275. That being the case, the garnishment proceeding is not an extension of the original action as the plaintiff in this situation asserts, but is a totally separate action in itself.

There are provisions in the Revised Uniform Reciprocal Enforcement of Support Act ("the Act"), §§ 20-88.12 to 20-88.31, that provide a right of enforcement of a support order. See § 20-88.24. However, as mentioned earlier, enforcement and garnishment are two different actions. There being no specific provisions for garnishment in the Act, such proceedings are governed by the general garnishment provisions found in §§ 8.01-511 to 8.01-525.

It is my opinion that the garnishment proceeding instituted by the plaintiff is not an extension of the original support proceeding, but an independent action. Therefore, the plaintiff is subject to any filing fee required by statute.

GARNISHMENTS. § 16.1-116 DOES NOT PROHIBIT GENERAL DISTRICT COURT FROM ISSUING SUMMONS IN GARNISHMENT AFTER TWO YEARS FROM DATE OF JUDGMENT WHERE PAPERS HAVE BEEN DELIVERED TO CIRCUIT COURT UNDER § 16.1-115.

September 28, 1981

The Honorable Robert E. Hayes, Judge
Page General District Court

This is in reply to your inquiry whether a general district court has the authority to issue a summons in garnishment, after two years from the date of the judgment, upon 1) an execution issued by the circuit court which is made returnable to the general district court, and 2) upon an execution issued by the circuit court made returnable to the circuit court.

With regard to the first part of your inquiry, it is my opinion that such a situation cannot legally arise. Under § 8.01-484 of the Code of Virginia (1950), as amended, upon the return of the executing officer, "it shall be the duty of the clerk...to enter the return of such officer on the execution book or judgment docket wherein such execution is entered...." (Emphasis added.) This requires writs of fieri facias to be returnable to the court issuing the writ. Furthermore, where the executing officer fails to make a timely return, it is the duty of the clerk of a circuit court which issued the writ to issue a rule against the officer.
See § 15.1-80. This would similarly require the return to be made to the clerk of the circuit court issuing the writ.

This Office has previously construed § 16.1-116 to mean that where papers have been delivered to the clerk of the circuit court under § 16.1-115, a court not of record has no authority to issue an abstract of the judgment nor an execution more than two years after judgment has been rendered by that court. See Reports of the Attorney General (1963-1964) at 35, (1977-1978) at 102. A summons in garnishment, however, is not an "execution" in Virginia. Butler v. Butler, 219 Va. 164, 165, 247 S.E.2d 353, 354 (1978) held:

"In Virginia, 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...."

The two-year limitation of § 16.1-116 therefore does not apply to summonses in garnishment.

No court may issue a summons in garnishment unless there is a "live" writ of fieri facias. This results from § 8.01-511, which permits the issuance of a summons in garnishment only to enforce the lien of a writ of fieri facias, and § 8.01-479, under which such a lien ceases on the return day of the writ.

Section 8.01-511 permits summonses in garnishment to be issued by "the clerk's office of the court in which the judgment is rendered..." or by "the clerk's office to which an execution issued thereon has been returned as provided in § 16.1-99...." With regard to the second part of your inquiry, therefore, it is my opinion that a general district court may issue a summons in garnishment after two years from the date of judgment, upon a "live" execution issued by the circuit court made returnable to the circuit court, but only where the general district court originally issued the judgment.

GARNISHMENTS. WAGES OF UNITED STATES GOVERNMENT EMPLOYEES ARE SUBJECT TO GARNISHMENT BY VIRGINIA COURTS.

February 2, 1982

The Honorable Edgar P. Smith
Sheriff of the City of Staunton

This is in reply to your letter of January 21, 1982, inquiring whether wages of United States government employees are subject to garnishment by Virginia courts.

Such wages may be garnished under § 8.01-523 of the Code of Virginia (1950), as amended. That section provides that the summons shall be served upon the "managing employee" of
the federal agency, or if the debtor is a member of the armed forces, upon the chief fiscal officer of the military post to which the debtor was last assigned. The statute further provides that if such service cannot be made, service may be made in accordance with Rule 4(d)(4) of the Federal Rules of Civil Procedure, as amended. I am enclosing a copy of the current Rule.

GARNISHMENTS. WHEN FEDERAL AGENCY FAILS TO HONOR GARNISHMENT SUMMONS, UNITED STATES ITSELF IS LIABLE.

February 23, 1982

The Honorable Lois S. Henson, Clerk
Staunton General District Court

This is in reply to your recent letter in which you make two inquiries regarding the garnishment of wages of federal employees. First, you inquire who is responsible if a federal agency fails to honor a garnishment summons. Second, you ask what procedures should be followed in enforcing such a dishonored garnishment.

In an Opinion dated February 2, 1982, addressed to the Honorable Edgar P. Smith, Sheriff of the City of Staunton, I advised that § 8.01-523 of the Code of Virginia (1950), as amended, subjects wages of federal employees to garnishment proceedings in Virginia courts (copy enclosed).

Federal law permits the garnishment of federal employees' wages only to satisfy debts for child or spousal support. 1 42 U.S.C. § 659. Pursuant to the statute, in such situations the federal government is subject to such garnishment actions "in like manner and to the same extent" as if it were "a private person."

Accordingly, the United States itself is liable for its failure to honor a garnishment arising from a federal employee's support obligation. Either the United States or the employing agency may be named a party. Since the United States may be sued "in like manner" as "a private person," usual enforcement procedures should be followed in the event the federal government fails to honor a garnishment.

1This limitation does not apply to garnishment of the wages of Postal Service employees whose wages may be garnished to satisfy any judgment debt. General Elec. Credit Corp. v. Smith, 565 F.2d 291 (4th Cir. 1977).

GENERAL ASSEMBLY. EFFECT OF FAILURE TO CONFIRM GUBERNATORIAL APPOINTMENTS.
February 8, 1982

The Honorable R. V. Davis
Executive Director
State Water Control Board

This is in reply to your letter of January 22, 1982, which reads as follows:

"Governor Dalton appointed Dr. Bartholomeus van't Riet to the State Water Control Board to succeed Mr. R. Alton Wright, whose term expired last June. Governor Dalton also reappointed J. Leo Bourassa to the Board. Both of these appointments were among those that the General Assembly failed to confirm before it adjourned on January 12.

On behalf of the State Water Control Board, I request your opinion of the effect of the General Assembly's failure to confirm Dr. van't Riet and Col. Bourassa."

The appointees mentioned were listed in Senate Joint Resolution No. 15 introduced in the 1981 special session of the General Assembly, which was the resolution introduced for the purpose of confirming appointments by the Governor. I am advised that on December 23, 1981, the House Democratic Caucus agreed not to take up any further confirmations which the House of Delegates Committee on Nominations and Confirmations might report for the House of Delegates to act upon. The Senate Committee on Privileges and Elections failed to report Senate Joint Resolution No. 15 prior to the adjournment of the General Assembly on January 12, 1982, and the resolution therefore failed to pass either house of the General Assembly. Under the circumstances, it is clear that the members of the General Assembly were aware of the existence of the pending resolution at the time of the General Assembly's adjournment. Such a failure to pass is tantamount to a refusal of the General Assembly to confirm the appointments. State Board of Barber Examiners v. Walker, 67 Az. 156, 192 P.2d 723 (1948).

Article V, § 11 of the Constitution of Virginia (1971) reads as follows:

"No person appointed to any office by the Governor, whose appointment is subject to confirmation by the General Assembly, under the provisions of this Constitution or any statute, shall enter upon, or continue in, office after the General Assembly shall have refused to confirm his appointment, nor shall such person be eligible for reappointment during the recess of the General Assembly to fill the vacancy caused by such refusal to confirm."

In view of the clear mandate in the foregoing constitutional provision, I am of the opinion that both
appointees were ineligible to enter upon, or continue in, office after the General Assembly adjourned on January 12, 1982.

In prior Opinions, this Office has held that in absence of any constitutional or statutory prohibition, incumbents in office hold over after expiration of their terms until qualification of their successors. See Report of the Attorney General (1980-1981) at 4. In the instant case, however, there is a constitutional prohibition. Consequently, I am of the opinion that neither appointee is eligible to continue in office, even though one was a reappointment to succeed himself in office.

This conclusion is buttressed by the fact that former § 33 of the Constitution of 1928, which provided that elected or appointed officers "shall continue to discharge the duties of their offices after their terms of service have expired until their successors have qualified..." was deleted from the Constitution of Virginia in the 1971 revision.

February 9, 1982

The Honorable Joseph V. Gartlan, Jr.
Member, Senate of Virginia

This is in response to your inquiry concerning § 15.1-36.2 of the Code of Virginia (1950), as amended. You have asked whether the General Assembly can by general statutory enactment authorize local governing bodies to reorganize human services agencies in a manner that would otherwise be prohibited by State statutes without requiring an affirmative action by the General Assembly. If the answer to this question is no, you have asked what legislative amendments could be made to the statute to cure the legal defects.

Section 15.1-36.2, which has been called the "local option" section, allows local governing bodies to reorganize their human services programs in ways that would conflict with existing laws, rules or regulations. The local governing agency is required to submit a reorganization plan to the Governor. If an existing provision of law prohibits or restricts the implementation of the plan, the Governor is directed to submit the plan to each house of the General Assembly at least forty-five days prior to the commencement of a session of the General Assembly. If the General Assembly does not specifically disapprove the plan by the end of that session, the plan has the force of law. No specific act of the General Assembly is required to approve the plan.

The statutes affected by a local option reorganization plan cannot be held to be suspended. Even if suspension were appropriate in this instance, it would be prohibited by Art. I, § 7, which states "[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised." This provision requires consent of the General Assembly, and in this particular situation failure to act cannot be interpreted as consent.

It is my opinion that in order to comply with the requirements of the Constitution, the local option reorganization requires specific approval by bill enacted by the General Assembly in any case where a reorganization plan conflicts with existing statutes. It is further my opinion that any such legislative action would constitute a special act as defined in Art. VII, § 1, which requires an affirmative vote by two-thirds of the members elected to both houses of the General Assembly.

GENERAL ASSEMBLY. MAY PRESCRIBE METHODS TO BE USED TO ASCERTAIN FAIR MARKET VALUE OF PROPERTY UNDER ART. X, § 2. PRESUMPTION OF CONSTITUTIONALITY.

March 10, 1982

The Honorable Clive L. DuVal, 2d
Member, Senate of Virginia

You have requested my opinion of the constitutionality of H.B. 3241 which would amend § 58-760 of the Code of Virginia (1950), as amended, to include the following provision:

"Beginning with assessments effective on January 1, 1983, the fair market value of multi-unit real estate of twelve units or more leased primarily to residential tenants shall be determined without regard to its potential for conversion to condominium or cooperative ownership."
The answer to your question is controlled by the provisions of Art. X of the Constitution of Virginia (1971). Article X, § 1 provides, in pertinent part, that "[a]ll taxes...shall be uniform upon the same class of subjects...." Article X, § 2 provides, in pertinent part, that "[a]ll assessments of real estate...shall be at their fair market value, to be ascertained as prescribed by law." (Emphasis added.)

It is often said that the assessment of property values is an inexact art and the Supreme Court of Virginia has recognized that many assessment tools, techniques and methods may be utilized to ascertain fair market value. See, e.g., Cross v. City of Newport News, 217 Va. 202, 228 S.E.2d 113 (1976), and Perkins v. Albemarle, 214 Va. 416, 200 S.E.2d 566 (1973). In the Cross case, the court, quoting from an earlier case, stated:

"'The Constitution does not prescribe that the valuation of all property for taxation shall be ascertained in the same way or manner. It is not even implied. In the nature of things, it could not be done. The many kinds or species of property with their diverse characteristics render it impossible....The requirement of equality and uniformity is satisfied by such regulations as will secure an equal rate and a just valuation, without reference to the method of valuation....The legislature may prescribe any method it may deem best for attaining a just and fair valuation of any species of property, and the court could not declare any such law void, unless it manifestly violated the principles required by the Constitution.'" Cross, 217 Va. at 206-207.

Indeed, by permitting the General Assembly to prescribe the methods by which the fair market value of property shall be ascertained, the Constitution adopted in 1971 continues to recognize that different factors may be appropriate in different situations.

The court has also recognized that certain factors may be inappropriate for consideration. In Fruit Growers v. Alexandria, 216 Va. 602, 607, 221 S.E.2d 757 (1976), the court, quoting from another source, stated:

"'Valuation based upon an estimate of the potential income which might be realized from utilization by the owner of the property in a manner of which it is capable (but of which he has not yet availed himself) has generally been rejected on the ground that such income is too uncertain and conjectural to be acceptable.'" (Emphasis added.)

House Bill 324 appears to be an attempt to prescribe one factor which shall not be considered in ascertaining fair market value. It obviously follows that, if the General Assembly may prescribe the method or methods to be used to
ascertain fair market value, it may prescribe what shall not be considered in ascertaining fair market value. The factor to be excluded, the potential of a certain type of residential property to be converted into a different type of ownership for the purpose of generating higher income, is not dissimilar from the factor excluded by the Supreme Court of Virginia in Fruit Growers. Accordingly, given the presumption of constitutionality to be accorded legislative enactments, I am of the opinion that H.B. 324 does not offend Art. X, § 2 of the Constitution.

Turning to Art. X, § 1, the constitutional commitment to uniformity has developed from a "general sense of justice in the equal distribution of the public burden" and "from the principle that those who are similarly situated should be treated in a like manner by the law." Board of Supervisors of Fairfax County v. Leasco Realty, Inc., 221 Va. 158, 166, 267 S.E.2d 608 (1980). House Bill 324 does not violate the uniformity provision of Art. X, § 1, simply because the Bill seeks to prescribe the method of ascertaining fair market value by mandating that a particular factor not be considered when valuing certain properties. As the court made clear in Leasco, the mere use of different methods of assessment does not require a conclusion of lack of uniformity.

Nevertheless, I do observe that H.B. 324 applies only to "multi-unit real estate of twelve units or more...." At least inferentially, the Bill permits consideration of the potential for higher incomes when valuing multi-unit residential properties having less than twelve units, while excluding such consideration from those properties having twelve or more units. While there may be a rational basis for this distinction, I am unaware of any such basis. In this sense, I believe there is a basis for a serious challenge to the Bill under the uniformity provision of Art. X, § 1. Of course, this challenge could be avoided by dropping the distinction between properties having less than twelve units and those having more than twelve units, or, alternatively, amending the cut-off to five multi-family units, which is a well recognized distinction in other areas of the law.

1It is my understanding that you do not question the constitutionality of that portion of H.B. 324 which adds § 58-769.3:2 to the Code.
As Chairman of the Privileges and Elections Committee, you have asked to be advised if the General Assembly of Virginia, convened in special session pursuant to a proclamation of the Governor, may consider matters other than those specially contained in the proclamation.

The Virginia Constitution provides two means of calling a special session of the General Assembly: (1) Governor's initiative, and (2) upon application of two-thirds of the members elected to each house. See Art. IV, § 6 of the Constitution of Virginia (1971).

The Governor may call a special session at his discretion when, in his opinion, the interest of the Commonwealth may require. Section 6 sets no limit on the subject matter of the special session. The decision to call, or not to call, is his alone and is not subject to judicial review. The reason assigned by the Governor for calling the session also lies in his sole discretion, not subject to challenge.

The Virginia Constitution does not grant authority to the Governor to limit or restrict the powers of the legislature at a special session. Neither does it limit the General Assembly to the subject matter specified in the Governor's proclamation which convenes the special session. The Virginia Constitution is not a grant of powers to the General Assembly, but a statement of limitations on its otherwise plenary powers. In the absence of such restrictive provisions, the legislative power of the General Assembly, when convened in special session, is as broad as its powers in its regular sessions. See Richards Furniture Corp. v. Board of Commissioners of Anne Arundel County, 233 Md. 249 (1964), 196 A.2d 621; 73 Am.Jur.2d Statutes § 35 (1974); 82 C.J.S. Statutes § 10 (1953); 1 Cooley Constitutional Limitations (7th ed.) 222.

Accordingly, I am of the opinion that the Governor is free to limit the subject matter on which he bases his proclamation convening the General Assembly into special session, but the General Assembly is not restricted to the subject matter specified in the Governor's proclamation.

GRIEVANCE PROCEDURE. PHRASE "WORK DAYS" REFERS TO NORMAL WORK SCHEDULE OF PERSON REQUIRED BY PROCEDURE TO TAKE SOME ACTION.

December 2, 1981

The Honorable Robison B. James
Member, House of Delegates

You have asked a question concerning the meaning of the phrase "work days" as used in the State grievance procedure. Specifically, you question whether a work day is any day that
any employee is working, or whether a given employee's work day is a day on which that employee is actually on duty.

The phrase "work days" is not defined in the grievance procedure statute or the procedure itself. Nor does there appear to be any uniform and consistent application of the term throughout the various departments and agencies of State and local government. While the normal work week for most employees will be Monday through Friday, some employees of local fire departments and of the State Department of Corrections, for example, may be required to follow schedules in which they would work extended periods followed by a number of consecutive days of leave.

Given these circumstances, it would appear most reasonable to interpret "work days" as referring to the normal work schedule of the employee or official required by the procedure to take some action. Such an interpretation would be consistent with the procedure's objective of affording a "fair" method of resolving disputes, since it would tailor the specified time requirements to each individual's normal schedule. In any event, in those instances where an employee or official fails to adhere to any of the prescribed time limits, the statute as well as the procedure allow for such a failure to be excused upon a showing of "just cause." Thus, whenever abnormal or unique time problems arise, there is flexibility within the procedure to protect those parties who have acted responsibly and in good faith.

Accordingly, I find that the phrase "work days" as used in the State grievance procedure should be interpreted as referring to the normal work schedule of the person required by the procedure to take some action.

HEALTH. VIRGINIA FREEDOM OF INFORMATION ACT AND § 8.01-413 NOT VIOLATED BY OPHTHALMOLOGISTS REPORTING CASES OF ALLEGEDLY SUBSTANDARD CARE BY OPTOMETRISTS TO BOARD OF OPTOMETRY FOR ADMINISTRATIVE ACTION. PRIOR CONSENT OF PATIENT SHOULD BE OBTAINED.

January 15, 1982

The Honorable Arthur R. Giesen, Jr.
Member, House of Delegates

You have asked several questions regarding a request by the Board of Optometry (the "Board") that certain ophthalmologists who reported incidents of allegedly substandard care by optometrists to the Virginia Society of Ophthalmology and Otolaryngology submit detailed accounts of those cases (including the names of optometrists involved) to the Board for possible administrative action. I shall address your questions seriatim.
You first asked whether the ophthalmologists are required to report these cases to the Board for administrative action. Given the Board's statutory responsibility for regulation of the profession of optometry and its duty to investigate allegations of substandard practice, the Board's request is not inappropriate. See § 54-380, et seq., of the Code of Virginia (1950), as amended. I know of no State law, however, imposing a requirement that the information requested by the Board be provided.

Your second question, whether voluntary compliance with the Board's request would violate any State law, also may be answered in the negative. Only three Virginia statutes appear to affect the requested disclosure of patient records, the Virginia Freedom of Information Act ("Freedom of Information Act"), the Virginia Privacy Protection Act of 1976 ("Privacy Act"), and § 8.01-413.

The Privacy Act and the Freedom of Information Act both apply to government-held information and consequently would not apply to records held by a private practitioner. Section 8.01-413, which does govern patient access to medical records of private physicians and hospitals, contains no express prohibition against release of these records to persons other than the patient or his attorney.

Your third inquiry, whether compliance with the Board's request by an ophthalmologist without his patient's consent would violate any physician-patient confidentiality, probably should be answered affirmatively. I know of no Virginia case holding a physician liable for violation of confidentiality under circumstances such as these, but the existence of certain Virginia statutes which provide express civil immunity to physicians in other circumstances implies that liability could attach. Since the Board did not request the ophthalmologists to provide the information without their patient's consent, I would advise first obtaining a written authorization to release that information in order to protect the releasing physician from any possible exposure to liability for breach of the physician-patient privilege of confidentiality.

1See, e.g., § 54-317.3 which provides immunity from civil liability (absent bad faith or malicious intent) to those physicians who treat other health care practitioners for certain disorders and report their patients to the appropriate licensing board. See, also, § 54-276.9:1 which similarly exempts physicians reporting aircraft pilots.

HEALTH DEPARTMENT. § 54-276.7:1 DOES NOT REQUIRE THAT LICENSED PHYSICIAN PERFORM HISTORY AND PHYSICAL EXAMINATION IN ADDITION TO HISTORY TAKEN AND PHYSICAL PERFORMED BY ADMITTING ORAL SURGEON.
You have asked whether § 54-276.7:1 of the Code of Virginia (1950) as amended, requires that a licensed physician take a health history and perform a physical examination on each patient hospitalized for oral surgery independent of the history taken and physical examination performed by the admitting oral surgeon.

Section 54-276.7:1 deals exclusively with the employment of third and fourth-year medical students to prepare medical history information and perform physical examinations on certain patients. The last portion of the statute provides that "[n]othing in this section shall have the effect of removing the responsibility of the attending physician to assure that a licensed physician shall do a history and physical examination on each hospitalized patient." Since third and fourth-year medical students do not meet the criteria for medical licensure in the Commonwealth, it is my judgment that the clear intent of the statute is to require that an appropriately licensed practitioner bear responsibility for the health history and physical examination performed by the student.

Section 54-276.7:1 makes no reference at all to the practice of dental surgery. In a previous Opinion to Mr. Robert W. Minnich, Executive Director of the Virginia Board of Dentistry, dated December 3, 1979, found in Report of the Attorney General (1979-1980) at 146, I concluded that while the practice of dentistry falls within the scope of the definition of the practice of medicine, any diagnosis of a patient's general health condition which is necessary to the proper and complete diagnosis of dental disease, and any health histories taken and physical examinations performed as part of such diagnosis, fall within the proper scope of the practice of dentistry under § 54-146. Section 54-146 defines the practice of dentistry to include "any practice included in the curricula of recognized dental colleges..." If the diagnostic skills involved in taking patient histories and performing physical examinations are learned by oral surgeons in the course of their professional training, such skills fall within the definition of the "practice of dentistry" and would not constitute the unlicensed practice of medicine.

Section 54-276.3 provides that nothing in the Medical Practices Act "shall be construed to apply to or interfere with dentists...within the scope of their usual professional activities..." I, therefore, conclude that § 54-276.7:1 does not impose a requirement that licensed physicians perform a history and physical examination in addition to the history taken and physical performed by the admitting oral surgeon.
HEALTH REGULATORY BOARDS, DEPARTMENT OF. PRACTICE OF CHIROPRACTIC. DIAGNOSIS IS PART OF PRACTICE OF CHIROPRACTIC BUT CHIROPRACTORS MAY ONLY TREAT CERTAIN CONDITIONS.

January 11, 1982

The Honorable Thomas J. Michie, Jr.
Member, Senate of Virginia

You have asked whether the laws of Virginia permit a doctor of chiropractic to diagnose.

Chiropractic is a branch of the healing arts governed by Ch. 12, Title 54 of the Code of Virginia (1950), as amended. Section 54-273(2) defines the healing arts as the "art or science or group of arts or sciences dealing with the prevention, diagnosis, treatment and cure or alleviation of human physical or mental ailments, conditions, diseases, pain or infirmities." (Emphasis added.) I, therefore, conclude that diagnosis is contemplated as an element of the healing arts, including chiropractic.

Section 54-274 requires a chiropractor to confine his practice within the scope of the definition chiropractic. Section 54-273(6) defines chiropractic 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...." The definition specifically precludes the use of surgery, osteopathy, obstetrics and the administration or prescribing of medication. Therefore, regardless of the diagnosis made by a chiropractor he may lawfully treat only those conditions for which chiropractic treatment is appropriate.

HIGHWAYS. ACCEPTANCE OF ROADS INTO STATE SECONDARY SYSTEM. SUBDIVISION STREETS. REQUIREMENT OF POPULATION DENSITY.

June 23, 1982

The Honorable Douglas W. Napier
County Attorney for Warren County

You have asked in your recent letter whether the State is prohibited from maintaining a publicly dedicated and publicly owned road which is one quarter mile long. The road was dedicated as a part of a subdivision which was recorded in 1974. The road is used by the public and one family resides upon the road.

I am not aware of any constitutional provision which prohibits the State from maintaining the road. Cf. Stewart v. Highway Commissioner, 212 Va. 689, 187 S.E.2d 756 (1972). Based upon the facts described, however, it is necessary for the road to be accepted into the secondary system of roads before the State will be obligated to maintain it.
The procedures and requirements for including such a subdivision road in the secondary system are prescribed in § 33.1-72.1 of the Code of Virginia (1950), as amended. One of the requirements of that section is that the road "has on it at least three families per mile." This Office has previously interpreted that provision to require that at least three families live on the road even though the road measures less than one mile. See Report of the Attorney General (1978-1979) at 125. I am further advised that this Office's earlier Opinion is consistent with the long-standing administrative interpretation which has been accorded the section and its predecessors by personnel of the State Highway and Transportation Department. The purpose of the provision is to husband the limited financial resources of the State Highway and Transportation Department and spend them where they will be of greater benefit to the public.

Accordingly, it appears that the road does not qualify for acceptance into the secondary road system and, therefore, there is no obligation upon the Commonwealth to maintain it.

1In cases where there is any ambiguity in a statute, great weight is given to the long-standing administrative interpretation accorded to it by those charged with its administration. County of Henrico v. Management Recruiters of Richmond, Inc., 221 Va. 1004, 277 S.E.2d 163 (1981).

HIGHWAYS. CONTINUOUS ROADWAY LIGHTING ON I-66 NOT VIOLATIVE OF STATE OR FEDERAL LAW OR REGULATIONS, NOR IS IT ARBITRARY OR CAPRICIOUS DECISION.

November 18, 1981

The Honorable Edward M. Holland
Member, Senate of Virginia

You have asked whether the Virginia Department of Highways and Transportation's ("the Department") lighting proposal for Interstate 66 (hereinafter "I-66"), most of which is about to be contracted for by the Department, is in conflict with a decision rendered in 1977 by then United States Secretary of Transportation, William T. Coleman, Jr. Specifically, you have pointed to Condition Seven which is one of eight conditions imposed upon the Department by the Secretary, satisfaction of which was necessary before it could construct I-66. Condition Seven provides that the Department must:

"Include the design elements and other features intended to minimize and compensate for adverse social and environmental impacts of the highway as set forth in the Final Four Lane Supplemental EIS." and this document, including specifically those set forth in Section V of this document (in other words, so far as possible,
construction should be similar to the George Washington Parkway....") Decision p. 9.

Background

At the same time that Condition Seven was placed upon the Department, the Secretary also placed Condition Five upon the Department requiring it to:

"Submit a plan within the next sixty days [by March 7, 1977] for DOT [United States Department of Transportation] review and acceptance, detailing the enforcement approaches and resources which will be committed to assure compliance with the traffic limitations set forth above, including a plan for identifying automobiles to and from Dulles." Decision p. 9.

The reference in Condition Five to the "traffic limitations" refers to Conditions Three and Four which require the Department to "[r]estrict the use of highway lanes in the peak direction, during the peak hours, to buses, car pools of four or more persons, emergency vehicles, and vehicles bound to or from Dulles Airport..." and to "[e]xclude heavy duty trucks (two-axled, six-tired or larger) from the facility at all times...." Decision p. 9.

In order to fulfill the mandate of Condition Five and assure that the compliance with the traffic limitations was enforced as to the traveling public, a Traffic Management Concepts Report was prepared by consultants, under date of February 28, 1977, and submitted to the United States Department of Transportation (hereinafter "DOT"). That report outlined three possible approaches to satisfying the conditions: minimum control, limited control, and full control. The Department recommended the fully controlled system, opting, however, for the initial installation of a limited control system. The "fully controlled" system, when completely implemented, calls for a closed-circuit television system using 19 remote cameras as compared with ten remote cameras under the "limited" concept. These cameras are to be located throughout the length of I-66 from Dunn Loring to Rosslyn. To enable the television system to operate, lighting is required. Although technology exists which would permit the use of low light cameras, those cameras were deemed too expensive. Furthermore, in reaching that decision, I am advised that the Department also took into consideration that roadway lighting provides other significant benefits for the traveling public and, on the western-most section, for the Washington Metropolitan Area Transit Authority System, in the event of an accident or malfunction associated with that system.

The DOT concurred with the Department and accepted the concept of building the "fully controlled" system with the installation of only the "limited control" system in the initial phase.
As the construction progressed, citizens sought to interject their ideas into the construction activities. At the insistence of the DOT in 1978, the position of an environmental monitor was funded and that position was implemented. This monitor serves as a focal point for the citizen input. Through the auspices of the monitor and that of two county appointed I-66 coordination committees, regular contacts have been maintained between the Department and citizens.

The Department commissioned a study in 1978 to determine if it should preclude the continuous lighting. Had that study demonstrated that there was no increase in accidents during periods of dusk and night, it is conceivable that the Department would have purchased the low light cameras initially or confined the lighting required for the present television cameras to the interchange areas. That study, however, supported continuous lighting. Furthermore, the DOT in December 1978, published Roadway Lighting Handbook, which indicates that "[l]ighting, in general, can be expected to reduce night accidents by about 30%." Still, further, an American Association of State Highway and Transportation Officials report entitled Informational Guide For Roadway Lighting, revised in March 1976, suggests that lighting on a freeway is warranted on those sections in or near cities where the current average daily traffic is 30,000 vehicles or more. Interstate 66 is expected to meet that traffic volume condition.

In view of the foregoing, the Department, once again, determined that the lighting was not only necessary for the traffic control system but would prove to be a significant safety factor. Although the television monitors will require lighting within the design range of the camera locations, the Department determined that frequent passages from lighted sections to unlighted sections of the roadway was not acceptable and that the lighting should be provided for the entire freeway.

Secretary Coleman's Decision

It is arguable that the requirements necessary to meet Condition Five, of the Coleman decision, (the traffic management condition) place it at odds with Condition Seven (the Parkway condition). Resort to the full decision, however, indicates that Secretary Coleman desired the finished roadway to compete "with the ambience of the George Washington Parkway." (Decision at p. 61). This does not mean a lockstep imitation of the design of the facility that has been dated by the passage of time. In fact, several major design features of I-66 are at odds with the Parkway. One feature, depressing the roadway, was urged upon the Commonwealth by the DOT after the Secretary's decision had been made. Further, the full decision recognizes that the construction of I-66 would have adverse social and environmental impacts which were outweighed by the perceived transportation benefits to be derived from its construction.
particularly when minimization aspects were undertaken. (Decision at pp. 61-62). In addition, Condition Seven of the Decision, when read as part of the total decision, does not mutually exclude lighting. In fact, the Secretary recognized that I-66 would create a visual intrusion into the community. (Decision at p. 47).

None of those conditions imposed by the Secretary were intended to violate sound, safe engineering. Lighting is a proven safety measure, and, by providing lighting the Department could satisfy the requirements of Condition Five to monitor traffic while at the same time providing for the safety of the traveling public. The Secretary has concurred in this approach. Adherence to Secretary Coleman's decision was made an essential element of a funding contract with the Commonwealth for the construction of I-66 inside the Beltway. This meant that specifications and estimates had to be submitted to DOT and approved by responsible officials before funding would be authorized and construction could begin. I am advised that DOT has approved the lighting proposal by approving both the contract on which bids were and are to be received and the various work orders in past and existing contracts.

Continued federal approval and monitoring of the construction of I-66 and all of its aspects has been an ongoing fact that has been accomplished pursuant to existing law and Secretary Coleman's decision. My review of the correspondence does not indicate any consequential unresolved disagreement by the DOT with the Commonwealth's lighting proposal. Thus, I believe the proposed lighting plan of the Department for I-66 complies with the Coleman decision.

Environmental Law

As stated before, given the content of the exchange of correspondence between the DOT and the Department, it is clear that both parties deem continuous lighting to be a necessity and in concurrence with the Coleman decision. Some members of the public have suggested the Department's safety justification involves "lying with statistics." Yet, the study that supports continuous lighting [continuous freeway illumination and accidents on a section of the Route 1-95, M.A. Hilton 1978] is statistically sound and avoids comparing improperly the two different time periods studied. Table 5 of that study indicates what the accident rates were on I-95 (I-395 now) in 1972-1973 using lights on and 1973-1974 with lights off. See attached Table.

If lighting the roadway at night makes no difference, one would expect the nighttime accident rate to be virtually the same as the daytime rate. In addition, if a change is made that would affect the accident rate for a given period (lowering speed), one would expect it to affect the night and day rates in a similar fashion. With the lighting off and a reduced speed limit imposed, a reduction in the daytime accident rates would be expected to be accompanied by a
corresponding reduction in the nighttime accident rate. Unfortunately, this did not occur, as the Table indicates.

The Department examined the accident rate on the George Washington Parkway. The accident experience on that Parkway shows that the total accident rate, night-to-day, is about two to one. The fatal injury rate, night-to-day, is about four to one.

It is not surprising that lighting per se was not mentioned in the Final Supplemental Environmental Impact Statement, irrespective of the need for the ultimate traffic management system. The final design details, which include lighting, the particular effect of limited access features, signing, pavement color, bridge design or color, etc., are developed after the approvals of the location and major design features are received. The efforts expended by both federal and State officials seem appropriate and in consonance with environmental statutes, regulations and court decisions. I am of the opinion that all of the above refutes any allegation or arbitrariness or capriciousness.5

Even if for the sake of argument it is assumed that the proposed lighting was not a direct result of the terms imposed upon the Department by the Coleman decision, the lighting in question does not constitute a major federal action and thereby is not subject to EIS requirements. See 23 CFR § 771.9 effective April 1, 1980, and 23 CFR § 771.775 effective December 29, 1980. Even if the lighting in question could be deemed as requiring the preparation of environmental documents under either above cited CFR schemes, the purposes of those requirements have been met given the public input and design modifications that have been made. Accordingly, I am of the opinion that no further environmental documentation is necessary.

State Law

The lighting proposal does not violate State law. Sections 33.1-12(5) and 33.1-13 of the Code of Virginia (1950), as amended, give to the Highway and Transportation Commission and Commissioner ample authority to do what has been done. I cannot pass on whether I would have chosen the traffic management scheme that was selected nor whether I would construct the lighting under present revenue statistics. The Virginia statutes give to the Department the authority to make those decisions. Given the documentation about continuous freeway lighting and enhanced safety, the fact the I-66 is a new facility and there exists an opportunity to build in anticipation of the ultimate configuration now, the decision to provide for complete highway lighting that is planned cannot be considered as being arbitrary and capricious.
The contract to be let later this month combines the traffic management system for I-395 and I-66 and includes lighting for I-66. Some of the light pedestals and conduit runs already have been incorporated as work orders in the original contracts and in many of the past and present roadway construction contracts. Use of work orders to accomplish this task was deemed appropriate so that some of the lighting items could be installed during the roadway construction, given the interplay between the road design and the light pedestals.

The Informational Guide, however, goes on to state that "[t]he meeting of these warrants does not obligate the highway agency to provide lighting." Id. at p. 5. Nonetheless, the decision to provide lighting can hardly be faulted.

See Department of Transportation "Roadway Lighting Handbook", Implementation Package 78-15 p. 117 (Dec. 1978). Again, the handbook is suggestive, not absolute, in the necessity that the roadway be continuously lighted.

Pignataro, "Traffic Engineering, Theory and Practice," Prentice Hall (1973); Traffic Institute, "Traffic Engineering Analysis," Northwestern University, Stock 3440 (rev. 1974). These two treatises indicate the approach taken by Hilton is the accepted analytical method.

Evolving federal case law would seem to foreclose a successful challenge to the lighting proposal by the third parties even if it were beyond the scope of Secretary Coleman's decisions. Noe v. Marta, 644 F.2d 434 (5th Cir. 1981). This is particularly so when the federal Department of Transportation's actions are not arbitrary or capricious and have sound engineering basis. Citizens to Preserve Overton Park to Volpe, 4016 U.S. 402 (1977).

HOUSING AUTHORITIES. APPROVAL FROM GOVERNING BODY PRIOR TO ACQUISITION OF LAND FOR ADDITIONAL HOUSING.

May 13, 1982

The Honorable David T. Stitt
County Attorney for Fairfax County

You have asked two questions concerning the powers of a redevelopment and housing authority (hereinafter "authority"). You first ask whether an authority must obtain approval from the local governing body before acquiring land for additional housing.

Section 36-19 of the Code of Virginia (1950), as amended, sets forth the authority's general powers to provide public housing. These powers, however, are limited by § 36-19.2 which specifically provides that no authority may acquire land for additional housing unless and until such additional housing is authorized or approved by the governing body of the county or city in which the authority is
authorized to transact business.¹ For this reason, it is my opinion that an authority must obtain approval or authorization from the governing body before acquiring land for additional housing.

You next ask:

"May approval of the governing body, where required by Va. Code § 36-19.2 be implicit, i.e. inferred from the acceptance of proffered conditions in connection with amendment of the zoning map pursuant to Va. Code § 15.1-491(a) (Repl. Vol. 1981), approval of public facilities as being substantially in accord with the Comprehensive Plan pursuant to Va. Code § 15.1-456 (Repl. Vol. 1981), approval of the Annual Housing Action Plan, or similar approvals by the Board of Supervisors, in which the location, scope and nature of a housing project are reasonably identified and described?"

The actions referred to in your question relate to planning and zoning concerns. Section 36-28 provides that all housing projects shall be subject to the planning and zoning laws applicable to the locality in which the project is situated. The General Assembly has approached land use restrictions and the authorization for additional housing as separate requirements in the housing authorities law. There is no evidence in Ch. 1 of Title 36 that the General Assembly perceived the satisfaction of the zoning and planning requirements of § 36-28 to abrogate the necessity for approval of additional housing set out in § 36-19.2.

While it is possible to consider both requirements at the same time, it is important that the final decision to approve the additional housing be made based upon a process in which all appropriate parties have an opportunity to be involved as the board of supervisors fulfills the statutory obligations mandated by the General Assembly. Consequently, it is my opinion that, if the governing body decides to authorize or approve the purchase of land for additional housing in conjunction with a related zoning or planning decision, it must be clear from the facts of the particular case that they have had the purchase issue properly before them and, in accordance with any prescribed rules of procedure, have acted upon it.

¹Section 36-19.2 provides: "Notwithstanding the provisions of § 36-19, no authority heretofore or hereafter permitted to transact business and exercise powers as provided in § 36-4 shall make any contract for the construction of any additional housing not authorized or approved by the governing body on April one, nineteen hundred fifty-two, or acquire land for, or purchase material for the construction or installation of any sewerage, streets, sidewalks, lights, power, water or any other facilities for any additional housing not authorized or approved on such date, unless and
until such additional housing shall have been authorized or approved by the governing body of the county or city in which the authority is authorized to transact business and exercise powers; provided, that this section shall not affect or impair the provisions of § 36-19.1 of the Code of Virginia." (Emphasis added.)

HOUSING AUTHORITIES. § 36-19 DOES NOT REQUIRE COMPETITIVE BIDDING IN SALE OR LEASE OF AUTHORITY PROPERTY. AUTHORITY MAY ALSO ACT AS ITS OWN DEVELOPER.

October 14, 1981

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

This is in response to your inquiry as to whether the Alexandria Redevelopment and Housing Authority (hereinafter "ARHA") may sell or lease its real property to a developer without competitive bidding. In addition, you ask if ARHA may act as its own developer.

ARHA was created pursuant to § 36-4 of the Code of Virginia (1950), as amended. The powers of this authority are enumerated in § 36-19. Section 36-19(d) specifically states that housing authorities may "sell, lease, exchange, transfer, assign, pledge or dispose of any real...property or any interest therein...." This section does not require competitive bidding in the sale or lease of authority property.

In answer to your second inquiry, § 36-19(b) provides that a redevelopment and housing authority may "operate housing projects, and...provide for the construction, reconstruction, improvement, alteration or repair of any housing project...." In addition, § 36-19(c) authorizes housing authorities to contract for services in connection with development of these projects. Section 36-19.2, however, provides that such contracts for construction must first be approved by the local governing body.

Accordingly, it is my opinion that a redevelopment and housing authority may sell or lease its property without competitive bidding and may also act as a developer in accordance with the powers granted in § 36-19.

INDUSTRIAL COMMISSION. NOT REQUIRED TO HAVE ONE MEMBER WHO COULD BE CLASSIFIED AS REPRESENTING EMPLOYERS AND ONE MEMBER WHO COULD BE CLASSIFIED AS REPRESENTING EMPLOYEES.

February 8, 1982

The Honorable Robert E. Washington
Member, House of Delegates
This is in reply to your letter of February 5, 1982, which reads as follows:

"By this letter I am asking for your interpretation of § 65.1-10 of the Code of Virginia. Specifically, I am asking for your interpretation of the third paragraph of that section wherein it states:

'Not more than one member of the Commission shall be a person who on account of his previous vocation, employment or affiliation shall be classified as a representative of employers, and not more than one such appointee shall be a person who on account of his previous vocation, employment or affiliation shall be classed as a representative of employees.'

Does that provision require that one member of the Industrial Commission be classified as a representative of employers and that one member be classified as a representative of employees, or does it permit the membership of the Industrial Commission to have neither a member classified as a representative of employers nor a member classified as a representative of employees? Does the membership of the Commission have to contain either one or both?"

I interpret the above quoted provision of § 65.1-10 of the Code of Virginia (1950), as amended, as a limitation on the number of commission members who, by reason of previous vocation, employment or affiliation, may have a proclivity to lean more favorably toward the position of either employers or employees. The words "not more than one member" are words of limitation, and do not require the appointment of any person to be a representative of either employers or employees. The Industrial Commission is a governmental agency with rulemaking and judicial powers. It should be an impartial tribunal in the exercise of its powers, without preferential treatment to either party to a dispute.

' I am, therefore, of the opinion that § 65.1-10 does not require the membership of the Industrial Commission to be composed of persons who may be classified as representatives of either employers or employees; provided, however, the General Assembly may not elect more than one person to the Industrial Commission, who, by reason of his previous vocation, employment or affiliation, could be classified as a representative of employers, or employees.

INDUSTRIAL DEVELOPMENT. AUTHORITY CANNOT ISSUE REVENUE BONDS TO CONSTRUCT FACILITIES FOR VOLUNTEER FIRE DEPARTMENT.

August 17, 1981

The Honorable John H. Chichester
Member, Senate of Virginia
You have asked whether an industrial development authority may issue revenue bonds for the purpose of erecting facilities to house a volunteer fire department.

The Industrial Development and Revenue Bond Act (the "Act"), §§ 15.1-1373 to 15.1-1391 of the Code of Virginia (1950), as amended, governs the creation, purposes and duties of industrial development authorities. The Act is designed to induce industrial, governmental and commercial enterprises to locate in the Commonwealth. See Industrial Dev. Auth. of the City of Richmond v. La France Cleaners & Laundry Corp., 216 Va. 277, 280, 217 S.E.2d 879, 881 (1975). Section 15.1-1375 states, in part:

"It is the intent of the legislature by the passage of this chapter to authorize the creation of industrial development authorities by the several municipalities in this Commonwealth so that such authorities may acquire, own, lease, and dispose of properties to the end that such authorities may be able to promote industry and develop trade by inducing manufacturing, industrial, governmental and commercial enterprises...to locate in or remain in this Commonwealth...."

The term "enterprise" is defined in § 15.1-1374:

"(j) 'Enterprise' shall mean any industry for the manufacturing, processing, assembling, storing, warehousing, distributing, or selling any products of agriculture, mining, or industry and for research and development or scientific laboratories, including, but not limited to, the practice of medicine and all other activities related thereto or for such other businesses as will be in the furtherance of the public purposes of this chapter."

The Act is not designed to fund construction projects that are contrary to the purposes set forth in § 15.1-1375. For example, development authorities cannot issue bonds for the construction of county health and welfare offices. See Report of the Attorney General (1976-1977) at 109. It is clear that the construction of a facility to house a volunteer fire department is contrary to the stated purposes of the Act. In addition, a volunteer fire department cannot be considered an "enterprise" as that term is defined in § 15.1-1374.

Accordingly, it is my opinion that an industrial development authority cannot issue revenue bonds for the purpose of erecting a facility to house a volunteer fire department.

JAILS. INMATES NOT PROHIBITED FROM EVERY FORM OF COMMUNICATIVE ACTIVITY.
February 10, 1982

The Honorable W. Onico Barker
Member, Senate of Virginia

You have asked whether the provisions of § 53-150 of the Code of Virginia (1950), as amended, prohibits a member of the General Assembly from corresponding with constituents who are incarcerated.

Section 53-150 makes it a misdemeanor for any person to hold any communication with a jail prisoner except in the presence of the sheriff or his deputies. The statute provides for certain exemptions, such as, counsel of the prisoner. The Supreme Court of Virginia has not had occasion to address this issue, but has held that this statute is one purely for safety of the jail and those in control of it. Bobo v. Commonwealth, 187 Va. 774, 48 S.E.2d 213 (1948).

The Supreme Court of the United States has held that a prisoner is not stripped of all rights merely by virtue of being incarcerated. Bell v. Wolfish, 441 U.S. 520 (1979). An inmate's right to communicate by mail with outside persons cannot be totally denied, although mail censorship by prison officials in furtherance of security and internal order is permitted as long as it is no broader than necessary to promote the governmental interest involved. Procunier v. Martinez, 416 U.S. 369 (1974). In Preston v. Cowan, 369 F.Supp. 14 (W.D. Ky. 1973), rem. 506 F.2d 288 (6th Cir. 1974), the court found that inmates have an absolute right to address their grievances to public officials through the mail.

In determining the general application of § 53-150, the primary object in the interpretation of statutes is to ascertain and give effect to the intention of the legislature. Volland v. Arlington County Electoral Board, 216 Va. 674, 222 S.E.2d 793 (1976). Further, a statute should not be interpreted in such a manner as to lead to an absurdity. McPadden v. McNorton, 193 Va. 455, 69 S.E.2d 445 (1952).

In my opinion § 53-150 is not intended to restrict absolutely every form of communicative activity by prisoners. Rather, it seems clear that the section is meant only to prohibit persons from coming to jails or otherwise communicating with inmates without adequate security measures being employed. Otherwise, the dangers are obvious. The construction of § 53-150 falls within the parameters of the cases cited above and within the apparent intent of the legislature. More specifically, I do not believe that § 53-150 is intended to prohibit members of the General Assembly from any communication with their constituents who are incarcerated in jail, nor should the section be enforced to prohibit such communications.
You ask whether district court judges have authority to prohibit substitute judges from practicing law in the courts in which they serve as substitute judges.

Section 16.1-69.12(c) of the Code of Virginia (1950), as amended, provides that substitute judges shall not appear as counsel in any civil or criminal case arising out of the circumstances which were involved in any other case brought before them.\(^1\) In addition, § 16.1-69.23 lists certain specific situations in which a substitute judge must abstain from participating as a judge.

Canon 8D of the Canons of Judicial Conduct\(^2\) provides that a substitute judge shall not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto. Canon 8D expressly provides, however, that a substitute judge is not required to comply with Canon 8A2 which states that certain judges shall not practice law in the courts in which they serve.

Accordingly, it is my opinion that district court judges do not have authority to prohibit substitute judges from practicing law in the courts in which they serve as substitute judges. As noted, however, there are certain situations prescribed by statute in which a substitute judge may not practice.

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\(^1\)By way of contrast, the former § 16.1-69.12(b) provided that no judge appointed to serve part time was to appear as counsel in any case, civil or criminal, pending in his court. Section 16.1-69.12(b), however, did not apply to substitute judges, and was repealed by Ch. 194 [1980] Acts of Assembly.


JUDGES. RETIREMENT. § 51-29.8 GOVERNS IN CASE OF JUVENILE AND DOMESTIC RELATIONS COURT JUDGE APPOINTED IN 1952.
September 11, 1981

The Honorable Benjamin L. Campbell, Judge
Juvenile and Domestic Relations District Court

You have asked for my opinion on the second clause of § 51-167(a) of the Code of Virginia (1950), as amended. You have indicated that you were appointed judge of the Juvenile and Domestic Relations Court of the City of Petersburg in May 1952. Section 51-167(a) states:

"Any member who attains seventy years of age shall be retired twenty days after the convening of the next regular session of the General Assembly; provided, however, that any member who was a judge immediately prior to July one, nineteen hundred seventy, may serve as long as he would have been permitted under the law in effect immediately prior to July one, nineteen hundred seventy."

A judge who had been on the bench since May 1952 would have been a judge immediately prior to July 1, 1970. The law on point that was in effect immediately prior to July 1, 1970, was § 51-29.8, which was repealed on that date (see Ch. 778 [1970] Acts of Assembly 1667). Section 51-29.8 stated:

"Any trial justice, also referred to as county judge, of any county who has attained the age of seventy years and has served not less than fifteen years as trial justice, and any trial justice of any county who has attained the age of sixty-five years and has served not less than twenty years as trial justice, may retire from active service as trial justice upon giving the judge who appointed him, or his successor in office, and the Comptroller notice in writing of his intention so to do, stating in such notice the date upon which such retirement will become effective."

As the language of § 51-29.8 was permissive, not mandatory, I do not believe that a juvenile and domestic relations court judge serving since May 1952 would be under any obligation to retire; such a judge could elect, however, to retire at any time after age sixty-five. See Report of the Attorney General (1975-1976) at 180.

JUDGES. RETIREMENT SYSTEM. § 51-179 NOT UNCONSTITUTIONAL.

September 8, 1981

The Honorable Robert M. Hurst, Chief Judge
Fairfax County General District Court

You have asked for my opinion on the constitutionality of § 51-179 of the Code of Virginia (1950), as amended. This section relates to the practice of law by certain
retired judges. You have noted that a recent decision by the Maryland Court of Appeals has struck down as unconstitutional a Maryland statutory section 2 prohibiting a retired judge who accepts a pension from engaging in the practice of law for compensation. See Attorney General of Maryland v. Waldron, 426 A.2d 929 (1981).

In Waldron, the Maryland Court of Appeals held that: (1) the statute did not fall within an area of legitimate legislative concern regarding the legal profession and its practitioners, and therefore its enactment violated separation of powers principles, and (2) that classifications in the statute were not reasonably related to the purpose for which the classifications were made, and therefore the statute violated the principles of equal protection.

The separation of powers doctrine is a limitation upon the State's police power. The doctrine is not absolute, however, and may constitutionally encompass a sensible degree of elasticity. See Waldron, supra, at 933; Winchester & Strasburg Ry. Co. v. Commonwealth, 106 Va. 264, 55 S.E. 692 (1906). It has been held, for example, that legislatures may act pursuant to their police powers to aid the courts in the performance of their judicial functions. See Waldron, supra, at 938; Denver Bar Association v. Public Utilities Commission, 154 Colo. 273, 391 P.2d 467 (1969).

One study group expressed in the following terms the rationale for prohibiting judges from practicing in court:

"Judges who receive retirement benefits under the new System and are, therefore, former full-time judges should be proscribed from practicing law which requires appearances in the courts of the Commonwealth. So long as a substantial and fair retirement benefit is provided for the judiciary, a condition of the retirement should be an agreement not to practice law before any court of the Commonwealth while beneficiary of the retirement system. The prestige of judicial office remains with a retired judge who may be still acting as a judge under the proposed obligatory recall provision.Appearances in court should therefore be prohibited. This recommendation does not proscribe such appearances by former part-time judges nor does it proscribe other types of law practice, law teaching and activities...." Report of the Virginia Advisory Legislative Council on Judicial Retirement System (1970) at 910.

Section 51-179 must be read together with § 51-178(a) 3 which provides for obligatory recall of retired judges. Pursuant to § 51-178, a retired judge is subject to recall to duties by the Supreme Court and possesses all the prestige, powers, duties and privileges of a judicial officer. The position of a retired judge is in fact a public office. 4 Thus, it seems apparent that § 51-179 was designed in part to prevent the appearance of and actual impropriety which could result from a retired judge appearing in judicial proceedings before his
former colleagues and wielding the prestige of his office to his client's advantage. In contrast to the Maryland statute, § 51-179 is reasonably narrow and simply restricts the right to appear as counsel in the courts of the Commonwealth, without prohibiting the practice of law altogether. As a result, I do not find that § 51-179 violates separation of powers principles.

Nor do I find that § 51-179 violates equal protection principles. In Waldron, the Maryland statute was held to violate equal protection guarantees because it was found to be both overinclusive and underinclusive. The statute was found to be overinclusive because it was aimed at prevention of the appearance of impropriety and yet was not limited in its application to those judges appearing in court but applied as well to judges engaged only in an office practice. The statute was found to be underinclusive because it applied only to judges practicing law for compensation and to judges electing to receive their pension benefits. The court properly noted that the potential for a judge to use his status improperly to his client's advantage could exist as well with retired judges practicing law without compensation and those judges electing to delay receipt of their retirement benefits.

In contrast to the Maryland statute, § 51-179 seems to avoid these problems because it has been drawn with more precision. First, it does not prohibit the practice of law by retired judges but only prohibits retired judges from appearing in the courts of the Commonwealth. Thus, the statute bears a direct relationship with its principal purpose of preventing improper influence or the appearance of such influence by retired judges who may be recalled to service at any time and thus are vested with the prestige of their former positions. Second, unlike the Maryland statute, § 51-179 is not underinclusive because it is not limited to judges practicing law for compensation. While the prohibition of § 51-179 is contingent on a judge receiving retirement benefits, I find that this requirement is related to the statutory purpose since only judges who are retired and are receiving retirement benefits are subject to recall.

For all of these reasons, I find that the distinctions between people which are drawn in § 51-179 bear a substantial relationship to the purpose for which the classifications were made. As a result, I do not find that § 51-179 violates the principles of equal protection.

Accordingly, I am of the opinion that § 51-179 is not unconstitutional.

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1Section 51-179 provides in part: "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."

2Section 56(c) of Art. 73B of the Maryland Code provides: "A judge who retires and accepts the pension provided by the subtitle may not, thereafter, engage in the practice of law for compensation; but this prohibition does not apply to a former judge who has attained the age of 70 years and received less than $3,500 per annum in pension as provided by this statute, and who has not voluntarily retired."

3Section 51-178(a) provides: "The Chief Justice of the Supreme Court may call upon and authorize any justice or judge of a court of record who is retired under the provisions of chapter 7 (§ 51-160 et seq.) of Title 51 of the Code of Virginia, either to hear a specific case or cases pursuant to the provisions of § 17-7, such designation to continue in full force and effect for the duration of the case or cases, or to perform for a period not to exceed ninety days at any one time, such judicial duties in any court of record as the Chief Justice shall deem in the public interest for the expeditious disposition of the business of the courts of record."


6Indeed, § 51-179 appears to have been accepted and adopted by the Supreme Court in Canon 8C of the Canons of Judicial Conduct for the State of Virginia which concerns retired judges and which states that "[t]he provisions of § 51-179 of the Code of Virginia and of those portions of this Code applicable to part-time judges shall apply to all retired judges eligible for recall to judicial service."

7See Note 5, supra.

8Because I find that § 51-179 bears a substantial relationship to a proper legislative purpose, I find that it may withstand equal protection analysis regardless of whether a traditional "rational basis" or more recent "intensified rational scrutiny" test is applied. Compare McGowan v. Maryland, 366 U.S. 420 (1961), with Reed v. Reed, 404 U.S. 71 (1971).

JUDGMENTS. LEGAL RATE OF INTEREST TO BE APPLIED UNLESS ONE OF EXCEPTIONS IN §§ 8.3-122 OR 6.1-330.10 MET.

October 26, 1981

The Honorable James P. Brice, Judge
General District Court
Twenty-Third Judicial District
You have asked whether the interest rate on judgments after July 1, 1981, should be calculated at the legal rate of 10 percent per annum even when the civil warrant indicates the plaintiff has only asked for the previous legal rate of 8 percent.

Section 6.1-330.10 of the Code of Virginia (1950), as amended, reads as follows:

"The judgment rate of interest shall be ten per centum per annum, except that a money judgment entered in an action arising from a contract for the loan of money shall carry interest at the rate lawfully charged on such contract, or at ten per centum per annum, whichever is higher."

The statute governing how interest shall be fixed on judgments is § 8.01-382,1 and provides in part that interest on a judgment will be at the legal rate whether stated in the judgment or not.

It is my opinion that the interest rate on a judgment or decree shall be the legal interest rate provided by law for judgments, no matter what the civil warrant has specified.2 This result is required by the language of § 6.1-330.10, which provides in part that "the judgment rate of interest shall be ten per centum per annum...." This language is mandatory, and no other rate is allowed except as expressly set forth by the legislature, for instance, when the matter involves a contract for the loan of money or negotiable instruments. See §§ 6.1-330.10 and 8.3-122, respectively. This conclusion does not violate the rule that a plaintiff may not recover an excessive amount over that for which he has sued since interest is not considered an element of damages, but is a statutory award for delay in payment for money due. Nationwide Mut. Ins. Co. v. Finley, 215 Va. 700, 214 S.E.2d 129 (1975).

1Section 8.01-382 provides: "Except as otherwise provided in § 8.3-122, in any action at law or suit in equity, the verdict of the jury, or if no jury the judgment or decree of the court, may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence. The judgment or decree entered shall provide for such interest until such principal sum be paid. If a judgment or decree be rendered which does not provide for interest, the judgment or decree awarded shall bear interest from its date of entry, at the rate as provided in § 6.1-330.10, and judgment or decree entered accordingly; provided, if the judgment entered in accordance with the verdict of a jury does not provide for interest, interest shall commence from the date that the verdict was rendered."

2The case of Marsteller Corp. v. Ranger Construction Co., 530 F.2d 608 (4th Cir. 1976), would seem to require a different result. The Fourth Circuit comments in that case
that a jury may award less than the legal interest rate to a plaintiff. 530 F.2d at 609. This result was based, however, on the fact that the judgment interest rate statute, then § 8-223, did not stipulate the applicable interest rate. The only interest rate was a general one for the "legal" rate of interest, codified in then § 6.1-311. Section 6.1-330.10, setting the judgment rate of interest, was first passed in 1975.

**JURISDICTION.** IF DIVORCE SUIT IS INITIATED, CIRCUIT COURT HAS POTENTIAL EXCLUSIVE JURISDICTION OF CUSTODY MATTER CURRENTLY BEFORE JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT.

July 14, 1981

The Honorable Robert F. Ward, Judge
Juvenile and Domestic Relations District Court

You have asked whether Virginia's Uniform Child Custody Jurisdiction Act (the "Act"), found at § 20-125, et seq., of the Code of Virginia (1950), as amended, is applicable to an intrastate transfer of a custody case in Virginia. If so, you then asked whether a court would be limited to the criteria found in said Act in deciding whether such an intrastate transfer was appropriate.

The Act was initially approved by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in 1968. Section 1 of that Act stated "the general purposes of this Act are to: (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody...(2) provide cooperation with the courts of other states...(6) avoid re-litigation of custody decisions of other states...(8) provide and expand the exchange of information...between the courts of this state and those of other states concerned with the same child...." The language used in § 1 clearly indicates that the thrust of this Act is to avoid jurisdictional conflict and confusion between states and to encourage an orderly decision-making process in custody situations when courts of several states are involved. No mention is made of intrastate custody disputes.

When the 1979 session of the Virginia General Assembly enacted its version of this Act, it omitted the language of § 1 as developed by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. However, by adopting virtually all of the remaining sections of this Act, it is clear that the General Assembly still intended that this legislation was meant to conform to the intent of those purposes in § 1 listed above. For example, § 20-125 is the "definitions" section and it is almost identical to the comparable section of the Act; § 20-126, the "jurisdiction" section, is identical to its counterpart in the Act; § 20-128, dealing with "Notice to Persons Outside
this State..." is comparable to the same section in the Act, etc. Since no mention is made of intrastate custody controversies, I am of the opinion that Virginia's version of this Act was also not intended to be applicable to those types of matters. Instead, intrastate custody matters would be controlled by §§ 16.1-241, 16.1-243, 16.1-244 and 20-83.1. Because I have responded in the negative to your first question, no response can be given to your second question.

You have also asked what potential jurisdiction, if any, lies with a circuit court in a future divorce action between parties now properly before a juvenile and domestic relations district court in a custody dispute.

Circuit courts have jurisdiction in divorce matters. See § 20-96. A circuit court may make orders providing for the custody of minor children of the parties during the pendency of a divorce. See § 20-103. Once such an order is entered by a circuit court, the jurisdiction of the juvenile and domestic relations district court in the custody matter of the minor children is divested. See §§ 16.1-244 and 20-79(a). I am, therefore, of the opinion that if a divorce suit is initiated, a circuit court has potential exclusive custody jurisdiction over the minor children which can be exercised by that court if one or both of the parties so request it. This is true even if the parties are now properly before a juvenile and domestic relations district court in a custody dispute.

2Sections 24 and 25 of the Act dealing with court calendar priority and severability were also omitted by the 1979 session of the Virginia General Assembly.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS.
JURISDICTION. NO JURISDICTION IN CRIMINAL CASE WHERE COMPLAINANT IS STEPGRANDFATHER OF DEFENDANT.

March 23, 1982

The Honorable Wm. W. Jones, Judge
Suffolk General District Court

This is in reply to your letter requesting an opinion whether the juvenile and domestic relations district court or the general district court has jurisdiction over a case where the complainant is the stepgrandfather of the defendant, both are adults and the defendant does not live in the same home with his grandmother and the stepgrandfather, the complainant. The defendant is charged with two felonies: breaking and entering and grand larceny.

Section 16.1-241J of the Code of Virginia (1950), as amended, grants exclusive original jurisdiction to juvenile
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and domestic relations district courts over all cases, matters and proceedings involving:

"[a]ll offenses committed by one member of the family against another member of the family and the trial of all criminal warrants in which one member of the family is complainant against another member of the family; provided further, that in prosecution for felonies over which the court shall have jurisdiction, said jurisdiction shall be limited to determining whether or not there is probable cause. The word 'family' as herein used shall be construed to include husband and wife, parent and child, brothers and sisters, grandparent and grandchild, regardless of whether such persons reside in the same home." (Emphasis added.)

Because certain relationships are specifically mentioned in § 16.1-241J as being within the definition of "family," the exclusion of other relationships is implied. Accordingly, in order for the juvenile and domestic relations district court to exercise jurisdiction over an offense committed against a stepgrandparent by a stepgrandchild, the stepgrandparent-stepgrandchild relationship must be found to be included within the meaning of "grandparent and grandchild." See Report of the Attorney General (1976-1977) at 121.

In the above referenced Opinion, this Office held that "parent and child" as used in § 16.1-158(8) (now § 16.1-241J) may be construed to include stepparents and infant stepchildren living in the same home. See Report of the Attorney General (1976-1977), supra. The basis for that conclusion was that "when a stepparent takes a stepchild into his home and treats the child as a member of the family, the stepparent stands in the place of the natural parent, or in loco parentis, and the reciprocal rights, duties and obligations of parent and child continue so long as such relationship continues...." Report of the Attorney General (1976-1977), supra, at 122.

In a different context, however, the Supreme Court of Virginia has stated that

"[s]tepchildren, as such, are not within the letter of the reason of the law that fixes mutual obligations upon parent and child or other near relatives, and therefore no obligations are created between the stepfather and the stepchild beyond such as flow from the acts of the stepfather during the dependency of the child...." Doughty v. Thornton, 151 Va. 785, 793, 145 S.E. 249 (1928).

In the instant case, the stepgrandchild does not live with his grandmother and stepgrandfather, nor is he an infant. Because neither of the parties in the present case is an infant and the stepgrandchild does not reside with the stepgrandparent, it appears that this particular relationship
is beyond the "family" relationship contemplated in § 16.1-241J. Accordingly, I am of the opinion that the general district court has jurisdiction in the case.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. JUVENILE CANNOT BE DETAINED IN JAIL NOT CERTIFIED FOR JUVENILES BY DEPARTMENT OF CORRECTIONS. IF JAIL REACHES MAXIMUM POPULATION SET BY ORDER OF U.S. DISTRICT COURT, SHERIFF REQUIRED TO NOTIFY APPROPRIATE JUDGES THAT ASSIGN INDIVIDUALS TO JAIL AND DIRECTOR OF DEPARTMENT OF CORRECTIONS.

September 14, 1981

The Honorable Michael E. Norris, Sheriff
City of Alexandria

You have asked whether a juvenile can be held in a jail that is not certified by the Department of Corrections for the jailing of a juvenile? Section 16.1-249(B)(iii) of the Code of Virginia (1950), as amended, specifically provides that any jail used to house juveniles must be certified by the Department of Corrections. It is, therefore, my opinion that a juvenile cannot be detained in a jail not certified for juveniles by the Department of Corrections.

You further ask that if the above answer is in the negative, what then should be done? It is my opinion that you have two options: you may take the steps necessary to have your jail certified by the Department of Corrections for the jailing of juveniles (see Standards for the Jailing of Juveniles, Commonwealth of Virginia, Department of Corrections, 1978), or you can locate a jail in your area which is certified for the jailing of juveniles and is willing to accept the juveniles.

You also ask what limits may a sheriff set regarding transportation of prisoners when there are not enough deputies to transport prisoners and maintain other mandatory obligations such as jail security? A sheriff is required to perform all duties imposed upon him by law, and I am not aware of any authority which would authorize a sheriff to place any limitations upon the performance of these duties. If you believe additional deputies are necessary to carry out your duties, you must take up the matter with the State Compensation Board and the local authorities.

Finally, you have asked what your responsibility is when the inmate population reaches the level set by the federal district court consent decree. A review of the consent decree in question reveals that the parties thereto have agreed that under certain conditions the population of the Alexandria City Jail will not exceed 115 inmates. It is my opinion that your duties as sheriff are to notify the appropriate judges that assign individuals to your jails and the Director of the Department of Corrections when said limit is reached.
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JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. JUVENILE REQUIRED TO PARTICIPATE IN PUBLIC SERVICE PROJECTS UNDER § 16.1-279(E)(7A). CANNOT BE REQUIRED TO PERFORM SERVICES FOR PRIVATE BUT ESSENTIALLY CHARITABLE ORGANIZATIONS. SERVICE MUST BE LIMITED TO GOVERNMENTAL OR QUASI-GOVERNMENTAL UNDERTAKINGS.

September 11, 1981

The Honorable J. Davis Reed, III, Judge
Juvenile and Domestic Relations District Court

You have asked whether § 16.1-279(E)(7a) of the Code of Virginia (1950), as amended, which allows the juvenile and domestic relations district court to require a juvenile to participate in "public service projects", empowers the court to require juveniles to perform services for private, but essentially charitable, organizations and, in particular, churches.

In my Opinion dated July 14, 1980, to the Honorable R. Baird Cabell, Judge, Juvenile and Domestic Relations District Court, a copy of which is enclosed, a "public service project" was defined as a large government supported undertaking which renders a service in the public interest. In my opinion, public service projects must be limited to governmental or quasi-governmental undertakings, and it would be inappropriate to require juveniles to perform services for private organizations.

Your other questions are premised upon an affirmative response to the question to which I have responded, and since I am of the opinion such projects are not appropriate, no response is necessary for your other questions.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS. JUVENILES. PROBATION AND PAROLE.

July 2, 1981

The Honorable Robert C. Boswell
Commonwealth's Attorney for Floyd County

You have asked whether a juvenile and domestic relations district court can revoke the suspended jail sentence of a juvenile sentenced pursuant to § 16.1-284 of the Code of Virginia (1950), as amended, after he turns twenty-one years of age.
Section 16.1-242 provides that the juvenile and domestic relations district court may retain jurisdiction until such person becomes twenty-one years of age, except when that person is in the custody of the Department of Corrections. It is, therefore, my opinion that if a juvenile and domestic relations district court has taken jurisdiction over a child before his eighteenth birthday the court may revoke a suspended sentence at any time up to his twenty-first birthday, excluding any period of time when the child is in the custody of the Department of Corrections. The jurisdiction of the court is automatically terminated when the child turns twenty-one years of age.

You have asked who has responsibility for supervising the probation of an adult convicted and sentenced in the juvenile court.

The powers and duties of adult probation officers are set forth in § 53-250(5) of the Code of Virginia (1950), as amended, which provides that "nothing in this article shall be considered as requiring the investigation or supervision of cases before juvenile and domestic relations district courts." It, therefore, must be assumed that the General Assembly did not intend that the adult probation and parole department should oversee anyone sentenced by a juvenile and domestic relations district court.

It is, therefore, my opinion that the responsibility for supervising the probation of an adult convicted and sentenced in the juvenile court rests with the juvenile probation and parole authorities.

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

The Honorable James L. Tompkins, III, Judge
Juvenile and Domestic Relations Court for Carroll County
This is in reply to your recent letter in which you request a clarification of an Opinion of this Office of November 17, 1981, which expressed the view that the responsibility for supervising the probation of an adult convicted and sentenced in the juvenile and domestic relations district court rests with the juvenile probation and parole authorities. You advise that the Office of Probation and Parole has requested a release of a number of adult defendants who have been placed on probation by your court for the offenses of contributing to the delinquency of a minor and for criminal nonsupport. You request that I review the Opinion addressed to the Honorable Michael J. Valentine in light of §§ 16.1-259 and 53-272 of the Code of Virginia (1950), as amended.

The conclusion stated in the letter to Judge Valentine was based on the language in § 53-250, which reads in pertinent part as follows:

"Provided that nothing in this article shall be considered as requiring the investigation or supervision of cases before juvenile and domestic relations district courts."

The probation and parole officers referred to in that section are those appointed by the circuit court pursuant to § 53-244. The last paragraph in § 53-250, above quoted, manifests an intent by the General Assembly to relieve the probation and parole officers appointed by the circuit court from the responsibility of investigating or supervising cases in the juvenile and domestic relations district courts. I, therefore, concur in the opinion of my predecessor.

The two sections to which you referred relate to procedure and disposition of cases in the juvenile and domestic relations court. Section 16.1-259 reads in part, as follows:

"A. In cases where an adult is charged with violations of the criminal law pursuant to subsections I or J of § 16.1-241, the procedure and disposition applicable in the trial of such cases in general district court shall be applicable to trial in juvenile court. The provisions of this law shall govern in all other cases involving adults."

That section provides that the procedure and disposition of cases against adults charged with the crimes against children, or family members specified in subsections I or J of § 16.1-241, will be the same in the juvenile and domestic relations district court as it is in the general district court. It does not undertake to specify which probation officer is responsible for such adults in the event the court should place the person on probation as authorized by § 53-272, which provides in pertinent part, as follows:
"After a plea, a verdict or a judgment of guilty in any court having jurisdiction to hear and determine the offense, with which the prisoner at the bar is charged, if there are circumstances in mitigation of the offense, or if it appears compatible with the public interest, the court may suspend the execution of sentence, in whole or in part, or the imposition of sentence or commitment, and may also place the defendant on probation under the supervision of a probation officer, during good behavior for such time and under such conditions of probation as the court shall determine...."

The powers, duties and functions of probation officers appointed to serve the juvenile and domestic relations district courts are set forth in § 16.1-237. That section provides, in part, that:

"In addition to any other powers and duties imposed by this law, a probation officer appointed hereunder shall:

A. Investigate all cases referred to him by the judge or any person designated so to do, and shall render reports of such investigation as required;

B. Supervise such persons as are placed under his supervision and shall keep informed concerning the conduct and condition of every person under his supervision by visiting, requiring reports and in other ways, and shall report thereon as required...."

You will note that the foregoing quoted provisions do not specify that the "persons" referred to therein are juveniles. Thus, we may assume that the General Assembly intended that the probation officers charged with responsibility for persons referred to them by the judge of the juvenile and domestic relations district courts would extend to adults and juveniles alike. Accordingly, I concur with the Office of Probation and Parole that its responsibility does not extend to persons placed on probation from your court.

JUVENILES. NON-CUSTODIAL PARENT CAN CONSENT TO MARRIAGE OF MINOR CHILD PURSUANT TO § 20-49.

June 16, 1982

The Honorable Margaret W. White, Clerk
Circuit Court for the City of Staunton

This is in reply to your letter in which you ask who is the proper person to give consent for the issuance of a marriage certificate to a minor child.
Section 20-49 of the Code of Virginia (1950), as amended, provides in pertinent part that if a person is under 18 years of age and has not been previously married the consent of the father, mother or guardian of such person shall be required. In the factual situation described in your inquiry, a 17-year-old female is pregnant and wishes to marry. Her parents are divorced and her mother has custody. Her mother will not consent to the issuance of a marriage license, but her father is willing to do so. Your inquiry is thus whether consent can only be given by the parent who has custody, or by the non-custodial parent as well.

"Legal custody," as defined in § 16.1-228(O), is a legal status created by court order which vests in the custodian a number of rights, including, but not limited to, the physical custody of the child, the choice of where and with whom the child will live, and the right and duty to protect, train and discipline the child. However, § 16.1-228(O) clearly provides that these rights are "subject to any residual parental rights and responsibilities." A final order terminating parental custodial rights does not sever residual parental rights. Walker v. Dept. of Public Welfare, Page County, 223 Va. 490, 265 S.E.2d 490 (1980); Weaver v. Roanoke Dept. of Human Res., 220 Va. 926, 265 S.E.2d 692, 695 (1980).

"Residual parental rights and responsibilities" are defined in § 16.1-228(S) as follows:

"All rights and responsibilities remaining with the parent after the transfer of legal custody...including but not limited to the right of visitation, consent to adoption, the right to determine religious affiliation and the responsibility for support." (Emphasis added.)

Although the right to consent to marriage is not explicitly stated to be a residual parental right and responsibility, it is similar in nature to several which are expressly listed in the statute. By acknowledging that the right to consent to marriage is a residual parental right and responsibility, the provisions of § 20-49, which allow for the consent of the father or mother when a minor child wishes to marry, can be construed in a manner which reinforces both §§ 16.1-228(O) and 16.1-228(S). 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. Covington Virginian v. Woods, 182 Va. 538, 549, 29 S.E.2d 406, 411 (1944).

Therefore, when the parents of a 17-year-old child are divorced, the father's residual rights have not been terminated, and the mother has been granted custody of the child, I am of the opinion that the father of the child can still consent to the marriage of the child pursuant to § 20-49, even though the mother refuses to do so. As indicated, this assumes that a court has not terminated the father's "residual parental rights and responsibilities."
A parent’s residual rights and responsibilities can be terminated. Such rights are not terminated by an order which merely vests custody in one parent rather than the other.


May 26, 1982

The Honorable Stanley C. Walker
Member, Senate of Virginia

You have asked whether a facility, the Wilderness Challenge School (hereinafter the "School"), operated by the Tidewater Regional Group Home Commission (hereinafter the "Commission"), established pursuant to § 16.1-315, et seq., of the Code of Virginia (1950), as amended, can receive juvenile placements and the attendant funding pursuant to § 16.1-286. Apparently, the School is but one of several schools operated by the Commission.

Section 16.1-286 provides that, when a court determines that the behavior of a child located within the jurisdiction cannot be dealt with in the child's own locality or within the resources of his locality, the court may take custody and place the child in a private or locally operated public facility. It further provides that the cost of said placement shall be paid by the treasurer of the Commonwealth. This section prohibits the court from placing such a child in any facility operated under the provisions of § 16.1-313.1

The Commission was established pursuant to § 16.1-315, et seq., which provides that several localities may join together and form a commission to operate regional juvenile detention homes, group homes or other residential care facilities. Such commissions allow several jurisdictions to pool their resources in providing detention homes, and thus allow localities to provide more specialized services.

The only provision for the funding of said Commission is § 16.1-317 which provides that "the governing bodies of the participating political subdivisions may by ordinance or resolution provide for the payment of compensation to the members of the commission and for the reimbursement of their actual expenses incurred in the performance of their duties."

The only express limitation on the placements permitted by § 16.1-286 is that they may not be made in facilities operated pursuant to § 16.1-313 which provides for funding certain residential facilities. The Commission, itself,
however, is not such a facility and thus it is ineligible to receive funds for its costs pursuant to § 16.1-313.

Accordingly, I am of the opinion that if the Commission is operating properly within the purview of § 16.1-315, et seq., there is no prohibition against its administering a facility which receives placements and the attendant funding pursuant to § 16.1-286.

Section 16.1-313 places the responsibility for construction and operation of detention homes for children in need of services upon the city or county, or combination thereof, with the burden on the Commonwealth to reimburse such localities in part.

JUVENILES. SENTENCE TO CONFINEMENT IN JAIL AND LIMITATIONS ON CONFINEMENT.

June 22, 1982

The Honorable Dale H. Harris, Judge
Juvenile and Domestic Relations District Court

You have inquired whether the subparagraphs of § 16.1-249B(iii) of the Code of Virginia (1950), as amended, limit the use of § 16.1-284 by juvenile and domestic relations courts, to situations involving an offense which would be a Class 1, 2 or 3 felony if committed by an adult.

Section 16.1-284 governs the authority of the juvenile and domestic relations district court to sentence juveniles fifteen years or older as adults and authorizes, under certain conditions, the imposition of confinement in jail subject to the provisions of §§ 16.1-249B(i), 16.1-249B(ii), and 16.1-249B(iii).1

Because both statutes cover the same general subject matter, they can reasonably be said to be in pari materia and must be construed together if reasonably possible, so as to allow both to stand and to give force and effect to each. Kirkpatrick v. Board of Supervisors of Arlington County, 146 Va. 113, 136 S.E. 186 (1926).

In giving intent to the reference in § 16.1-284 of §§ 16.1-249B(i), 16.1-249B(ii) and 16.1-249B(iii), it is necessary to recall that § 16.1-284 applies to disposition of a case in which a child fifteen years or older has committed "an offense which if committed by an adult would be a misdemeanor or a felony...." (Emphasis added.) There is no indication in § 16.1-284 that it should be limited to situations involving Class 1, 2 or 3 felonies; rather, it clearly, by its own terms applies to misdemeanors and felonies.
Full effect to §§ 16.1-249B(i), 16.1-294B(ii) and 16.1-249B(iii), may be given by ending the provision contained in § 16.1-249B(iii) after the phrase "detention of children." The three paragraphs which follow and which are denoted by Arabic numbers are not subportions of § 16.1-249B(iii) but, rather, are independent provisions which, collectively, modify § 16.1-249B. Accordingly, the only aspects of § 16.1-249B which limit a judge's authority to dispose of a case under § 16.1-284 by sentencing a juvenile to jail are (1) the jail must have a room or ward entirely separate and removed from adults into which the juvenile will be placed (§ 16.1-249B(i)); (2) adequate supervision is provided (§ 16.1-249B(ii)); and (3) the facility has been approved by the Department of Corrections (§ 16.1-249B(iii)).

Accordingly, for the foregoing reasons, I am of the opinion that juvenile and domestic relations courts are not limited in using § 16.1-284 to situations which would be a Class 1, 2 or 3 felony if committed by an adult.

1Section 16.1-249B provides in its entirety: "A delinquent child or a child alleged to be delinquent who is fifteen years of age or older may be detained in a jail or other facility for the detention of adults provided (i) the detention is in a room or ward entirely separate and removed from adults, (ii) adequate supervision is provided and (iii) the facility is approved by the Department for the detention of children and only if:

1. Space in a facility designated in subsection A hereof is unavailable; provided, however, if the child has previously been before the juvenile court and has by waiver or transfer been treated as an adult in the circuit court, this provision shall not apply; or

2. A judge or intake officer determines that the facilities enumerated in subsection A hereof are not suitable for the reasonable protection of the child or community, when the child is charged with an offense which would be a Class 1, 2 or 3 felony if committed by an adult; or

3. The detention home in which the child should be placed is at least twenty-five miles from the place where the child is taken into custody and is located in another city or county; provided, however, a child may be placed in such jail or other facility for the detention of adults pursuant to this subparagraph for no longer than seventy-two hours."
You inquire what efforts are required by the serving officer to make personal service of summonses in juvenile and domestic relations district court cases before it is appropriate to make service by certified mail under § 16.1-264A of the Code of Virginia (1950), as amended, which provides, in pertinent part:

"If a party designated in § 16.1-263 A to be served with a summons can be found within the State, the summons shall be served upon him in person. If he is within the State and cannot be found, but his address is known or can with reasonable diligence be ascertained, the summons may be served upon him by mailing a copy thereof by certified mail return receipt requested.

If after reasonable effort a party other than the person who is the subject of the petition cannot be found or his post office address cannot be ascertained, whether he is within or without the State, the court may order service of the summons upon him by publication in accordance with the provisions of §§ 8-71 and 8-72."

The securing of personal service on a party to litigation is an integral part of our judicial system. Other methods of service are allowed only when clearly authorized by the legislature and circumstances triggering the use of such substituted service must be closely followed. Washburn v. Angle Hardware Co., 144 Va. 508, 132 S.E. 310 (1926). Crockett v. Etter, 105 Va. 679, 54 S.E. 864 (1906). Section 16.1-264A provides for three types of service—personal, certified mail and service by publication. There is no provision for posting or substituted service in this statute.

The section does not set out the circumstances which must exist before one can use service by certified mail, other than requiring a determination that the person to be served is within the State but cannot be found. The section does, however, establish a standard of "reasonable effort" to locate a party before a court can authorize the use of service by publication. While it is beyond the authority of this office to establish a standard for determining when service by certified mail may be used, it is reasonable to assume that the legislature would not set a lesser standard for use of certified mail service than is set for service by publication.

Under these circumstances, I am of the opinion that at least a "reasonable effort" to attain personal service on a party under § 16.1-264A must be made before the summons may be served by certified mail, return receipt requested.

LAW-ENFORCEMENT OFFICERS. HEARING PANELS. AGENCY MAY SET FORTH MINIMUM POINTS TO BE COVERED IN PANEL'S RECOMMENDATIONS.
September 8, 1981

The Honorable David T. Stitt
County Attorney for Fairfax County

You have asked about the scope of authority of hearing panels established pursuant to the Law-Enforcement Officer's Procedural Guarantees, Ch. 10.1 of Title 2.1 of the Code of Virginia (1950), as amended. Specifically, you ask if § 2.1-116.7 requires hearing panels to make recommendations concerning the disciplinary action to be taken against an officer charged with a violation which could result in dismissal, demotion, suspension or transfer for punitive reasons.

Pursuant to § 2.1-116.5(3), an agency may provide a law enforcement officer a hearing prior to a dismissal, demotion, suspension or transfer for punitive reasons. This is apparently the situation involved in your inquiry. In any such hearing, the officer is to be afforded the opportunity to present evidence and examine and cross-examine witnesses. The panel is directed in § 2.1-116.7 to make recommendations to the parties, which recommendations shall be advisory but shall be accorded significant weight. In directing panels to make recommendations, the General Assembly has placed no limitations on the kinds of recommendations which can be made, with the precise scope of the recommendations left to the discretion of the panel. Certainly, in cases where the principle issue concerns whether a particular form of discipline should be imposed, it would seem logical that a panel's recommendations would include a recommendation concerning the propriety of such discipline.

Pursuant to § 2.1-116.9, agencies are required to promulgate grievance procedures not inconsistent with Ch. 10.1. That section also specifies that agencies may provide rights of law-enforcement officers in addition to the rights afforded by Ch. 10.1. As a result, I do not believe that it would be inappropriate for an agency procedure to set forth minimum points to be covered in a panel's recommendations, including a recommendation concerning appropriate discipline.

I am of the opinion, however, that it would not be proper for an agency procedure to restrict the inquiry of the hearing panel solely to the fact finding process of determining the validity of the charge.

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1Section 2.1-116.7 provides: "The recommendations of the panel, and the reasons therefor, shall be in writing, shall be transmitted promptly to the law-enforcement officer or his attorney and to the chief executive officer of the law-enforcement agency. Such recommendations shall be advisory only, but shall be accorded significant weight."
Section 2.1-116.5(3) provides: "At the option of the agency, it may, in lieu of complying with the provisions of § 2.1-116.4, give the law-enforcement officer a statement, in writing, of the charges, the basis therefor, the action which may be taken, and provide a hearing as provided for in § 2.1-116.5 prior to dismissing, demoting, suspending or transferring for punitive reasons the law-enforcement officer."

Section 2.1-116.9 provides: "The rights accorded law-enforcement officers in this chapter are minimum rights and all agencies shall promulgate grievance procedures not inconsistent herewith; provided that any agency may provide for the rights of law-enforcement officers in addition hereto."

LAW-ENFORCEMENT OFFICERS. PRIVATE SECURITY PERSONNEL.

EXCEPTION TO EXEMPTION FROM TRAINING REQUIREMENT WHERE ARMED
EMPLOYEE OF OTHER THAN PRIVATE SECURITY SERVICES BUSINESS IN
CONTACT WITH GENERAL PUBLIC.

July 14, 1981

Mr. R. H. Geisen, Executive Director
Criminal Justice Services Commission

You have asked a number of questions regarding the recent amendment to § 54-729.28(H) of the Code of Virginia (1950), as amended. That amendment qualifies a specific exemption to the requirement imposed by § 54-729.29(B) that employees of private security services businesses be registered with the Virginia Department of Commerce. The section, as amended, states that the following category of persons shall be exempt from such registration requirement:

"Regular employees of persons engaged in other than the private security services business, the regular duties of which employees primarily consist of protecting the property of their employers; provided that any such employee who carries a firearm and is in direct contact with the general public in the performance of his duties shall possess a valid registration with the Department as provided in § 54-729.29 B. 'General public' shall mean individuals who have access to areas open to all and not restricted to any particular class of the community." Section 54-729.28(H).

The clause of the above statute incorporating the proviso is the section added by the recent amendment, and it is concerning the effect of this section that you inquire. I will respond to your questions in the order in which you raise them.

1. Are those armed individuals who come within the purview of the amendment covered by a "grandfather" provision?
Obviously the language of the subject amendment itself contains no grandfather clause. In referring to § 9-111.2, which deals with the compulsory minimum training for private security personnel for which § 54-729.28(H) provides a qualified exemption, there is also no grandfather clause. It is particularly instructive to compare § 9-111.2 with § 9-111 which does contain a specific exemption, or grandfather clause, concerning compulsory minimum training for law enforcement officers. Because the General Assembly specifically provided for the exemption for law enforcement officers in § 9-111, but provided no such exemption for private security personnel in § 9-111.2, it seems apparent that there was no intent to provide such an exemption for private security personnel. I, therefore, believe that no grandfather clause exemption should be inferred with reference to § 54-729.28(H).

2. Is an armed individual working at an entrance gate to private property required to be trained in accordance with § 54-729.28(H)?

Section 54-729.28(H) mandates training for any armed employee who is in "direct contact with the general public." The section defines "general public" as "individuals who have access to areas open to all and not restricted to any particular class of the community." It is clear that armed employees who serve as guards within restricted areas are exempt from the requirements imposed by the section; it is unclear, however, whether such armed employees working at the point of contact between public area and private area would be so exempt. The answer to this question would turn on whether the area providing access to the private property would itself be considered to be private or public property. I believe that such access point itself would be considered to be a public area as the general public would have free access up to the point of entrance. Individuals would have a right to approach the point seeking information, admittance or clarification of posted notices. The gate itself would not be restricted, only passage through the gate. Otherwise merely approaching the gate could be considered criminal trespass. See Hubbard v. Commonwealth, 207 Va. 673, 152 S.E.2d 250 (1967). Therefore, it is my opinion that armed employees working at an access gateway to private property would not be exempt from the training and registration requirements imposed by law.

3. Does § 54-729.28(H) apply to armed employees of federal, State or local governmental agencies, or private facilities, where such employees are not included in § 9-108.1(H)?

Section 9-108.1(H) defines "law enforcement officer" as "any full-time employee of a police department or sheriff's office which is a part of or administered by the State or any political subdivision thereof and who is responsible for the prevention and detection of crime
and the enforcement of the penal, traffic or highway laws of this State, and shall include any member of the Enforcement or Inspection Division of the Alcoholic Beverage Control Commission vested with police authority."

For those persons falling under the above definition, § 9-111.1 imposes minimum training standards. No training standards are mandated, however, for those employees not included in § 9-108.1(H), unless those standards can be seen to derive from §§ 54-729.29(B) and 54-729.28(H). With reference to armed employees of private facilities, those sections would compel registration and training in all cases where such armed employees are in direct contact with the general public. With reference to armed employees of federal, State or local governmental agencies, the question is more complex because of § 54-729.28(A), which exempts from registration and training requirements an "officer or employee of the United States of America, or of this State or a political subdivision of either, while the employee or officer is engaged in the performance of his official duties." While § 54-729.28(A) may have been meant to apply only to law enforcement personnel as defined in § 9-108.1(H), the section does not so state. It refers to any employee of the federal, State or local government in the performance of his official duties, and would thus seem to exempt armed guards in the employ of such government entities, even if such armed guards were not considered to be law enforcement personnel under § 9-108.1(H) and were thus not subject to any other training.

4. Do the power of arrest provisions of § 54-729.33 apply to the additional individuals affected by the amendment to § 54-729.28(H)?

Section 54-729.33 states:

"The compliance with the provisions of this chapter shall not of itself authorize any person to carry a concealed weapon or exercise any powers of a conservator of the peace. A registered guard of a private security services business while on a location which such business is contracted to protect shall have the power to effect an arrest for an offense occurring in his presence on such premises or in the presence of a merchant, agent, or employee of the merchant the private security business has contracted to protect, if such merchant, agent, or employee had probable cause to believe that the person arrested had shoplifted or committed willful concealment of goods as contemplated by § 18.2-105. For the purposes of § 19.2-74, a registered guard of a private security services business shall be considered an arresting officer."

Because this section is specifically limited to a registered guard of a "private security services business," I do not believe that employees of persons engaged in "other than the
private security services business," as addressed in § 54-729.28(H), can be seen to have arrest power by virtue of that statute.

LIBRARIES. REGIONAL LIBRARY FUNDS CONSOLIDATION WITH COUNTY FUNDS PERMITTED WHERE PARTICIPATING JURISDICTIONS CONSENT AND REGIONAL LIBRARY BOARD RETAINS CONTROL.

February 25, 1982

Mr. Donald Haynes
State Librarian

This is in reply to your recent letter which reads as follows:

"I would be grateful for an opinion as to whether regional library funds, as covered by § 42.1-41 of the Code, can be consolidated in a county centralized accounting system under § 15.1-163. If so, does the regional library board retain control of expenditures as specified in § 42.1-39?"

Counties, cities and towns are encouraged by the General Assembly to use consistent procedures for the preparation and approval of their budgets. They may request the assistance of the State Auditor of Public Accounts in establishing a centralized accounting system for such counties, cities and towns. See § 2.1-167 of the Code of Virginia (1950), as amended. Additionally, § 15.1-163.1 provides:

"Notwithstanding any provision of law to the contrary, any county using a centralized accounting system may, by resolution adopted by its governing body, consolidate the financial accounting of its department of social services and library system with the general fund of such county."

The manifest purpose of these provisions is to provide a county governing body with accurate and comprehensive information on the county's fiscal condition so that it may intelligently prepare the budget and make appropriations. Section 15.1-163.1, by its terms, relates only to accounting procedures and reporting; it does not alter the control which agencies, required to participate in those accounting procedures, have over the disbursement of those funds consolidated in the centralized accounting system for one of the participating jurisdictions. I assume that all participating parties will agree to such consolidation.

It appears that § 15.1-163.1 does not impose any greater substantive reporting obligations on regional library boards than they have without such consolidation. A detailed report of receipts and disbursements must be given by a regional library board to the governing body of each participating
jurisdiction. See § 42.1-41. Section 15.1-163.1 would affect only the format and timing of that report.

This Office previously has determined that library boards generally are empowered to control their own employees and disburse funds appropriated to them. See Reports of the Attorney General (1980-1981) at 227; (1978-1979) at 116; (1977-1978) at 233. Regional library boards have explicit statutory power to control the expenditure of funds appropriated to them by the participating localities. See § 42.1-39. That power remains undiminished by the terms of § 15.1-163.1.

Therefore, it is my opinion that, with the concurrence of all participating jurisdictions, funds under the control of regional library boards can be consolidated with general county funds for the purpose of a county's achieving a centralized accounting system, but that this consolidation does not alter or limit the statutory power of the regional library board over the disbursement of appropriated funds.

LICENSES. PRIVATE SECURITY SERVICES BUSINESSES. LIABILITY INSURANCE REQUIREMENT PRIOR TO LICENSURE NOT OUTSIDE LEGISLATIVE AUTHORITY.

January 13, 1982

The Honorable Ralph L. Axselle, Jr.
Member, House of Delegates

You have asked whether Regulation 3.3 of the License Law Regulations for Private Security Services Businesses in Virginia exceeds the statutory delegation of authority granted by § 54-729.31(A)(ii) of the Code of Virginia (1950), as amended. You have also inquired whether an individual registered as a private security guard or private detective, or in some other individual capacity, can be insured as an individual, rather than requiring that his company be insured.

With reference to your first question, § 54-729.31(A)(ii) states that every person licensed under § 54-729.29(A) shall file with the Virginia Department of Commerce, before such license shall become operative, "evidence of a policy of liability insurance in an amount and with coverage as fixed by the Department." Regulation 3.3 states:

"Each firm wishing to apply for or maintain a license as a private security service business in this state shall secure a surety bond in the amount of $25,000.00, executed by a surety company authorized to do business in Virginia or a Certificate of Insurance showing a policy of general comprehensive liability insurance with a minimum coverage of $100,000.00 and $300,000.00."
It is axiomatic that administrative powers are limited to those expressly provided by statute or necessarily implied. Safeway Stores, Inc. v. Milk Commission, 197 Va. 69, 87 S.E.2d 769 (1955); Lucerne Cream and Butter Co. v. Milk Commission, 182 Va. 490, 29 S.E.2d 397 (1944). In the specific case about which you inquire, § 54-729.31(A)(ii) states that the policy of liability insurance prerequisite to the granting of a license to a private security firm shall be "in an amount and with coverage as fixed by the Department." Regulation 3.3 proceeds to take the directive of § 54-729.31(A)(ii) and to establish the amount and coverage required. Thus, I do not believe that Regulation 3.3 exceeds the authority granted in § 54-729.31(A)(ii).

With reference to your second question, § 54-729.31 states that the evidence of liability insurance is required of "[e]very person licensed under § 54-729.29(A)...." Section 54-729.29(A) states: "No person shall engage in the private security services business in this State without having first obtained a license therefor from the Department." This is as opposed to § 54-729(B) which addresses the registration of individuals as guards, private detectives or other such private security personnel to work for licensed private security services businesses. Section 54-729.27(H) defines "person" as "any individual, group of individuals, firm, company, corporation, partnership, business, trust, association, or other legal entity." I thus believe it is clear that § 54-729.31(A) requires insurance only of a private security services business as prerequisite to licensure, and does not require, or authorize, insurance as a prerequisite to individual registration.

LICENSES. STATEMENT OF PHYSICIAN THAT RESIDENT NEEDS WHEELCHAIR TO EXIT HOME FOR ADULTS LICENSED ONLY FOR AMBULATORY PERSONS DOES NOT PERMIT RESIDENT TO REMAIN THERE.

August 31, 1981

The Honorable Dudley J. Emick, Jr.
Member, Senate of Virginia

You ask whether an adult home licensed for ambulatory residents only can be required to discharge a resident patient whose physician advises that such resident requires a wheelchair to exit the home. The Department of Welfare (the "Department") licenses some adult homes for ambulatory residents only and other homes for ambulatory or non-ambulatory residents, depending upon the home's structural and fire safety features. The adult home in question is licensed for ambulatory patients only. The term "non-ambulatory" is defined in the Department's Standards and Regulations, in part as follows:

"The condition of a person, who because of physical or mental impairment, must be led or carried by another person, or is dependent on the use of a device, such as,
but not limited to, a walker, wheelchair or leg prosthesis to make an exit from a building in an emergency...." Standards and Regulations, § I,B(16).

(Emphasis added.)

Section 63.1-174.1 of the Code of Virginia (1950), as amended, provides:

"In determining whether to deny admission to a home for adults which is licensed to accept only ambulatory residents or to discharge from such a home a person who is non-ambulatory and who objects to being denied admission or being discharged, the operator of the home shall consider the opinion of a physician as to the ability of the person to exit the home in an emergency. In enforcing regulations governing the kinds of residents accepted by a home for adults, the Department shall consider any medical opinions received by the operators of such homes as to the ability of residents to exit in an emergency and shall have the option of requiring additional medical evaluations, if deemed advisable."

You state that the resident patient's physician has certified that the resident needs a wheelchair to exit the home. The statement, therefore, indicates that the resident is non-ambulatory for purposes of the Standards and Regulations of the Department. Since the facility is approved for "ambulatory" residents only, his continued presence would be a violation of the Department's Standards and Regulations.

It is, therefore, my opinion that the Department can require discharge of a resident patient in a home licensed for ambulatory patients only where the patient's physician certifies that the patient requires a wheelchair for exit.

1The Standards and Regulations for Licensed Homes for Adults (hereinafter "Standards and Regulations") were adopted by the State Board of Welfare on July 19, 1979, and became effective on January 1, 1980. Sections III,A(9) and IX,F are the relevant sections for determining whether a facility can be licensed for non-ambulatory residents.

LIENS. WRIT OF FIERI FACIAS. LIEN CREATED BY PROPER LEVY REMAINS EFFECTIVE FOR REASONABLE TIME.

August 7, 1981

The Honorable Richard L. Ashby
Sheriff of Stafford County

You have asked how long a lien created by levy under a writ of fieri facias remains effective, if possession of the
levied property remains in the hands of the debtor because the creditor has failed to give bond.

A lien of fieri facias commences from the time the writ is delivered to the officer to be executed. See, e.g., In re Acorn Electric Supply, Inc., 348 F.Supp. 277 (E.D. Va. (1972)), Crump v. Commonwealth, 75 Va. (1 Math.) 922 (1882). The lien survives the return day of the writ if the property has been levied on, § 8.01-479 of the Code of Virginia (1950), as amended, and to properly effectuate a levy, it is not essential that the levying officer take possession of the property. Dorrier v. Masters, 83 Va. 459, 2 S.E. 927 (1887); Bullitt v. Winston, 75 Va. (1 Munf.) 269 (1810). As a prerequisite to the execution and sale of levied property, an officer may require the creditor to give an indemnifying bond. See § 8.01-367.

The execution statutes (generally Title 8.01, Ch. 18) specify no termination date for liens created by the fieri facias writ, but not pursued past the levy stage; the Code merely provides that property levied on "may be advertised and sold within a reasonable time thereafter...." See § 8.01-479.

Section 8.01-251 provides, however, that no execution shall be brought on a judgment twenty years after the judgment date. Until that time the lien created by the writ of fieri facias remains effective unless there has been a judicial determination that a reasonable time for pursuing the matter to sale has elapsed. See Wright v. Camp Mfg. Co., 110 Va. 678, 66 S.E. 843 (1910). The test for such a determination is whether an intention to abandon is manifest by the acts of the creditors. See Rhea v. Preston, 75 Va. (1 Math.) 757 (1881); Palais v. Dejarnette, 145 F.2d 953 (1944). Your records of fieri facias writs, therefore, must be maintained for a period of twenty years after judgment, unless it is judicially determined that the writ has been abandoned.

LOANS. APPLICATION OF § 6.1-330.24 TO UNLICENSED AND NONREGULATED LENDERS.

November 9, 1981

The Honorable Willard J. Moody
Member, Senate of Virginia

You ask whether an unlicensed and nonregulated lender is a lender within the meaning of language in § 6.1-330.24 of the Code of Virginia (1950), as amended, which states that "any lender" may pay brokerage fees in certain circumstances.1

Section 6.1-330.24(D) provides that "[t]his section shall not apply to any loan made by any lender enumerated in § 6.1-330.25." The lenders listed in § 6.1-330.25 are all
licensed and regulated by the State Corporation Commission or the federal government. You describe the lender involved in the inquiry as "nonregulated and unlicensed." Since § 6.1-330.25 does not include any nonregulated or unlicensed lenders in its enumeration, such a lender would not be precluded by this section from paying broker's fees. Another possible exception is § 6.1-330.48, which provides that § 6.1-330.24 "shall not apply to a seller in a real estate transaction who takes a subordinate mortgage on such real estate." However, the information which you provided indicates that the lender involved in the inquiry is not a seller of real estate.

Accordingly, it is my opinion that the lender you describe is entitled to pay broker's or finder's fees as specified in § 6.1-330.24, since it is neither regulated nor licensed and is not a seller of real estate.

1 Pertinent language in § 6.1-330.24(A) states: "Broker's or finder's fees may be paid by the lender from the service charge or interest permitted under § 6.1-330.16 or a broker's fee, finder's fee or commission may be paid by the borrower not to exceed two per centum of the amount of the loan if the total interest, service charge, broker's fees, finder's fees or commissions do not exceed the amount of service charges and interest permitted under § 6.1-330.16."

LOANS. SMALL LOAN COMPANY CANNOT INCLUDE PROVISION IN PROMISSORY NOTE THAT, UPON DEFAULT, BORROWER LIABLE FOR ATTORNEYS' FEES.

July 2, 1981

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

You have asked whether § 6.1-278 of the Code of Virginia (1950), as amended, permits a small loan company to include a provision in its promissory note such that, upon default, the borrower may be liable for attorneys' fees. A prior Opinion to the Honorable George H. Heilig, Jr., Member, House of Delegates, dated June 6, 1977, found in Report of the Attorney General (1976-1977) at 148, responded to this same question, concluding that § 6.1-278 does not permit a small loan company to include a provision that the borrower is liable for attorneys' fees.

Since this prior Opinion was issued, § 6.1-278 has been amended to permit small loan companies to collect fees for the cost of recordation, handling fees for returned checks and insurance premiums. Such amendments, which allow the collection of certain specified fees or costs, further support the conclusion that, as stated in the Opinion to Delegate Heilig, "the explicit mention of particular subjects
in a statutory provision implies that those subjects not specifically mentioned are excluded."

Therefore, it is my opinion that § 6.1-278 still prohibits a small loan company from including a provision in its promissory note such that, upon default, the borrower shall be liable for attorneys' fees.

LOTTERIES. CONSIDERATION. TELEPHONE COMPANY BASING ENTRY INTO CONTEST ON SERVICE SUBSCRIBERS MAKE A CERTAIN NUMBER OF LONG DISTANCE CALLS.

July 14, 1981

The Honorable Daniel M. Hall
Commonwealth's Attorney for Washington County

You ask whether it is permissible for a telephone company to operate a contest where users of its telephones submit proof of having made three long-distance calls and prizes are awarded by a random drawing.

This Office has frequently ruled that an activity constitutes illegal gambling under § 18.2-336 of the Code of Virginia (1950), as amended, where the elements of prize, chance and consideration combine. See, e.g., Report of the Attorney General (1977-1978) at 238. There is no question but the elements of chance and prize are present in the contest you describe. Winners are to be determined by random drawings, and the company intends to offer prizes to the winners.

It is my opinion that the element of consideration is also present in this proposed contest. The participants in this contest will be limited to residential telephone subscribers of the company. The telephone subscribers pay not only a fee for the telephone service, but additionally must pay the costs of the long-distance calls. Such a situation is similar to that which was addressed in the Opinion to the Honorable W. Alan Maust, Commonwealth's Attorney for the City of Hampton, dated February 12, 1980, and found in Report of the Attorney General (1979-1980) at 228. There it was concluded that consideration existed where participation in bingo games to be conducted by a hotel would be limited to persons who had paid for a room at the hotel. The same type of pecuniary benefit would be derived by the telephone company as was derived by the hotel. I am, therefore, of the opinion that all the elements of illegal gambling would be present in the proposed contest, and thus such contest is barred by § 18.2-326.

LOTTERIES. RAFFLES. ARRANGEMENT BY PROPERTY OWNER TO SELL REAL ESTATE TO ORGANIZATION FOR USE AS PRIZE IN RAFFLE VIOLATES § 18.2-340.9.
REPORT OF THE ATTORNEY GENERAL

January 4, 1982

The Honorable Ray L. Garland
Member, Senate of Virginia

You have asked whether an organization qualified to conduct raffles may enter into an arrangement with the owner of parcels of real estate to purchase periodically these parcels for use as prizes in raffles.

You advise that the organization will purchase each parcel for a specified price and contemporaneously give the seller a first deed of trust or the seller will reserve a vendor's lien against the parcel to secure the purchase money. The seller would then deed title to the property to the organization prior to any raffle being held. When the seller is given a purchase money deed of trust, however, the seller will expressly waive its right to any deficiency and will agree to look solely to the encumbered property to recover any unpaid purchase price. The organization anticipates that the proceeds from the raffle would pay off any purchase obligation.

In an Opinion to the Honorable Anthony P. Giorno, County Attorney for Patrick County, dated November 17, 1981 (copy enclosed), I concluded that as a general rule it was proper to use the proceeds of a raffle to purchase land given as a prize in the raffle and it made no difference if this was done by means of a deed of trust arrangement. I pointed out, however, that it would be impermissible to condition such purchase arrangements on the success of the raffle. The raffle could not merely be a joint enterprise between the organization and the owner of the property. In these situations, the owner is able to divest himself of the property if the raffle is a success, but the owner retains the property if the raffle is not a success. Section 18.2-340.13 of the Code of Virginia (1950), as amended, provides for the only joint operation permitted in the bingo and raffle provisions and that provision is limited solely to operations between two qualified organizations and also limited to bingo games.

By waiving any right to a deficiency judgment and by limiting his remedies strictly to the property itself, the seller in your factual situation is actually in no better or worst position than he was before the sale if the raffle turns out to be unsuccessful. Essentially, the seller and the organization are conducting a joint enterprise and the seller is relying on the success of the raffle for his money. This arrangement is no different than placing a provision in the deed of trust that the property will be deeded back if the raffle is not a success. Either financing arrangement for the sale of the land runs afoul of the statutory prohibitions in § 18.2-340.9.
Accordingly, based on the foregoing and on the rationale of the Giorno Opinion, I must conclude that the arrangement you describe is prohibited.

LOTTERIES. RAFFLES. USE OF PROCEEDS FROM RAFFLE IMPERMISSIBLE UNDER CIRCUMSTANCES.

December 16, 1981

The Honorable Andre Evans
Commonwealth's Attorney for the City of Virginia Beach

You have asked whether a non-profit scientific/educational organization engaged in research and in the investigation of all aspects of the science of parapsychology may use the net proceeds from a raffle to purchase an undeveloped piece of property on which a community of homes would be built. These homes would then be offered to persons meeting certain criteria, including income and previous inability to qualify for other housing.

Among the organizations qualified to conduct raffles or bingo games are those operated exclusively for religious, charitable, community or educational purposes. See § 18.2-340.1(1)(b) of the Code of Virginia (1950), as amended. Assuming, for the purpose of answering your question, that the organization in question falls into that category, § 18.2-340.9(A) provides, in part:

"Except for reasonable and proper operating costs and prizes, no part of the gross receipts derived by an organization...may be used for any purpose other than those lawful religious, charitable, community or educational purposes for which the organization is specifically chartered or organized."

The ultimate decision as to whether proceeds of a raffle are being used in accordance with § 18.2-340.9(A) must be made by the local authorities who granted the raffle permit and who also audit the organization's financial report as required by § 18.2-340.7. On the application for a raffle permit, this particular organization stated that the specific purpose of the organization was to engage in research and the investigation of the science of parapsychology. Thus, it would appear that the proposed use of the raffle proceeds is for some purpose other than that for which the organization is specifically organized in contravention of § 18.2-340.9(A).

You have also asked whether a governing body may refuse to issue a raffle or bingo permit to those organizations which otherwise have complied with all statutory requirements.

Before the enactment of §§ 18.2-340.1 through 18.2-340.13 and their predecessor, § 18.2-335, bingo games
and raffles were governed by former § 18.1-340(b). In construing former § 18.1-340(b), this Office concluded that if the organization was entitled to receive a permit by complying with all statutory requirements, a locality could not arbitrarily refuse to issue the permit. See Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated October 3, 1973, and found in Report of the Attorney General (1973-1974) at 222; see, also, Opinion to the Honorable William Roscoe Reynolds, Commonwealth's Attorney for Henry County, dated October 8, 1974, and found in Report of the Attorney General (1974-1975) at 247. The Pickett Opinion noted that the statute clearly intended to allow certain organizations to conduct bingo games and raffles. However, a permit was a necessary prerequisite and that permit could only be obtained from the locality where the organization was located.

Though the bingo and raffle provisions were revised and re-enacted in 1979, see §§ 18.2-340.1 through 18.2-340.12, the intent of the statute and the basic prerequisites noted in the Pickett Opinion have not changed. Thus, while § 18.2-340.3(D) provides "[u]pon compliance by the applicant with the provisions of this article, the governing body...may issue an annual permit..." language in other provisions indicate that the authority is not as discretionary as it seems. Section 18.2-340.10 allows localities to deny, suspend or revoke the permits of organizations not in strict compliance with the statutory requirements. Further, § 18.2-340.12 requires that the locality provide a hearing on such denials, suspensions or revocations. If, after a hearing, the locality still denies, suspends or revokes the permit based on non-compliance, the organization may still appeal the decision to the circuit court. Based on the foregoing, I am of the opinion that the conclusions reached in the Pickett and Reynolds Opinions are still valid. Therefore, I am of the opinion that a locality cannot arbitrarily deny a raffle or bingo permit if the organization has strictly complied with the statutory requirements. Section 18.2-340.10 provides that a locality may later revoke that same permit if it is found that the organization failed to continue to comply with the statutory requirements.

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1 Section 18.2-340.10 provides in part: "The governing body of such political subdivision where a permit was issued may deny, suspend or revoke the permit of any organization found not to be in strict compliance with the provisions of this article." (Emphasis added.)

2 Section 18.2-340.12 provides: "No permit to conduct bingo games or raffles shall be denied, suspended or revoked except upon notice stating the proposed basis for such action and the time and place for a hearing thereon. After a hearing on the issues, the local governing body may refuse to issue or may suspend or revoke any such permit if it determines that the organization has not complied with the provisions of this article. Any organization aggrieved by the decision of the
local governing body may appeal such decision to the circuit court."

(Emphasis added.)

MAGISTRATES. CRIMINAL PROCEDURE. BOND-RELEASE. MAGISTRATE
OR OTHER JUDICIAL OFFICER HAS AUTHORITY TO FORBID PERSON
ACCUSED OF SPouse ABUSE FROM RETURNING TO HIS/HER OWN HOME AS
CONDITION OF RELEASE PURSUANT TO § 19.2-123(a)(4) WHEN SAID
OFFICIAL BELIEVES THERE IS DANGER THAT PHYSICAL ABUSE MAY
RECUR AND THAT RESTRICTION IS NECESSARY TO ASSURE ACCUSED'S
GOOD BEHAVIOR PENDING TRIAL.

April 26, 1982

The Honorable Charles J. Colgan
Member, Senate of Virginia

You have asked whether a magistrate or other judicial
officer has authority to forbid an accused from returning to
his/her own home as a condition of release when said person
is charged with spouse abuse and the magistrate or other
judicial officer believes there is a danger that physical
abuse may recur. You specifically refer to § 19.2-123(a)(2)
of the Code of Virginia (1950), as amended.

Section 19.2-123 provides the basic authority for a
magistrate to determine whether a person accused of a crime
should be detained or released. In furtherance of said
power, a magistrate is granted authority to impose certain
restrictions upon anyone who is released. The second
paragraph of this section provides, in part:

"Should the judicial officer determine that such a
release will not reasonably assure the appearance of the
accused as required, or, in the case of a juvenile, the
judicial officer shall then, either in lieu of or in
addition to the above methods of release, impose any
one, or any combination of the following conditions of
release which will reasonably assure the appearance of
the accused or juvenile for trial or hearing:

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(2) Place restrictions on the travel, association or
place of abode of the person during the period of
release;

***

(4) Impose any other condition deemed reasonably
necessary to assure appearance as required, and to
assure his good behavior pending trial, including a
condition requiring that the person return to custody
after specified hours." (Emphasis added.)

While § 19.2-123(a)(2) specifically provides that a
magistrate can place restrictions on a person's place of
abode during the period of release, it is unclear from the
wording of that language whether he can do so for any reason
other than to assure the appearance of the accused at the
trial. However, § 19.2-123(a)(4) specifically grants the
magistrate the authority to "[i]mpose any other condition deemed reasonably necessary to assure appearance as required, and to assure his good behavior pending trial...." (Emphasis added.)

It is, therefore, my opinion that a magistrate or other judicial officer has the authority to forbid a person accused of spouse abuse from returning to his/her own home as a condition of release pursuant to § 19.2-123(a)(4) when said official believes there is a danger that physical abuse may recur and that the restriction is necessary to assure the accused's good behavior pending trial.

MAGISTRATES. TEMPORARY DETENTION ORDER. MUST OBTAIN ADVICE OF PERSON SKILLED IN DIAGNOSIS OR TREATMENT OF MENTAL ILLNESS BEFORE ISSUING TEMPORARY DETENTION ORDER UNDER § 37.1-67.1.

March 15, 1982

The Honorable Donald H. Sandie, Chief Judge
Portsmouth General District Court

You have requested my opinion concerning the requirements which must be met before a magistrate may issue an order of temporary detention pursuant to § 37.1-67.1 of the Code of Virginia (1950), as amended. Specifically, you have asked whether a magistrate can issue such an order "absent the affirmative advice" of a person skilled in the diagnosis or treatment of mental illness or whether the magistrate can issue such an order "based solely" on the advice of a person skilled in the diagnosis or treatment of mental illness.

In 1981 the General Assembly amended § 37.1-67.1 so that it now provides in pertinent part:

"Any judge as defined in § 37.1-1, or a magistrate upon the advice of a person skilled in the diagnosis or treatment of mental illness, may, upon the sworn petition of any responsible person or upon his own motion based upon probable cause, issue an order requiring any person within his jurisdiction alleged or reliably reported to be mentally ill and in need of hospitalization to be brought before the judge and, if such person cannot be conveniently brought before the judge, may issue an order of temporary detention." (Emphasis added.)

The 1981 amendment added the underscored portion. By adding the 1981 amendment, the General Assembly extended to magistrates the authority to issue orders of temporary detention, but required that they first obtain "the advice of a person skilled in the diagnosis or treatment of mental illness." The requirement of obtaining such advice does not limit the magistrate's exercise of discretion as a judicial officer, but it does insure that such advice be considered in
determining whether probable cause exists to issue an order of temporary detention. That advice is only one factor, although a significant one, for a magistrate to consider in determining whether to issue an order of temporary detention.

In my opinion, therefore, prior to issuing an order of temporary detention, a magistrate must obtain the advice of a person skilled in diagnosis or treatment of mental illness. The magistrate is not bound to follow that advice, however, in determining whether probable cause exists to issue the order.

MARINE PRODUCTS COMMISSION. HAS AUTHORITY TO APPOINT ITS OWN EXECUTIVE SECRETARY.

April 22, 1982

The Honorable Betty J. Diener
Secretary of Commerce and Resources

You have asked the following questions: (1) should the executive secretary of the Marine Products Commission (the "Commission") be appointed by the Commission or by the Governor? (2) since the current incumbent was appointed by the Commission and carries the status of a classified employee, if he should be required to be a gubernatorial appointee, what is the legal status of his past actions?

Both §§ 2.1-41.2 and 28.1-237 of the Code of Virginia (1950), as amended, address the first question. Where two statutes cover the same subject matter they are in pari materia and should be construed together. See Report of the Attorney General (1974-1975) at 219. Repeal of statutes by implication is not favored. Two statutes in apparent conflict should be construed to give force and effect to each if at all possible. Scott v. Lichford, 164 Va. 419, 422, 180 S.E. 393, 394 (1935).

Section 2.1-41.2 provides, in part, that "[n]otwithstanding any provision of law to the contrary, the Governor shall appoint the administrative head of each agency of the executive branch of State government..." with certain exceptions which do not include the executive secretary of the Commission. (Emphasis added.) The Commission is an agency within the executive branch of the State government.

Section 28.1-237 specifically provides in part, however, that "[t]he [Marine Products] Commission may appoint an executive secretary and such other employees as may be necessary at salaries to be fixed by the Commission, subject to the provisions of chapter 10 (§ 2.1-110 et seq.) of Title 2.1." Chapter 10 of Title 2.1 provides for the classification of most State employees.
The conflict between these two statutes is real. They cannot be harmonized. For the reasons which follow, I conclude that § 28.1-237 controls the appointment of the executive secretary of the Commission.

It is a general principle of statutory construction that where a specific statute conflicts with a previously enacted general statute, the specific, by implication, repeals the general to the extent necessary to resolve the conflict. See Report of the Attorney General (1980-1981) at 330 and cases cited therein. Section 28.1-237 is a statute specific to the Commission which was enacted in Ch. 274 [1979] Acts of Assembly. It, therefore, prevails over § 2.1-41.2, which is a general statute originally enacted in Ch. 542 [1977] Acts of Assembly.

The words "[n]otwithstanding any provision of law to the contrary" in § 2.1-41.2 do not control the plain terms of subsequently enacted legislation such as § 28.1-237. Such phrase refers to provisions of law which were in force at the time the act in which it is found was first enacted. See Commonwealth v. Sanderson, 170 Va. 33, 42, 195 S.E. 516, 3nU (1938).

The General Assembly's intention that the Commission appoint its executive secretary is further manifested by the specific reference in § 28.1-237 to Ch. 10 of Title 2.1, which has no applicability to officers appointed by the Governor. If the executive secretary were to have been appointed by the Governor, that position would not have been mentioned in this section, which clearly relates to non-gubernatorial appointments.

I am, therefore, of the opinion that the Commission should appoint its executive secretary. Because the Commission has such authority, there is no need to answer your second question.

MARINE RESOURCES COMMISSION. JURISDICTION. STRUCTURES ON SCENIC RIVERS.

August 17, 1981

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You have asked whether § 10-174 of the Code of Virginia (1950), as amended, preempts the jurisdiction of the Marine Resources Commission (the "Commission") under § 62.1-3.

Under § 62.1-3 the Commission has jurisdiction over encroachment on state-owned bottoms of rivers and other bodies of water. Section 62.1-3 provides that it shall be unlawful to:
"trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission...."

The Scenic Rivers Act §§ 10-167 through 10-175 is designed to ensure preservation of rivers having scenic and historic values and provides for designation of rivers or sections of rivers as scenic rivers by the General Assembly. Section 10-174 provides:

"After designation of any river or section of river as a scenic river by the General Assembly, no dam or other structure impeding the natural flow thereof shall be constructed, operated, or maintained in such river or section of river unless specifically authorized by an act of the General Assembly."

Section 62.1-3 expressly excepts from Commission permit jurisdiction encroachments "pursuant to statutory authority." It is clear from § 10-174 that any dam or other structure impeding the natural flow of a scenic river must be authorized by an act of the General Assembly. Once so authorized, such an encroachment is statutorily authorized for purposes of § 62.1-3. Accordingly, I conclude that dams or other structures on scenic rivers which are authorized by an act of the General Assembly do not require further approval by the Commission under § 62.1-3.1

1The jurisdiction of the Commission over state-owned bottoms of rivers not designated as scenic rivers is broad and includes authority to grant or deny permits for all encroachments, including, for example, placement of dams, piers or other structures, landfill or dredging. The authority over encroachments upon the bottoms of scenic rivers reserved to the General Assembly under § 10-174 is more narrowly defined and embraces only dams or other structures impeding the natural flow of the river. Commission jurisdiction under § 62.1-3 would apply to encroachments on bottoms of scenic rivers other than dams or other structures impeding the river's natural flow.

May 3, 1982

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission
You have inquired (1) as to the geographical extent of the jurisdiction of the Marine Resources Commission (the "Commission") under § 62.1-3 of the Code of Virginia (1950), as amended, and (2) as to the criteria the Commission might use to determine its jurisdiction over a specific area or project.

Your first question may be answered by reference to § 62.1-3. The first sentence of that section provides that "it shall be unlawful and constitute a Class I misdemeanor for anyone to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission."

The section goes on to authorize several specific uses, and then provides that "[t]he Marine Resources Commission shall have the authority to issue permits for all other reasonable uses of state-owned bottom lands...."

As successor to the Crown, the Commonwealth has title to all vacant land including subaqueous beds unless it has been granted away. See Martin v. Waddell’s Lessee, 41 U.S. 367, 410 (1842). I am therefore of the opinion that the jurisdiction of the Marine Resources Commission extends to the beds of all the bays and ocean, rivers, streams and creeks in every part of the Commonwealth unless they have been lawfully granted to others.

Your second inquiry is what criteria the Commission should use to determine jurisdiction in particular cases. The Commission's jurisdiction is based on the Commonwealth's title. Since the Commonwealth has title unless it has been lawfully conveyed, the Commission should presume that it has jurisdiction over any subaqueous bed in the Commonwealth until someone else shows title to the bed derived from a grant from the king or the Commonwealth. The manner in which such title would have been granted depends on the date at which the grant was made, and whether the waterway is navigable or non-navigable.

A royal grant of land bounded by navigable waters, which under English common law meant tidal waters, conveyed no title to subaqueous beds. It conveyed only to the high-water line, although the General Assembly, in 1819, by statute, extended the boundary of all riparian lands to the low-water line. A royal grant of land bounded by non-navigable waters, that is non-tidal waters, conveyed title to the middle of the stream. This was the law until 1776.

After independence, the Commonwealth continued to follow the common law, but the test for navigability became whether a waterway is navigable in fact. Ewell v. Lambert, 177 Va.
222, 228, 13 S.E.2d 333 (1941). The Supreme Court has suggested that the rights of riparian owners are now governed by Virginia and not English law. Old Dominion Iron & Nail Co. v. Chesapeake and Ohio Railway Co., 116 Va. 166, 170-171, 81 S.E. 108 (1914). However, while it has considered the effect in other states of this changed definition of navigability, it expressly declined to discuss what theory applies in Virginia. James River and Kanawha Power Co. v. Old Dominion Iron and Steel Corp., 138 Va. 461, 466-468, 122 S.E. 344 (1924).

From 1776 to 1779, a grant could only be made by a special act of the legislature. Miller v. Commonwealth, 159 Va. 924, 945, 166 S.E. 557 (1932). In 1779, the General Assembly set up a land office to issue patents for "waste and unappropriated land." 10 Hening's Statutes at Large 50. This phrase did not include land under water, James River and Kanawha Power Co., supra, at 472, and the statute did not authorize the granting of the bottoms of navigable waters. Miller, supra, at 946.

In 1792 the General Assembly expressly prohibited the grant of "the bed of any river or creek in the eastern part of this commonwealth." 1 Shep. 65. Specifying "any" river or creek would seem to extend the common law prohibition against granting the beds of navigable waters to prohibiting the granting of the beds of non-navigable waters as well. See Boerner v. McCallister, 197 Va. 169, 174, 89 S.E.2d 23 (1955), Alvin T. Embrey's Waters of the State at 269. This exclusion was subject to the additional limitations that such lands be lands "which have remained ungranted...and which have been used as a common to all the good people...." In 1802, the General Assembly again amended the land office act to exclude "beds of the rivers and creeks in the western part of this commonwealth." 2 Shep. 317.

In the absence of any direct guidance from the General Assembly as to the boundary between the eastern and western parts of the Commonwealth, I have consulted Embrey's Waters of the State at 279-302. On the basis of an exhaustive analysis of other acts of the General Assembly, he concluded that the dividing line for eastern and western Virginia was the Allegheny Mountains.. Waters west of the Allegheny Mountains drain toward the Gulf of Mexico, those east of the mountains drain toward Chesapeake Bay. Although the Supreme Court equated eastern Virginia with Tidewater in Boerner, supra, at 174, that portion of the decision was dicta, and until there is a definitive holding on the meaning of "eastern Virginia" I would suggest that the Commission follow Embrey's view.

Chapter 44 [1865-1866] Acts of Assembly 160, repealed the prohibition on the sale of beds. However, it did not authorize the sale of beds. There would be no sale of a bed unless it were specifically mentioned. Because I am aware of no such sales meeting this criteria, the Commission should
assume that there were no sales of beds made under grants issued during this period.

Section 62-1 of the Virginia Code of 1873 reinstated the prohibition against granting the beds and shores if they had not previously been conveyed but no longer contained the requirement that they had been used as a common. This section is virtually the same one that remains in the Code today as § 62.1-1.

To assist the Commission in determining its jurisdiction, I would classify the beds of the Commonwealth's waters as follows:

1. Under tidal waters. The Commission has jurisdiction over the beds of all tidal waters except where a final court decision has otherwise determined, and the Commission should be prepared to defend its jurisdiction in court if necessary.

2. Under non-tidal waters. The Commission should assume that all streams above some administratively determined minimum size are navigable-in-fact until evidence is presented proving non-navigability.

The question of navigability is a question of fact as to whether a stream is being or has been historically used as a highway for trade and travel or whether it is capable of such use in its ordinary and natural condition (i.e., disregarding artificial obstructions such as dams which could be abated). Ewell, supra, at 228; Crenshaw v. The Slate River Company, 27 Va. (6 Rand.) 271 (1828).

A. Navigable-in-fact. The Commission should assume jurisdiction unless the landowner can show title to the riparian land acquired by grant prior to July 4, 1776.

B. Non-Navigable-in-fact. The Commission should assume jurisdiction unless the landowner can show a grant prior to 1792 in that part of the State draining toward the Atlantic Ocean, or prior to 1802 in that part of the State draining toward the Gulf of Mexico.

In summary, the Commission's jurisdiction is based on the Commonwealth's ownership of the bottom, and the Commission should assume that the Commonwealth does own the bottom until it receives proof, as outlined above, that the Commonwealth no longer has title to the parcel in question.

MARINE RESOURCES COMMISSION. RIPARIAN OWNER WHO LAWFULLY FILLS STATE-OWNED SUBAQUEOUS BOTTOM HAS COMPENSABLE AND EXCLUSIVE RIGHT TO USE SUCH FILL AND SUCH BOTTOM, BUT TITLE TO SUCH BOTTOM AT ALL TIMES REMAINS IN COMMONWEALTH.
December 21, 1981

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You have asked for my opinion on the following questions:

1. What property rights, if any, does a riparian owner have in state-owned subaqueous bottoms over which fill is lawfully placed under either a Marine Resources Commission ("Commission") permit, or the statutory authority to fill granted certain riparian owners in § 62.1-3(6), or a permanent easement authorized by Act of Assembly and executed by the Commission?

2. What property rights, if any, does a riparian owner have in the fill lawfully placed on state-owned subaqueous bottoms?

3. Do these rights, if any, vary depending upon whether the fill is accomplished under a Commission permit, the provisions of § 62.1-3(6) or permanent easement?

I. Property Rights in the Bottom

Section 62.1-1 provides:

"Ungranted beds of bays, rivers, creeks and shores of the sea to remain in common.--All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the provisions of Title 28.1, and any future laws that may be passed by the General Assembly. And no grant shall hereafter be issued by the State Librarian to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether the bed, rock or shoal shall ebb bare or not."3

Section 41.1-3 of the Code, further, provides that no grant shall pass any estate or interest in lands made a common under § 62.1-1. The Commonwealth, therefore, owns the beds of navigable waters and cannot, by grant, patent or other means convey its title to private ownership. Norfolk City v. Cooke, 68 Va. (27 Gratt.) 430 (1876). I, therefore, conclude that one who lawfully fills on state-owned subaqueous bottoms does not acquire title to the bottom filled, whether the fill is authorized by Commission permit, § 62.1-3(6), or a permanent easement. Title to the filled bottoms at all times remains in the Commonwealth.
Section 62.1-3, however, authorizes certain private uses of state-owned bottoms, including fill by riparian owners, providing in part:

"It shall be unlawful and constitute a Class 1 misdemeanor for anyone to build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks, which are the property of the Commonwealth, unless such act is pursuant to statutory authority or a permit by the Marine Resources Commission. Statutory authority is hereby conferred for the doing of such acts as are necessary for...(6) fills by riparian owners opposite their property to any lawfully established bulkhead line, provided that such owners have been granted, prior to July one, nineteen seventy-two, a certificate of assurance from the State Water Control Board pursuant to § 21 (b) of the Water Quality Improvement Act of 1970....

The Marine Resources Commission shall have the authority to issue permits for all other reasonable uses of state-owned bottom lands, including but not limited to, the taking and use of material, the placement of wharves, bulkheads, dredging and fill, by owners of riparian land, in the waters opposite such riparian land; provided, however, that such wharves, bulkheads and fill shall not extend beyond any lawfully established bulkhead line....

The permits issued by the Marine Resources Commission shall be in writing and shall specify such conditions, terms and royalties as the Marine Resources Commission deems appropriate."

Fill lawfully placed on state-owned subaqueous bottoms by a riparian owner under a Commission permit, § 62.1-3(6) or permanent easement authorizes the riparian owner's exclusive private use of the filled area, including the filled bottoms. This exclusive right to use state-owned bottoms, whether granted by § 62.1-3(6), Commission permit or easement, constitutes a compensable property interest. See United States v. Smoot Sand & Gravel Corporation, 248 F.2d 822, 827-828 (4th Cir. 1957). I, therefore, conclude that where a riparian owner lawfully fills on state-owned bottoms in reliance upon a Commission permit, easement or § 62.1-3(6) he acquires a compensable property interest in the bottoms lawfully filled even though title to the filled bottoms at all times remains in the Commonwealth. United States v. Smoot Sand & Gravel Corp., supra.

II. Property Rights in the Fill

Where a riparian owner lawfully fills state-owned bottoms under a Commission permit or easement or under § 62.1-3(6), I am of the opinion that the riparian owner retains title to and exclusive use of the fill material and
any improvements lawfully placed on the filled area.6 Cf.
Lambert's Point Company v. Norfolk and Western Railway

III. Whether Rights Vary Under
Permit, Easement or Statute

In my opinion, the rights of the Commonwealth and the
riparian landowner do not vary whether the fill is
accomplished under a Commission permit, easement, or the
provisions of § 62.1-3(6). I conclude that in each situation
title to the state-owned bottoms filled at all times remains
in the Commonwealth. Your inquiry relates to Commission
permits and easements which do not expressly reserve public
rights in the authorized filled area. See footnote 4, infra.
I, therefore, conclude that a riparian owner who lawfully
fills under permit, easement or § 62.1-3(6) acquires an
exclusive right to use the state-owned bottoms legally filled
consistent with the terms and limitations of the easement,
permit or the provisions of § 62.1-3(6).

1In Virginia state-owned subaqueous bottoms are the lands
lying below the mean low watermark on navigable waters
(except on the Atlantic shores of Virginia, where the
Commonwealth owns the "shores of the sea" and State title
extends to the high watermark). See: Taylor v.
Commonwealth, 102 Va. 759 (1904); §§ 62.1-1 and 62.1-2 of the
Code of Virginia (1950), as amended. The subaqueous bottoms
of non-navigable waters are owned by the riparian owners.
2Section 62.1-4 authorizes the Commission to grant
easements or leases in the beds of State waters for periods
not exceeding five years. Permanent easements must be
authorized by separate Act of Assembly and are not covered by
§ 62.1-4.
3Section 62.1-1 is merely declaratory of the common law.
Taylor v. Commonwealth, supra.
4The Commission is authorized to impose appropriate terms
and conditions in permits under § 62.1-3. Nothing would
prevent a permit or easement containing terms or conditions
reserving rights of public access in a filled area. You
indicate, however, that your inquiries relate to situations
in which a riparian owner is authorized to fill by Commission
permit or permanent easement, the terms of which reserve no
public rights in or access to the filled area. Section
62.1-3(6), authorizing fill by certain riparian owners,
contains no reservation of public rights in the filled area,
thereby giving the riparian owner exclusive use of the filled
bottoms. The riparian owner's exclusive use of state-owned
bottoms associated with lawful fill does not, however,
include any property interest in minerals or other resources
in or beneath the bottoms filled. The Commonwealth at all
times retains title to such minerals or other resources.
Taylor v. Commonwealth, supra.
The riparian owner cannot acquire any compensable interest in bottoms which are filled unlawfully. Fill placed in areas not authorized by a Commission permit, easement or § 62.1-3(6) would not give the riparian owner compensable property interests in the illegally filled areas. Failure of the riparian owner to meet any term, limitation or condition of a permit or easement may also defeat any property interest which might be otherwise acquired.

The riparian owner retains title to and exclusive use of any lawful fill, but he may be required to remove any illegal fill or improvements without compensation. This opinion does not address the question of lawful fill or improvements which are abandoned by the riparian owner. The riparian owner does not, however, own the filled bottoms. Title to the bottoms remains in the Commonwealth. See Part I, infra.

MARRIAGE. H.B. 691 WILL NOT BE APPLICABLE TO DIVORCE MATTERS FILED, BUT NOT MATURER OR FINAL, AS OF JULY 1, 1982.

May 21, 1982

The Honorable Thomas M. Moncure, Jr.
Member, House of Delegates

This is in reply to your letter in which you ask whether H.B. 691, enacted by the 1982 General Assembly as Ch. 309 of the Acts of Assembly, will apply to divorce suits filed, but which have not matured or in which final judgments have not been entered prior to July 1, 1982. House Bill 691 is effective July 1, 1982, and it recodifies many of the maintenance, support and custody provisions now found in § 20-107 of the Code of Virginia (1950), as amended, and expands upon them. Section 20-107 will be repealed. House Bill 691 also empowers a court to grant monetary awards based on an equitable apportionment and valuation of marital property.

Section 3 of H.B. 691 states that its provisions shall not affect any pending litigation. In construing a statute, the legislative definition should control its interpretation. When a statute is plain and unambiguous, the plain meaning and intent of the statute will be given to it. School Board of Chesterfield County v. School Board of the City of Richmond, et al., 279 Va. 244, 250, 247 S.E.2d 380, 384 (1978). Therefore, I am of the opinion that H.B. 691 will not be applicable to divorce matters filed, but not matured or final, as of July 1, 1982.

MENTAL HEALTH AND MENTAL RETARDATION. COURT MAY NOT PERMIT PERSON TEMPORARILY DETAINED TO VOLUNTARILY ADMIT HIMSELF WITHOUT FIRST CONDUCTING HEARING. COURT MAY REVOKE TEMPORARY DETENTION ORDER PRIOR TO HEARING UPON RECOMMENDATION OF PSYCHIATRIST.
You have asked whether a court may allow a person temporarily detained pursuant to § 37.1-67.1 of the Code of Virginia (1950), as amended, to voluntarily admit himself pursuant to § 37.1-65 in lieu of conducting a formal hearing. Section 37.1-67.2 provides in part:

"The judge, when a person is produced pursuant to § 37.1-67.1, shall inform him of his right to make application for voluntary admission and treatment as provided for in § 37.1-65 and shall afford such person an opportunity for voluntary admission. The judge shall hold a preliminary hearing to ascertain if such person is then willing and capable of seeking voluntary admission and treatment. If the person is capable and willingly accepts voluntary admission and treatment, the judge shall require the person to accept voluntary admission for a minimum period of treatment and after such minimum period not to exceed seventy-two hours to give the hospital forty-eight hours' notice prior to leaving the hospital, unless sooner discharged pursuant to § 37.1-98 or § 37.1-99...."

This statute clearly requires that prior to voluntary admission of one detained under § 37.1-67.1 a judge must hold a hearing to determine whether the person is willing and capable of seeking voluntary admission. Moreover, the judge is required to prescribe a minimum period of treatment and the person is required to give forty-eight hours' notice prior to leaving the hospital. Neither of these requirements would apply to a person who sought voluntary admission under § 37.1-65 without first having been detained under § 37.1-67.1. The General Assembly clearly intended a different procedure for those who have been involuntarily detained under § 37.1-67.1. Accordingly, it is my opinion that a court may not permit a person who has been temporarily detained to voluntarily admit himself under § 37.1-65 without first conducting the hearing required by § 37.1-67.2.

You have also asked whether the court, without holding a hearing, may allow the discharge of an involuntarily detained person if the same psychiatrist who sought the detention order recommends and requests that the person be discharged. Section 37.1-67.1 authorizes a court to issue an order permitting the temporary detention of a person "alleged or reliably reported to be mentally ill and in need of hospitalization...." Where the basis for the detention is an opinion from a psychiatrist who, prior to the time for the hearing required by § 37.1-67.3, informs the court that the person is no longer mentally ill or in need of hospitalization, the court has the inherent authority to rescind its order of detention and thereby discharge the person without holding a hearing.
MENTALLY ILL.  INVOLUNTARY DETENTION.  INDIVIDUAL MAY NOT BE INVOLUNTARILY DETAINED PURSUANT TO § 37.1-67.1 FOR LONGER THAN SEVENTY-TWO HOURS.

December 2, 1981

The Honorable A. Joe Canada, Jr.
Member, Senate of Virginia

You have asked whether an individual may be involuntary detained in a psychiatric facility under the provisions of § 37.1-67.1 of the Code of Virginia (1950), as amended, for a period longer than forty-eight hours. The above-mentioned statute provides that a judge, or in some cases a magistrate, may order the involuntary detention of an individual who has been reported to be mentally ill for a period of up to forty-eight hours. In addition, the statute provides:

"If the forty-eight hour period herein specified terminates on a Saturday, Sunday or a legal holiday, such person may be detained, as herein provided, until the next day which is not a Saturday, Sunday or legal holiday, but in no event may he be detained for a period longer than seventy-two hours." (Emphasis added.)

It is my opinion that the maximum amount of time an individual may be detained without a hearing pursuant to this statute is seventy-two hours. The statute does not authorize involuntary detention for seventy-two hours beyond the original forty-eight hour period.

MINES AND MINING.  COMMUNICATION FACILITIES.  MUST BE LOCATED WITHIN FIVE HUNDRED FEET OF ALL MAIN PORTALS, AND AT LEAST ONE MANNED WHEN MEN ARE UNDERGROUND.

April 14, 1982

The Honorable Frederick C. Boucher
Member, Senate of Virginia

You have requested a review of the Opinion addressed to you by this Office dated March 5, 1981. That Opinion, reported in Report of the Attorney General (1980-1981) at 245, pertains to that portion of § 45.1-81(a) of the Code of Virginia (1950), as amended, which concerns the two-way communication facility required to be located on the surface near all main portals of mines.

Section 45.1-81(a) reads as follows:

"(a) Telephone service or equivalent two-way communication facilities shall be provided between the top and each landing of main shafts and slopes. 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."

(Emphasis added.)

In the factual situation described in your letter, the required communications network serves two mines, separated by a distance of more than one mile. While the communication facilities have been installed within 500 feet of the main portals of each mine, there are shifts when none of the communication facilities located within 500 feet of the portals of one of the mines is attended.

I have reviewed the prior Opinion, and, for the reasons hereinafter stated, I disagree with the conclusion reached therein that the practice described by you is consistent with the requirement of § 45.1-81(a).

By the enactment of § 45.1-81(a), the General Assembly mandated the installation of communication facilities within 500 feet of all main portals, and imposed a requirement that at least one of these facilities 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 term "at least one of these facilities" refers to the facilities specified in the immediately next preceding sentence, i.e., those within 500 feet of the portal. Accordingly, I do not agree with the conclusion expressed in the former Opinion that the communication practice, as described by you, necessarily complies with the statute as a matter of law.

Whether the attended communication facility is so located that a responsible individual "can respond immediately in the event of an emergency" is a question of fact to be determined on a case-to-case basis. Factors other than distance from the portals should be considered in a determination of the ability of a responsible person being able to hear the call and respond immediately in the event of an emergency. Whether the communications facility is located where a responsible person can hear the facility and respond immediately in the event of an emergency is a determination which should be made by mine inspectors, but, in any event, I am of the opinion that the manned facility must be one within 500 feet of the main portal to each mine.

MINES AND MINING. SURFACE MINING OF COAL. EXEMPTION FOR CONSTRUCTION PROJECTS UNDER § 45.1-253(3) WILL APPLY ONLY TO PROJECTS FINANCED AT LEAST 50% WITH PUBLIC MONEY ONCE VIRGINIA PERMANENT REGULATORY PROGRAM IS APPROVED BY U.S. SECRETARY OF INTERIOR.
The Honorable J. Ray Dotson  
Commonwealth's Attorney for Wise County  
and City of Norton

You ask whether § 45.1-253(3) of the Code of Virginia (1950), as amended, which exempts certain construction projects from State surface mining regulation is limited to government financed construction.

The statute in question is part of the Virginia Coal Surface Mining Control and Reclamation Act of 1979 (the "Act"), § 45.1-226, et seq. The Act, also known as Ch. 19 of Title 45.1, was adopted in order to enable the Commonwealth to comply, to the extent required, with the Federal Surface Mining Reclamation and Control Act of 1977 (P.L. 95-87) (the "Federal Act"). The Act authorizes the development of a permanent regulatory program to be approved by the United States Secretary of the Interior under the Federal Act. That process is almost completed but until Virginia's program is so approved the Act will not be implemented. In the meantime, surface mining continues to be regulated under Ch. 17 of Title 45.1, § 45.1-198, et seq., which implements the so-called "interim program" required by the Federal Act. It may well be that the mining operation which you describe is in violation of this present law.

Once the Virginia permanent program is approved, § 45.1-253 will be applicable to determine whether a particular project is exempt from regulation under the Act. The Department of Interior Office of Surface Mining ("OSM") in drafting its own permanent regulations, encountered the same question you have posed. Upon examining the Federal Act and its legislative history, OSM rejected an interpretation of "other construction" which would exempt from regulation private, non-governmental projects. See Comments to 30 C.F.R. Part 707 appearing at 44 Federal Register 14948-14950, a copy of which is attached for your convenience.

The Board of Conservation and Economic Development (the "Board") as part of the Virginia permanent regulatory program adopted on June 18, 1981, a new set of regulations which will be effective when the program is approved. The Board's regulations implementing § 45.1-253(3) appear at §§ V700.11(d) and V707.5 of the Virginia Coal Surface Mining Regulations. Copies of those regulations are also enclosed for your review.

As you can see, the Board has adopted regulations on this subject which are consistent with those of OSM. Under these regulations, the exemption of § 45.1-283(3) will be available only for projects funded at least 50 percent with public money.

I conclude, therefore, that under Virginia's permanent regulatory program the construction exemption of § 45.1-253
will apply only to government financed projects, not to private ones. Your question is therefore answered in the affirmative, subject to limitations already described.

MOTOR VEHICLES. AUCTIONS. AUCTION COMPANY MUST ACQUIRE DEALERS LICENSE FROM DIVISION OF MOTOR VEHICLES TO SELL AUTOMOBILES ON CONSIGNMENT AND TO CONDUCT ANTIQUE AUTOMOBILE SALE. ALSO MUST COMPLY WITH ALL STIPULATIONS OF LICENSE SUCH AS ODOMETER RECORDKEEPING.

March 13, 1982

The Honorable W. Onico Barker
Member, Senate of Virginia

This is in reply to your letter of March 8, 1982, regarding an auction company's plans to conduct a consignment sale of motor vehicles. You enclosed a copy of a letter addressed to you by Southwood Realty & Auction Company, in which the sales practice is outlined. It appears that it is a recognized practice in the area for auctioneers to sell consigned surplus property, including motor vehicles, on a commission basis. The company contemplates conducting an antique car auction/show at which the cars would be sold to support the event.

You request my opinion on the following questions: "first, is Southwood Realty's normal license sufficient for the company to conduct this consignment sale; second, if it is not sufficient and the company must procure a dealer license from DMV, must the company comply with all the stipulations of such a license, i.e., keeping odometer records; and third, is the company required to secure a dealer license from DMV for an antique automobile sale that is scheduled for later in the year."

Section 58-286 of the Code of Virginia (1950), as amended, provides in part: "Any person licensed as an auctioneer may sell by auction any property not prohibited by law...."

Engaging in the business of selling motor vehicles in Virginia is prohibited, without first having obtained a license as a motor vehicle dealer or salesman. See § 46.1-523. The terms "motor vehicle dealer" and "motor vehicle salesman" are defined in § 46.1-516 as follows:

"(a) 'Motor vehicle dealer' means any person, partnership, association, corporation or entity which (1) For commission, money or other thing of value, buys, sells, exchanges, either outright or on conditional sale, bailment lease, chattel mortgage or otherwise howsoever, or arranges or offers or attempts to solicit or negotiate on behalf of others a sale, purchase or exchange of an interest in, new motor vehicles or new and used motor vehicles or used motor vehicles alone or
trailers or semitrailers whether or not such motor vehicles, trailers or semitrailers are owned by such person, partnership, association, corporation or entity.

(c) 'Motor vehicle salesman' or 'salesman' means any person who is employed as a salesman by, or has an agreement with, a motor vehicle dealer to sell or exchange motor vehicles."

Subsection (b) specifically excludes from the definition of "motor vehicle dealer" six categories of persons who might on occasion buy, sell or solicit the sale of motor vehicles. None of these exceptions mentions auctioneers.

Clearly, the auction in question is being conducted for the purpose of selling motor vehicles, for which the selling agent is to be paid a commission. The company is thus engaged in the business of selling motor vehicles as contemplated in § 46.1-523. Accordingly, I am of the opinion that the auctioneer's normal license is not sufficient for the company to conduct the consignment sale. The same answer applies to your third inquiry relating to the antique auction/show.

The answer to your second question is in the affirmative. As a motor vehicle dealer or motor vehicle salesman, the auctioneer will be bound by the terms of his license, as any other licensed dealer or salesman. The requirement for odometer disclosure and recordkeeping, however, presents an additional requirement to comply with federal statutes and regulations. The federal statutes and regulations on this subject appear in 15 U.S.C. §§ 1981-1990 and 49 C.F.R. §§ 580.1-580.7. In this context, "dealer" is defined in 15 U.S.C. § 1982 as meaning any person who has sold five or more motor vehicles in the past twelve months to purchasers who in good faith purchase such vehicles for purposes other than resale. This definition differs somewhat from that of "motor vehicle dealer" in § 46.1-516. Whether the company in question is a "dealer" for purposes of these federal statutes and regulations turns on the precise facts of the company's sales in the past twelve months and is a matter which should be ruled on by the proper federal authorities rather than this Office.

MOTOR VEHICLES. BLOOD ANALYSIS. IMPLIED CONSENT. ACCUSED MUST BE ARRESTED WITHIN TWO HOURS OF ALLEGED OFFENSE.

February 22, 1982

The Honorable J. R. Zepkin, Judge
Ninth Judicial District

This is in response to your inquiry of February 11, 1982, concerning § 18.2-268(b) of the Code of Virginia (1950), as amended. You ask whether the two-hour period
mentioned in that statute imposes a requirement that the arrest be made within two hours of the alleged offense, or whether it imposes a requirement that the chemical test to determine the alcoholic content of the defendant's blood be administered within two hours of the alleged offense.

This Office has previously held that the reference to two hours pertains to the time between the offense and the arrest, and is not a limitation on the time within which the test is to be administered. See Reports of the Attorney General (1974-1975) at 278; (1972-1973) at 266; (1969-1970) at 95; (1966-1967) at 176; (1965-1966) at 170; and (1962-1963) at 155 and 159.

As you correctly point out, in Deaner v. Commonwealth, 210 Va. 285, 286, 170 S.E.2d 199, 200 (1969), the Supreme Court of Virginia made reference to "the two-hour statutory period during which the test could be administered." That language, however, was not part of the holding in that case. In Bowman v. Commonwealth, 201 Va. 656, 112 S.E.2d 887 (1960), the court construed former § 18-75.1, which differs significantly from the current "implied consent" law. There, the court noted the former section gave an accused "the right to have the test, provided his request is made within two hours of his arrest." Bowman, supra, at 660. Accordingly, I find nothing in these cases which warrants overruling the previous Opinions of this Office on the question you raise.

Section 18.2-268(b) provides as follows: "Any person whether licensed by Virginia or not, who operates a motor vehicle upon a public highway in this Commonwealth on and after January one, nineteen hundred seventy-three, shall be deemed thereby, as a condition of such operation, to have consented to have a sample of his blood or breath taken for a chemical test to determine the alcoholic content of his blood, if such person is arrested for violation of § 18.2-266 or of a similar ordinance of any county, city or town within two hours of the alleged offense. Any person so arrested shall elect to have either the breath or blood sample taken, but not both. It shall not be a matter of defense that either test is not available."

MOTOR VEHICLES. DRIVING WHILE INTOXICATED. APPEAL OF CONVICTION MUST BE NOTED WITHIN TEN DAYS OF CONVICTION OR MOTION FOR REHEARING.

June 23, 1982

The Honorable James H. Harvell, III, Judge
Seventh Judicial District

This is in response to your recent letter wherein you pose two questions concerning Ch. 301 [1982] Acts of Assembly. This Act amends, among other statutes,
§ 18.2-271.1 of the Code of Virginia (1950), as amended, the Virginia Alcohol Safety Action Program (hereinafter "VASAP") statute.

You first inquire whether, in the case of a person assigned to an alcohol safety action program, an appeal of the conviction for driving while intoxicated must be noted within ten days after conviction, notwithstanding the fact that such person might have a subsequent court hearing for violating the terms of his VASAP probation.

In answering your inquiry it is instructive to review the existing law in effect prior to the 1982 amendment. Under the existing VASAP statute, any person charged with driving while intoxicated in this State may

"upon a plea of guilty or after hearing evidence which is sufficient in law to give rise to a finding of guilt, with leave of court or upon court order, with or without a finding of guilt by the court or jury, enter into an alcohol safety action program, or a driver alcohol rehabilitation program or such other alcohol rehabilitation program as may in the opinion of the court be best suited to the needs of such person...upon such terms and conditions as the court may set forth...." See § 18.2-271.1(a).

If the court finds that such person has violated any of the conditions set forth by the court in entering such program, the court is required to dispose of the case as if no program had been entered. Section 18.2-271.1(b). If, on the other hand, the court finds that such person has complied with its order and has completed such program successfully, such compliance may be accepted by the court in lieu of a conviction for driving while intoxicated and a license revocation as set out in § 18.2-271, or the court may amend the warrant and find such person guilty of such other violations of the traffic laws as the evidence may show. Id. Existing § 18.2-271.1(b) concludes as follows:

"Appeals from any such disposition or finding shall be allowed as provided by law. The time within which an appeal may be taken shall be calculated from the date final disposition or finding was made."

In passing Ch. 301, the legislature changed these procedures significantly. First, it provided that any person convicted of a violation of § 18.2-266 may, with leave of court or upon court order, enter into a VASAP program. Second, it rewrote paragraph (b) of § 18.2-271.1 in its entirety as follows:

"Upon conviction of a violation of § 18.2-266 or any ordinance of a county, city or town similar to the provisions thereof, the court shall impose sentence as authorized by §§ 18.2-270 and 18.2-271. Upon a finding that a person so convicted is eligible for participation
in the program described herein, the court shall enter
the conviction on the warrant, and shall note that the
person so convicted has been referred to such program.
The court may then proceed to issue an order in
accordance with paragraph (bla) of this section, if the
court finds that the person so convicted is eligible for
a restricted license. If the court finds that a person
is not eligible for such program or subsequently that
such person has violated, without good cause, any of the
conditions set forth by the court in entering the
program, the court shall dispose of the case as if no
program had been entered, in which event the revocation
provisions of §§ 18.2-271 and 46.1-421(a) shall be
applicable to the conviction. The court shall, upon
final disposition of the case, send a copy of its order
to the Commissioner of the Division of Motor Vehicles.
If such order provides for the issuance of a restricted
license, the Commissioner of the Division of Motor
Vehicles, upon receipt thereof, shall issue a restricted
license. Appeals from any such disposition shall be
allowed as provided by law. The time within which an
appeal may be taken shall be calculated from the date of
the final disposition of the case or any motion for a
rehearing, whichever is later."

Under existing law, because a person assigned to VASAP
is not convicted of any offense until after he or she
successfully or unsuccessfully completes the program, the ten
days for noting an appeal runs from the date following
completion of the program when the court disposes of the case
in view of the program results. Under Ch. 301, however, the
defendant is convicted at the outset, sentence is then
imposed, and only thereafter is the court permitted to refer
the defendant to a program and grant him a restricted license
to drive.

Chapter 301 specifically provides that the time within
which an appeal may be taken shall be calculated from the
date of the final disposition of the case or any motion for a
rehearing, whichever is later. What is meant by "final
disposition of the case" is clear from the provisions in the
new law in paragraph (b) of § 18.2-271.1. There, it is
provided that upon final disposition of the case the court
shall send a copy of its order to the Commissioner of the
Division of Motor Vehicles, and if such order provides for
the issuance of a restricted license, the Commissioner shall,
on receipt thereof, issue a restricted license. In
accordance with paragraph (bla) of § 18.2-271.1 of the new
law, a restricted license is granted when a person enters a
program, not when he or she completes one.

Accordingly, "final disposition" within the meaning of
Ch. 301 occurs when the defendant is convicted and sentenced,
not when he returns to court upon successful or unsuccessful
completion of a VASAP program. This is consistent with
§ 16,1-132 and Rule 3A:26 of the Rules of the Supreme Court
of Virginia, which provide for appeals from convictions in
district courts within ten days after conviction. Consequently, I am of the opinion the ten days within which to note an appeal runs from the date of conviction or disposition of motion for rehearing, whichever is later.

Your second question concerns the power of a court to issue a restricted license to a person who is convicted of a second offense of driving while intoxicated. You specifically inquire whether a court may issue a restricted license to such person if the court has suspended two of the three years (or one of two years, as the case may be under § 18.2-271 of the new law) of the required time for forfeiture of license.

Under Ch. 301, § 18.2-271 provides, in part, that, except as provided in § 18.2-271.1, the conviction for driving while intoxicated in the case of a first offense shall, of itself, operate to deprive the person so convicted of the privilege to drive a motor vehicle in the Commonwealth for a period of six months. If a person is convicted of a second or other subsequent offense within five years of a first offense conviction for driving while intoxicated, such person's license shall be suspended for three years. If such conviction is for a second or other subsequent offense within five to ten years of a first offense conviction, such person's license to operate shall be suspended for two years. Subject to the conditions specified in § 18.2-271, the court is authorized to suspend (a) the entire license suspension in the case of a first offense conviction, (b) two years of the license suspension in the case of a second conviction less than five years after a previous conviction, and (c) one year if the second conviction occurred five to ten years after a previous conviction.

Under the new law, the issuing of restricted licenses is expressly provided for in paragraph (b1a) of § 18.2-271.1. That new paragraph provides in part that, whenever a person enters a program pursuant to this section and such person's license to operate a motor vehicle in the Commonwealth has been suspended or revoked, the court may, in its discretion for good cause shown, provide that such person be issued a restricted permit to operate a motor vehicle for any or all of the purposes enumerated therein. There is nothing in this new paragraph or related provisions which precludes a court from issuing a restricted license for the year the court is not authorized to suspend pursuant to § 18.2-271. Indeed, the expressly-stated prerequisite for granting a restricted license is the fact that the person's license to drive has been suspended or revoked. In addition, § 18.2-271, the forfeiture of license provision, itself begins with the qualification "[e]xcept as provided in § 18.2-271.1...."

Accordingly, I am of the opinion that § 18.2-271, which provides that the license of a person convicted of a second offense of driving while intoxicated within ten years of a first offense conviction, must be read in pari materia with the new provisions in paragraph (b1a) of § 18.2-271.1.
this is done, it is apparent that the court is given certain
discretion as to that one year period, that is, it may issue
a restricted license in place of complete suspension of the
license. I, therefore, answer your second question in the
affirmative.

MOTOR VEHICLES. DUTY OF MOTORIST APPROACHING SCHOOL CROSSING
SIGN.

December 10, 1981

The Honorable Frederick H. Creekmore
Member, House of Delegates

This is in response to your inquiry whether a motorist
approaching certain "school crossing" signs is required to
reduce his speed to 25 miles per hour. The sign in question
is yellow, depicts two school children and a replica appears
on page 45 of the 1981 Virginia Driver Manual printed by the
Virginia Division of Motor Vehicles with the explanation:

"School Crossing

Slow down--the speed limit is usually 25 MPH. Watch for
children crossing. Obey signals from any crossing
guards."

Section 46.1-193 of the Code of Virginia (1950), as
amended, prescribes maximum and minimum speed limits on
highways in Virginia. Section 46.1-193(1)(f) establishes a
maximum speed limit of 25 miles per hour "between portable
signs, tilt-over signs, or fixed blinking signs placed in or
along any highway bearing the word 'school' or 'school
crossing....'" The sign about which you have written is
neither a portable, tilt-over or blinking sign, but is a
fixed non-blinking sign of a warning or advisory nature, as
opposed to being regulatory. Consequently, its positioning
on a highway does not alter the maximum speed limit as set
(1970-1971) at 261. Accordingly, your question is answered
in the negative. The sign, however, is not without
significance. It is a visible warning of possible hazards,
and a prudent driver should be prepared to reduce his speed
and be especially alert for the presence of children.

1Section 46.1-193(1)(f) provides as follows: "Twenty-five
miles per hour between portable signs, tilt-over signs, or
fixed blinking signs placed in or along any highway bearing
the word 'school' or 'school crossing.' Such word or words
shall indicate that school children are present in the
vicinity. Any signs erected under this section shall be
placed not more than six hundred feet from the limits of the
school property or crossing in the vicinity of the school,
which is used by children going to and from the school;
provided that 'school crossing' signs may be placed in any location if the Department of Highways and Transportation or the council of the city or town or the board of supervisors of a county maintaining its own system of secondary roads approves the said crossing for such signs. If the portion of the highway to be posted is within the limits of a city or town, such portable signs shall be furnished and delivered by such city or town. If the portion of highway to be posted is outside the limits of a city or town such portable signs shall be furnished and delivered by the State Highway and Transportation Department. It shall be the duty of the principal or chief administrative officer of each school or some responsible person designated by the school board, preferably not a classroom teacher, to place such portable signs in the highway at a point nor more than six hundred feet from the limits of the school property and remove such signs when their presence is no longer required by this subsection. Such portable signs, tilt-over signs, or fixed blinking signs shall be placed in a position plainly visible to vehicular traffic approaching from either direction but shall not be placed so as to obstruct the roadway. Such portable signs, tilt-over signs, or blinking signals shall be in a position, or be turned on, for thirty minutes preceding regular school hours and for thirty minutes thereafter and during such other times as the presence of children on such school property or going to and from school reasonably requires a special warning to motorists. Provided, however, that the governing body of any city or town may, if the portion of the highway to be posted is within the limits of such city or town, increase or decrease the speed limit provided in this subsection only after justification for such increase or decrease has been shown by an engineering and traffic investigation, and provided further that no such increase or decrease in speed limit shall be effective unless such increased or decreased speed limit is conspicuously posted upon the portable signs, tilt-over signs, or fixed blinking signs required by this subsection."

MOTOR VEHICLES. LOCAL LICENSE. CITY MAY REQUIRE THAT ALL TANGIBLE PERSONAL PROPERTY TAXES ON VEHICLE FOR WHICH ASSESSMENT WAS MADE AND PAYMENT WAS DUE WITHIN ONE YEAR PRIOR TO FILING OF PETITION IN BANKRUPTCY BE PAID PRIOR TO ISSUING LICENSE DECAL.

May 27, 1982

The Honorable Margaret Anne Smith
Treasurer for the City of Buena Vista

You have asked whether a city has the authority pursuant to § 46.1-65(c) of the Code of Virginia (1950), as amended, to prevent a person from buying a local motor vehicle license until all motor vehicle, trailer or semitrailer personal property taxes are paid when that person has declared bankruptcy and obtained a discharge of his personal property tax debt.
This question was addressed in a recent Opinion of this Office which held that, if a city is satisfied from the evidence presented or available to it that a discharge has been issued, then the city 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. See Report of the Attorney General (1980-1981) at 256.

Please be mindful of the circumstances described in the aforementioned Opinion under which the general rule of discharge would not be controlling. For instance, 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. 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.

MOTOR VEHICLES. LOCAL LICENSE. COUNTIES MAY NOT REQUIRE PAYMENT OF ALL PERSONAL PROPERTY TAXES BEFORE ISSUANCE OF LOCAL MOTOR VEHICLE LICENSE.

March 4, 1982

The Honorable Onnie L. Woodruff
Treasurer of Sussex County

You have presented two inquiries concerning tax matters. You have first asked whether the provisions of § 46.1-65(c) of the Code of Virginia (1950), as amended, authorize a county to enact an ordinance to allow it to deny issuance of a local license for motor vehicles until all delinquent personal property taxes owed by the applicant to that county have been paid.

Section 46.1-65(c) 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." (Emphasis added.)
The portion that I have underlined, which was added by Ch. 185 [1979] Acts of Assembly 244, is the provision which prompts your question.

In my opinion, the language of this provision would authorize denial of a local motor vehicle license only for failure to pay delinquent personal property taxes on motor vehicles, trailers or semitrailers. Moreover, it is my opinion that the meaning of the terms "motor vehicles, trailers, and semitrailers" as used in § 46.1-65(c) is the meaning given to those terms in the Motor Vehicle Code, Title 46.1,1 and not necessarily the meaning which might apply under the personal property tax statutes.

Therefore, your first question is answered in the negative. A county may not enact an ordinance to deny issuance of a local license for a motor vehicle until all delinquent personal property taxes on all objects of personal property have been paid by the applicant.

You also have asked whether the provisions of § 58-961 permit a county treasurer to require a taxpayer to pay delinquent real estate taxes before paying current personal property taxes, or, conversely, to pay delinquent personal property taxes before paying current real estate taxes.2 In a prior Opinion of this Office, it was concluded that § 58-961 does "not require treasurers to apply the tender by the taxpayer of payment for one type of tax to an earlier delinquency of another type of tax." See Report of the Attorney General (1978-1979) at 267. I concur in that Opinion, and, therefore, answer your second question in the negative.

1These three terms are defined in § 46.1-1 as follows: 
"(15) 'Motor vehicle'. - Every vehicle as herein defined which is self-propelled or designed for self-propulsion except that the definition contained in § 46.1-389(d) shall apply for the purposes of chapter 6 (§ 46.1-388 et seq.) of this title. Any structure designed, used or maintained primarily to be loaded on or affixed to a motor vehicle to provide a mobile dwelling, sleeping place, office or commercial space, shall be considered a part of a motor vehicle. For the purposes of this chapter, any device herein defined as a bicycle or a moped shall be deemed not to be a motor vehicle.

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(27) 'Semitrailer'. - Every vehicle of the trailer type so designed and used in conjunction with a motor vehicle that some part of its own weight and that of its own load rests upon or is carried by another vehicle.

***

(33) 'Trailer'. - Every vehicle without motive power designed for carrying property or passengers wholly on its own structure and for being drawn by a motor vehicle.'
Section 58-961 provides in part: "Unless otherwise provided by ordinance of the governing body, any payment of local levies received shall be credited first against the most delinquent local account...." (Emphasis added.)

MOTOR VEHICLES. LOCAL LICENSE. COUNTY MAY NOT CHARGE MORE THAN STATE.

May 18, 1982

The Honorable Harold T. Chapman
Sheriff for Greene County

This is in response to your recent letter wherein you ask to be advised as to (1) the fee counties may charge for licenses for vehicles which have Virginia National Guard license plates as provided in § 46.1-105.9 of the Code of Virginia (1950), as amended, and (2) the legality of the use of a temporary registration card for the purchase of a local motor vehicle license.

Section 46.1-105.9 was amended during the 1982 session of the General Assembly, by emergency legislation, effective March 12, 1982. Chapter 85 [1982] Acts of Assembly amended § 46.1-105.9 by adding a new paragraph as follows:

"C. In accordance with the provisions of § 46.1-65, no county, city or town may impose on any vehicle licensed under this section any license fee or tax greater than the amount of license fee imposed under this section."

Additionally, § 46.1-65 was also amended in Ch. 85 to read in part as follows:

"The amount of the license fee or tax imposed by any county, city or town upon any motor vehicle, trailer, or semitrailer shall not be greater than the amount of the license tax imposed by the Commonwealth on such motor vehicle, trailer, or semitrailer...." 

In view of the statutory amendments, I am of the opinion that, with respect to vehicles having Virginia National Guard license plates, a county may not charge more for a county motor vehicle license than the Commonwealth charges for the special Virginia National Guard license plates provided for in § 46.1-105.9.

With respect to your second question, § 46.1-124 provides in pertinent part that "[n]o dealer shall issue, assign, transfer, or deliver such temporary license plates to other than the bona fide purchaser or owner of a vehicle, whether or not such vehicle is to be registered in Virginia...." Accordingly, I am of the opinion that the issuance of temporary license plates pursuant to § 46.1-123, et seq., is legal and the accompanying temporary registration card would be sufficient proof of ownership to permit a
person to purchase a county motor vehicle license under § 46.1-65.

MOTOR VEHICLES. SERVICE OF DRIVERS LICENSE SUSPENSION AND REVOCATION ORDERS. SUBSTITUTED SERVICE IN APPROPRIATE CIRCUMSTANCES PERMISSIBLE.

January 8, 1982

The Honorable Andrew G. Conlyn, Judge
15th Judicial District

This is in response to your recent letter concerning §§ 8.01-296 and 46.1-441.22 of the Code of Virginia (1950), as amended.

You first inquire whether, in view of the language in § 46.1-441.2, the General Assembly has indicated an intent that service of driver's license suspension orders must be made in person on the operator or chauffeur. The language in question is the provision in § 46.1-441.2 for service in accordance with § 8.01-296 in the event the Division of Motor Vehicles' records indicate that (1) someone other than the operator or chauffeur has signed the postal service return receipt for the order or (2) such return receipt is returned unsigned. Section 8.01-296, however, clearly provides for substituted service in appropriate circumstances either by delivery to a member of the family or by posting at the front door of the place of abode. Accordingly, I am of the opinion the General Assembly has indicated that service need not be made in person in all cases and I, therefore, answer your first question in the negative.

Your second inquiry is whether, in view of the language of § 8.01-296, a suspension order may be served under the provisions of that section by any other method than personal service. Again, I would note that § 8.01-296 expressly provides for service of process by methods other than delivering a copy of the process to the party in person. For example, if the party to be served is not found at his usual place of abode, then in accordance with paragraph a. of § 8.01-296, service may be made by delivering a copy of the process and giving information as to its purport to any person found there who is a member of his family other than a temporary sojourner or guest and who is 16 years of age or older. Accordingly, I answer your second question in the affirmative.

Your third question is whether a sheriff or deputy can refuse to serve orders or notices if the Division of Motor Vehicles sends them to him. This question was answered in the negative in the Opinion of the Attorney General to the Honorable Edgar P. Smith, Sheriff for the City of Staunton, dated May 11, 1981, and found in Report of the Attorney General (1980-1981) at 262. A copy of that Opinion is enclosed.
Section 8.01-296 provides in part as follows: "Process, for which no particular mode of service is prescribed, may be served upon natural persons as follows:

1. By delivering a copy thereof in writing to the party in person; or

2. By substituted service in the following manner:
   a. If the party to be served be not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of sixteen years or older; or

   b. If such service cannot be effected under subdivision 2, then by posting a copy of such process at the front door of such place of abode, provided that not less than ten days before judgment by default may be entered, the party causing service mails to the party served a copy of the pleading and thereafter files in the office of the clerk of the court a certificate of such mailing...."

Section 46.1-441.2 provides in part as follows: "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...."

MOTOR VEHICLES. SNOWMOBILES. MAY BE OPERATED ON HIGHWAYS IN ABSENCE OF LOCAL ORDINANCE AUTHORIZING SUCH OPERATION.

February 5, 1982

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem
This is in response to your letter of January 20, 1982, inquiring whether a snowmobile may be operated upon public streets and highways in a given locality in the absence of a local ordinance authorizing such operation.

The definitions of "highway" and "vehicle" found in § 46.1-1 of the Code of Virginia (1950), as amended, compel the conclusion that a snowmobile is a vehicle which, in the absence of other restriction or prohibition, may be operated on a highway. Section 46.1-41 provides, in part, that, except as otherwise provided by law, every person owning a motor vehicle intended to be operated upon any highway in this State shall, before the same is so operated, apply to the Division of Motor Vehicles for and obtain the registration thereof and a certificate of title therefor in the name of the owner. Section 46.1-45.2 exempts golf carts and snowmobiles from the requirements of § 46.1-41. As you correctly note, in the case of golf carts, paragraph (a) of § 46.1-45.2 expressly limits the exemption to situations in which that type of vehicle is operated on or over the highway solely for the purpose of movement from one hole of a public or private golf course to another thereof. There is no comparable limitation in § 46.1-45.2 for snowmobiles. Finally, paragraph (6a) of § 46.1-180.2 empowers the governing body of any county, city or town to "authorize and regulate the operation of snowmobiles on or across streets and highways during periods of snow or ice or at the direction of any law-enforcement officer during an emergency."

The Supreme Court of Virginia has said that in construing legislative enactments all provisions dealing with the same subject should be construed together and reconciled whenever possible. Shepherd v. Kress Box Co., 154 Va. 421, 153 S.E. 649 (1930). Under the definitions of § 46.1-1, it appears that a snowmobile may be operated on highways subject to other applicable requirements of law and § 46.1-45.2 exempts snowmobiles from State registration as a condition precedent to operation on the highways. The express grant of power to local governments in § 46.1-180.2(6a), to authorize and regulate the operation of snowmobiles on highways in time of snow or ice does not require a conclusion that such vehicles are prohibited from operating on highways in the event the locality fails to exercise its power. The need for increased regulation of snowmobiles in time of snow may be necessary because of their relatively increased mobility in relation to pedestrians and other vehicles.

When read together, § 46.1-45.2(6a) exempts snowmobiles operated on a highway from State registration, but their use of public highways may be regulated in accordance with an ordinance adopted pursuant to § 46.1-180.2(6a). Accordingly, I am of the opinion that a snowmobile may be operated upon public streets and highways in a given locality, subject to the regulatory powers of the local governing body pursuant to § 46.1-180.2(6a).
Section 46.1-45.2 provides as follows: "(a) No person shall be required to obtain the registration certificates, license plates and decals or to pay any fee prescribed therefor, pursuant to the provisions of this chapter, for any vehicle designed to transport persons playing golf and their equipment from one hole on a golf course to another, and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway from one hole of a public or private golf course to another hole thereof.

(a1) No person shall be required to obtain the registration certificates, license plates and decals or to pay any fee prescribed therefor, pursuant to the provisions of this chapter, for any self-propelled vehicle, designed for travel on snow or ice, steered by skis or runners and supported in whole or in part by one or more skis, belts, or cleats.

(b) Any vehicle exempted under the provisions of (a) hereof shall not be permitted to use the highways as above provided between sunset and sunrise unless such vehicle is equipped with headlights, taillights and other lights required by law."

MOTOR VEHICLES. TRIAL OF TRAFFIC OFFENSES. BIFURCATED TRIAL UNDER § 46.1-347.2 AVAILABLE IN HABITUAL OFFENSE; FELONY CASE UNDER § 46.1-387.8.

May 21, 1982

The Honorable Michael M. Foreman, Clerk
Circuit Court for the City of Winchester

This is in response to your recent inquiry concerning a person who has been declared a habitual offender and, subsequently, is charged and tried for operating a motor vehicle in violation of § 46.1-387.8 of the Code of Virginia (1950), as amended. You asked whether this person is entitled to a bifurcated trial as provided in traffic cases under § 46.1-347.2.

Section 46.1-387.8 provides, among other things, that it "shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect...." In addition, the section provides that if the person is an habitual offender, the violation shall be treated as a felony.

Section § 46.1-347.2 provides, in pertinent part, that "[w]hen any person is found guilty of a traffic offense, the court or jury trying the case may consider the prior traffic record of the defendant before imposing sentence as provided by law...." Section 46.1-347.1(a) defines "traffic offense" as used in § 46.1-347.2 to mean "any moving traffic violation
described or enumerated in paragraphs (a) and (b) of § 46.1-412...." Section 46.1-412 identifies certain types of cases and mandates that records be kept of those cases. Paragraph (a) of that section concerns, in part, cases in which a person is charged with "a violation of any law of this State pertaining to the operator or operation of a motor vehicle...." Paragraph (b) of that section concerns, in part, cases in which a person is charged with a felony "in the commission of which a motor vehicle was used...."

In light of the foregoing, I conclude that a violation of § 46.1-387.8 concerns both a violation of a law of this State pertaining to the operator or operation of a motor vehicle and a felony in the commission of which a motor vehicle is used. Accordingly, I am of the opinion that the violation in question meets the definition of a traffic offense, and the defendant is entitled to a bifurcated trial in accordance with the provisions of § 46.1-347.2.

NEWSPAPERS. PUBLICATIONS. NOTICES. DESIGNATION OF NEWSPAPER TO PUBLISH NOTICES UNDER § 8.01-324 SHOULD BE DONE BY OFFICIAL WHO HAS DUTY TO PUBLISH NOTICE.

May 27, 1982

The Honorable Sam T. Barfield
Commissioner of the Revenue for the City of Norfolk

In your recent letter you state that you have selected newspapers of your choice for publication of required legal notices. You now ask my opinion of who has the right to determine whether the newspaper meets the qualifications prescribed in § 8.01-324 of the Code of Virginia (1950), as amended.

Section 8.01-324 reads as follows:

"Whenever any ordinance, resolution, notice, or advertisement is required by law to be published in a newspaper, such newspaper, in addition to any qualifications otherwise required by law, shall:
1. Have a bona fide list of paying subscribers;
2. Have been published and circulated at least once a week for six months without interruption for the dissemination of news of a general or legal character; and
3. Have a circulation reasonably calculated to give notice to the public or parties to whom such legal ordinances, resolutions, notices of advertisements are directed."

That statute does not specify which body or official should make the determination in question.

Occasionally, the particular statute requiring publication will specify the identity of the official who
shall select the newspaper. In those cases, the designated officials should determine whether the newspaper meets the prescribed qualifications. In the absence of a statute, the law generally provides that the official within whom the law has vested the duty to cause a notice to be published is the proper person to select a newspaper through which the notice is to be published. See New Haven Publishing Co. v. County Court of Mason County, 124 W.Va. 513, 20 S.E.2d 675 (1942), Creek County v. Robinson, 114 Okl. 163, 245 P. 584 (1926), and 66 C.J.S. Newspapers § 10 (1950). Accordingly, unless a particular statute specifies otherwise, I am of the opinion that the public official or body that is required to cause the notice to be published has the authority to designate the newspaper in which that notice is to be published.

1For example, § 8.01-317 provides in pertinent part as follows: "Such order of publication shall be published once each week for four successive weeks in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct...."

NURSING HOMES. NO STATUTE OR REGULATION PERMITS DEPARTMENT OF HEALTH TO REVIEW OR BECOME INVOLVED IN HIRING OR FIRING OF LICENSED NURSING HOME PERSONNEL.

March 15, 1982

The Honorable Clifton A. Woodrum
Member, House of Delegates

This is in reply to your letter of March 10, 1982, in which you asked whether the Commonwealth of Virginia or the Department of Health has authority by statute, rule or regulation, to become involved in, or to review, the hiring or firing of licensed nursing home personnel.

There are a number of areas in which the Commonwealth has broad authority to "become involved in, or review" employment practices. An example would be a complaint alleging retaliation against an employee who sought enforcement of State enforced labor regulations.

There is no statute of the Commonwealth or rule or regulation of the State Board of Health, however, which authorizes the Department of Health to become involved in the employment practices of licensed nursing homes, simply because the licensee is a nursing home.

OPEN-SPACE LAND ACT. STATUTES. COUNTIES. ZONING. ACT DOES NOT AUTHORIZE COUNTIES TO ACQUIRE EASEMENTS FROM OWNERS OF MULTI-FAMILY RENTAL PROPERTY RestrictING PROPERTY TO SUCH USE.
December 10, 1981

The Honorable Charles G. Flinn
Acting County Attorney for Arlington County

You ask whether the Open-Space Land Act (the "Act"), Ch. 13 of Title 10 of the Code of Virginia (1950), as amended, authorizes a county to acquire easements from owners of multi-family rental property, under which the owners agree not to use their property except for multi-family rental purposes.

Section 10-152 provides that, to carry out the purposes of the Act, any public body may acquire by grant or otherwise any interests or rights in real property that will provide a means for the preservation or provision of open-space land.

At the time of the Act's passage in 1966, the General Assembly stated, among its legislative findings, that the provision and preservation of open-space land are necessary to help curb urban sprawl, to help provide or preserve necessary park, recreational, historic and scenic areas, and to conserve land and other natural resources. Pursuant to these findings, the General Assembly stated that the purposes of the Act are to authorize and enable public bodies to preserve open-space land in urban areas.

Under § 10-156(c), open-space land means "any land in an urban area which is provided or preserved for (1) park or recreational purposes, (2) conservation of land or other natural resources, (3) historic or scenic purposes, (4) assisting in the shaping of the character, direction, and timing of community development, or (5) wetlands as defined in § 62.1-13.2...."

Subsection (4) must be construed in accordance with the rule of "ejusdem generis," and not as a broad grant of power to acquire land in any way connected with shaping the character, direction and timing of community development.1 Open-space land, under § 10-156(c), means land directly related to parks, recreation, conservation of natural resources, and historic or scenic purposes.

The legal and economic form of ownership of multi-family dwellings has nothing to do with these purposes. Under the easements proposed, the owner of multi-family rental property can still expand or otherwise physically change the rental property, and not violate the easement terms. Such physical changes can even encroach upon, or destroy recreational and scenic open-space lands, and the easements will not be violated. The proposed easements then have a socio-economic purpose, rather than a purpose to deal with physical development.2 The easements are therefore beyond the grant of power made in the Act.

Accordingly, it is my opinion that the Act does not authorize a county to acquire easements from owners of
multi-family rental property, under which the owners agree not to use their property except for multi-family rental purposes.

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1The rule of ejusdem generis ("of the same kind") provides that where a particular class of things is spoken of in a statute and general words follow, the class first mentioned must be taken as the most comprehensive, and the later, more general words treated as referring to matters of the same kind, the effect of the general words thereby being restricted. See, for example, East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953).

2See, for example, Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973) (zoning requirement that developer build at least 15% of dwelling units as low or moderate income housing).

ORDINANCES. ADOPTION OF ORDINANCES AND AMENDMENTS BY REFERENCE TO STATUTE.

April 20, 1982

The Honorable Francis M. Hoge, Judge
General District Court of Smyth County

This is in reply to your recent letter which reads in part as follows: "Is it legally permissible for counties, towns and cities to adopt sections or titles of the Code of Virginia, as amended, by reference, in so far as such sections or titles may be applicable, as opposed to adoption of ordinances drawn in full detail?"

Your letter further indicates that your inquiry contemplates amendments to ordinances by reference, rather than enacting separate amendments that parallel State statutes each time such statutes are amended by the legislature. You suggest this would reduce the cost and promote the timely adoption of the amendments in the localities.

Assuming the governing body takes action to amend the ordinances when the statutes incorporated are amended, I am of the opinion your inquiry may be answered in the affirmative.

In Virginia, governing bodies of counties may adopt ordinances only in accordance with the procedure set forth in § 15.1-504 of the Code of Virginia (1950), as amended, unless otherwise provided by law. One requirement of this statute is that "descriptive notice" of an intention to propose an ordinance for passage must be published in a designated newspaper for a specified time period. The notice must state that a full text of the proposed ordinance is on file at a
REPORT OF THE ATTORNEY GENERAL

particular county office. The publication requirement is to advise the public of the content of the proposed ordinance.

"An ordinance may by appropriate language adopt by reference the provisions of existing statutes...." McQuillen 5 Municipal Corporations, "Enactment of Ordinances," § 16.12 (1981). See, also, Rollins v. Gordonsville, 216 Va. 25, 215 S.E.2d 637 (1975). The Code specifically allows adoption of certain statutes by reference, e.g., § 46.1-188. It would not be improper to extend this principle to the adoption of amendments to statutes when such changes are made by the General Assembly, but it will be necessary to amend the ordinance to incorporate any statutory changes. The Supreme Court of Nebraska has held that because a legislative body, such as a city council, may not delegate its power to enact ordinances, it could not "by ordinance make future amendments of a statute enacted by reference into a city ordinance a part of such ordinance." State v. Lookabill, 176 Neb. 254, 125 N.W.2d 695 (1964). See, also, Report of the Attorney General (1949-1950) at 76, expressing the opinion that periodic amendments would be required because of changes that occur from time to time in a State Health Department bulletin containing definitions which had been incorporated by reference in an ordinance.

To summarize, I am of the opinion that local governing bodies may adopt statutes by reference and may also adopt statutory amendments by reference, provided the amendments to them are adopted subsequent to the statutory amendments. Conversely, an ordinance may not be adopted by reference to an existing statute if such ordinance also contains a provision to include future amendments by the legislature. The portion of the ordinance relating to future amendments would be invalid.

ORDINANCES. MUST BE CONSISTENT WITH STATE LAW TO BE VALID.

January 15, 1982

The Honorable Warren E. Barry
Member, House of Delegates

You have asked (1) whether the authority to regulate the disposal of solid waste is vested solely in the State Board of Health or whether it is possessed jointly by the State Board of Health and local governments, and (2) whether § 1-13.17 of the Code of Virginia (1950), as amended, renders invalid a Fairfax County debris landfill ordinance which lists the specific types of materials which may be disposed of in such landfills. You state that in Fairfax County the State Health Department has licensed a landfill, which also qualifies as a debris landfill under the county ordinance, to receive solid waste materials which are not listed as materials which can be disposed of in a debris landfill under the county ordinance. You do not, however, state that the
The county ordinance has been applied so as to preclude disposal of materials which the State landfill permit allows.

The General Assembly has delegated the principal responsibility for regulating and managing solid waste in Virginia to the State Board of Health. Article 3, Ch. 6, Title 32.1, §§ 32.1-177 through 32.1-186, the State Board of Health's responsibility to regulate the disposal of solid waste in the Commonwealth. Section 32.1-178 provides that "[t]he Board [of Health] is responsible for carrying out the purposes and provisions of this article...and is authorized to: 1. [e]xercise general supervision and control over solid...waste management activities in this Commonwealth...[and] 10. [p]romulgate such regulations as may be necessary to carry out its powers and duties and the intent of this article...." Solid waste management is defined at § 32.1-177.15 as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment and disposal of solid waste...." Section 32.1-180 provides for the issuance of permits for solid waste disposal facilities by the State Health Commissioner.

The General Assembly has also conferred certain responsibilities in the area of solid waste disposal upon local governments. Section 15.1-857 authorizes municipal corporations to regulate and inspect dumps and other places and facilities for the disposal of garbage and other refuse and to regulate the manner in which such dumps, places and facilities are operated or maintained. Section 15.1-522 grants this same power and authority to the board of supervisors of the various counties. The General Assembly has authorized counties to acquire land, facilities and equipment to be utilized in solid waste management. See § 15.1-282. It has required county governments to develop comprehensive regional solid waste management plans and made county governments responsible for ensuring, within county boundaries, that the solid waste management plan is implemented. See § 32.1-183.

Two bodies of law which pertain to the same subject matter are said to be in pari materia. Where possible, the two should be harmonized in order to give effect to both. "If both the statute and the ordinance can stand together and be given effect, it is the duty of the courts to harmonize them and not nullify the ordinance." King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954). Of course, consistent with Dillon's Rule, the local ordinance must be supported by adequate enabling legislation; such legislation clearly exists in this case. Consequently, I am of the opinion that the power to regulate solid waste is possessed jointly by the State Board of Health and local government.

Secondly, you ask for my opinion on the validity of the specific ordinance governing debris landfills adopted by Fairfax County. It does not follow from my answer to your first question that all local ordinances governing solid
waste are valid. Section 1-13.17 precludes the local governing body from enacting ordinances "inconsistent with" State law. Loudoun County v. Pumphrey, 221 Va. 205, 269 S.E.2d 361 (1980). It is beyond doubt that § 1-13.17 can have the effect of invalidating local ordinances under appropriate circumstances. Loudoun County v. Pumphrey, supra; Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972); Wayside Restaurant, Inc. v. City of Virginia Beach, 215 Va. 231, 208 S.E.2d 51 (1974); King v. County of Arlington, supra.

The Virginia Supreme Court has said, however, that:

"'The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no (actual) conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective...'

King v. County of Arlington, supra, at 195 Va. 1090-1091.

The statutes of the Commonwealth and regulations of the State Board of Health governing solid waste disposal do not address "debris landfills." The Fairfax County ordinance defines a debris landfill and delineates specific types of materials which may be disposed of in a debris landfill. It prohibits the operation of a debris landfill, as defined in the ordinance, without a permit. Significantly, according to the facts provided, the ordinance is not applied so as to prohibit the operation of landfills which have obtained all required State permits in conformance with all applicable State regulations. Thus, the Fairfax ordinance does not prevent operation of landfills otherwise authorized by State law. Where possible, two bodies of law governing the same subject matter should be read so as to avoid a conflict. Loudoun County v. Pumphrey, supra. Under the circumstances you have described, I am of the opinion that the Fairfax County debris landfill ordinance is not in conflict with State laws and regulations governing solid waste disposal and, therefore, is not invalidated by § 1-13.17.
June 22, 1982

The Honorable Frank M. Slayton
Member, House of Delegates

You have referred to § 53-251.31 of the Code of Virginia (1950), as amended, providing for mandatory release on parole, and you indicate that, according to information furnished to you, the statutes may have been interpreted in such a manner as to release inmates only four months prior to their mandatory release date. You ask whether that interpretation is correct.

No official Opinion interprets § 53-251.3 in the manner suggested to you. The only official Opinion of this Office that appears to have any direct bearing on your inquiry was one dated October 9, 1979, to the Honorable Pleasant C. Shields, Chairman, Virginia Parole Board. See Report of the Attorney General (1979-1980) at 268. Mr. Shields' inquiry related to the proper method of computing discretionary parole eligibility as a result of amendments to §§ 53-211 and 53-213. The Opinion states that those sections provide credit for good conduct only after it has been earned; that is, an inmate must serve the specified amount of time before he is awarded good time credit which he earned for satisfactorily serving the specified time. Thus, an inmate's parole date is based upon his sentence less the amount of good time actually earned at the point of eligibility. The Opinion further stated that good time credit could be anticipated or computed prospectively. The Opinion further stated that good time credit must be earned before it can be taken into consideration in computing an inmate's date of final discharge under § 53-251.3.

In light of the apparent uncertainty which exists with respect to mandatory parole, it is necessary that I state in detail my opinion on the proper interpretation of § 53-251.3. Section 53-251.3, in essence, provides that an inmate shall be released on parole six months before the date of final discharge. This means, that, even if an inmate earns absolutely no good time credit during service of his sentence, he still must be paroled six months before the end of his sentence. Thus, if the inmate is sentenced to serve two years, he must be mandatorily paroled after service of no more than one year and six months. If an inmate earns good credit, which under § 53-209.2 reduces his maximum term of confinement, the following example illustrates how his mandatory parole release date under § 53-251.3 is determined:

Assume an inmate has been convicted of a felony after July 1, 1981, and that he has received a sentence of one year to be served in the State system. Assume
further that, pursuant to § 53-209.4A, he has been placed in Class 1 so that he receives thirty days good time credit for each thirty days served. The chart below demonstrates how time served plus good conduct credit earned reduces the time remaining on an inmate's sentence and thereby influences the mandatory parole release date.

<table>
<thead>
<tr>
<th>Total Time Served In 30 Day Intervals</th>
<th>Total Good Conduct Credit Earned</th>
<th>Total Credit To Sentence Remaining On Sentence</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>0</td>
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</tr>
<tr>
<td>30</td>
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<tr>
<td>60</td>
<td>60</td>
<td>120</td>
</tr>
<tr>
<td>90</td>
<td>90</td>
<td>180</td>
</tr>
</tbody>
</table>

The example shows that, after an inmate has served 90 days of his sentence, assuming he is entitled to receive all of his good time credit, he would be within a few days of his mandatory release date under § 53-251.3.

Although a credit of 30 days is to be given for each 30 day period actually served, the General Assembly mandated that an inmate be released six months before expiration of his sentence. In order to carry out this mandate and to allow for an award of good time for a remaining sentence of less than 30 days, it is proper to give the inmate credit earned on a pro rata basis. It is important to understand that as long as the inmate earns good time credit, his date of final discharge moves forward and must be taken into account in determining when six months remain on his sentence before his date of final discharge.

If the computation method I have suggested is followed, an inmate will be released six months before his final date of discharge as required by § 53-251.3.

1In pertinent part, § 53-251.3 reads as follows: "Every person who is sentenced and committed under the laws of the Commonwealth to any State correctional institution or as provided for in §§ 19.2-308.1, 53-251.1 or § 53-251.2 shall be discharged on parole by the Virginia Parole Board when six months remain in the person's sentence until his date of final discharge; provided, however, each person so sentenced or committed shall serve a minimum of three months of his sentence prior to such a discharge."

2I am also advised that on October 2, 1979, my predecessor wrote a letter to Terrell Don Hutto, then Director of the Department of Corrections, which contained certain hypothetical calculations dealing with the relationship between good time credit and the mandatory parole provisions
of § 53-251.3. That letter has apparently been widely disseminated.

Section 53-251.3, by its own terms, mandates a release six months prior to the end of the inmate's "sentence," that is, the term of confinement imposed by the sentencing judge, if the inmate has not otherwise been released as a result of parole. There is no indication in § 53-251.3 that the six months provision is to affect in any way the calculation of the inmate's parole eligibility date which, as before, will still use as the base figure the inmate's original sentence.

POLICE OFFICERS. CHIEF OF POLICE NOT REQUIRED BY STATUTE TO CERTIFY TO STATE AGENCY THAT HIS OFFICERS HAVE MINIMUM QUALIFICATIONS PRESCRIBED IN § 15.1-131.8.

May 26, 1982

The Honorable R. H. Geisen, Executive Director
Criminal Justice Services Commission

This is in reply to your letter of May 19, 1982, concerning the effect of Ch. 442 [1982] Acts of Assembly, which adds § 15.1-131.8 to the Code of Virginia (1950), as amended, effective July 1, 1982. That section promulgates minimum qualifications for police officers and deputy sheriffs. You have asked whether the chief of police or sheriff is required to certify to the Department of Criminal Justice Services (the "DCJS") or any academy or other State agency that his newly-employed officers to whom the statute applies have met the minimum qualifications. You also have asked whether it is incumbent on the DCJS or any academy or other State agency to monitor compliance with the statute.

Section 15.1-131.8 provides that:

"A. The chief of police and all police officers of any county, city or town and all deputy sheriffs in this Commonwealth who enter upon the duties of such office after July 1, 1982, are required to meet the following minimum qualifications for office. Such person shall (i) be a citizen of the United States, (ii) be required to undergo a background investigation, (iii) have a high school education or have passed the General Educational Development exam, (iv) possess a valid Virginia driver's license if required by the duties of office to operate a motor vehicle, and (v) undergo a complete physical examination.

B. Upon request of a sheriff or chief of police, the Department of Criminal Justice Services is hereby authorized to waive the requirements for qualification as set out in paragraph A of this section for good cause shown."

I find no requirement that a chief of police or sheriff certify to the DCJS or any academy or other State agency that
his officers have met these minimum qualifications. Likewise, I am unaware of any statute mandating a particular State agency to monitor compliance with § 15.1-131.8. It is the duty, however, of every chief of police and sheriff to insure that his personnel meet the prescribed minimum statutory qualifications unless a waiver is appropriately obtained. Cf. Report of the Attorney General (1976-1977) at 59.

1As of July 1, 1982, the Criminal Justice Service Commission, the Division of Justice and Crime Prevention and the Counsel on Criminal Justice will be abolished and replaced by a Department of Criminal Justice Services. See Ch. 632 [1981] Acts of Assembly 1325.

2Nevertheless, it should be recognized that the State Compensation Board, pursuant to its authority under § 14.1-50 has the authority to require a sheriff to respond to a questionnaire concerning the affairs of his office and, in the discretion of the Compensation Board, this information sought may include information concerning compliance with § 15.1-131.8.

POLICE OFFICERS. COUNTY MAY NOT WAIVE ITS POLICE POWER.

August 11, 1981

The Honorable William H. Harris
Acting County Attorney for Stafford County

You have requested that I render an Opinion as to whether or not Stafford County can send the Veterans Administration a "street bond letter" stating the county would never assess any cost against the purchasers of property under Veterans Administration loans or against the property itself for completion of dedicated streets and other public improvements.

It is my understanding that the Veterans Administration requires this "letter" from the county before it will grant loans in a particular subdivision.

Specifically, the language which the Veterans Administration requires to be encompassed within the "letter" reads as follows:

"Completion by the county of dedicated streets, and public improvement in dedicated easements will not involve any cost to the purchasers or assessment against the properties affected by the improvements."

You point out that a representation of this nature would constitute a waiver of the county's police power; a power which the Virginia Constitution declares may never be abridged.
Further, in light of the limitations and obligations placed upon a county by the Constitution of Virginia and the General Assembly, it is your opinion that the county cannot make the above representation absent the language, "except as provided by law," added at the end of the sentence.

I concur in your assessment that the county cannot waive the exercise of its police power; further, I agree that the representation asked for by the Veterans Administration cannot be made absent the "disclaimer" language at the end. The completion of dedicated streets and public improvements are matters of public health, safety and welfare and the request made by the Veterans Administration would leave the county in an awkward, as well as an illegal, position should the contractor default and the bond amount prove insufficient to complete construction. The county cannot bargain away its police power in such a manner. "[T]he police power of a State is a governmental function, the exercise of which neither the Legislature nor any subordinate agency thereof, upon which part of its authority may have been conferred, can alienate or surrender by grant, contract or other delegation." Petersburg v. Petersburg Aqueduct Co., 102 Va. 654, 659, 47 S.E. 848, 849 (1904).

In addition, Art. X, § 3 of the Virginia Constitution (1971) provides in part that "[t]he General Assembly by general law may authorize any county, city, town, or regional government to impose taxes or assessments upon abutting property owners for such local public improvements as may be designated by the General Assembly...."

In light of this constitutional mandate, the General Assembly has delegated to the counties the power to assess for local improvements;¹ to create sanitary districts and assess for expenses incident to the powers and duties created thereby;² and to assess for local road improvements.³

Based on the foregoing, I am of the opinion that the county cannot make the representation to the Veterans Administration absent the language, "except as provided by law," added at the end.

¹See § 15.1-239, et seq.
²See § 21-118, et seq.
³See § 33.1-72.T.

POLICE OFFICERS. SPECIAL POLICE. PRIVATE SECURITY GUARDS NOT AUTHORIZED TO ENFORCE CH. 1 THROUGH 4 OF TITLE 46.1.

September 11, 1981

The Honorable David T. Stitt
County Attorney for Fairfax County
You ask whether security guards, operating in compliance with Ch. 17.3 of Title 54 of the Code of Virginia (1950), as amended, may enforce the motor vehicle provisions of Title 46.1, Ch. 1 through 4 in a subdivision of land or on land submitted to a horizontal property regime, where the streets are maintained by private owners who have consented to the enforcement of these laws under § 46.1-6.

Section 46.1-6 provides that the State and its political subdivisions shall enforce the motor vehicle statutes contained in Ch. 1 through 4 of Title 46, "through the agency of any peace or police officer, sheriff or deputy...." These officers must be uniformed or display a badge at the time of enforcement, and must be salaried in such a way that they derive no benefit from the enforcement of these laws.

It is my opinion that the legislature did not intend Ch. 1 through 4 of Title 46.1 to be enforced by private security guards. Although private security guards "have the power to effect an arrest for an offense occurring in [their] presence..." according to § 54-729.33, that section does not attempt to vest private security guards with the same degree of authority held by State and local law enforcement officials who are required by § 46.1-6 to enforce the motor vehicle statutes. Section 54-729.33 specifically limits the power of security guards by providing that "compliance with the provisions of this chapter shall not of itself authorize any person to carry a concealed weapon or exercise any powers of a conservator of the peace...." The private guard's arrest authority is further limited in instances in which the offense occurred outside his presence. In such instances, a guard can only arrest for the offenses of shoplifting or willful concealment of goods, and only if he is informed by a merchant, agent or employee of the merchant whose business he has contracted to protect.

The statutory scheme evidenced in Ch. 17.3 of Title 54 does not attempt to transform the private security guard into a functionary of the State. If, however, the private security officer qualifies as a conservator of the peace, he would be vested with the kind of authority contemplated by § 46.1-6, and could, therefore, enforce the motor vehicle statutes embodied in Ch. 1 through 4 of Title 46.1. See Opinion to the Honorable Herbert H. Bateman, Member, Senate of Virginia, dated May 19, 1978, found in Report of the Attorney General (1977-1978) at 178. If the private security guards are not qualified as conservators of the peace, the motor vehicle statutes will be enforced by local police officials, since, as you mentioned in your initial inquiry, the property owners have consented to their enforcement under § 46.1-6.
November 9, 1981

The Honorable Marie Whitaker Pollock
Commissioner of the Revenue for the City of Covington

This is in response to your request for my opinion as to whether a retail merchant who purchases secondhand precious metals for restoration and repair work must comply with the provisions of the Virginia Dealers in Precious Metals Act (the "Act"), §§ 54-859.15 through 54-859.27 of the Code of Virginia (1950), as amended.

Section 54-859.15 of the Act provides that the term "dealer" shall not be construed to include retail merchants that purchase secondhand precious metals where such merchants use the metals to repair, restore, or design jewelry in the normal course of their business.1

The answer to this question depends on whether the retail merchant uses secondhand precious metals to repair, restore or design jewelry in the normal course of business.

It is my opinion that retail jewelers who, in the normal course of their business, purchase secondhand precious metals in order to repair, restore or design jewelry are not governed by the Act.

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1Section 54-859.15(2) provides, in pertinent part: "'Dealer' means any person, firm, partnership, or corporation engaged in the business of (i) purchasing secondhand precious metals or gems; (ii) removing in any manner precious metals or gems from manufactured articles not then owned by such person, firm, partnership, or corporation; or (iii) buying, acquiring, or selling precious metals or gems removed from such manufactured articles. 'Dealer' shall mean all employers and principals on whose behalf a purchase is made, and any employee or agent who makes any such purchase for or on behalf of his employer or principal.

This definition shall not be construed so as to include persons engaged in the following:

***

d. Repairing, restoring or designing jewelry by a retail merchant, if such activities are within his normal course of business."

PRISONERS. DOUBLE-BUNKING IN JAILS NOT IN AND OF ITSELF VIOLATIVE OF INMATES' EIGHTH AMENDMENT RIGHTS. WILL BE DETERMINED BY TOTALITY OF CIRCUMSTANCES.

May 5, 1982

The Honorable James A. Gondles, Jr.
Sheriff of Arlington County
This is in response to your request for my Opinion whether double-bunking in the Arlington County Detention Center would violate any State regulations, statutes or the constitutional rights of inmates confined therein. You also inquired if the Commonwealth of Virginia or the County of Arlington would defend your office in litigation arising out of any double-bunking.

There are no Virginia statutes or regulations prohibiting double-bunking. In Rhodes v. Chapman, 452 U.S. 309, 69 L.Ed.2d 59, 101 S.Ct. 2627 (1981), the Supreme Court of the United States stated that no status test can exist by which courts may determine whether conditions are cruel and unusual. That opinion, however, provides an excellent benchmark for determining whether a given set of circumstances may amount to a violation of the Eighth Amendment proscriptions. The court held that double-celling long term prisoners, in the circumstances presented in that case, did not constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. One cannot, however, read the Rhodes case to give blanket approval to double-celling under all circumstances. The court considered, among other factors, the physical plant, general living conditions and the effects of double-celling on the inmates in finding that, under the totality of the circumstances, double-celling, itself, was not a violation of the inmates' constitutional rights. In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court held that double-bunking did not amount to punishment of pretrial detainees. As in Rhodes, the court examined the totality of the existing conditions in the facility in arriving at its decision. In any challenge to double-celling, therefore, the totality of all conditions in the jail would be considered by the trier of fact in connection with double-bunking to determine if the conditions there were in violation of the Eighth Amendment rights of the inmates. Any decision regarding double-bunking should be made in consultation with the county attorney and other appropriate local authorities.

In the event that the Commonwealth's attorney and county attorney decline to represent your office in litigation arising from double-bunking, I am of the opinion that you should secure representation under the provisions of § 15.1-66.4 of the Code of Virginia (1950), as amended. That section provides that, in the event you or your deputies are made defendants in any civil action arising out of the performance of your official duties, you may make application to the Circuit Court of Arlington County to assign counsel for your defense.

PRISONERS. REIMBURSEMENT TO POLICE DEPARTMENTS FOR TRANSPORTING PRISONERS IN-STATE TO BE PAID FROM CRIMINAL FUND ADMINISTERED BY SUPREME COURT.
September 28, 1981

The Honorable Robert N. Baldwin  
Executive Secretary  
Supreme Court of Virginia

You ask whether reimbursement to police departments for transporting prisoners in-State is to be paid from the criminal fund administered by the Supreme Court or by the Department of Corrections under § 53-96 of the Code of Virginia (1950), as amended.

Section 53-96 provides in pertinent part that "[a]ll transportation costs shall be out of the general criminal accounts fund of the treasury..." Although § 53-96 is located in the Title generally dealing with corrections, such a placement does not justify an interpretation of the statute which would be contrary to its very terms. The language in § 53-96 is clear and unambiguous and the words in a statute must be given their ordinary meaning unless a contrary meaning is clearly intended. McCarron v. Commonwealth, 169 Va. 387, 193 S.E. 509 (1937). Finding no contrary meaning intended, it is my opinion that the transportation costs about which you inquire should be paid from the criminal fund administered by the Supreme Court.

My opinion is supported by a look at other statutes. Formerly § 14.1-85 (repealed by Ch. 465 [1979] Acts of Assembly 706) provided that mileage for law-enforcement officers in criminal cases was to be payable out of the State treasury. This statute co-existed with § 53-96 and is a clear indication that such mileage expenses are to be paid from the State treasury rather than by the Department of Corrections. In criminal cases whenever an officer renders any service required by law for which no specific compensation is provided, including mileage, such allowance shall be paid out of the State treasury from the appropriation for criminal charges. See § 19.2-332. This legislation makes it clear that the police departments are to be reimbursed from the criminal fund for the expenses outlined in your letter.

March 25, 1982

The Honorable Jack B. Carson, Director  
Department of Health Regulatory Boards

You have inquired if § 2.1-384 of the Code of Virginia (1950), as amended, limits the dissemination of names and addresses of health professionals licensed by the Department of Health Regulatory Boards (the "Department") to only those
persons or organizations offering informational materials relating solely to available professional educational materials or courses, or if requests for the names and addresses must be released under the Virginia Freedom of Information Act.

Section 2.1-384 is a portion of the Privacy Protection Act of 1976 (the "Privacy Act"). Sections 2.1-377 through 2.1-386. The stated purpose of the Privacy Act is to ensure safeguards for personal privacy by record-keeping agencies of the Commonwealth and political subdivisions. Section 2.1-378B. The exemptions to the Privacy Act are the personal information systems specified in § 2.1-384.1 The quoted portion of that section not only exempts the systems mentioned therein from the privacy provisions of the chapter but it expressly authorizes the dissemination of names and addresses of licensed persons on a limited basis.

The Virginia Freedom of Information Act (the "Act") § 2.1-340, et seq., requires the disclosure of public records upon a proper request, unless there is an exception or prohibition provided by law.2 There is no exception or prohibition provided by law for the information in question other than the limitation in § 2.1-384. While there may have existed some question as to legislative intent prior to 1979 with respect to the unlimited disclosing of licensees' names and addresses, the 1979 enactment of § 54-1.413 resolved that question. Unless expressly excepted by that section, the records of any board named in Title 54 are subject to the provisions of the Act.

Accordingly, I am of the opinion that the Act would require the dissemination of the information in question, notwithstanding § 2.1-384.

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1Section 2.1-384 provides in pertinent part, inter alia: "The provisions of this chapter shall not be applicable to personal information systems:

5. 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...."

2Section 2.1-342 provides in pertinent part as follows: "(a) Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by
any citizens of this Commonwealth during the regular office hours of the custodian of such records...."
3Official records of the Department or any board named in this title shall be subject to the disclosure provisions of the Virginia Freedom of Information Act, except for the following:

1. Examination questions, papers, booklets and answer sheets at the discretion of the regulatory board administering or causing to be administered such examinations.

2. Applications for admission to examinations or for licensure and scoring records maintained by any board or the Department on individual licensees or applicants; except that such material may be made available during normal working hours for copying, at his expense, by the individual who is subject thereof at the office of the Department or the offices of any board, whichever of these may have possession of the material.

3. Records of active investigations being conducted by the Department or any board."

PRIVACY ACT. STATE AGENCIES. LABOR. SUPPLYING PERSONAL INFORMATION TO U.S. DEPARTMENT OF LABOR DOES NOT VIOLATE PRIVACY ACT.

June 28, 1982

The Honorable Dorothy S. McDiarmid
Member, House of Delegates

This is in reply to your recent letter requesting an Opinion whether certain practices employed by the Virginia Employment Commission (the "VEC") in carrying out its duties regarding permanent labor certifications under the Immigration and Nationality Act are in violation of the Virginia Privacy Protection Act, §§ 2.1-377 through 2.1-386 of the Code of Virginia (1950), as amended, (the "Privacy Act").

Pursuant to federal regulations, 20 C.F.R. § 621.2 (1981) and 20 C.F.R. § 656.21 (1981), applications provided by the United States Department of Labor for alien employment certification for temporary and permanent employment in the United States are filed with the local office of the VEC. Based upon your letter and interviews with the personnel of the VEC, I assume the practice of processing the applications is as follows: after receiving an application which has been completed by the employer and the prospective employee and after reviewing the application for completeness and accuracy, the VEC makes determinations regarding wage rate and availability of United States citizens for the particular job. The local VEC office then forwards the application to the regional office of the United States Department of Labor for a determination regarding permanent labor certification. If the reviewing officer of the VEC notes from the information on the application that there is an apparent
violation of § 40.1-11.1, he sends the case to the central VEC office which, in turn, forwards it to the Virginia Department of Labor and Industry (the "Department"). The Department is responsible for the enforcement of the provisions of Title 40.1.2

Section 2.1-380 of the Privacy Act provides that "[a]ny agency maintaining an information system... shall:
1. Collect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency...."3 (Emphasis added.) I find no law that specifically permits or requires the VEC to disseminate information collected from the United States Department of Labor form to any other State agency. I do note, however, that it is a proper purpose of the VEC to "promote the reemployment of unemployed workers throughout the State in every... way that may be feasible...." See § 60.1-39. By helping to enforce the provisions of § 40.1-11.1, and thereby discouraging the hiring of aliens who do not possess proper work permits, the VEC is properly working to accomplish this purpose.

Accordingly, because the VEC practice is necessary to accomplish a proper purpose of that agency, I am of the opinion that the VEC practice of furnishing information to the Department that is collected from United States Department of Labor application forms is not violative of the Privacy Act.

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1Section 40.1-11.1 provides in pertinent part as follows: "It shall be unlawful and constitute a Class 1 misdemeanor for any employer or any person acting as an agent for an employer, or any person who, for a fee, refers an alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States for employment to an employer...."

2See §§ 40.1-1 and 40.1-6.

3Section 2.1-379 defines "information system" as "the total components and operations of a record-keeping process, whether automated or manual, containing personal information and the name, personal number, or other identifying particulars of a data subject."

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The Honorable Michael E. Norris
Sheriff of the City of Alexandria

You have asked in your recent letter if an attorney authorizes a secretary to receive process for him and service
is so made, is this valid service upon the attorney, and if not, you ask if I can recommend statutory amendment that would permit such practice.

You have indicated in further communications with this Office that your question is framed in the context of an attorney who has been designated as a registered agent to receive service on behalf of a corporation or who receives service under § 8.01-314 of the Code of Virginia (1950), as amended, after he has made a general appearance on behalf of his client.

It is my opinion that an attorney who is designated as registered agent to receive service on behalf of another may not designate a secretary or other person to receive process in his stead. Section 8.01-299 specifically provides for personal service on a registered agent. It does not authorize the appointment or delegation of any other person to receive such process.

It is an accepted principle of statutory construction that the mention of one thing implies the exclusion of another. A statute, limiting a thing to be done in a particular manner, or by a prescribed person or tribunal, implies that it shall not be done otherwise, or by a different person or tribunal. Expressio unis est exclusio alterius. Pine v. Commonwealth, 121 Va. 812, 821, 93 S.E. 652, 654 (1917).

On the other hand, § 8.01-314, which provides for service on an attorney after he has made a general appearance, does not specify personal service. Indeed, such service may be made in accordance with Rule 1:12, Rules of the Supreme Court, which permits service by either delivering or mailing a copy. Under such circumstances, I am of the opinion that an attorney's secretary or any other person he designates may accept service of process or other pleading.

In response to your second inquiry, I am unaware of any constitutional provision which would prohibit the General Assembly from adopting legislation authorizing attorneys to delegate someone to accept service on them in all cases, provided that the procedure is adequate to insure that the process served is brought to the attention of the person who is intended to receive it.

PROFESSIONAL AND OCCUPATIONAL REGULATION. OPTICIAN. FITTING OF CONTACT LENSES. AFTER JULY 1, 1982, CONTACT LENS CERTIFICATION MANDATORY FOR OPTICIANS TO FIT CONTACT LENSES.

May 4, 1982

The Honorable Elliot S. Schewel
Member, Senate of Virginia
This is in reply to your inquiry concerning the applicability of the regulation adopted by the Virginia State Board of Opticians (the "Board") in relation to the fitting of contact lenses. You state that the individual involved is a part owner of a long-established optical business, who is neither an optician nor optometrist, but has fitted contact lenses over a number of years, and has been classified as a "contact lens specialist."

Board Regulation 12-7, effective June 1, 1981, provides: "The Board shall administer a contact lens examination of those Virginia licensed opticians desiring to be certified to fit contact lenses. As of July 1, 1982, contact lens certification shall be mandatory for opticians to fit contact lenses."

This regulation is self explanatory, unequivocal in the requirement that certification shall be mandatory for opticians to fit contact lenses subsequent to July 1, 1982.

The definition of "optician" appears in § 54-398.2(d) of the Code of Virginia (1950), as amended, as follows:

"'Optician' means any person, not exempted by § 54-398.1, who prepares or dispenses eyeglasses, spectacles, lenses, or appurtenances thereto, for the intended wearers or users thereof, on prescriptions from licensed physicians or registered optometrists, or as duplications or reproductions of previously prepared eyeglasses, spectacles, lenses, or appurtenances thereto; or who interprets such prescriptions or such duplications or reproductions, and, in accordance therewith, measures, adapts, fits, and adjusts such eyeglasses, spectacles, lenses, or appurtenances, to the human face."

You refer me to the exemption listed in § 54-398.1, which reads as follows:

"(3) Any person who does not hold himself out to the public as an 'optician,' and who works exclusively under the direct supervision and control of a licensed physician or registered optometrist or registered optician, and in the same location...."

The individual in question is neither an optician nor optometrist. While he may not advertise as an optician, if he engages in the work described in § 54-398.2(d) for the benefit of the general public, as he apparently does, then he clearly holds himself out to the public as an "optician" within the definition above quoted. If he prepares or dispenses eyeglasses, spectacles, lenses, or appurtenances thereto, interprets prescriptions, and measures, adapts, fits, and adjusts such eyeglasses, spectacles, lenses, or appurtenances, he is practicing as an "optician." A second reason for not applying the exemption is that there is no indication that the individual works "exclusively under the
direct supervision and control" of the designated individuals.

Accordingly, I am of the opinion that the individual may not continue fitting contact lenses, unless he obtains a license from the Board, and after July 1, 1982, the necessary contact lens certification in order to continue fitting contact lenses.

PROPERTY. DIVISION FENCES. LIABILITY FOR REPAIRS TO EXISTING FENCE UNDER § 55-319 MAY NOT BE AVOIDED BY CHOOSING TO LET LAND LIE OPEN UNDER § 55-317.

November 2, 1981

The Honorable Kevin G. Miller
Member, House of Delegates

You ask three questions about division fences.

You first ask whether, under § 55-319 of the Code of Virginia (1950), as amended, a landowner may avoid liability for repairs to an existing division fence by choosing to let his land lie open, as provided in § 55-317.

Section 55-319 provides that when any division fence shall become out of repair to the extent it is no longer a lawful fence, either adjoining landowner may give written notice of his desire and intention to repair such fence, and the landowner giving such notice may then repair the entire fence so as to make it a lawful fence, and the other landowner shall be liable for one half of the expense.

Section 55-317 provides that adjoining landowners shall build and maintain, at their joint and equal expense, division fences between their lands, unless one of them shall choose to let his land lie open.

The option to let land lie open is mentioned in §§ 55-317 and 55-318, and by the terms of those sections, the option applies only when no division fence has been built. Section 55-319, by its terms, applies when a division fence has already been built. Section 55-319, unlike § 55-317, allows no option to a landowner to let his land lie open.

Accordingly, it is my opinion that, under § 55-319, a landowner may not avoid liability for repairs to an existing division fence by choosing to let his land lie open, as provided in § 55-317.

You next ask whether a landowner may recover damages from the owner of trespassing domesticated animals, if the landowner's property is not enclosed by a lawful fence.

At common law, the owner of domestic animals was required, at his peril, to keep them on his own land, or
within enclosures, but the rule has been changed in Virginia as to domesticated animals, by legislative action, except in those areas where a "no fence" ordinance applies. ²

Section 55-316 provides that it shall be unlawful for the owner of any domesticated animal to permit the animal to run at large beyond the limits of his own lands, in areas where a "no fence" ordinance applies under § 55-310.

Where such an ordinance does not apply, the owner may permit his domesticated animals to run at large beyond the limits of his own lands, and the owner of the domesticated animal is not liable for trespass by the animal, except as provided in § 55-306, which provides for liability only where domesticated animals shall enter grounds enclosed by a lawful fence.

Accordingly, it is my opinion that a landowner may not recover damages from the owner of trespassing domesticated animals if the landowner's property is not enclosed by a lawful fence, except in areas where a "no fence" ordinance applies under § 55-310. ³

Your last question is whether the phrase "one half of the expense thereof," under § 55-319, means one half of the expense of repair, or the repair of one half of the fence's length.

Section 55-319 provides that the one landowner may repair the entire fence so as to make it a lawful fence, and the other landowner shall be liable for one half of the expense thereof. The item divided in two is not the length of the fence or the portion repaired, but the expense of repairing the entire fence.

Accordingly, it is my opinion that the phrase "one half of the expense thereof," under § 55-319, means one half the expense of repair, and not the repair of one half the fence's length.

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¹You also asked whether the land in question was being used for commercial purposes under § 55-317, thereby denying the landowner the option to let his land lie open. This question need not be answered, inasmuch as § 55-319 controls, and § 55-319 does not allow such an option where there is an existing division fence.

²See Poindexter v. May, 98 Va. 143, 34 S.E. 971 (1900); Tate v. Ogg, 170 Va. 95, 195 S.E. 496 (1938).

³See Perlin v. Chappell, 198 Va. 861, 96 S.E.2d 805 (1957) (negligence liability for escape over lawful fence of heifer known to be wild and capable of jumping barrier); Rice v. Turner, 191 Va. 601, 62 S.E.2d 24 (1950) (relationship between statutory duty and common-law duty of ordinary care). The law recognizes three kinds of tort liability: 1) intentional torts; 2) negligence; and 3) absolute
liability (which includes casual trespass by domesticated animals). The law of "legal fences" relates only to casual trespass.

PUBLIC CONTRACTS. FRANCHISES OF PUBLIC PROPERTY, OR AMENDMENTS TO FRANCHISES, FOR PERIODS OF FIVE YEARS OR LESS DO NOT REQUIRE COMPETITIVE BIDDING.

November 17, 1981

The Honorable A. L. Philpott
Speaker, House of Delegates

You ask whether §§ 15.1-308 and 15.1-314 of the Code of Virginia (1950), as amended, require an amendment extending the term of a ten year franchise for a period of 59 months, or in the alternative a termination of the franchise and a grant of a new franchise to the same party for a period of 59 months, to be awarded only upon competitive bids.

I have previously concluded that § 15.1-308 does not require competitive bidding with respect to the award of a lease of public property, the term of which is to be less than five years. See Report of the Attorney General (1979-1980) at 276. In my opinion, a similar conclusion should be reached with respect to franchises awarded pursuant to § 15.1-308. Competitive bidding is required only when the term of the franchise is to exceed five years. Accordingly, it is my opinion that the second alternative suggested in your letter, a termination of the existing franchise and a grant of a similar franchise for a period of 59 months, would not require competitive bidding.

Section 15.1-314 requires, in part, that amendments extending the term of franchises granted pursuant to § 15.1-308 must meet the requirements of §§ 15.1-308 through 15.1-313. There is no indication that the General Assembly intended to limit the authority of localities to permit only one such amendment of a franchise. It is my opinion that no competitive bidding is required with respect to any amendment which does no more than extend the termination date of an existing franchise to a time less than five years after the date of the amendment; and there is no limit on the number of such amendments so long as the term of the franchise remains less than five years after each amendment.

I note that § 15.1-314 also requires public notice of amendments to franchises which release the grantee from duties previously imposed or permit the grantee to increase charges to the city. This notice is required regardless of the term of the franchise or amendment. Either approach suggested in your letter is, in effect, an amendment of an existing franchise. As a result, if either approach involves releasing the grantee from duties under the franchise, or allows an increase in charges to the city, it would, in my view, require such public notice.
PUBLIC DEFENDERS. DUTIES OF. REIMBURSEMENT BY LOCALITY FOR THEIR SERVICES. § 19.2-163.

August 7, 1981

The Honorable Overton P. Pollard, Executive Director
Public Defender Commission

You have asked two questions concerning the duties of public defenders and who should pay the costs for their services.

Basic Considerations

The Public Defender Commission and public defenders, at least as State employees, came into being in 1972.1 The duties of the Public Defender Commission and the duties of the public defenders are currently governed by §§ 19.2-163.1 to 19.2-163.6 of the Code of Virginia (1950), as amended.2 While public defenders and their staff are funded from State appropriations, I am informed that public defenders have not only defended individuals charged with violations of State statutes but also have defended individuals charged with violations of city, county and town ordinances at no cost to those localities. I am also informed that public defenders are normally appointed to these cases in much the same manner as any other court-appointed counsel.

Duties Of Public Defenders

You have now asked if it is proper for public defenders and their staffs, as State employees, to represent persons charged with violations of county, city or town ordinances.

Section 19.2-163.3 sets forth the duties of public defenders and their assistants. Specifically, § 19.2-163.3(b) provides that public defenders are "[t]o represent indigent persons charged with a crime or offense when such persons are entitled to be represented by law by court-appointed counsel...." There is no requirement that public defenders limit themselves to one particular type of case as opposed to another. Rather, the statutory mandate seems to encompass any crime or offense. Inasmuch as the statute seems clear and unambiguous, I must conclude that public defenders must defend persons charged with violations of city, county and town ordinances as well as violations of State statutes.

Reimbursement For Their Services

You also ask if it is proper for public defenders, as State employees, to represent persons charged with violations of city, county and town ordinances, should the State be reimbursed by the locality for fees taxed as costs under the provisions of §§ 19.2-163.2(g) and 19.2-163.

Section 19.2-163 provides for the payment of fees and expenses of court-appointed counsel. The 1981 session of the
General Assembly amended § 19.2-163 to read, in part, as follows:

"The Court shall direct that the foregoing payments shall be paid out by the Commonwealth, if the defendant is charged with a violation of a statute or, by the county, city or town, if the defendant is charged with a violation of a county, city or town ordinance, to the attorney so appointed to defend such person...."

(Emphasis added.)

The "foregoing payments" to which that section refers are the fees and expenses of court-appointed counsel.

Section 19.2-163.2(g) provides that such sum as would have been allowed a court-appointed attorney shall be taxed against the person defended by a public defender as part of the costs of the prosecution when such person has been convicted.

Until now, localities have essentially been receiving the services of public defenders for free when they would have to compensate any other court-appointed counsel for defending a person charged with a violation of that locality's ordinances. However, in light of the foregoing statutory language and specifically § 19.2-163, I am of the opinion that the State should be reimbursed by the locality for the services of a public defender who has been appointed to defend a person charged with a violation of a county, city or town ordinance.

4Section 19.2-163.2(g) provides, in part: "In any case in which a public defender or his assistant represents an indigent person charged with an offense and such person is convicted, such sum as would have been allowed a court-appointed attorney as compensation and as reasonable expenses shall be taxed against the person defended as a part of the costs of the prosecution, and, if collected, shall be paid to the Commonwealth...."

PUBLIC OFFICERS. COMPATIBILITY. ABSENT STATUTE TO CONTRARY, INCOMPATIBLE OFFICE VACATES FIRST OFFICE.

September 14, 1981

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County
You ask about the effect of a member of the county social services board qualifying as a member of the county school board.

When a member of the county social services board qualifies as a member of the county school board, there is a violation of § 22.1-30 of the Code of Virginia (1950), as amended, and the first office is vacated or surrendered. See Opinion to the Honorable J. Edgar Pointer, Jr., County Attorney for the County of Gloucester, dated October 31, 1980 (copy enclosed).

The qualification as a member of the school board is, of course, a valid qualification. See Pointer Opinion, cited above. You ask, however, whether the individual's actions as a member of the social services board are valid, under the de facto officer doctrine, after qualification as a member of the school board.

Under the de facto officer doctrine, the official acts of a public officer are valid even though the individual inadvertently vacates the office and continues to perform the duties of the office. See, for example, Opinion to the Honorable Frederic Lee Ruck, County Attorney for Fairfax County, dated December 18, 1975, found in Report of the Attorney General (1975-1976) at 286. Vacation of an office by qualification in a second incompatible office is within the de facto officer doctrine.

Accordingly, it is my opinion that the individual's actions as a member of the social services board, after qualification as a member of the school board, are valid.

PUBLIC OFFICERS. COMPATIBILITY. CHARTERS. MAYOR AS REGULAR MEMBER OF COUNCIL ELECTED AT-LARGE DIRECTLY BY PEOPLE. INDIVIDUAL HOLDING ONE SEAT ON COUNCIL IS ELIGIBLE, AT MID-TERM AND WITHOUT RESIGNING, TO BE CANDIDATE FOR MAYOR.

October 23, 1981

The Honorable Hunter B. Andrews
Member, Senate of Virginia

You ask whether an individual holding one seat on a city council is eligible, at mid-term and without resigning, to be a candidate for mayor, where under the charter in question, the mayor (in addition to special duties) is another regular member of the council, elected at-large directly by the people.1

Article II, § 5 of the Virginia Constitution (1971) provides that the only qualifications to hold any office, elected by the people, are residence and qualification to vote for the office, except as otherwise provided in the Constitution, and except that the General Assembly retains the power to prevent conflict of interests, dual
officeholding, or other incompatible activities by elective officials of any political subdivision.²

I am not aware, however, of any general law relating to conflict of interests, incompatible activities, elections or public officers generally, that prohibits an incumbent of one office from being a candidate for another office.

Similarly, I am not aware of any general law that prohibits an incumbent from resigning from one public office at mid-term to qualify, after election or appointment, for another public office. Such law as there is in the area deals not with preventing resignation from the first office but rather with requiring removal therefrom, if the two offices are deemed incompatible.³

Accordingly, it is my opinion that an individual holding one seat on a city council is eligible, at mid-term and without resigning, to be a candidate for mayor, even though under the charter in question, the mayor (in addition to special duties) is another regular member of the council elected at-large directly by the people.

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¹The potential candidate for mayor, if successful, would not be completing his term as councilman. See Opinion to the Honorable S. Wallace Stieffen, Member, House of Delegates, dated March 23, 1981 (mayor’s office may not be combined with second voting office as regular member of governing body) (copy enclosed).

²Section 6 of Art. VII (Local Government) contains two prohibitions against multiple offices. One prohibition applies to holding two offices at the same time, and the other to offices filled by the governing body. Neither applies to being a candidate for an office elected by the people. For similar statutory prohibitions, see §§ 15.1-50 (holding two offices at same time) and 15.7-800 (offices filled by the council).

³See § 15.1-50(A) which provides that no person holding the office of treasurer, sheriff, attorney for the Commonwealth, clerk of the court where deeds are recorded, commissioner of the revenue, or supervisor or councilman shall hold any other office mentioned in Art. VII of the Constitution. The eight offices named are elected by the people, as are most, if not all, of the offices mentioned in Art. VII.

Section 15.1-50(C) provides that if any person while holding any of the offices enumerated shall be appointed or elected to any other office, his qualification in such other office shall be null and void.

PUBLIC OFFICERS. COMPATIBILITY. CITIES. TOWNS. TREASURERS. CITY TREASURER PERMITTED TO SERVE AS ACTING CITY MANAGER.
The Honorable Jerry W. Davis, Treasurer  
City of Manassas Park

You ask whether a city treasurer is permitted, under Art. VII, § 6 of the Virginia Constitution (1971) and § 15.1-50 of the Code of Virginia (1950), as amended, to serve at the same time as acting city manager.

Article VII, § 6 provides that no person shall at the same time hold more than one office mentioned in Art. VII.1

Section 15.1-50 provides that no person holding the office of treasurer shall hold any other office mentioned in Art. VII of the Constitution at the same time.

The post of city manager may or may not be a public office, depending on how the post is structured under the city's charter.2 In either event, the post is not mentioned in Art. VII.3

Accordingly, it is my opinion that a city treasurer is permitted under Art. VII, § 6, and § 15.1-50, to serve at the same time as acting city manager.4

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1Article VII, § 6 provides in part: "Unless two or more units exercise functions jointly as authorized in Sections 3 and 4, no person shall at the same time hold more than one office mentioned in this article...."
2See Opinion to the Honorable Floyd C. Bagley, Member, House of Delegates, dated September 15, 1980 (public officer status as determined by charter) (copy enclosed).
3Furthermore, a person occupying an office pro tempore cannot be said to hold the office. See Opinion to the Honorable Joseph P. Crouch, Member, House of Delegates, dated October 6, 1980 (copy enclosed).
4There is also a question of dual employment under the Virginia Conflict of Interests Act (Ch. 22 of Title 2.1), but this question is for the Commonwealth's attorney under § 2.1-356. It appears, however, that the dual employment is permissible under § 2.1-349(a)(2), inasmuch as the posts of treasurer and city manager are with separate governmental agencies. See Bagley Opinion, cited above.

PUBLIC OFFICERS. COMPATIBILITY. COMMISSIONERS OF ACCOUNTS. ELECTIONS. COMMISSIONER OF ACCOUNTS MAY NOT SERVE AT SAME TIME ON ELECTORAL BOARD.

September 14, 1981

The Honorable S. W. Coleman, III, Judge  
Thirtieth Judicial Circuit
You ask whether a commissioner of accounts appointed under § 26-8 of the Code of Virginia (1950), as amended, may serve at the same time, under Art. II, § 8 of the Constitution of Virginia (1971) and § 24.1-33, as a member of a county electoral board.

Article II, § 8 provides that no person who is employed by or holds any office or post of profit or emolument, under the governments of the Commonwealth, or any county, shall be appointed a member of a local electoral board. The text of § 24.1-33 contains the same prohibition.

Section 26-8 provides that the judges of each circuit court shall appoint so many commissioners of accounts as may be requisite to carry out the duties of that office who shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts. Each commissioner shall retain the power of supervision over every account, matter or thing referred to him until his final account is approved unless he shall resign, retire or be removed from office.

Under § 26-8, a commissioner of accounts is a supervisory officer of the circuit court, with limited jurisdiction over certain fiduciaries and their accounts. See Cope v. Shed-Carter, 175 Va. 273, 280, 7 S.E.2d 891 (1940). In acting under § 26-8, a commissioner is implementing a special statutory jurisdiction for the efficient administration of fiduciary accounts without resort, in ordinary cases, to a full-scale suit for directions in the administration of estates. See Carter v. Skillman, 108 Va. 204, 213, 60 S.E. 775 (1908).

Therefore, a commissioner of accounts under § 26-8 is a public officer exercising statutory jurisdiction, and an officer of the circuit court, in a capacity different from the ordinary attorney. See Opinion to the Honorable Owen B. Pickett, Member, House of Delegates, dated November 2, 1977, found in Report of the Attorney General (1977-1978) at 69.1

Accordingly, it is my opinion that a commissioner of accounts appointed under § 26-8 may not serve at the same time, under Art. II, § 8 and § 24.1-33, as a member of a county electoral board.

1Inasmuch as Art. II, § 8 and § 24.1-33 apply to offices or posts of profit or emolument, under the governments both of the Commonwealth and any county, I need not presently decide whether the government of the Commonwealth or the county is the source of a commissioner's office or post.
PUBLIC OFFICERS. COMPATIBILITY. MEMBER OF BOARD OF SUPERVISORS MAY SERVE AS MEMBER OF STATE HIGHWAY AND TRANSPORTATION COMMISSION.

February 9, 1982

The Honorable Robert W. Ackerman
Member, House of Delegates

This is in reply to your letter of January 26, 1982, in which you inquired whether there is any constitutional or statutory prohibition against an individual simultaneously serving as a member of a county board of supervisors and as a member of the State Highway and Transportation Commission.

Generally speaking, this situation invokes the doctrine of compatibility of dual officeholding, and must be viewed in this light in determining whether there is any constitutional or statutory prohibition. Absent specific statutory or constitutional prohibition, the common law doctrine may still preclude such dual officeholding if the two are inherently incompatible. The two offices in question are not inherently incompatible; hence, the common law doctrine is no barrier.

Article VII, § 6 of the Constitution of Virginia (1971), pertaining to local government officials, states, in pertinent part, that "no person shall at the same time hold more than one office mentioned in this article." This proscription, however, is directed at dual officeholding by elected or appointed officials solely at the local level. As a consequence, it would not be applicable to the present situation which involves the question of the dual holding of State and local offices.

Section 6 further states that, "[n]o member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law." (Emphasis added.)

Section 15.1-50(A)(1) of the Code of Virginia (1950), as amended, a general law, expressly provides that a county supervisor may be a member "of any commission or board appointive by the Governor." The Governor appoints the State Highway and Transportation Commission.

I am, therefore, of the opinion that there is no prohibition against a member of the board of supervisors serving as a member of the State Highway and Transportation Commission.

PUBLIC OFFICERS. CONFLICT OF INTERESTS. COMPATIBILITY OF OFFICE. EXECUTIVE DIRECTOR OF SERVICES BOARD MAY SERVE ON CITY COUNCIL.
You have asked whether the executive director of the Region Ten Services Board can be a member of the Charlottesville City Council. The board was established under the provisions of § 37.1-195 of the Code of Virginia (1950), as amended, to provide mental health, mental retardation and substance abuse services to the counties of Albemarle, Nelson, Greene, Louisa, and Fluvanna and the City of Charlottesville. Each locality provides financial support and appoints members to the board. I am advised that the executive director is considered an employee of the board and not any one locality.

Article VII, § 6 of the Constitution of Virginia (1971) provides that, with certain exceptions permitted by general law, 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. This restriction is codified in § 15.1-800. The executive director of a services board established under § 37.1-195 is appointed by the board and the members of the board are appointed by the governing bodies of the localities that make up the board. As a result, the Charlottesville City Council does not directly appoint the executive director of the Region Ten Services Board. The foregoing constitutional and statutory provisions, therefore, do not prohibit the director of the services board from sitting on the city council. I assume there is no prohibition in the Charlottesville city charter.

Section 2.1-349(a)(2) of the Virginia Conflict of Interests Act is applicable to the situation where an officer or employee of a governmental agency contracts with another governmental agency. The Charlottesville City Council and the services board are separate governmental agencies for the purposes of this statute. See Report of the Attorney General (1970-1971) at 408. Section 2.1-349 provides, in part, that no officer or employee of a governmental agency shall "[b]e a contractor or subcontractor with any governmental agency other than the governmental agency of which he is an officer or employee, or have a material financial interest in any contract or subcontract, other than a contract of salaried employment with any governmental agency other than the governmental agency of which he is an officer or employee..." unless certain other provisions are met. (Emphasis added.) In this case, the material financial interest would be a contract of salaried employment and would be permitted by the Virginia Conflict of Interests Act.

It is, therefore, my opinion that the executive director of the Region Ten Services Board is not prohibited by State statutory or constitutional provisions from serving on the Charlottesville City Council.
PUBLIC OFFICERS. ELECTORAL BOARD MEMBERS ARE OFFICERS OF LOCALITY AND PROHIBITED FROM SERVING AS DIRECTORS OF INDUSTRIAL DEVELOPMENT AUTHORITY.

May 28, 1982

The Honorable Merlin M. Renne
Commonwealth's Attorney for York County

This is in reply to your recent letter requesting an Opinion concerning potentially incompatible officeholding as follows:

"1. Do the provisions of Article II, Section 8 of the Virginia Constitution (1971), and of its corresponding statutory provision, § 24.1-33 of the Code of Virginia (1950), as amended (hereinafter, "Code"), prohibit a director of an industrial development authority, created under the Industrial Development and Revenue Bond Act, Chapter 33, Title 15.1 of the Code, by a county governing body, from being appointed to and from serving as a member of a county electoral board?

2. Does the limitation of Code § 15.1-1377, which specifically provides that '[n]o director shall be an officer or employee of the municipality,' prohibit a member of a county electoral board from serving as a director of the industrial development authority of such county?

3. Does the aforementioned limitation of Code § 15.1-1377 prohibit a member of a county board of assessors, who was appointed by a circuit court under the provisions of Code § 58-789, from serving as a director of the industrial development authority of such county?"

I shall address your last two questions first as their resolution points toward the resolution of your first question:

Even though a member of a county electoral board would be classified as a public officer,1 further consideration must be given as to whether the electoral board member is an officer of a "municipality,"2 because not all public officers are officers of a municipality and only the latter are prohibited from serving as a director of an industrial development authority by § 15.1-1377 of the Code of Virginia (1950), as amended.

Article II, § 8 of the Constitution of Virginia (1971)3 provides for the appointment of electoral boards, officers of election and registrars to serve "each county and city." (Emphasis added.) These election officials are appointed at the local level4 and their duties are of a local nature. This Office has opined that the members of the electoral board of a city are city officers or officers of a particular
municipality rather than State officers who are elected and whose duties are to serve the interests of the people of the State at large and whose authority extends beyond the confines of a single municipality. 3

I am of the opinion, therefore, that members of a county electoral board are officers of that locality and are therefore prohibited by § 15.1-1377 from serving as directors of an industrial development authority of such county.

A similar analysis must be applied to determine if a member of a county board of assessors is an officer or employee of that locality and therefore is prohibited from being a director of an industrial development authority under § 15.1-1377.

Section 58-769.3 provides for the appointment of a board of real estate assessors under certain circumstances. While members of this board would be deemed public officers, 6 a determination must be made whether they are officers of that locality. The board assesses all real estate in the county or city for tax purposes and reports its findings to the commissioner of revenue. 7 Because real estate is subject to local taxation only, 8 the duties of the assessment board are exclusively of a local nature. Consequently, I conclude that its members are officers of a locality and are therefore prohibited from serving on an industrial development authority.

Turning to your first inquiry, Art. II, § 8 and § 24.1-33 provide that

"[n]o 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 an officer of election."

These provisions preclude a director of an industrial development authority from serving as a member of a county electoral board only if the office of director is both (1) an office of profit or emolument or an elective office of profit or trust and (2) an office under the governments of either the United States or the Commonwealth or any city, county or town. Under Art. II, § 8 and § 24.1-33, both characteristics are necessary for disqualification from appointment to an electoral board.

Under § 15.1-1377, directors of an industrial development authority are to be appointed by governing bodies of municipalities and thus do not hold an elective office of profit or trust. However, directors do hold an office of profit or emolument 9 because § 15.1-1377 authorizes appointing municipalities to compensate directors up to fifty dollars per meeting, in addition to requiring these
municipalities to reimburse directors for expenses incurred in performing their duties.

The second necessary characteristic for disqualification, however, does not appear to be present. While directors, like members of local electoral and assessment boards are public officers in a generic sense, further consideration must be given to whether directors hold office under the governments of either the United States, the Commonwealth, or any county, city or town within the meaning of Art. II, § 8 and § 24.1-33.

Directors clearly do not hold office under the government of the United States. Like members of local electoral and assessment boards, directors are not officers of the Commonwealth as they do not serve the interests of the people of the State at large but rather the interests of the municipalities which appoint them. Additionally, the Commonwealth is not liable for the debts and obligations incurred by an industrial development authority (see § 15.1-1380). Accordingly, I am of the opinion that directors do not hold office under the government of the Commonwealth within the meaning of Art. II, § 8 and § 24.1-33.

Unlike members of local electoral and assessment boards, however, directors are not officers of a particular municipality. As opined above, members of local electoral and assessment boards are precluded by § 15.1-1377 from serving as directors precisely because they are officers of a municipality which is defined by § 15.1-1374(b) as "any county, or incorporated city or town within the Commonwealth." Contrarily, by definition under §§ 15.1-1374(b) and 15.1-1377, directors are not officers of the municipalities they are appointed to serve. Additionally, the municipalities which organize an authority are not liable for the debts and obligations it incurs (see § 15.1-1380).

That an industrial development authority is a separate body politic and corporate with unique public and corporate powers is recognized by the Virginia Supreme Court in Industrial Development Authority of the City of Richmond v. LaFrance v. Lower and Laundry Corp., 216 Va. 277, 217 S.E.2d 879 (1975). Such an entity is neither a county, nor a city nor a town. Rather, it is a separate and distinct political subdivision.

Accordingly, I am of the opinion that directors do not hold office under the government of any county, city or town within the meaning of Art. II, § 8 and § 24.1-33.

The Constitution does not require that public officers be either officers of the Commonwealth or officers of a county, city or town. Rather, it leaves open the possibility of another category of officers, a possibility made concrete by the Code provisions making industrial development
authorities separate and independent political and legal entities apart from both the Commonwealth and the municipalities which organize them. Accordingly, I am of the opinion that a director of an industrial development authority does not hold office under the governments of either the Commonwealth or any county, city or town within purview of Art. II, § 8 or § 24.1-33, and, therefore, a director is not prohibited from serving as a member of a county electoral board.

To summarize, a director of an industrial authority is not prohibited from being appointed a member of a county electoral board, but a member of a county electoral board or board of assessors is prohibited from being appointed a director of an industrial authority because § 15.1-1377 expressly provides that no director shall be an officer or employee of the county which creates the authority. The offices are thus incompatible, and one or the other must be vacated by any person appointed to both.

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1See Report of the Attorney General (1977-1978) at 322 for criteria used in making this determination. See, also, § 24.1-32 and Art. II, § 8 for determinative characteristics of this board.
2For purposes of § 15.1-1377 "municipality" is defined as "any county or incorporated city or town in the Commonwealth with respect to which an authority may be organized and in which it is contemplated the authority will function." Section 15.1-1374(b).
3Article II deals with franchise and officers.
4The circuit judges of the judicial circuit for such county or city appoint the electoral board. See § 24.1-29. The members of the electoral board then appoint officers of election and registrars. See § 24.1-32.
5See Report of the Attorney General (1957-1958) at 111. See, also, State v. Lambert, 18 Va. L. Reg. 336 (1912) which defines an officer of the Commonwealth as one who "performs any public service in which the people of the state at large are interested."
6See Report of the Attorney General (1977-1978) at 322 for criteria used in making this determination. See, also, § 58-769.3 for particular characteristics of this board.
7See § 58-769.3.
9See Report of the Attorney General (1978-1979) at 138 on compensation of officers. Profit or emolument of office, a term broader than salary, is generally defined as any pecuniary gain derived from an office above reimbursement for expenses. See Black's Law Dictionary (5th ed. 1979); 14 Words and Phrases Emolument (1952).
10See Report of the Attorney General (1977-1978) at 322 for criteria used in making this determination. See, also, § 15.1-1377 for characteristics of an industrial development authority.
11See fn. 5.
PUBLIC OFFICERS. INCOMPATIBILITY OF OFFICE. MEMBER OF SCHOOL BOARD SELECTION COMMISSION MAY NOT ALSO SERVE AS OFFICER OF ELECTION OF SAME COUNTY.

March 22, 1982

The Honorable Robert B. Fox
Commonwealth's Attorney for Westmoreland County

This is in reply to your letter of March 8, 1982, requesting an Opinion whether one person may simultaneously serve as a member of the school board selection commission (the "Commission") and as an officer of election of the same county.

Section 22.1-35 of the Code of Virginia (1950), as amended, prohibits a member of the Commission from being a county or State officer. Section 24.1-33 and Art. II, § 8 of the Constitution of Virginia (1971), prohibit a "person, who is employed by or holds any office or post of profit or emolument...under the governments of the United States, the Commonwealth, or any county, city, or town..." from being appointed an officer of election.

This Office has previously enunciated the criteria for determining whether a position is a public office. One important consideration is that, to constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, which are assigned by law. A frequent characteristic of such an office is a fixed term of office. See Report of the Attorney General (1977-1978) at 322.

The position of "officer of election" is one created by the Constitution (Art. II, § 8), and by statute (§ 24.1-32). The position is filled by appointment. See § 24.1-32. An officer of election is also required to take and subscribe the oath prescribed in the Constitution. See § 24.1-32.

The Commission is created by statute; the term of office for its members is four years; its members are appointed. See § 22.1-35.

A person holding either position, therefore, is a public officer. Because the laws creating the positions prohibit the holding of the position by one holding another public office, I am of the opinion that one person may not serve simultaneously as a member of the Commission and as an officer of election.

PUBLIC OFFICERS. OATHS. GUBERNATORIAL APPOINTEES MUST HAVE OATHS ADMINISTERED AS PROVIDED IN § 49-3.
April 21, 1982

The Honorable Laurie Naismith
Secretary of the Commonwealth

This is in reply to your recent letter in which you ask who shall properly administer oaths to the various gubernatorial appointees. You advised that the former Secretary of the Commonwealth instructed gubernatorial appointees that, when no bond for office is required, the appointee may take the oath before a notary public. That instruction was based on an Opinion of this Office dated June 12, 1980, found in Report of the Attorney General (1979-1980) at 283.

I have reviewed the prior Opinion, and, for the reasons hereinafter set forth, I cannot concur in the conclusion expressed therein that the oath of appointees to boards, commissions, councils and other collegial bodies may be administered under § 49-4 of the Code of Virginia (1950), as amended, rather than under § 49-3.

Section 49-3 provides in pertinent part as follows:

"And the oaths to be taken by a person elected or appointed to any other office or post shall, except in cases in which it may be otherwise directed by law, be administered in a court of record or, if no bond is required of such officer, by the judge of such court or the clerk thereof in vacation...."

This section obviously applies to gubernatorial appointees, and requires that the oath must be administered in a court of record or, if no bond is required of such officer, by the judge of such court or the clerk thereof in vacation.

Section 49-4 provides in pertinent part:

"Any oath or affidavit required by law, which is not of such nature that it must be made in court, may be administered by or made before a justice of the peace and certified by him, unless otherwise provided, a notary...."

This section applies to an oath or affidavit required by law, which "is not of such nature that it must be made in court...." (Emphasis added.) As stated above, the oath required of a gubernatorial appointee is of such nature that it must be made in court, although if no bond is required of such officer, it need not be administered in the courtroom. In that event, it may be administered by the judge of such court or the clerk thereof in vacation, but it does not alter the nature of the oath to be taken.

I, therefore, conclude that the provisions of § 49-4 do not apply to the oaths to be administered to persons appointed by the Governor to State boards, commissions, etc.
Accordingly, I am of the opinion that the oaths administered to gubernatorial appointees must be administered in a court of record, unless no bond is required of such officer, in which event, the oaths may be administered by the judge of such court or the clerk thereof in vacation.

PUBLIC OFFICERS. SPECIAL JUSTICES PRESIDING IN COMMITMENT HEARINGS UNDER § 37.1-67.3 ARE "OFFICIALS" ENTITLED TO REPRESENTATION BY ATTORNEY GENERAL UNDER § 2.1-121 IN CIVIL SUITS ARISING FROM DUTIES.

May 13, 1982

The Honorable James F. Almand
Member, House of Delegates

You have inquired whether court-summoned physicians, court-appointed defense attorneys, and special justices are immune from civil liability when they participate in civil commitment hearings conducted pursuant to § 37.1-67.3 of the Code of Virginia (1950), as amended. You have also inquired whether the Commonwealth would represent these physicians, attorneys, and special justices in civil suits resulting from participation in these hearings.

Your first inquiry concerning immunity must be considered from the standpoint of both federal civil rights law and State law.


It is not necessary to reach the question of federal immunity for court-appointed doctors and defense attorneys because they do not act under color of state law, a prerequisite to being subject to suit under 42 U.S.C. § 1983, the 1871 Civil Rights Act. In Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980), a case arising out of a Virginia civil commitment proceeding conducted under § 37.1-67.3 of the Code of Virginia, the Court of Appeals affirmed the dismissal of a suit against the court-appointed doctor and defense attorney. The court held that they were not subject to suit under 42 U.S.C. § 1983 because they did not act under color of state law.

While the recent case of Polk County v. Dodson, U.S. (50 U.S. Law Week 4077), Dec. 14, 1981, is not directly on point, it does support the conclusion of the Court of
Appeals in Hall. In Polk County, a suit was filed under 42 U.S.C. § 1983 against a defense attorney who had been appointed to represent the plaintiff in a prior criminal proceeding. The attorney worked in a public defender office. The Supreme Court acknowledged that the attorney was paid by public funds, but focused on the attorney's duty to his client and the necessity for the attorney to function independently of governmental control. Based on those factors, the court concluded that the attorney did not act under color of state law.

In State tort actions for malpractice, there is no immunity for court-appointed defense attorneys or physicians. They are therefore liable for legal and medical malpractice. See Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975).

With regard to your second inquiry, it is my opinion that special justices are State "officials" for the purpose of § 2.1-121. By virtue of § 37.1-88, they have all the powers and jurisdiction conferred upon judges, and would therefore be represented by the Attorney General. Physicians and attorneys appointed under § 37.1-67.3 are not in my opinion "officials" under § 2.1-121, and would therefore not be entitled to representation by the Attorney General. Such attorneys and physicians are independent contractors, and as indicated in Polk County, supra, they do not act under color of State law.

RETIREEMENT SYSTEM. VARIABLE INTEREST ON LOANS TO STATE.

August 28, 1981

Mr. Charles B. Walker, Chairman
Board of Trustees
Virginia Supplemental Retirement System

You ask whether the interest paid by the State to the Virginia Supplemental Retirement System ("VSRS") on facilities financed by the system are to be adjusted periodically with the market or are to be set at the rate prevailing at the time the loan is made. If adjusted periodically, you then inquire whether a biennial adjustment is proper. You also ask whether the present method of determining the prevailing rate is proper.

Your question involves construction of the enabling legislation, §§ 51-111.24:5, 51-111.24:6 and 51-111.24:7 of the Code of Virginia (1950), as amended. These statutes authorize investments of VSRS funds in various facilities, and each contains substantially identical language, providing for payment of VSRS of:

"[A]n annual rental in an amount to be determined by the Board, such rental to be fixed and adjusted in respect to the total investment of the retirement system in such
site or sites and improvements thereon so as to provide a rental income to the retirement system sufficient to restore to it the total investment in such property within a period not exceeding twenty years from the time such site or sites are first made available for occupancy by State agencies, and also to provide to the retirement system annual interest charges at the prevailing rate of interest on the unpaid balance of the total investment of the Board in such property as such unpaid balance shall appear from time to time."

Section 51-111.24:6.

The statutes in question were enacted in 1972 and 1973. Previously, such loans had been financed at a flat four percent annual rate set by Ch. 96 [1964] Acts of Assembly. Chapter 96 provided for "annual interest charges of not more than four per centum on the unpaid balance...." The four percent rate was below the usual rate of interest for similar projects at the time. On loans made since 1972, the prevailing rate at the time of financing has been ascertained and applied as simple interest over the life of the debt. Because the trend in interest rates has been upward since the enactment of the legislation, the effect of the use of the flat rate has been to diminish the return to VSRS. The General Assembly has appropriated funds to pay interest calculated at the fixed rate of the various loans.

Past Administrative Practice

There are compelling practical reasons to conclude that the administration of the law has been consistent with sound public policy. It is customary for mortgages to carry a fixed interest rate. No evidence has been found to indicate that there was any public discussion of a variable rate at the time of the enactment of the legislation. A fixed rate may be essential in ascertaining the feasibility of a large construction project. Appropriations are made on a biennial basis, so it would be unusual for the General Assembly to call for interest rate adjustments on an annual basis. On balance, it would seem that the statutory language would have required greater specificity if a variable rate was contemplated.

Accordingly, if the answer to your questions turns on the reasonableness of past administrative practice, it would be understandable to conclude that a fixed interest rate was contemplated. Indeed, past administrative practice is given weight in statutory construction. Southern Spring Bed Co. v. State Corporation Comm'n, 205 Va. 272, 136 S.E.2d 900 (1964).

However, statutory construction is not appropriate if it changes the plain meaning of the legislation. School Board of Chesterfield County v. School Board of the City of Richmond, 219 Va. 244, 247 S.E.2d 380 (1978). Only if following the literal reading of the statute would create a "manifest absurdity" would it be proper to apply the rules of

Periodic Adjustment

I am of the opinion that the reference to the prevailing rate of interest requires the interest payments to be adjusted periodically. I have not found another reference to setting interest at the "prevailing" rate, the most instances of indexing to a prevailing rate are usually specific in stating when the indexing is to occur. For instance, salaries at prevailing wage rates are determined at the time the governing board sets salaries. Alameda County Employees' Assn. v. County of Alameda, 106 Cal. Rptr. 441 (Cal. App. 1973). Or, a prevailing wage rate to be paid on a contract is determined with the signing of the contract. Commissioner of Labor & Industries v. Worcester Housing Authority, 393 N.E.2d 944 (Mass. App. 1978).

However, as a general matter, indexing to a prevailing rate contemplates automatic adjustments. It is clear that the word prevailing means "current," City of Cincinnati v. Thomas J. Emery Memorial, 25 O.L.A. 57 (Ohio), or "present," Alameda County Employees' Assn., supra, 106 Cal. Rptr. at 449. Those cases which involve indexing to a prevailing rate, without specifying a time for fixing the rate, generally are held to contemplate a rate that changes on a periodic basis during the life of the agreement. For instance, an agreement to sell goods at the prevailing market price during the life of the contract will result in price fluctuations with the changes in the market price. Beyer v. Saginow Creamery Co., Inc., 100 N.W.2d 441 (Mich. 1960). Or, where a contract provides for utility payments indexed to a prevailing rate, the rate fluctuates with changes in the prevailing rate, rather than setting an initial rate in accord with the index and having it remain fixed during the life of the contract. City of Cincinnati v. Thomas J. Emery Memorial, supra.

In the instant case, since the statute does not specify that the rate will be fixed at the prevailing rate, I conclude that the rate should be adjusted periodically to reflect the prevailing interest rate.

Time of Adjustment

You ask whether adjustments may be made biennially rather than annually. Theoretically, the prevailing interest rate in the market changes more frequently. The statutes do refer to annual interest charges at the prevailing rate. Since appropriations are made on a biennial basis State officials would have no authority to make payments in excess of the amount appropriated. However, since statute calls for annual adjustments there is no basis for the VSRS board to contract for financing at a prevailing rate adjusted
biennially. If appropriations are insufficient to satisfy the interest obligation, it would be discretionary with the General Assembly to appropriate additional revenues.

Method of Indexing

You further ask whether it is proper to determine the prevailing interest rate by comparison with treasury bills of similar maturity, which has been the practice in the past. I am advised that an extra one-half percent is added to the rate of 20-year treasury bills to compensate VSRS for the extra risk in that the debt instrument in this case cannot be marketed.

Courts traditionally have recognized that determination of the prevailing rate is within the discretion of the administrative officials. See Alameda County Employees' Assn. v. County of Alameda, supra, 106 Cal. Rptr. at 448-449. In this case, the legislation provides no criteria to be applied. There is no measurable number of mortgage loans to state governments, so the idea of a prevailing rate of interest is a fiction. Accordingly, the board would have considerable discretion in determining the "prevailing" interest rate. Indexing to treasury bills would be one acceptable way.

Indexing to treasury bills provides a greater return to VSRS, and a greater expense to the State, than would be the case if tax-free bonds were issued. So there are probably other prevailing rates of interest which also would be within the discretion of the parties.

Legislation

The ultimate response to the situation presented will have to come from the General Assembly, either in the form of an increased appropriation to pay the extra costs resulting from upward changes in the prevailing rate, or in the form of clarifying language indicating that the prevailing rate at the time of financing is to be fixed over the life of the transaction. Legislation would be appropriate to resolve any questions as to the time intervals for changes in the rates and the manner of fixing the rates.

The pertinent language formerly appeared in §§ 51-111.52:2, 51-111.52:4 and 51-111.52:5, respectively.

RIGHT TO COUNSEL. CRIMINAL PROCEDURE. CRIMINAL DEFENDANT WHO WAIVES RIGHT TO COUNSEL IN DISTRICT COURT NOT PRECLUDED FROM ASSERTING RIGHT TO COUNSEL ON APPEAL SOLELY BECAUSE OF WAIVER IN DISTRICT COURT.
June 21, 1982

The Honorable Leonard B. Sachs, Judge
Norfolk General District Court

In your letter you asked whether a defendant who wishes to waive his right to counsel in a general district court proceeding may be required to waive, anticipatorily, his right to counsel in circuit court proceedings which might follow as a result of an appeal. The waiver of counsel form for district courts, as prescribed by § 19.2-160 of the Code of Virginia (1950), as amended, provides in part: "I hereby waive my right to have counsel appointed for me in this court or to any other court to which this case might be appealed...."

The Sixth and Fourteenth Amendments to the United States Constitution require that defendants be afforded the opportunity of representation by counsel—even for petty offenses which may lead to imprisonment for only brief periods of time. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972); In Re Gault, 387 U.S. 1, 37 (1967). The right to counsel may be voluntarily and intelligently waived, however, and defendants may exercise their "correlative" constitutional right to represent themselves. Faretta v. California, 422 U.S. 806, 814 (1975). Indeed, there appears to be no reason why a defendant cannot waive counsel for some future proceeding.

Waiver of counsel is not always binding, however, although the United States Supreme Court has never held that one has a constitutional right to withdraw his waiver of counsel, lower courts appear to treat withdrawal of counsel questions as right to counsel issues. For example, the United States Court of Appeals for the Fourth Circuit has held in United States v. Holmen, 586 F.2d 322 (4th Cir. 1978), that it was error not to allow a defendant who proceeded pro se at his trial to withdraw his waiver of counsel and have an attorney appointed to represent him at the sentencing hearing. Nevertheless, courts do have some discretion to refuse to accept a request to withdraw a waiver of counsel, if that request is untimely made or is made for the purpose of disrupting proceedings. See, e.g., People v. Cruz, 147 Cal. Rptr. 740 (1978). As was suggested in Holmen, however, courts do not appear to treat waivers at one stage of the proceedings as binding on separate and distinct proceedings which follow. See People v. Morgan, 48 Ill. Dec. 467, 416 N.E.2d 740 (1981).

In Virginia, an appeal to the circuit court is heard in the form of a trial de novo and such is a separate and distinct proceeding from the hearing in the general district court. The statutory grant of a new trial in the circuit court, in effect "annuls the judgment of the inferior court as completely as if there had been no previous trial." Harbaugh v. Commonwealth, 209 Va. 695, 698-699, 167 S.E.2d 329, 332 (1969). Accordingly, based upon the rationale
discussed in the foregoing cases, I am of the opinion that defendants should be permitted to exercise in a timely fashion their right to have counsel representation at the circuit court level even if they have waived counsel in the district court.2

Where the right to counsel is constitutionally guaranteed in the general district court, it is similarly guaranteed on appeal to the circuit court in a trial de novo. Therefore, I recommend that the phrase "or to any other court to which this case might be appealed" be stricken from the form in the event a defendant is unsure of whether he desires to waive counsel in that eventuality. I further recommend that, should the defendant appeal and timely indicate a desire to withdraw his prior waiver, that he be permitted to do so.

1See, e.g., Ross v. State, 623 P.2d 980 (Nev. 1981), where the court relied on the leading right-to-counsel case of Gideon v. Wainwright, 372 U.S. 335 (1963), to hold that the district court had no discretion to refuse defendant's request to withdraw his waiver of counsel, one month before the trial date.

2Cf., Lemke v. Commonwealth, 218 Va. 870, 241 S.E.2d 789 (1978), in which the Supreme Court of Virginia concluded that a defendant who had appeared at trial de novo on appeal in the circuit court and who requested a continuance because of lack of counsel had been denied the right to counsel even though the defendant, after conviction in the general district court, had signed a form stating "'failure to employ an attorney until just before the trial date is not grounds for a continuance....'

SALARIES. ABSENT WRITTEN, SIGNED AUTHORIZATION FROM EMPLOYEE ALLOWING SUCH DEDUCTION, EMPLOYER MAY NOT WITHHOLD ALL OR PART OF WAGES OR OTHER EARNINGS AS SET-OFF AGAINST MONEY OWED TO EMPLOYER BY EMPLOYEE.

March 15, 1982

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

This is in reply to your letter of March 3, 1982, in which you ask if either § 40.1-29 or 34-29 of the Code of Virginia (1950), as amended, prohibits an employer from withholding all or part of an employee's wages or other earnings as a set-off against a debt incurred by the employee because of a loan advanced to him by the employer or because of the employee's theft from the employer. You have also asked whether a signed agreement by which the employee consents to such withholding would violate § 40.1-29(cl).1
In answer to your first question, I am of the opinion that your inquiries are governed, in part, by an Opinion to the Honorable Ralph L. (Bill) Axselle, Jr., Member, House of Delegates, dated September 8, 1975, and found in Report of the Attorney General (1975-1976) at 293. The question there was:

"if it would be proper under § 40.1-29 for an employer to deduct from an employee's payroll check any cost for overload fines, damage to cargo, wrecker bills, or other expenses incurred by the employee in the course of his employment and billed to the employer without the written permission of the employee in the absence of a collective bargaining agreement specifically allowing such payroll deductions."

This Office opined that:

"absent a written and signed authorization from the employee in question, such deductions...would be in violation of § 40.1-29."

I concur in that conclusion. Accordingly, in the situation which you pose, it is my opinion that a withholding of wages or other earnings by an employer, without a written and signed authorization from the employee, would violate § 40.1-29.2

In answer to your second question, I am of the opinion that a signed authorization relative to the withholding of wages as outlined in your letter would not violate § 40.1-29(cl), provided the agreement is voluntary and is not made a condition of continuing employment.

1Section 40.1-29(cl) states: "No employer shall require any employee, except executive personnel, to sign any contract or agreement which provides for the forfeiture of the employee's wages for time worked as a condition of employment or the continuance therein, except as otherwise provided by law."

2Section 34-29 is solely applicable to garnishment proceedings instituted in accordance with § 8.01-511 and does not affect any common law rights which the employer may have had prior to adoption of § 40.1-29.

SALES. OFFER OF PAYMENT IN RETURN FOR REFERRALS TO PROSPECTIVE PURCHASERS. SUCH OFFER EXTENDED FOLLOWING COMPLETION OF SALE MAY BE INDUCEMENT TO SALE CAUSING SALE TO BE REFERRAL SALE IN VIOLATION OF § 18.2-242.1.

May 4, 1982

The Honorable Owen B. Pickett
Member, House of Delegates
You have asked whether the following hypothetical transaction constitutes a violation of § 18.2-242.1 of the Code of Virginia (1950), as amended:

"Consumer A enters Seller's retail store and selects and purchases a television. Seller makes no offer of any kind to induce this purchase. Subsequent to the purchase, but before Consumer A has departed the retail store, the Seller offers to pay Consumer A $5.00 if Consumer A will refer a Consumer B to the store, provided Consumer B purchases a television or some other specified consumer item."

Section 18.2-242.1 prohibits a selling practice, commonly called a referral sale, in which the seller offers a rebate, discount or other payment of value to the buyer as an inducement for the sale in return for which the buyer gives to the seller the names of prospective purchasers, provided that the earning of such rebate or discount is contingent upon the occurrence of a subsequent event, such as a purchase by the prospective buyer.

The issue presented in your hypothetical transaction is whether a seller who makes its offer of payment for successful referrals after, rather than before, the completion of the sale has thereby induced the buyer to make a purchase. If such offer of payment in return for successful referrals serves as an inducement to the sale, it would cause such sale to be a prohibited referral sale under § 18.2-242.1.

In your hypothetical transaction, the "seller makes no offer of any kind" to induce the consumer to make a purchase. Black's Law Dictionary 697 (5th ed. 1979) defines "induce" as "[t]o bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on." Although the seller makes no offer to induce the consumer to make a purchase, a seller can use a referral sales program as an inducement or to bring about a consumer's purchase, other than through an explicit offer to the consumer. If the seller makes it known to the consumer or the community in general that an offer of payment in return for successful referrals will be made upon the completion of the sale, the seller can reasonably expect that such offer will serve as an inducement, that is, will bring about or affect the consumer's purchasing decision.

For example, if it can be established that the seller in your hypothetical transaction always offers payment in return for referrals after the completion of a sale, the prospective buyer will likely be induced to purchase because he expects such an offer to be made to him.

Because § 18.2-246 is a criminal statute, it must be strictly construed against the Commonwealth. Accordingly, I am of the opinion that an offer of payment in return for successful referrals where such offer is made after the
completion of a sale would be an inducement to a sale only if the pattern is clearly established that the consumer could have expected such an offer to be made.

SANITARY DISTRICTS. MAY CHARGE FEE TO FINANCE AND MAINTAIN STORM WATER AND SURFACE DRAINAGE FACILITIES.

February 10, 1982

The Honorable Madison E. Marye
Member, Senate of Virginia

You have asked for my opinion as to (1) whether a unit of local government under current law could charge a separate fee to (a) finance and (b) maintain storm water and surface drainage facilities; and (2) whether this fee could be based on the number of square feet of impervious surface (parking lots, roofs, etc.) a property owner holds.

Section 15.1-239 of the Code of Virginia (1950), as amended, authorizes localities to impose an assessment on abutting property owners to pay, within certain limits, the cost of constructing sanitary and storm water sewer facilities. There is no express statutory authority for compelling abutting owners to pay the cost of maintaining such facilities.

By adoption of a subdivision ordinance, a locality may require developers of land to finance the construction of drainage and sewerage systems. See §§ 15.1-466(e) and 15.1-466(f).

By virtue of § 15.1-466(j), a locality may include in the ordinance a provision:

"[f]or payment by a subdivider or developer of land of his pro rata share of the cost of providing reasonable and necessary sewerage and drainage facilities, located outside the property limits of the land owned or controlled by him but necessitated or required, at least in part, by the construction or improvement of his subdivision or development...."

I am, therefore, of the opinion that a local government, by means of its subdivision ordinance, may require a developer of land under that ordinance to finance the pro rata share of construction costs of storm water and surface drainage facilities, provided the other requirements of that section are met. In general terms, that section limits the amount of contribution in relation to the total cost to the amount of run off from the property in relation to the total run off utilizing the storm water facility. The amount of impervious surface, as defined above, obviously bears on this calculation but there are also other factors which must be considered such as the permeability of the soil. Thus, the
fee calculated under this section must be based on the amount of run-off rather than any single factor which contributes to it.

If a sanitary district has been created in the locality as provided in Ch. 2, Title 21 (§§ 21-112.22 through 21-140.3), the governing body may exercise those powers therein authorized. Section 21-118(6) authorizes the governing body to levy and collect an annual tax upon all the property in the sanitary district subject to local taxation to pay, either in whole or in part, the expenses and charges incident to constructing, maintaining and operating water supply and sewerage systems.

Section 21-118.4 provides in part:

"Notwithstanding any other provisions of law, when an order has been entered creating a sanitary district in such county, the board of supervisors or other governing body hereinafter referred to as 'board of supervisors,' shall have the following powers and duties, in addition to such powers and duties created by any law, subject to the conditions and limitations hereinafter prescribed.

(a) To construct, reconstruct, maintain, alter, improve, add to and operate...drainage...systems, for the use and benefit of the public in such sanitary district....

(d) To require owners or tenants of any property in the district to connect with any such system or systems, and to contract with the owners or tenants for such connections....

(e) To fix and prescribe or change the rates of charge for the use of any such system or systems...."

As indicated above, I do not believe the number of square feet of impervious surface owned by a property owner is the only factor which must be considered in calculating the cost of providing the storm water facility.

To summarize, there is no dispositive answer to your first inquiry. The authority of the local governing body to impose a separate fee to finance the cost of construction and maintenance of storm water and surface drainage facilities depends in large measure upon the locality's having adopted a subdivision ordinance, or creating a sanitary district. The answer to your second inquiry is in the negative, inasmuch as the participation cost in surface drainage facilities must have some relationship to the benefits to be derived from the facility, and not be based upon the single factor of the amount of impervious surface owned by an individual within the area served.
The Honorable Thomas M. Moncure, Jr.
Member, House of Delegates

This is in reply to your letter dated April 24, 1982, in which you made the following inquiry:

"Whether or not the County of Stafford, by and through its Sanitary Districts, can hold a Landlord liable for the non-payment of water and sewer bills by a Tenant, after the County has entered into a contractual relation with the Tenant for the payment of those bills?"

Section 21-118.4(e) of the Code of Virginia (1950), as amended, authorizes sanitary districts to collect and charge for the use of water and sewer services. The statute also provides that any uncollected charges shall be a lien superior to the interest of any owner, lessee, or tenant of the property that uses the services.1 In view of the language of the statute, I am of the opinion that the sanitary district of Stafford County may collect charges for the use of water and sewer services from the landlords in question in accordance with the provisions of § 21-118.4(e).

1Section 21-118.4(e) reads in pertinent part as follows: "To fix and prescribe or change the rates of charge for the use of any such system or systems after a public hearing upon notice as provided in § 21-118.4(d) and to provide for the collection of such charges...Any unpaid charge shall become a lien superior to the interest of any owner, lessee or tenant, and next in succession to county taxes, on the real property on which the use of any such system was made and for which the charge was imposed...." See Report of the Attorney General (1976-1977) at 145.

SCHOOLS. DEAF AND BLIND. POWER TO ESTABLISH ADDITIONAL PROGRAMS VESTED IN BOARD OF VISITORS OF VIRGINIA SCHOOLS FOR DEAF AND BLIND.

July 27, 1981

Curtis W. Fitzgerald, President
Board of Visitors
The Virginia Schools for the Deaf and the Blind

You have asked whether it is permissible under § 23-259 of the Code of Virginia (1950), as amended, for the Board of Visitors of the Schools for the Deaf and the Blind at
Staunton and Hampton to begin programs for the deaf and blind students at the high school level in addition to those required by that statutory section.

Section 23-259(A) provides in part:

"The Virginia School for the Deaf and the Blind at Staunton shall provide an educational program for deaf children from preschool through grade twelve and an educational program for blind children from preschool through grade eight. The Virginia School at Hampton shall provide an educational program for deaf children from preschool through grade eight, an educational program for blind children from preschool through grade twelve, and an educational program for multi-handicapped children whose primary disability is either blindness or deafness from preschool through grade twelve...."

Your question requires a determination of whether this section is exclusive in character, thereby precluding the establishment of programs in addition to those enumerated within it, or non-exclusive in character, thereby permitting the supplementation of the required programs.

The provisions now contained in § 23-259(A) were enacted by the General Assembly in 1977. See Ch. 668 [1977] Acts of Assembly. They were part of comprehensive amendments intended to consolidate the governing boards for the two schools into a single Board of Visitors and to eliminate distinctions which historically differentiated the two schools. See Report of the Subcommittee on the Education of the Deaf and the Blind, December 23, 1975, Submitted Pursuant to H.R. 31 [1975] Acts of Assembly 1516; H.B. 977 of the 1977 General Assembly.

Additionally, the provisions of current § 23-259 were enacted to express by statute the administrative assignment of the then existing student population which had been made effective in September 1974. The Commonwealth developed a student assignment plan which established attendance zones using Interstate Route 95 as a boundary line. All deaf and blind students from kindergarten through the seventh grade were assigned to the Hampton or the Staunton school depending on the zone of their residence. All rising eleventh grade deaf students from Hampton were transferred to Staunton, because Hampton's program for the deaf terminated at grade ten and Staunton's continued through grade twelve.

After further study, in September 1974, the high school division for the blind at Staunton was administratively transferred to the Virginia School for the Deaf and Blind at Hampton, and students enrolled in the high school division for the deaf at Hampton were transferred to the school at Staunton. See Report to the Governor by the Office of Human Affairs and the Task Force on the Utilization of the Virginia Schools for the Deaf and the Blind, October 1973. This scheme was expressed in H.B. 977 of the 1977 General Assembly.
which provided the basis for the provisions of current § 23-259. These events preceding the enactment of § 23-259 indicate the legislative intent to continue the then current programs at the schools.

The language of § 23-259(A), on its face, does not indicate any clear intention by the General Assembly to limit the programs or curricula at the schools to those outlined in that section. Terms of limitation, such as "only," "solely," "exclusively," or "primarily" are absent from § 23-259(A). Likewise, negative, prohibitory, or conditional terms are lacking. Rather, the statutory provisions relating to the management and instruction offered at the schools give the Board of Visitors broad latitude. See §§ 23-255 and 23-256.

Further, the Board of Visitors is empowered to conduct in-depth studies, to adopt a student transportation policy, to institute student activity fees, and to prescribe student admission and placement review procedures. See §§ 23-256, 23-258 through 23-259(C), and 23-260. The Board of Visitors also has the discretion to establish the geographic attendance zones for students through grade eight and to determine the extent to which the preschool programs at the schools will be residential in character. See §§ 23-259(A) and 23-259(D). This Office previously has noted that the Board of Visitors may designate the schools to be regional centers for the multi-handicapped. See Report of the Attorney General (1978-1979) at 236.

The obvious purpose of providing schools for the deaf and blind is to extend educational programs to those handicapped groups. The General Assembly itself has sought to fulfill this purpose through various provisions. See §§ 22.1-217, 63.1-68 through 63.1-85; 63.1-85.1 through 63.1-85.7. It is legitimate to assume that had the General Assembly intended to limit the programs which legally could be provided at the schools for the deaf and blind to those expressed in § 23-259, it would have expressly done so and would have placed concomitant restrictions upon the broad powers of the Board of Visitors over the governance of the schools. Without such statutory limitations, the Board of Visitors possesses broad flexibility, within available appropriations, to improve and expand the programs offered at the schools, maximize available facilities and carry out the mission of education. See Troy v. Walker, 218 Va. 739, 751, 241 S.E.2d 420 (1978). Accordingly, it is my opinion that § 23-259 is nonexclusive in character and permits the Board of Visitors to supplement those programs required by that section.

This determination, however, relates only to the permissibility, under the current statutory provisions, of establishing such supplementary programs. It does not, and cannot, decide whether supplemental or "parallel" programs are appropriate and feasible in view of current costs, alternative systems of education, student enrollments or available and expected appropriations. The Board of Visitors
itself must determine these factors in making an ultimate
decision on the question of whether the additional programs
should be offered.

1The current section was originally designated § 23-237 and
later changed to its present designation.
2In 1972 the federal Department of Health, Education and
Welfare (HEW) cited the Commonwealth of Virginia for
noncompliance with Title VI of the Civil Rights Act of 1964.

SCHOOLS. SCHOOL BOARDS. AUTHORITY TO SELL COPYRIGHTS ON
COMPUTER PROGRAMS.

May 19, 1982

The Honorable J. Richmond Low, Jr.,
Commonwealth's Attorney for King George County

You ask whether the King George County School Board (the
"Board") has the legal authority to contract with a private
commercial firm to sell computer software programs developed
by school employees for the Board.

You indicate that the Board employed certain employees
for a special project to develop computer software programs
for educational use. You further indicate that the
copyrights to these programs are vested in the Board. A
policy adopted by the board, presumably prior to the
employment of these persons for the project, provides that
such computer software programs, which are designed or
developed by the staff of the county school system, are the
sole property of the county public schools and that the Board
has the right to copyright such material in its name.

County school boards are corporate bodies having the
general statutory authority to contract for school purposes.
They are vested with broad discretion in managing and
supervising their school affairs and school property. See
§§ 22.1-125, 22.1-129. Section 22.1-129 gives the school
board the power to sell personal property in such manner and
upon such terms as it deems proper.1 Section 22.1-131
further authorizes school boards to determine who will use
their property and in what manner.

Computer services, information, and programs are
recognized as property. See § 18.2-98.1. A copyright to a
computer program is, likewise, personal property; it is both
incorporeal and heritable. See American Tobacco Co. v.
Werckmeister, 207 U.S. 284, 52 L.Ed. 208, 28 S.Ct. 72 (1907);
§ 55-262. Accordingly, it is my view that the Board has the
authority to sell its copyrights in the computer software
programs as any other personal property.
For purposes of this Opinion I assume that the development of the computer program was part of a reasonable need of the Board and not an effort to compete with private industry in development and sale of such programs.

SCHOOLS. SCHOOL BOARDS. DUAL SERVICE ON LOCAL WELFARE BOARD PROHIBITED.

October 12, 1981

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

You ask several questions about dual officeholding, the first being whether a member of the county school board may also serve on the local board of public welfare for the same county.

The Virginia General Assembly has provided that each county and city of the Commonwealth shall be represented by a local board of public welfare. See § 63.1-38 of the Code of Virginia (1950), as amended. The local governing body is empowered to make appointments thereto for specific terms established by statute. The duties of the local board are also set forth by statute, and the individual appointees must give the usual oath of office. Section 63.1-40, et seq. Accordingly, the appointees hold positions as officers of the county. See, e.g., Report of the Attorney General (1975-1976) at 287.

With certain exceptions inapplicable to your inquiry, the General Assembly has provided that county officers may not also serve on the school board for their county. Section 22.1-30. A member of the county school board may not, therefore, also serve on the board of public welfare for the same county.

You also ask whether a member of the county planning commission may also serve as a member of the county school board or the county board of public welfare. A planning commission member is an officer of the county. See Report of the Attorney General (1973-1974) at 295. As a result, § 22.1-30 also prevents such a member of the county planning commission from serving on the county school board. I know of no prohibition, however, to an individual serving simultaneously on the county planning commission and the local board of public welfare for the same county. The foregoing assumes that such dual membership is not restricted by an applicable charter provision or ordinance.

1Section 63.1-40 provides that only members of a local board of public welfare be residents of the county; and are
appointed by the local governing body. Similarly, the local planning commission members are required to be residents of their county, "qualified by knowledge and experience to make decisions on questions of growth and development," appointed by the local governing body. One member may be a member of the governing body, and one member may also be a member of the county administration. Section 15.1-437, et seq.

SCHOOLS. SCHOOL BOARDS. HAS POWER TO DETERMINE EXPENDITURE OF SCHOOL FUNDS. MAY SHIFT APPROPRIATIONS WITHIN MAJOR BUDGETARY CLASSIFICATIONS.

May 18, 1982

The Honorable Bernard J. Natkin
County Attorney for Rockbridge County

This is in reply to your recent letter in which you ask the following questions:

1. May a school board, after approval of the budget, switch funds from one line item to another within a major classification over the objection of the board of supervisors?

2. May the board of supervisors prohibit the school board from changing a specific line item without its consent?

The local supervision of the public schools in each school division is the responsibility of the school board rather than the local governing body. See Art. VIII, § 7 of the Constitution of Virginia (1971); § 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 local governing body, however, does have certain power and duty to supervise 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).

When appropriating funds to the school board, the local governing body may not increase, decrease or delete individual line items from the budget. It may only fund by total or by major classification and it may only increase or decrease the appropriations by the total or by major classifications, thereby affecting expenditures. See § 22.1-94; Reports of the Attorney General (1980-1981) at 9, 33; (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. Once the board of supervisors has appropriated funds for educational purposes to the school board, the school board has the right to determine how such funds will be spent, provided the expenditure is consistent with law and the local appropriation. See Report of the Attorney General.
Your first question is answered, therefore, in the affirmative; your second question is answered in the negative.

SCHOOLS. SCHOOL BOARDS. INCUMBENT MEMBERS OF SCHOOL BOARD AND SCHOOL BOARD SELECTION COMMISSION HOLD OVER UNTIL SUCCESSIVE REDISTRICTINGS CAUSED BY DECENTENNIAL REAPPORPTIONMENT AND ANNEXATION ARE COMPLETED.

May 4, 1982

The Honorable Robert W. Ackerman
Member, House of Delegates

You ask two questions concerning the effect of successive redistrictings due to decennial reapportionment and annexation by the City of Fredericksburg of part of Spotsylvania County upon the membership of the Spotsylvania County School Board and the Spotsylvania County School Board Selection Commission. Specifically, you inquire as to the proper composition of the board and the commission after decennial reapportionment and after the redistricting required as a result of annexation. Based upon the facts contained in your letter and subsequent conversations with Steven Foster, County Administrator for Spotsylvania County, the factual setting in which these questions arise is set forth below.

Prior to midnight on December 31, 1981, Spotsylvania County was divided into five election districts. Pursuant to § 22.1-35 of the Code of Virginia (1950), as amended, the board of supervisors had requested, and the circuit court had appointed, one person from each election district to serve on the school board selection commission. The board of supervisors also consisted of five members, one from each district; thus, pursuant to § 22.1-36, the school board was similarly constituted.

At midnight on December 31, 1981, however, the decennial reapportionment mandated by Art. VII, § 5 of the Constitution of Virginia (1971), became effective. See §§ 15.1-37.5:1 and 24.1-17.1. This reapportionment plan was approved by the United States Department of Justice in a letter dated March 5, 1982, to the County Attorney for Spotsylvania County. The approved plan increases the number of election districts from five to seven.

The situation is complicated further by the fact that under the terms of a negotiated agreement, the City of
Fredericksburg is annexing a 4.63 square mile portion of Spotsylvania County in exchange for a thirty year moratorium from further annexation. This annexation by the city is intended to become effective on January 1, 1983. Under § 15.1-571.1B, the county must begin redistricting within 90 days of the effective date of annexation, and complete the process within twelve months thereafter. It is anticipated by the county that this process will be complete by October 1983, in order that the November 1983, general election may be held on schedule.

Your inquiry is whether the current members of the county school board and the county school board selection commission may retain their seats until after all of the redistrictings are complete, or whether new members must be appointed after the redistricting required by reapportionment and then again after that required following annexation. For the reasons hereinafter stated, I am of the opinion that the current membership of both boards holds over until both redistrictings have been completed.

Section 15.1-37.9 explicitly provides that a school board member who was appointed and qualified prior to the effective date of reapportionment may finish his term of office even though he has lost his residence in the district because of that reapportionment. This curative statute, enacted in 1976, was manifestly passed to deal with redistricting required by reapportionment.

Previous to the enactment of § 15.1-37.9 in 1976, this Office had ruled on numerous occasions that redistricting caused by reapportionment resulted in the vacating of positions on the school board. See Reports of the Attorney General (1975-1976) at 286-287; (1971-1972) at 338-340; and (1970-1971) at 87-88, 323, 326. The enactment of § 15.1-37.9 in 1976 was obviously intended to override this conclusion.

Because § 15.1-37.9 is a specific legislative solution to a special problem, it thus takes precedence over the more general provisions of § 22.1-29, which provides generally that a school board member must relinquish his seat if he ceases being a resident of the district from which he was appointed. Section 22.1-29 results from the 1980 recodification of §§ 22-68 and 22-90. Although a later enacted statute normally controls an earlier enactment, this rule of statutory construction does not apply here. The recodification of a general statute does not supersede the specific legislative direction set forth in § 15.1-37.9.

An earlier Opinion of this Office concluding that § 15.1-37.9 is not controlling in such a situation, is hereby expressly overruled.

In addition to the holdover provisions of § 15.1-37.9, § 15.1-1053 provides that a county officer may finish his term of office, even though annexation has removed him as a resident of the county. A school board member is a county
The conclusion above expressed is also applicable to the school board selection commission. Although the school board selection commission is not included by name in § 15.1-37.9, the continuation and maintenance of the orderly processes of government mandate that the school board selection commission also be controlled by § 15.1-37.9. In addition, it is interesting to note that although one member has been appointed from each election district, § 22.1-35 requires only that the commission members be voters and residents of the county; it does not require that each member reside in the election district from which he is appointed. Absent any clear legislative direction to the contrary, there is no legal preclusion to the membership of the commission holding over in the same fashion as the school board.

By permitting the current incumbents of the school board and the school board selection commission to retain their seats, a compelling State interest--the continuation and maintenance of the orderly process of local government--can best be achieved. This justifies the interval of time during the various redistrictings, and comports both with due process and equal protection. See Duncan v. Blacksburg, 364 F.Supp. 643 (W.D. Va. 1973); Avens v. Wright, 320 F.Supp. 677 (E.D. Va. 1970); Report of the Attorney General (1976-1977) at 70.

1Section 15.1-37.9 provides in pertinent part: "Upon reapportionment of the representation of any county, city or town with or without a change in the boundaries of the district from which a member of the school board or planning commission may have been appointed, any member of a school board or planning commission duly qualified and appointed in accordance with the laws of the Commonwealth of Virginia prior to the date the reapportionment is effective may upon and after said date continue to serve as appointed for the remainder of the then unexpired term, regardless of loss of residency within a particular district due to reapportionment."

counsel to advise it on legal matters on a continuing basis regardless of whether litigation is pending.

Section 22.1-82A provides:

"Notwithstanding any other provision of law, the attorney for the Commonwealth or other counsel may be employed by a school board to advise it concerning any legal matter or to represent it, any member thereof or any school official in any legal proceeding to which the school board, member or official may be a party, when such proceeding is instituted by or against it or against the member or official by virtue of his actions in connection with his duties as such member or official."

An analysis of the legislative history of § 22.1-82 leads to the inescapable conclusion that a local school board now has the power to retain private counsel on a permanent basis to advise it on legal matters and to act as a full time legal advisor to the board.

In 1972 this Office rendered an Opinion on the question which you ask. In that Opinion, this Office interpreted § 22-56.1, the predecessor to § 22.1-82, and concluded that school boards did not have the authority to retain counsel to act as a full time legal advisor. This Office concluded that it was the duty of the Commonwealth's attorney to render such advice.1 Report of the Attorney General (1971-1972) at 340. The following year, the 1973 session of the General Assembly, amended § 22-56.1 to permit a school board to employ counsel "to advise" it "concerning any legal matter."2 Chapter 299 [1973] Acts of Assembly. The apparent purpose of the 1973 amendment was to overturn this Office's 1972 Opinion.3 In the 1980 recodification of Title 22, § 22.1-82 was retained in substantially the same form as § 22-56.1.

Accordingly, because § 22.1-82 authorizes a school board to retain private counsel "to advise it concerning any legal matter," I am of the opinion that a school board may employ such counsel to advise it on a continuing basis and that the institution of a law suit is not a prerequisite to the existence of such authority.

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1In pertinent part § 22-56.1 then provided: "Notwithstanding any other provision of law, the attorney for the Commonwealth or other counsel approved by the school board may be employed by the school board of any county, city or town to defend it...in any legal proceeding, to which the school board...may be a defendant...."

2As amended in 1973, § 22-56.1 provided in pertinent part: "Notwithstanding any other provision of law, the attorney for the Commonwealth or other counsel approved by the school board may be employed by the school board of any county, city or town, to advise or to defend it...concerning any legal
matter, or in any legal proceeding, to which the school board...may be a defendant...." (Emphasis added.)

In 1980, this Office rendered an Opinion interpreting the 1973 amendment as authorizing the school board to hire and pay supplemental compensation to the Commonwealth's attorney "for advice concerning any legal matter, including day-to-day counsel." Report of the Attorney General (1979-1980) at 89. Of course, as § 22.1-82 makes clear, the school board is not limited to hiring the Commonwealth's attorney but may retain "other counsel."

SCHOOLS. SCHOOL BOARDS. MAY DEMOLISH SCHOOL BUILDING.

July 14, 1981

The Honorable Thomas Stark, III
Commonwealth's Attorney for Amelia County

You indicate that the Amelia County School Board wishes to demolish a surplus school building in order to utilize the underlying and contiguous land for other school purposes. You ask if the school board must, however, convey the surplus building to the county by virtue of § 22.1-129 of the Code of Virginia (1950), as amended; which provides in pertinent part:

"Whenever a school board determines that it has no use for some of its real property, the title to such real property shall be conveyed to the county...comprising the school division or, if the school division is composed of more than one county or city, to the county or city in which the property is located...."

Title to all school property vests in the respective school boards. See § 22.1-125. And, the school boards possess broad discretionary powers with respect to the management and control of their school property. See Reports of the Attorney General (1967-1968) at 236; (1978-1979) at 224. Indeed, under our Virginia Constitution, school boards have the exclusive authority to supervise the daily operations of the schools. Article VIII, § 7 of the Constitution of Virginia (1971); Bradley v. School Board, 462 F.2d 1058 (4th Cir. 1972); aff'd, 412 U.S. 92 (1973). As a result, the Virginia General Assembly may not divest the school boards of their constitutionally vested power to determine whether a particular property is needed for school purposes and the manner in which it is used. Howard v. Alleghany School Board, 203 Va. 55, 122 S.E.2d 891 (1961); see, also, Richmond School Board v. Parham, 218 Va. 950, 243 S.E.2d 468 (1978). Furthermore, this Office has previously recognized that a school board has the power to demolish surplus improvements in order to devote the underlying land to more useful school purposes. See Report of the Attorney General (1970-1971) at 335.
Accordingly, it is my opinion that § 22.1-129 has no application to the present circumstances. Any other view would interfere with the constitutional autonomy of the school boards to direct the use of their property and result in one public body holding title to the "surplus" building, and another public body holding title to the "non-surplus" land.\(^1\) Any expenditure of funds for the demolition expenses must, however, be authorized by law. See §§ 22.1-89 and 22.1-91.

\(^1\)It appears that the statutory language relating to surplus property was intended only to apply to a sale of surplus real property. Since funds received from the sale of real property are subject to appropriation by the governing body, the statute sets up a procedure for the transfer of title to the locality. See Report of the Virginia Code Commission on Revision of Title 22 of the Code of Virginia to the Governor and the General Assembly of Virginia (1980) at 149; Report of the Attorney General (1960-1961) at 269.

SCHOOLS. SCHOOL BOARDS. MAY HAVE INTEREST IN COMPUTER PROGRAM DEVELOPED BY EMPLOYEE.

April 22, 1982

The Honorable Charles R. Hawkins
Member, House of Delegates

This is in reply to your recent letter requesting an opinion regarding what rights, if any, accrue to a county school board in a computer program that its employee developed on county property during normal working hours as part of his employment. You indicated that the program is currently being used by the school system.

As a general rule, even though an employee develops an invention on his employer's time using materials of the employer, the ownership of the invention and any patent therefor remains with the employee unless there is an agreement to the contrary. United States v. Dubilier Condenser Corp., 289 U.S. 178, 53 S.Ct. 554, 77 L.Ed. 1114 (1933). Under certain situations, however, the employer may have a "shop right" or license in the invention. A shop right is an employer's right to use the invention and to duplicate it as often as he may find occasion to employ similar appliances in his business. United States v. Dubilier Condenser Corp., supra.

It is generally held that the mere relationship of employer and employee does not give to an employer a license or shop right to use an invention or discovery developed by the employee. There are, however, certain circumstances that may arise which will allow the implication of a shop right in
the absence of an express agreement to that effect. Cases in which the circumstances gave rise to implication include:

1) a special trust relationship,

2) acquiescence of employee to employer's use of the invention,

3) a contract of employment for the special purpose of making an invention or inventions,

4) the perfecting of an idea which was originally conceived by the employer, or

5) developing the invention on the employer's time and using his materials.

The contract of employment in the instant case is silent regarding the rights to any invention made by the employee. Therefore, any shop right would have to be implied, using the criteria set forth above and a determination made on a case by case basis. The United States District Court for the Eastern District of Virginia has held that a corporation had the right to free and unlimited use of inventions made by its chief engineer in the course of his employment and patented in his name, but at the expense of the corporation. Wilson v. J. G. Wilson Corp., 241 F.494 (E.D. Va. 1917). The United States Supreme Court has held that when an employee uses his employer's time, facilities, and materials to attain a concrete result of an employee's idea, the employer is, in equity, entitled to use the invention in his business, but has no equity to demand a conveyance which was the original conception of the employee alone in which the employer had no part. United States v. Dubilier Condenser Corp., supra.

In the case before us, because the employee developed the program on county property, during his normal working hours, as part of his employment and because the school system is now using the program, I conclude that a shop right may properly be implied in this situation.

You also inquired as to the existence of any potential liability on the part of the county school board if it allows the employee to sell the information or know-how needed to recreate this program. At common law, a master (i.e., employer) is liable for all tortious acts of the servant (i.e., employee) while acting within the scope of his employment. Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926). Under the doctrine of sovereign immunity, however, county school boards may not be held liable in tort. Mann v. County Board of Arlington County, 199 Va. 169, 98 S.E.2d 575 (1957). Without expressing a view on the circumstances which could expose the employee to personal tort liability, I am of the opinion that the county school board may not be held liable for the negligent acts of its employee in selling or in any other way disseminating the information regarding the computer program.

SCHOOLS. SCHOOL BOARD. TOWN COUNCIL MEMBER SERVING ON SCHOOL BOARD.

September 29, 1981

The Honorable J. Ray Dotson
Commonwealth's Attorney for Wise County and City of Norton

You ask if a member of the Town Council for the Town of Coeburn (the "Town") may concurrently serve on the School Board for Wise County. You indicate that the Town does not have a separate school board, but that its schools are governed by the School Board for Wise County.

Article VIII, § 7, of the Constitution of Virginia (1971) provides that "[t]he 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." Pursuant to this constitutional provision, the General Assembly has enacted § 22.1-30 of the Code of Virginia (1950), as amended, prohibiting certain State and local officers from simultaneously serving on the school board for any school division. Subject to specific exceptions inapplicable to the given circumstances, the statute squarely prohibits a town officer, or a member of the governing body of the town, during his or her term of office, from being appointed to or serving on the school board for the town in question.

Since you have indicated that the schools for the town are within the school division supervised by the School Board for Wise County, I am of the opinion that said dual service would be prohibited by § 22.1-30.1


SCHOOLS. § 22.1-294. ASSISTANT PRINCIPALS CANNOT ACHIEVE CONTINUING CONTRACT STATUS.
July 20, 1981

The Honorable H. Woodrow Crook, Jr.
County Attorney for Isle of Wight County

You ask whether assistant principals acquire continuing contract status under § 22.1-294 of the Code of Virginia (1950), as amended. You relate that a teacher obtained continuing contract status as a teacher. The teacher then served more than three years as an assistant principal. The teacher was then made a principal. She, however, had not obtained continuing contract status as a principal and had been reassigned to teaching status. You ask whether her service of more than three years as an assistant principal conferred continuing contract status upon her.

Section 22.1-293 permits a school board to employ principals and assistant principals. Section 22.1-294 provides in pertinent part:

"A person employed as a principal or supervisor, including a person who has previously achieved continuing contract status as a teacher, shall serve three years in such position in the same school division before acquiring continuing contract status as principal or supervisor...."

Section 22.1-303 provides similar criteria for teachers. Both statutes, however, are silent on the subject of assistant principals.

Because the statutes specifically name principals, supervisors and teachers, but make no reference to assistant principals, I am of the opinion that a person cannot obtain continuing contract status as an assistant principal. See Report of the Attorney General (1973-1974) at 435. It is noteworthy that the General Assembly has seen fit to expressly refer to assistant principals in other instances under Title 22.1. See, e.g., §§ 22.1-293, 22.1-296 and 22.1-297.

SCHOOLS. SURPLUS IN ONE DISTRICT'S SPECIAL LEVY FUND MAY NOT BE TRANSFERRED TO ANOTHER DISTRICT'S SPECIAL LEVY FUND UNLESS § 22.1-103 IS FOLLOWED.

December 2, 1981

The Honorable W. Claude Dodson, Clerk
Bath County Circuit Court

You ask whether a surplus arising from one school district's special levy for debt service may be transferred to ameliorate a deficit in another school district.

You relate that Bath County has five school districts, each of which has a separate school levy for the purpose of
debt service for capital improvements. Three districts have the same tax rate and all proceeds are kept in the same fund; this fund currently has a surplus. The other two districts have the same tax rate and all proceeds are kept in another fund; this second fund currently has a deficit.

Section 22.1-102 of the Code of Virginia (1950), as amended, permits a county to levy a special tax for capital expenditures and the payment of indebtedness or rent. The tax may be levied county-wide, or by district, city or town. In order to accomplish your purposes, the Bath County School Board need only follow the provisions of § 22.1-103. This statute permits a school board, by resolution, to petition the governing body for a uniform county levy for school purposes; such purposes include repayment of district school obligations. Once the request is made, the governing body must petition the circuit court of the county to set the date for a referendum election on the proposed change.

In my opinion, therefore, you may not transfer the surplus funds until the provisions of § 22.1-103 have been met.

SHERIFFS. COUNTIES, CITIES AND TOWNS. EXPENSES. JAILS AND PRISONERS. SHERIFF MAY NOT BILL INCORPORATED TOWNS OR CITIES FOR PER DIEM COSTS OF MAINTAINING PRISONERS IN COUNTY JAIL PURSUANT TO § 53-182.

March 1, 1982

The Honorable Glenn M. Weatherholtz
Sheriff of Rockingham County

You have asked whether, pursuant to § 53-182 of the Code of Virginia (1950), as amended, it is permissible to bill towns and cities within Rockingham County for prisoners' per diem costs within your jail.

Section 53-182 reads as follows:

"Each sheriff or sergeant shall collect from the counties, cities and towns of the Commonwealth, other than the county or city for which he is elected or appointed, and from any other state or country for which any prisoner is held in such jail, the reasonable costs, to be determined by agreement with the governmental unit involved, or, in the absence of such agreement, as shall be determined by the governing body of his county or city, of feeding, clothing, caring for, and furnishing medicine and medical attention for, prisoners held for such county, city, town, state or country."

This section specifically exempts prisoners from "the city or county for which [he is] elected or appointed." You are elected for all of Rockingham County, including the towns, and the City of Harrisonburg.
It is, therefore, my opinion that you may not bill the incorporated towns within Rockingham County or the City of Harrisonburg for the per diem cost of maintaining prisoners in the Rockingham County Jail pursuant to § 53-182.

SHERIFFS. GOOD TIME PROVIDED BY § 53-209.2, ET SEQ., NOT APPLICABLE TO INMATES SENTENCED TO LOCAL JAIL.

February 18, 1982

The Honorable Jesse W. Williams
Sheriff of Patrick County

You have asked whether §§ 53-209.2 and 53-209.4 of the Code of Virginia (1950), as amended, are applicable to inmates sentenced to the local jail.

Section 53-209.2 makes provision for the new good conduct system enacted in 1981. It provides that such good conduct allowance shall reduce the person's maximum term of confinement while that person is confined in any State correctional institution. (Emphasis added.) The term "State correctional institution" is not defined in the Code, although § 33-19.18 defines "correctional institution" to include "every prison...correctional field unit...and every jail, jail farm, lockup or other place of detention owned, maintained or operated by any political subdivision of the Commonwealth...." It is therefore apparent that by using the term "State correctional institution" in § 53-209.2, the legislature intended it to mean something other than the definition in § 53-19.18.

In § 53-251.2, the legislature has used the term "State correctional institutions" to mean those facilities operated by the Department of Corrections by providing eligibility for parole for certain jail inmates who are incarcerated by transfer or commitment to State correctional institutions. This same meaning is found in § 53-209.5, which provides that upon receipt by the Department of Corrections, persons confined awaiting transfer to a State correctional institution shall be credited with such time certified in accordance with § 53-151 (jail credit). 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). In my opinion, had the legislature intended that § 53-209.2 apply to inmates sentenced to the local jail, it would have used the term "correctional institution" without the modifying term "State."

Furthermore, § 53-151 specifically provides for a good conduct allowance for persons in jails. Two statutes which cover the same subject matter are said to be in pari materia, and must be construed together if reasonably possible, so as to allow both to stand and to give force and effect to each. Kirkpatrick v. Board of Supervisors of Arlington County, 146
If the legislature had intended § 53-209.2 to apply to inmates sentenced to jails, it would have repealed § 53-151, an action it did not take. It is, therefore, my opinion that §§ 53-209.2 and 53-209.4 are not applicable to inmates sentenced to local jails.

SHERIFFS. WHERE PROPERTY IS REMOVED FROM PREMISES IN UNLAWFUL DETAINER, SHERIFF NOT REQUIRED TO PROVIDE STORAGE WHERE NO STORAGE AREA IS DESIGNATED.

May 11, 1982

The Honorable Clay Hester
Sheriff of the City of Newport News

This is in reply to your inquiries regarding property removed from premises under a court order in an action for unlawful detainer.

You have inquired whether, in the absence of a designated storage area by the governing body of the county or city under § 8.01-1561 of the Code of Virginia (1950), as amended, the sheriff is required to provide storage for property referenced above. In my opinion, if no storage area has been designated by the governing body, the officer’s duty under § 8.01-156 ends when he places the property on a public way. See Reports of the Attorney General (1979-1980) at 312 and (1965-1966) at 318.

Assuming a negative response to the first inquiry, you have further inquired whether the officer may legally leave the property on a public way. In my opinion he may, as long as he does not do so in such a manner as to constitute a nuisance under § 15.1-316 or 15.1-867, or in violation of any applicable local ordinances.

1"In any county or city, when personal property is removed from premises pursuant to an action of unlawful detainer or ejectment, or pursuant to any other action in which personal property is removed from premises in order to restore such premises to the person entitled thereto, the sheriff shall cause such personal property to be placed in a storage area, if such a storage area has been designated by the governing body of such county or city, unless the owner of such personal property then and there removes the same from the public way."

SIGNATURES. GOVERNOR. MAY DIRECT THAT HIS SIGNATURE BE AFFIXED TO CERTAIN OFFICIAL DOCUMENTS BY MECHANICAL DEVICE.
February 18, 1982

The Honorable Laurie Naismith
Secretary of the Commonwealth

This is in reply to your letter of February 18, 1982, in which you request my opinion as to whether certain documents enumerated therein should be executed with the Governor's personal signature or a mechanical reproduction of the Governor's signature. Additionally, you inquired as to the form of signature - personal or mechanical - of the Secretary of the Commonwealth which may be utilized to attest the Governor's signature on such documents.

A similar question was presented by one of your predecessors in office to former Attorney General Robert Y. Button, regarding the validity of the use of a rubber stamp for affixing the Governor's signature. In his reply dated March 8, 1962, reported in Report of the Attorney General (1961-1962) at 238, the Attorney General expressed the opinion that the use of a rubber stamp by the Governor would constitute compliance with § 75 of the Constitution of Virginia (now Art. V, § 17) which provides: "Commissions and grants shall run in the name of the Commonwealth of Virginia, and be attested by the Governor, with the seal of the Commonwealth annexed." The conclusion reached by Attorney General Button was based upon the intention of the Governor that the stamp be considered his signature, "intent" being the vital factor. I am in accord with that opinion. Accordingly, if the Governor expresses his intention that a mechanical reproduction of his signature be utilized as his signature, to be affixed by the person or persons designated by him, I am of the opinion that such mechanical device may be affixed to such documents, and by such persons, as the Governor may direct.

I would suggest that the Governor issue an executive order authorizing this procedure. He may well decide to reserve some of the documents mentioned in your letter to be signed by him personally.

The foregoing opinion applies equally to the form in which you, as Secretary of the Commonwealth, affix your own signature to documents attesting the Governor's signature.

SOVEREIGN IMMUNITY. STATE AGENCIES ENTITLED TO SOVEREIGN IMMUNITY PARTIALLY WAIVED AFTER JULY 1, 1982.

October 15, 1981

The Honorable William T. King
Commonwealth's Attorney for Richmond County

This is in reply to your inquiry whether the members of the No. 'hern Neck Soil and Conservation District Board (the "Board") are liable for damages resulting from negligence of
Board members, employees or other agents. This question was addressed in an Opinion to Mr. Verne R. Hillman, Executive Officer, State Soil Conservation Committee, found in Report of the Attorney General (1946-1947) at 147.

All State agencies, including the Board, are presently protected from liability for damages caused by the torts of their agents under the doctrine of sovereign immunity. The Virginia Tort Claims Act, § 8.01-195.1, et seq., of the Code of Virginia (1950), as amended, (the "Act") however, grants a limited waiver of sovereign immunity effective July 1, 1982. The Act makes the Commonwealth liable for the negligence of its employees to the extent of $25,000 or the limits of any applicable State liability insurance policy, whichever is greater.

Board members, employees and agents sued in their individual capacities for alleged torts arising out of their employment are not protected by sovereign immunity, but may be protected by immunity for public officers. This immunity does not protect employees who act intentionally, wantonly, in a grossly negligent manner, or beyond the scope of their employment. In cases of simple negligence, immunity may apply depending on the particular State function the employee is performing, the extent of the State's interest in that function, whether the use of judgment and discretion is required of the employee in performing it, and the degree of control and direction exercised by the State over the employee. James v. Jane, 221 Va. 43, 53, 267 S.E.2d 108, 113 (1980). Where immunity does not apply and the employee is liable under these principles, only the tort-feasor is liable; except as specifically provided in the Virginia Tort Claims Act, supra, there is no vicarious liability on the part of the State or the employee's supervisors. Lawhorne v. Harlan, 214 Va. 405, 407, 200 S.E.2d 569, 571 (1973).

STATE AGENCIES. VIRGINIA EDUCATION LOAN AUTHORITY (VELA) IS "AGENCY" FOR PURPOSES OF § 2.1-41.2. DIRECTOR OF VELA SERVES AT WILL AND PLEASURE OF GOVERNOR.

May 19, 1982

The Honorable John T. Casteen, III
Secretary of Education

You ask whether the director of the Virginia Education Loan Authority ("VELA") serves at the pleasure of the Governor and, therefore, is subject to appointment by him pursuant to § 2.1-41.2 of the Code of Virginia (1950), as amended.

With certain exceptions inapplicable to this question, § 2.1-41.2 grants the Governor the authority to appoint the administrative head of each agency of the executive branch of
The threshold question is, therefore, whether VELA is an "agency" as defined in the statute.

This Office previously addressed the identical issue with respect to the Virginia Port Authority (the "Authority"). See Report of the Attorney General (1976-1977) at 319. The Opinion noted that the Authority, although a political subdivision of the Commonwealth, was an administrative unit of government established by law, and reported to the Secretary of Commerce and Resources. As the Authority fell within none of the exempted agencies listed in § 2.1-41.2, the Authority was therefore deemed to be an "agency" of State government within the meaning of that section of the Code. Accordingly, the Opinion held that the director of the Authority was necessarily subject to gubernatorial appointment. It is manifest that the manner of appointment of the director of VELA should be determined similarly.

VELA is an administrative unit established by law and it is not an arm of the legislative or judicial branch of government. VELA is assigned to the Secretary of Education, § 2.1-51.21, who is expressly responsible to the Governor for the agency. VELA does not report to any other State department or agency. It is not an educational institution as defined in §§ 9-84, 23-14, 23-252, and 23-254, nor is it a regional planning, transportation, or sanitation district which would render it exempt from § 2.1-41.2.

VELA, therefore, clearly falls under the definition of "agency" as that term is defined for the specific purposes of § 2.1-41.2. As an administrative head of this State agency, the Director serves at the Governor's pleasure and may be removed or reappointed as the Governor wishes. Cf. Report of the Attorney General (1977-1978) at 389. I understand, furthermore, that the current director was appointed by the prior Governor.2

Accordingly, it is my view that the Director of VELA serves at the pleasure of the Governor and, pursuant to § 2.1-41.2, is subject to gubernatorial appointment.

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1Section 2.1-41.2 provides in pertinent part: "Notwithstanding any provision of law to the contrary, the Governor shall appoint the administrative head of each agency of the executive branch of State government...Each administrative head appointed by the Governor pursuant to this section shall be subject to confirmation by the General Assembly, shall have such professional qualifications as may be prescribed by law, and shall serve at the pleasure of the Governor. For the purposes of this section, 'agency' shall include all administrative units established by law or by executive order which are not arms of the legislative or judicial branches of government...."
A prior Opinion of this Office drew careful distinctions between the term "agency" and the phrase "independent political subdivision" for the purposes of determining the applicability of certain provisions of the Appropriations Act. That Opinion recognized, however, that the Director of VELA was appointed by the Governor. See Report of the Attorney General (1978-1979) at 305. For purposes of this Opinion, it is necessary to note that the term "agency" may denote different meanings depending upon its definition and use in a given statute.

STATE LIBRARY RECEIVES UNRESTRICTED STATE AGENCY PUBLICATIONS PRINTED OR ISSUED AT PUBLIC EXPENSE.

June 9, 1982

Mr. Donald Haynes, State Librarian
Virginia State Library

You ask whether § 2.1-467.2 of the Code of Virginia (1950), as amended, requires that State agencies furnish to the State Library without cost the following materials: (1) consultants' reports that are paid for with State funds, (2) publications of the University Press of Virginia that are published on behalf of, and paid for at least in part by, State agencies, and (3) publications that are printed by State agencies with private funds or grants, but are prepared, housed, or distributed at public expense, such as museum publications.

Section 2.1-467.2 provides:

"Every agency shall furnish two copies of each of its publications at the time of issue to the Virginia State Library for its collection and copies sufficient for the depository system, not exceeding one hundred copies." (Emphasis added.)

Definitions of the operative terms in that statutory provision are set forth in § 2.1-467.1, which provides in pertinent part that:

"'Agency' includes every agency, board, commission, office, department, division, institution or other entity of any branch of the State government. 'Publication' includes all unrestricted publications of whatever kind which are printed or reproduced in any way, published or issued by an agency of the State in full or in part at State expense." (Emphasis added.)

Not all reports and publications of agencies are subject to § 2.1-467.2. In order to fall within the requirements of § 2.1-467.2, the publication must be: (1) an unrestricted publication and (2) printed, reproduced, published or issued in full or in part at State expense.
I cannot provide a definitive response to the first category of publications. It is unlikely that consultants' reports would fall within the above requirements. A determination whether such documents are subject to § 2.1-467.2 can only be made on a case by case basis, taking into account the character and purpose of the report.

Although the University Press of Virginia is supported in part by private sources, it is clearly a constituent part of the University of Virginia and an "agency" within the broad reach of § 2.1-467.1. Unrestricted publications meeting the other requirement, as described above, printed by the University Press for an agency, must be provided to the State Library.

Although publications may be printed by public agencies with private funds, but prepared, housed, or distributed at public expense, they must be made available to the State Library if they are published or issued at State expense, assuming that they meet the above-noted criteria of unrestricted publications. The fact that the publication may be prepared, housed or distributed at public expense is not in itself sufficient to meet the requirement if it is not published or issued by the agency.

"Issue" denotes emanating, issuing, promulgating or giving a thing its first inception.

STATUTES. CONSTRUCTION OF § 59.1-21.10.

September 14, 1981

The Honorable A. Joe Canada, Jr.
Member, Senate of Virginia

You have asked whether or not, under the facts stated below, Subsidiary 1 of Corporation A may operate a gasoline retail outlet in the State of Virginia.

Facts

Corporation A operates approximately 700 retail gasoline outlets in more than 20 states. Some of these stations are operated by its Subsidiary 1, the remainder by Corporation A. Corporation A also has Subsidiary 2 which operates a small oil refinery and various ancillary businesses. Subsidiary 2 supplies less than 5% of Subsidiary 1's product needs, and does not fix the retail cost of the product that it sells to Subsidiary 1. Neither Corporation A nor either of its subsidiaries has ever entered into franchise agreements for the operation of its stations. Subsidiary 1 wishes to establish a retail outlet in Virginia. This retail outlet will be within one and one-half miles of several dealers franchised by other corporations.
Applicable Law

Chapter 306 [1979] Acts of Assembly added § 59.1-21.16:2 of the Code of Virginia (1950), as amended. Section 59.1-21.16:2 prohibits producers or refiners of petroleum products from establishing a company operated retail outlet in Virginia after July 1, 1979, if the retail outlet is located less than one and one-half miles from a retail outlet operated by a franchised dealer.

Section 59.1-21.10 defines producer or refiner to mean:

"any person engaged in the refining and subsequent sale, consignment or distribution of petroleum products to retail outlets which it owns, leases, controls or with which it maintains a contractual relationship for the sale of such products and shall include a subsidiary or other entity in which such person has more than a fifty percent beneficial interest; but shall not include (i) a person engaged in the general retail business whose total volume of sales consists of more than ninety-five percent of nonpetroleum products, where the sale of petroleum products is from the same premises or commercial complex or shopping center or (ii) any customer or agent of a producer or refiner who either retails the petroleum products of the producer or refiner or supplies such petroleum products to dealers on consignment from the producer or refiner, provided that the producer or refiner supplying the customer or agent with the petroleum products shall not establish, suggest or recommend the retail price of the petroleum products so supplied...." (Emphasis added.)

The provisions of § 59.1-21.10 set forth above indicate that the General Assembly intended to look beyond mere corporate structures in prohibiting retail gasoline sales operations by producers or refiners. Section 59.1-21.10 expressly provides that the business activities of subsidiaries or other entities controlled by a corporation shall be taken into account in determining whether that corporation is a refiner or producer. Corporation A is a producer or refiner under the terms of § 59.1-21.10. Its wholly-owned Subsidiary 2 is a refiner and re-sells to retail dealers. Corporation A retails gasoline itself and through its wholly-owned Subsidiary 1. While the retail outlet about which you inquire will be operated under the corporate name of Subsidiary 1 (which itself is not engaged in producing or refining), Subsidiary 1 is wholly owned by Corporation A. Since Corporation A is a producer or refiner as defined by the act, and wholly owns Subsidiary 1, Corporation A is, in fact, the operator of the proposed retail outlet for purposes of § 59.1-21.10. To hold that the prohibition of § 59.1-21.16:2 is not applicable in these circumstances because Subsidiary 1 itself is not a producer or refiner would be contrary to the obvious purpose of the General Assembly to prohibit retail sales operations of producers and...
refiners conducted through separate corporate entities which they own or control.

Conclusion

I am, therefore, of the opinion that neither Corporation A nor Subsidiary 1 of Corporation A can operate a gasoline retail outlet within one and one-half miles of a franchised dealership in Virginia.

STATUTES. PEACE OFFICER MAY DEVIATE FROM STATUTE’S SELECTION CRITERIA FOR STORAGE GARAGES TO FURTHER UNDERLYING PURPOSES.

July 10, 1981

The Honorable Charles L. Waddell
Member, Senate of Virginia

You have asked that I provide you with an interpretation of the words "nearest storage garage" as they appear in § 46.1-2 of the Code of Virginia (1950), as amended. That statute provides, among other things, that any peace officer discovering a motor vehicle, trailer or semitrailer, or part thereof on a paved or improved surface of a highway which thereby creates "a hazard in the use of the highway by reason of its position thereon, or has been left unattended longer than twenty-four hours outside the corporate limits of any city or town, or on an interstate highway inside the corporate limits...shall remove it or have it removed to the nearest storage garage for safekeeping...." You have specifically inquired whether, in view of the foregoing language, it is permissible for a peace officer to deviate from the statutory direction that the vehicle be removed to the "nearest" storage garage.

I am of the opinion that in interpreting § 46.1-2, whether the vehicle is creating a hazard must play a significant part in determining the framers' intent in employing the phrase "nearest storage garage for safekeeping." In those circumstances where the vehicle is creating a hazard, I am of the opinion that the General Assembly's primary goal was to insure that the vehicle would be removed with the greatest possible dispatch. A review of Title 46.1, generally, reveals the great stress that the General Assembly has placed upon the safety of the travelling public. Accordingly, in those circumstances where a hazard is being presented by the vehicle, the peace officer should direct that the vehicle be removed to the nearest storage garage capable of providing proper security for the vehicle and its contents. A deviation by the peace officer from the statute's requirements would be permissible only where that deviation sustains or furthers, rather than hinders, the statute's underlying safety purpose. By way of illustration, where the peace officer has reasonable cause to believe that the nearest service garage cannot provide the most prompt service (because, for example, its only tow truck is on call
in an area remote from the location of the vehicle requiring removal) it would be permissible to call upon the next nearest storage garage. In sum, the literal language of the statute should not "be followed slavishly where blind obedience would do violence to the manifest purpose of the statute." Olp v. Town of Brighton, 19 N.Y.S.2d 546, 549 (1950). In those situations where the vehicle is not creating a hazard, then alacrity in the removal of the vehicle is not a paramount consideration and I am of the opinion that the General Assembly intended in such circumstances the nearest facility be utilized in order to save the vehicle owner the added expense of a longer tow. Consequently, under these circumstances, the peace officer should not deviate from the requirements of the statute and should see that the vehicle is removed to the nearest storage garage that can provide for the vehicle's safekeeping.

In determining whether a particular garage meets the statutory criteria, it must be ascertained that the garage not only has facilities for storing vehicles but that the garage also has adequate provisions for the vehicle's security.

1Words of similar import also incur in a like context in other statutes of the Motor Vehicle Code. See, e.g., §§ 46.1-2.1, 46.1-3, 46.1-3.02 and 46.1-551. It should be observed that none of these statutes delineates circumstances that mandate or permit vehicle removal because of a pressing safety concern. Furthermore, the legislature has omitted the term "nearest" and merely provided, for example, that the vehicle "may be removed for safekeeping by or under the direction of a police officer to a storage garage or area...." See § 46.1-3.

STERILIZATION. STERILIZATION STATUTES NOT ENABLING STATUTES PERMITTING PHYSICIANS TO PERFORM OTHERWISE PROHIBITED SURGICAL PROCEDURE.

October 27, 1981

Carroll H. Lippard, M.D., President
Virginia State Board of Medicine
Department of Health Regulatory Boards

You have asked whether the current statutes governing sexual sterilization, §§ 54-325.9 to 54-325.15 of the Code of Virginia (1950), as amended, are simply immunity statutes or whether they proscribe all sexual sterilizations except as expressly authorized in those statutes. Related to that inquiry, you also have asked whether the absence of any reference in the sterilization statutes to disciplinary provisions of Title 54, specifically §§ 54-317 and 54-322, has any bearing on the foregoing question. You note the fact
that earlier statutes concerning sterilization, now repealed, did contain such references.

In my opinion, the current statutes simply provide a physician who performs a sterilization procedure in conformity with the statutes immunity from civil or criminal liability, if any. The sterilization statutes are not enabling statutes that permit a physician to perform an otherwise prohibited surgical procedure; see Report of the Attorney General (1979-1980) at 325, nor do they make unlawful all sexual sterilizations not performed in conformity with the procedures set forth in those statutes.¹

This view is consistent with the Opinions of my predecessors regarding the sterilization statutes in effect during their terms of office. See Reports of the Attorney General (1973-1974) at 340; (1977-1978) at 391. While the present statutes do not contain exactly the same provisions as the former statutes, I find nothing significantly different in their substance insofar as the concept of immunity is concerned.²

You also asked about the lack of any reference to §§ 54-317(16) and 54-322 in the present sterilization laws. Your concern apparently relates to the fact that the former § 54-325.5:1, enacted in 1979 and repealed in 1981, referred to disciplinary provisions of Title 54. I do not believe that the absence of this reference has any bearing on whether the statutes are immunity laws. The current statutes, like the 1962 and 1972 statutes, do not refer to disciplinary statutes. The earlier sterilization laws of 1962 and 1972 were interpreted as immunity laws. The absence of such reference in the present statutes, therefore, does not affect my conclusion that the sterilization statutes are immunity statutes only.

¹Arguably, though, a construction of the statutes can be made, based upon the maxim of expressio unius est exclusio alterius, that the statutes specify what is lawful and, by exclusion, specify what is unlawful. Thus, when the statute begins "It shall be lawful..." it implies that all conduct not set forth in the statute is illegal. That interpretation, however, is contrary to the consistent construction by former Attorneys General and by at least one court of record. See Doe v. Temple, 409 F.Supp. 899, 902 (E.D. Va. 1976).

²The original immunity statutes were enacted in 1962. See Ch. 451 [1962] Acts of Assembly 742. They were amended in 1972, but the immunity concept remained unchanged. See Ch. 710 [1972] Acts of Assembly 987. Likewise, in 1979, when the General Assembly transferred the statutes with minor amendments to Title 54, the concept of immunity was left intact. See Ch. 720 [1979] Acts of Assembly 1128.
SUPPORT ACT. SIX-YEAR LIMITATION ON ADMINISTRATIVE REMEDIES PROVIDED IN CH. 13 OF TITLE 63.1 ON ACTIONS BY DEPARTMENT OF WELFARE'S DIVISION OF SUPPORT ENFORCEMENT TO INSTITUTE ESTABLISHMENT AND COLLECTION OF SUPPORT DEBT NOT APPLICABLE TO COURT PROCEEDINGS INITIATED TO COLLECT COURT-ORDERED PAYMENTS AS PROVIDED IN CH. 14 OF TITLE 63.1.

June 30, 1982

The Honorable C. B. Andrews, Chief Judge
Twenty-Ninth District
Juvenile and Domestic Relations Court

This is in reply to your recent letter in which you ask whether the six-year limitation on an action by the Virginia Department of Welfare's Division of Support Enforcement (hereafter "Department") to institute collection of a support debt, found in § 63.1-270 of the Code of Virginia (1950), as amended, is applicable to all judicial proceedings initiated by the Department to collect court-ordered support payments, or whether it is applicable only to the administrative remedies for establishment and enforcement of a support obligation which are found in Ch. 13 of Title 63.1.

In the factual situation described in your inquiry, a husband and wife were divorced in 1972, and the divorce decree contained a provision that $50 would be paid by the husband every two weeks for the support of their minor children. The case was remanded to the Tazewell County Juvenile and Domestic Relations District Court in May 1974. The former wife began to receive public assistance in 1974, eight years ago. In June 1976, that court entered an Order amending the support obligation to $50 per week. In May 1977, a wage assignment was executed, ordering the payment of $150 every two weeks and assessing an $850 arrearage debt against the husband based on the 1976 court Order. In January 1982, the Department filed a petition for judgment against the husband for $2,850 in support arrearages that it alleges it became subrogated to for the period from May 1974, through June 1976. The petition was filed pursuant to authority granted the Department by Ch. 14 of Title 63.1.

Chapter 14 of Title 63.1, titled "Alternative Method of Enforcing Support of Children and Caretakers," provides the Department with an alternative method for the initiation or enforcement of support matters. Pursuant to § 63.1-281(5), a Commonwealth's attorney may, at the request of the Department, initiate civil proceedings to secure reimbursement from parents of minor children for monies expended by the Department in providing assistance. Additional responsibilities of the Commonwealth's attorney to initiate or enforce support obligations are also provided for in that section. Nowhere in Ch. 14 of Title 63.1 is a time limitation imposed for the actions provided therein. The time limitation contained in Ch. 13 of Title 63.1 is applicable, by its own terms, only to that chapter.
Therefore, while the Department is limited in the use of the administrative remedies provided in Ch. 13 of Title 63.1 to the establishment and collection of a support debt within a six-year period, I am of the opinion that the six-year limitation is not applicable to court proceedings initiated to collect court-ordered payments as provided in Ch. 14 of Title 63.1.

1Section 63.1-270 states, in part as follows: "[N]o proceedings or action under the provisions of this chapter may be begun after expiration of such six-year period to institute collection of a support debt...." (Emphasis added.)

TAXATION. ABATEMENT REQUIRED FOR BUILDINGS INTENTIONALLY RAZED OR DESTROYED.

October 27, 1981

The Honorable Helen B. Sharp
Commissioner of the Revenue for the City of Hopewell

You have asked whether a city ordinance adopted under the authority of § 58-811.2 of the Code of Virginia (1950), as amended, must provide that any abatement of real property taxes on buildings which are "razed or destroyed" must be limited to circumstances where the razing or destruction results from "a fortuitous happening beyond the control of the owner...." Subject to certain other restrictions and limitations, this statute provides that "the governing body shall provide for the abatement of levies on buildings which are razed or destroyed or damaged by a fortuitous happening beyond the control of the owner...." (Emphasis added.) The statute also contains a proviso which reads: "Application for such abatement shall be made by or on behalf of the owner of such building within the calendar year in which such building was razed or destroyed or in which such damage was sustained." (Emphasis added.)

Analysis of this Code section in light of a number of principles of statutory construction compels me to conclude that abatement for razing or destruction is not limited to fortuitous happenings beyond the control of the owner. The General Assembly's choice of the disjunctive "or" is presumed to signify an intent that an abatement should follow upon the occurrence of any one of the events separated by "or." 1A Sutherland Statutory Construction § 21.14 Conjunctive and Disjunctive Words (4th ed. 1972). The use of the word "such" in the provision of the statute relating to applications is a referential and qualifying word which must be understood to refer to the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence. 2A Sutherland Statutory Construction § 47.33 Referential and Qualifying Words (1973). The absence of such a referential
word immediately prior to "razed or destroyed" leads to the conclusion that "such damage" must refer to damage caused "by a fortuitous happening beyond the control of the owner" and that these words do not qualify "razed or destroyed."

The equity of the statute must also be considered and statutes relating to taxes are commonly given extended interpretation in accordance with the spirit of the legislation. Id. § 54.05 Extensive Interpretation. When §§ 58-811.1 and 58-811.2 are read in pari materia, it becomes apparent that the General Assembly sought, by the enactment of § 58-811.2, to balance the authority extended to local governing bodies to make partial year assessments of new construction with the requirement that there be an abatement of levies on buildings which are intentionally razed or destroyed during the assessment year. Thus, I am of the opinion that the ordinance must provide for an abatement of levies on buildings which are razed or destroyed by the intentional act of the owner in addition to those occasions where buildings are damaged by a fortuitous happening beyond the control of the owner.

TAXATION. ALL COSTS MUST BE PAID TO REDEEM DELINQUENT PROPERTY.

April 26, 1982

The Honorable C. B. Flannagan, II, Judge
Circuit Court of the City of Bristol

This letter is in response to your recent inquiries regarding tax sales under Title 58, Ch. 21, Art. 8, of the Code of Virginia (1950), as amended. First, you ask whether a city may file a bill in equity to sell land when the city has published a notice listing the property as delinquent; the owner of the land has paid all delinquent taxes, penalties, and interest; but, the owner has refused to pay the city's costs attendant to his delinquency.

Section 58-1117.1 authorizes municipalities to sell real estate for the payment of delinquent taxes on the property. The section provides that an owner may redeem property listed as delinquent by paying "all accumulated taxes, penalties, interests, and costs thereon." (Emphasis added.) A prior Opinion held that the costs of publication and advertising should be apportioned among delinquent taxpayers and paid from redemptions. See Report of the Attorney General (1974-1975) at 446. Accordingly, if the landowner has not paid all properly assessed costs, the land has not been redeemed, and the city may file a bill to sell the property.

Your second inquiry is whether, prior to the filing of a bill in equity to sell the land, an attorney's fee may properly be included in the costs which a delinquent taxpayer must pay to redeem his property. Section 58-1117.10 authorizes assessment of an attorney's fee as costs only
after a bill in equity has been filed to sell the land. See Report of the Attorney General, supra.

TAXATION. ASSESSMENT/REASSESSMENT. BIENNIAL ASSESSMENT NOT REQUIRED WHEN FULL-TIME APPRAISERS OR ASSESSORS ARE EMPLOYED.

January 11, 1982

The Honorable Madison E. Marye
Member, Senate of Virginia

You have asked whether a county's employment of at least one full-time, certified real estate appraiser or assessor requires the county to provide by ordinance for the biennial assessment and equalization of real estate in lieu of other optional methods. The language of § 58-778.1 of the Code of Virginia (1950), as amended, addresses these circumstances and states that the county "may provide" for the biennial assessment and equalization of real estate. It is my opinion that the employment of full-time real estate appraisers or assessors does not require the adoption of real estate assessments on a biennial basis.

TAXATION. BOARDS OF ASSESSORS. NOT BOUND BY ACREAGE RECITED IN DEEDS OF CONVEYANCE.

May 13, 1982

The Honorable Gammiel G. Poindexter
Commonwealth's Attorney for Surry County

You have advised that pursuant to § 58-787 of the Code of Virginia (1950), as amended, the Circuit Court for Surry County constituted five freeholders as the board of assessors to make the county's general reassessment. The board of assessors has determined that several tracts of land situated in the county are significantly larger in size than shown in the deeds of record relative to the tracts. You have inquired whether the board of assessors is bound by the acreage recited in the deeds of conveyance or whether the board may assess the parcels in question on the basis of other information available to it.

Under §§ 58-787 and 58-790 the General Assembly has empowered counties to create boards of assessors to make the county-wide reassessment by assessing all lands at their respective fair market values. Section 58-790 requires the board "as soon as practicable after being so designated, [to] proceed to examine all lands and lots...within...their... county, and shall, upon examination, ascertain and assess the fair market value thereof." The language of § 58-790 is certainly broad enough to permit visual or physical inspection as an appraisal tool. See Perkins v. County of Albemarle, 214 Va. 416, 200 S.E.2d 566 (1973). Moreover, the acreage or size of a parcel is a factor which must be

Finally, assessing officers "act and are required by statute, indeed, to act upon their own knowledge, or upon any means of information they may have, that is, upon their own opinion based upon such information as they may have...." Union Tanning Co. v. Commonwealth, 123 Va. 610, 632, 96 S.E. 780, 786 (1918). While the board of assessors should consider the information reflected in the deed of record maintained in the clerk's office, the board is not bound to make its reassessments strictly on the basis of such information, and, in fact, is required to act upon its own knowledge and opinion based on the information it possesses. Id.; Smith, supra.

TAXATION. COLLECTION POWERS. APPLICABILITY OF § 58-1010 TO FEDERAL AGENCIES AND INSTRUMENTALITIES AS EMPLOYERS.

June 2, 1982

The Honorable John T. Atkinson
Treasurer for the City of Virginia Beach

You ask whether § 58-1010 of the Code of Virginia (1950), as amended, which provides for collection of taxes from third parties, is enforceable against the United States as employer of military and civilian personnel.

This Office has previously opined that the procedure provided in § 58-1010 would not lie against the Commonwealth of Virginia because the Commonwealth is not a "person," as that term is used in § 58-1010. See Report of the Attorney General (1967-1968) at 261. Similarly, I must conclude that the United States of America is not a "person" subject to the requirements of § 58-1010. In this regard, it is noteworthy that, since the 1968 Opinion of this Office, the General Assembly has not adopted any amendments to make the Commonwealth subject to § 58-1010. This indicates that the legislature concurs in the prior interpretation. See Albemarle County v. Marshall, 215 Va. 756, 762, 214 S.E.2d 146, 150 (1975); Smith v. Bryan, 100 Va. 199, 204, 40 S.E. 652, 654 (1902).

I, therefore, conclude that the United States, as employer of military and civilian personnel, is not subject to the lien and demand procedures of § 58-1010.

1This conclusion would not necessarily hold for separate, independent corporations created by the federal government to perform governmental functions such as the Postal Service.
You have asked whether Scott County may continue to levy a consumer utility tax after the towns of Gate City and Weber City enact ordinances levying consumer utility taxes within those jurisdictions. Your letter makes the assumption that the county consumer utility tax would not apply within the limits of the two towns. This is not necessarily the case. In order for the county tax to be so limited, the towns must be providing police or fire protection and water or sewer services, or must constitute special school districts. See §§ 58-587.1 and 58-617.2 of the Code of Virginia (1950), as amended; Report of the Attorney General (1972-1973) at 453. Your letter does not indicate whether these conditions are met. Assuming, however, for purposes of your question that these conditions are met, your concern focuses on whether the county ordinance is unlawful because it would not then apply uniformly throughout the county.

The fact that the tax does not apply within the limits of the two towns does not violate the constitutional requirement for uniformity of taxation found within Art. X, § 1 of the Constitution of Virginia (1971). The application of the "uniformity" principle is limited to direct taxes on property and does not apply to the circumstances involving a consumer utility tax. See Reports of the Attorney General (1976-1977) at 198; (1977-1972) at 419. Therefore, Scott County may continue to impose its consumer utility tax upon all residents of the county living outside the towns of Gate City and Weber City.

The Honorable B. Randolph Boyd
Commonwealth's Attorney for Charles City County

You have asked several questions regarding the duty of the county treasurer under § 58-964 of the Code of Virginia (1950), as amended, to collect interest on delinquent real estate taxes. You state that the due date for real estate taxes in Charles City County is December 5 of each year. You also state that the real estate tax bills mailed in your county for tax years 1980 and 1981 indicated that interest would be charged on past due taxes only after July 1 of the following year. As you observe, however, in 1980 the General Assembly amended § 58-964 to require that interest be charged on delinquent real estate taxes from the first day following
the day on which taxes are due. The treasurer of Charles City County failed to notice the 1980 amendment and did not begin requiring payment of the correct amount of interest until January 11, 1982. Between April 4, 1980, and January 11, 1982, the treasurer calculated interest only from July 1 of the year following the date on which the taxes were due and gave paid receipts despite the erroneous interest calculation. You have asked:

"1. Is the County Treasurer acting properly when she requires payment of the statutorily correct interest on delinquent real estate taxes even though the tax notice stated a different (and lesser) amount of interest would be charged?"

Subject to the condition of rebilling the corrected amount, as hereinafter discussed, this question is answered in the affirmative.

Section 58-964, as amended effective April 4, 1980, requires that:

"Interest...from the first day following the day such taxes are due, shall be collected upon the principal and penalties of all such taxes and levies then remaining unpaid, which penalty and interest shall be collected and accounted for by the officers charged with the duty of collecting such taxes or levies, along with the principal sum thereof...."

This language is mandatory and requires the treasurer to collect the full amount of interest imposed. See Rixey's Executors v. Commonwealth, 125 Va. 337, 99 S.E. 573 (1919) reh. den., 125 Va. 337, 101 S.E. 404 (1919) app. dis., 255 U.S. 561, 41 S. Ct. 322 (1921), and Report of the Attorney General (1978-1979) at 289. Errors and omissions of taxing officials do not relieve taxpayers of their statutory duty to pay the full amount of taxes, penalties and interest due, unless their rights have been prejudiced thereby. Stevenson v. Henkle, 100 Va. 591, 42 S.E. 672 (1902); Reports of the Attorney General (1977-1978) at 430 and (1966-1967) at 280. Thus, it is my opinion that the failure of a taxing official to properly bill a tax does not relieve a taxpayer of his liability and the treasurer must proceed to collect the taxes due. Rixey's Executors, supra; Union Tanning Co. v. Commonwealth, 123 Va. 610, 96 S.E. 780 (1918); Report of the Attorney General (1970-1971) at 373; 72 Am Jur.2d State and Local Taxation § 888 (1974).

You next inquire if the county treasurer may now show as delinquent and proceed to collect the additional charges for those real estate taxes which were improperly marked paid "in full," according to the erroneous tax notices.

Treasurers are required under § 58-960 to prepare and send tax bills. See Aetna Casualty and Surety Co. v. Board of Supervisors of Warren Co., 160 Va. 11, 168 S.E. 617 (1933)
and Report of the Attorney General (1972-1973) at 451. While the failure to receive a tax bill does not relieve a taxpayer of his obligation to pay, the sending of a bill is a necessary prerequisite to collection. Board of Supervisors v. Stanley Bender & Assoc., Inc., 201 F.Supp. 839 (E.D. Va. 1961); Opinion of the Attorney General addressed to the Honorable Archer L. Jones, II, Commonwealth's Attorney for Isle of Wight County, dated March 25, 1982 (copy enclosed). In the circumstances you present, it is my opinion that the treasurer must first send supplemental tax bills to all delinquent taxpayers who did not pay the appropriate amount of interest before the taxes may be shown as delinquent and collection can be made.

You next inquire if the treasurer is obligated to make those collections set forth in inquiry #2.

As noted above, the provisions of § 58-964 are mandatory and interest imposed thereunder must be collected unless the governing body of the locality has enacted an ordinance under § 58-847, which permits localities by ordinance to alter the due date of taxes and penalties and to impose interest. It further provides that:

"The governing body may provide by ordinance for the waiver of the penalty and interest for failure to file a return or to pay a tax if such failure was not in any way the fault of the taxpayer."

A previous Opinion of this Office found in Report of the Attorney General (1980-1981) at 352, states that an ordinance decreasing the minimum penalty for late filing of returns may apply retroactively. See, also, Report of the Attorney General (1979-1980) at 349. It would, thus, be within the authority of the governing body under § 58-847 to enact an ordinance with a retroactive effect waiving payment of interest if the failure to file a return or to pay a tax was not "in any way the fault of the taxpayer." In the absence of such an ordinance, the treasurer must proceed by proper methods to collect all interest due.

Your final inquiry reads:

"4. Is the Treasurer personally liable for the collections set forth in inquiry #2?"

A treasurer is held strictly accountable for duties imposed upon him by law. County of Mecklenburg v. Beales, 111 Va. 691, 69 S.E. 1032 (1911). The duties of a treasurer are ministerial in nature, Aetna Casualty, supra, and a treasurer, like other public officials, is held strictly liable for negligent acts committed in the performance of his ministerial duties. 15 M.J. Public Officers §§ 9 (1979). Although you advise that the treasurer's records were audited and no discrepancy was noted, periodic settlements of a treasurer's accounts is only prima facie evidence of the correctness of those accounts and does not relieve the
Treasurer of liability for uncollected taxes, penalties or interest. See Aetna Casualty, supra. Thus, it is my opinion that a treasurer remains personally liable for all amounts which were not collected by reason of his failure to impose interest on past due taxes pursuant to the 1980 amendment to § 58-964.

TAXATION. EXEMPTION. PRIVATE, NONPROFIT, CHARITABLE CORPORATION NOT AUTOMATICALLY EXEMPT FROM PROPERTY TAXES.

May 21, 1982

The Honorable Robertine H. Jordan
Commissioner of the Revenue for Montgomery County

You have asked whether the Virginia Tech Student Aid Association, Inc. is exempt from tangible personal property tax on automobiles owned by it and located in Montgomery County. Your letter furnished evidence of the fact that this organization is a private, nonprofit, charitable corporation exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code of 1954, as amended.

The fact that an organization is exempt from federal income tax automatically exempts that organization from Virginia income tax. However, exemption from income tax does not carry with it an automatic exemption from either real or tangible personal property taxes. In order for an organization to be exempt from property taxes it must be able to point to an exemption under Art. X, § 6 of the Constitution of Virginia (1971) or §§ 58-12 through 58-12.130 of the Code of Virginia (1950), as amended.

I have examined the relevant constitutional and Code provisions and found that § 58-12.25 may furnish an exemption to the Virginia Tech Student Aid Association, Inc. Section 58-12.25 reads as follows:

"Incorporated alumni associations operated exclusively on a nonprofit basis for the benefit of colleges or other institutions of learning located in Virginia, and incorporated charitable foundations conducted not for profit, the total income from which is used exclusively for literary, scientific or educational purposes, are hereby designated as charitable and cultural in the meaning of Article X, § 6(a)(6) of the Constitution of Virginia. Property owned by such organizations and used exclusively for literary, scientific and educational purposes is hereby determined to be exempt from taxation." (Emphasis added.)

Among the words given emphasis above, "foundation" may require further definition. A "foundation" is "[a]n institution or association given to rendering financial aid to colleges, schools and charities and generally supported by
gifts for such purposes." Black's Law Dictionary 591 (5th ed. 1979).

You did not provide sufficient information for me to determine whether the association is an "incorporated alumni association" or "incorporated charitable foundation" operating exclusively for the benefit of Virginia Polytechnic Institute and State University within the meaning of § 58-12.25. I suggest that you require the association to furnish you with a complete copy of its articles of incorporation, by-laws and any other information which will enable you to determine whether it qualifies for this exemption.

According to a letter from the Internal Revenue Service accompanying your letter, the Virginia Tech Student Aid Association, Inc. is not a private foundation within the meaning of § 509(a) of the Internal Revenue Code. This does not mean that the association may not qualify as an "incorporated charitable foundation" within the meaning of § 58-12.25. The association is incorporated, nonprofit and charitable. The information which you should require the association to provide as suggested in the preceding paragraph will enable you to determine whether the association is a foundation, "the total income from which is used exclusively for literary, scientific or educational purposes." Assuming that the information to be provided to you is the same as the information reviewed by the Internal Revenue Service, the favorable Internal Revenue Service ruling suggests the probability that the association will meet this latter test for exemption.

TAXATION. EXEMPTION. REAL PROPERTY. "INCOME" INCLUDES COMPENSATION RECEIVED BY PERSONS PERMANENTLY AND TOTALLY DISABLED FOR DETERMINING ELIGIBILITY.

April 27, 1982

The Honorable Frank Medico
Member, House of Delegates

You have asked for clarification of Art. X, § 6(b) of the Constitution of Virginia (1971) relating to local tax relief for real property owned by persons not less than sixty-five years of age or persons permanently and totally disabled. Your letter presents three questions as follows inquiring of the definition of certain words or phrases used in that constitutional provision:

"(1) What is legally required by the phrase '***bearing an extraordinary tax burden on said property in relation to their income and financial worth.'"

(2) Please define 'extraordinary tax burden,' 'income' and 'financial worth' for application in carrying out the requirements of Article X, Section 6(b).
(3) Was it the intent of the constitutional amendment that 'income' include compensation received by the totally disabled? IRS usually exempts such compensation from income for tax purposes."

Your first and second questions address the individual and collective meaning of the terms within the clause "bearing an extraordinary tax burden on said property in relation to their income and financial worth." Prefixing the quoted clause is the language, "deemed by the General Assembly to be." Thus, the Constitution charges the General Assembly with the duty to prescribe income and financial worth eligibility standards which elderly and handicapped persons must meet in order to obtain tax relief under provisions enacted pursuant to that section of the Constitution.2

During the course of the legislative debates on constitutional revision, the subject of the exemption or deferral of real estate tax relief for elderly persons3 was discussed many times. Perhaps the best summary of the thinking of the General Assembly was given by the Honorable H. Clyde Pearson, Member of the Senate, who was speaking in favor of adding the requirement that "financial worth" be considered in determining eligibility. Senator Pearson’s remarks read as follows:

"We all know what we are attempting to do in this paragraph, and that it is not wise to try to draft now the precise language that will carry out our intent. We are interested in helping elderly people who are living in their small homes on a fixed retirement income, who are being caught in the inflationary squeeze. My amendment would give the General Assembly the right to include the factor of financial worth in determining the benefits to be given to people in this category.

As I interpret the language of the proposed paragraph, it provides that the General Assembly may give the benefit of tax deferral to those persons over sixty-five who bear a tax burden on their real estate that is extraordinary in relation to their income. They could be living, I assume, in a $100,000 house on the hill and be receiving $185 in social security payments. Their income would be $185 per month, but their actual net worth could be a half million dollars. To give relief to such persons certainly is not our purpose.

I think the General Assembly, in trying to formulate legislation to grant the benefits permitted by this constitutional provision, should be allowed to take into consideration the factor of financial worth. This would better express what we have in mind, since we are particularly interested in those people living on small incomes with no other substantial resources."

(Proceedings and Debates of the Senate of Virginia
The General Assembly has exercised its authority by enacting § 58-760.1 of the Code of Virginia (1950), as amended. That section uses the terms "total combined income...from all sources" and "net combined financial worth, including equitable interests" in fixing the eligibility standards to identify persons "bearing an extraordinary tax burden." Consequently, I believe Art. X, § 6(b) means the localities may exempt from taxation those properties owned by persons falling within the limitations and conditions provided in § 58-760.1.4

Your third question asks whether "income" includes compensation received by the totally disabled. The meaning of the terms "income" and "net worth" was discussed in a prior Opinion of this Office. See Report of the Attorney General (1973-1974) at 401. In that Opinion, this Office expressed the view that social security payments are income, even though nontaxable. Your letter does not clearly identify the type of disability compensation which you have in mind, but payments, made on a regular basis, should be considered part of income inasmuch as they are cash intended to be used for daily expenses. Assuming that the type of disability compensation to which you refer is in the form of cash intended to be used for daily expenses, I am of the opinion that such compensation received by a totally disabled person is "income" for purposes of Art. X, § 6(b). The remarks of Senator Pearson quoted above confirm this interpretation.

1Article X, § 6(b) provides: "The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local real property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said real estate in relation to their income and financial worth."

2A. Howard Commentaries on the Constitution of Virginia, at 1086 (1974). "[T]hey must be deemed by the General Assembly to be bearing an extraordinary tax burden on that real estate in relation to their income and financial worth. Both indicia--income and worth--must be established in the enabling legislation. The purpose of the twin measurements is to preclude tax relief to people who clearly were not in the circumstances that the drafters of section 6(b) had in mind, for example, the millionaire who, because of tax write-offs, has little or no taxable income."

3A provision to include disabled veterans in the real property tax relief provision of the original revision to the
Constitution was rejected. Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution, April 1, 1969, at 415 (Remarks of Delegate Morrison).

Successive amendments to § 58-760.1, since it was first enacted in 1971, have progressively raised the dollar figures by which the General Assembly set the ceiling on income and financial worth thereby periodically redefining what constitutes an extraordinary burden in relation to income and financial worth.

TAXATION. EXEMPTION FOR NONDOMICILIARIES UNDER § 58-834 REQUIRES IMPOSITION OF PERSONAL PROPERTY TAX BY STATE OF DOMICILE.

May 11, 1982

The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have inquired as to the distinction between property taxes and excise taxes for purposes of the exemption granted nondomiciliaries under § 58-834 of the Code of Virginia (1950), as amended. Section 58-834 states in part:

"[A]ny person domiciled in another state, whose motor vehicle is principally garaged or parked in this State during the tax year, shall not be subject to a personal property tax on such vehicle upon a showing of sufficient evidence that such person has paid a personal property tax on such vehicle in the state in which he is domiciled...."

You state that persons owning vehicles located within your jurisdiction have claimed exemption from § 58-834 by reason of excise and other license taxes imposed by their state of domicile. Hellerstein and Hellerstein, State and Local Taxation (4th ed. 1978) at 29, notes the well-recognized distinction between property and excise taxes.

"Property taxes may be regarded as levies on the entire bundle of rights of ownership, as distinguished from a levy on the exercise of a special power of ownership, such as, e.g., sale or transfer or gift. Property taxes are typically levied on all or selected property in accordance with its value on a stated day--tax day.

Excise taxes are levies on an activity or event, or the exercise of a specific right in property, or on a privilege granted... Judge Cooley defined excises in an oft quoted definition as 'taxes levied upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.'" (Citations omitted.)
The Supreme Court of Virginia has noted this distinction between excise and property taxes in *Pocahontas Consol. Colleries Co. Inc., v. Commonwealth*, 113 Va. 108, 73 S.E. 446 (1912).

Subject to the limitations contained therein, the exemption under § 58-834 is available only to a domiciliary of a state other than Virginia who has property located in Virginia which would otherwise be taxable under § 58-834. See Report of the Attorney General (1974-1975) at 528. Furthermore, the exemption is allowed only where the person "has paid a personal property tax on such vehicle in the state in which he is domiciled...." (Emphasis added.) Section 58-834. This exemption, like all exemptions from taxation, is to be strictly construed. *WTAR Radio-TV Corp. v. Commonwealth*, 217 Va. 877, 234 S.E.2d 245 (1977).

In light of the foregoing, I am of the opinion that the nondomiciliary exemption under § 58-834 is available only when a personal property tax, as opposed to an excise tax, is imposed upon the vehicle by the owner's state of domicile.

**TAXATION. FUELS TAX. EFFECT OF COURT HOLDING REDUCED TAX RATE UNCONSTITUTIONAL.**

August 31, 1981

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

This is in response to your recent letter concerning Ch. 391 [1981] Acts of Assembly 508, which amends §§ 58-711 and 58-744 of the Code of Virginia (1950), as amended, by establishing a special temporary reduction in the State fuels tax for synthetic motor fuel produced in Virginia from coal and any motor fuel containing at least 10 percent anhydrous ethyl alcohol distilled in Virginia from agricultural, forestry, or waste products in a plant which does not use natural gas or a petroleum based product as a primary fuel. You ask whether a person who receives the benefits of the reduced tax rate might become liable at some future date for the taxes thereby avoided if a court were to hold this legislation unconstitutional.

The possibility that a court might hold this legislation unconstitutional was expressly recognized in para. 2 of Ch. 391, which provides that "if any portion of this act is held unconstitutional by a court of competent jurisdiction, the entire act shall fail, and the sections amended herein shall be administered as they existed prior to its enactment." I find nothing in this language suggestive of a legislative intent that, in the event the reduced rates for the fuels in question were held unconstitutional, closed tax transactions would be reopened and an effort made to recoup the revenue lost. It is a well-established principle of law that the words of a statute are not to be given a
retrospective operation in the absence of words clearly expressing a contrary intention. McIntosh v. Commonwealth, 213 Va. 330, 191 S.E.2d 791 (1972); Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774 (1937). It is an equally well-established principle that there can be no collection of taxes except in the manner provided by law, and back taxes can only be levied by special legislative authority. County of Sussex v. Jarratt, 129 Va. 672, 106 S.E. 384, 627 (1921); Commonwealth v. United Cigarette Machine Company, 120 Va. 835, 92 S.E. 901 (1917).

In the County of Sussex case, supra, which concerned the power of a county to collect a tax on bank shares for several past years, the court held in part that the board of supervisors and commissioners of the revenue for Sussex County could not assess such property for taxation since there had been no levy on that class of property. Every assessment must rest on a proper levy of a tax, the levy being a legislative function declaring the subject and rate of taxation. A different result was reached in Woolfolk v. Driver, 186 Va. 174, 41 S.E.2d 463 (1947), where the Virginia Supreme Court considered a Caroline County levy on all real estate and tangible personal property in the county except for that in the Towns of Bowling Green and Port Royal. In Woolfolk, the court held that the exceptions as to Bowling Green and Port Royal were unconstitutional and consequently void, but that since the language excepting the towns were severable from the remaining legislation, there remained after striking the exceptions a valid general county levy for Caroline County for the years in question, which thus permitted the collection of back taxes in the two towns. The facts associated with your inquiry, however, are distinguishable from those considered in Woolfolk because of the absence in the Woolfolk case of the legislative language embodied in para. 2 of Ch. 391, supra, as well as the absence of any detrimental reliance on the part of the taxpayers.

While it has been said that an unconstitutional law confers no rights, imposes no duties, affords no protection, and is, in legal contemplation, as inoperative as though it had never been passed, Campbell v. Bryant, 104 Va. 509, 52 S.E. 638 (1905), the actual existence of a statute, prior to its being ruled unconstitutional, is an operative fact and may have consequences which cannot justly be ignored. Chicot Co. Drainage Dist. v. Baxter State Bank, 308 U.S. 377, 84 L.Ed. 329, 60 S.Ct. 317 (1940); rehearing denied, 309 U.S. 695, 84 L.Ed. 1035, 60 S.Ct. 581 (1940). In the Chicot County case, the United States Supreme Court described the complexity of this problem as follows:

"The effect of the subsequent ruling as to invalidity may have to be considered in various aspects— with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the..."
light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." (84 L.Ed. at 333).

Thus, the Florida Supreme Court, in a case wherein that court ruled unconstitutional a Florida tax statute providing a special property tax classification with respect to certain subdivided property, stated that its decision would operate prospectively because persons relying on the statute in question did so assuming it to be valid. Interlachen Lakes Estates, Inc. v. Snyder, 304 So.2d 433 (Fla. 1973); Later app. 341 So.2d 993 (Fla. 1977). One can easily anticipate that the persons who eventually enjoy the benefits of Virginia's reduced tax for synthetic motor fuel will have done so only after the expenditure of some effort and the incurrence of possibly substantial expenses. Under such circumstances, it would be an unfair burden to apply the higher tax rates retroactively.

As I find retroactive application of the higher tax rates an excessive burden, and as I find the legislative language embodied in para. 2 of Ch. 391 exclusively prospective in nature, I am of the opinion that a person who receives the benefit of the reduced tax rates in question would not become liable retroactively for the taxes thereby avoided if a court were to hold Ch. 391 unconstitutional. Your question is therefore answered in the negative.

1In accordance with §§ 58-711 and 58-744, motor fuel is generally taxed at a rate of 11 cents per gallon. The temporarily reduced tax for the fuels in question is as follows: from July 1, 1981 to July 1, 1984, 3 cents per gallon; from July 1, 1984 to July 1, 1986, 5 cents per gallon; from July 1, 1986 to July 1, 1988, 7 cents per gallon, from July 1, 1988 to July 1, 1990, 9 cents per gallon.

TAXATION. INTEREST. PENALTIES MAY ACCRUE INTEREST BY ORDINANCE.

August 24, 1981

The Honorable J. Richmond Low, Jr.
Commonwealth's Attorney for King George County

You have asked whether an ordinance enacted pursuant to § 58-847 of the Code of Virginia (1950), as amended, may permit the imposition of interest on penalties for the late payment of taxes imposed under such an ordinance. You have
also asked whether a penalty which may be imposed under an ordinance enacted pursuant to § 58-847 may exceed the limit set forth in § 58-963.

The 1980 General Assembly amended § 58-847 to add a new sentence which reads, "Any such penalty when so assessed shall become a part of the tax." Ch. 663 [1980] Acts of Assembly 1011. The same Act set the interest ceiling at ten per centum in both §§ 58-847 and § 8-964. Thus, interest may be imposed on the penalty. These amendments to the statutes supersede a prior Opinion of this Office to the Honorable James E. Durant, Treasurer of the City of Falls Church, dated June 20, 1972, and found in Report of the Attorney General (1971-1972) at 393(2), which had held that the language of § 58-847 prior to its amendment would not permit interest upon a penalty in excess of that imposed by § 58-964. That limitation no longer exists.

The amount of the penalty which may be imposed under § 58-847 is expressly limited to ten percent of the tax due or ten dollars, whichever is greater. These limits supersede the lower limit of § 58-963 (five percent) as provided by the express terms of § 58-847.

TAXATION. LICENSE TAXES UPON THE BUSINESS OF SEVERING OIL OR PETROLEUM FROM THE EARTH.

May 14, 1982

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

You advise that Scott County wishes to impose a license tax upon persons conducting or engaging in the business of severing or extracting oil or petroleum from the earth within the county. You ask whether such a license tax may be imposed under the authority of either § 58-266.1 or § 58-266.1:1 of the Code of Virginia (1950), as amended. If an ordinance imposing such a license tax may be enacted pursuant to § 58-266.1, you also ask whether such a license tax is subject to the rate limitation contained in § 58-266.1B4.

This Office has previously opined that the extraction of natural resources, as well as the extraction and crushing of stone, may be taxed under the authority of § 58-266.1. See Reports of the Attorney General (1973-1974) at 375 and (1968-1969) at 234. I concur in such prior Opinions of this Office and conclude that the business of extracting oil or petroleum may likewise be taxed under § 58-266.1.

Because such a business enterprise (the extraction or severance of oil or petroleum) does not fit within any of the classes of business described in subsections 1, 2, or 3 of § 58-266.1B, it necessarily falls within § 58-266.1B4, which includes "all other businesses and occupations not
specifically listed or excepted in this section...." Thus, such a license tax under § 58-266.1 would be subject to the rate limitation contained in § 58-266.1B4.

Turning to whether such a license tax may be levied pursuant to § 58-266.1:1, that section authorizes the governing body of any county to "levy a license tax on every person engaging in the business of severing coal or gases from the earth...." (Emphasis added.) It is plain that oil or petroleum is not coal, and it seems to be equally clear that oil or petroleum is not encompassed within the term "gases." Where the language of a statute is free from ambiguity, such language is to be given its plain meaning without resort to rules of interpretation. See 17 M.J. Statutes § 61 (1979).

Finally, tax laws are liberally construed in favor of the taxpayer and should not be extended by implication beyond the clear import of the language used. No one can be subjected to payment of a tax unless he clearly comes within the terms of the act. City of Richmond v. Valentine, 203 Va. 642, 125 S.E.2d 854 (1962). Based on the principles recited above, I must conclude that a locality does not have authority under § 58-266.1:1 to subject the business of extracting oil or petroleum to such a license tax.

In summary, I am of the opinion that a license tax may be imposed under the authority of § 58-266.1, but not § 58-266.1:1. The tax so imposed would be subject to the rate limitation contained in § 58-266.1B4.

1Both sections authorize license taxes in certain situations but the tax rate permitted by § 58-266.1:1 is higher than that permitted by § 58-266.1. Thus the distinction between the two statutes takes on additional significance.

1362 REPORT OF THE ATTORNEY GENERAL

TAXATION. LOCAL BOARDS OF EQUALIZATION MUST PROVIDE NOTICE AND AN OPPORTUNITY TO BE HEARD BEFORE ISSUING FINAL ORDER CHANGING ASSESSMENTS OF REAL PROPERTY.

May 27, 1982

The Honorable Diane Bruce, Clerk
Circuit Court for Rappahannock County

This is in reply to your letter in which you inquired whether Form 907 issued by the Department of Taxation meets the notice requirements of § 58-906 of the Code of Virginia (1950), as amended.

Sections 58-895 through 58-915 set forth the powers and duties of local boards of equalization. Section 58-906 empowers a board of equalization to issue an order increasing
real property assessments after first providing notice of the proposed adjustment to the owner and an opportunity for him to be heard. Such notice and opportunity to be heard are required before the board may issue a final order adjusting a real property assessment. Form 907 is a form of final order only and does not provide the necessary notice nor does it advise the taxpayer of his right to be heard. In light of the foregoing, I am of the opinion that Form 907 should be used only when notice has previously been given to the property owner as contemplated by § 58-906.

You also asked if it is advisable to notify the owner of the proposed changes and of his right to be heard before the board within a stated time period before the proposed order is entered and becomes final. As indicated above, such notice is required by law.

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1Section 58-906 states: "The board shall hear and determine any and all such petitions and, by order, may increase, decrease or affirm the assessment of which complaint is made; and, by order, it may increase or decrease any assessment, upon its own motion; provided, however, that no assessment shall be increased until after the owner of the property has been notified and given an opportunity to show cause against such increase, unless such owner has already been heard."

TAXATION. LOCAL LEVIES. MAINTENANCE OF BRANCH OFFICE WITHIN STATE SUFFICIENT NEXUS FOR IMPOSITION OF LOCAL BUSINESS TAX.

July 10, 1981

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You have asked whether Chesterfield County may require a firm to purchase a local business license under the following circumstances:

1. The business is a consulting firm with its main interest in labor relations.

2. The firm has an office in Chesterfield County and also offices in California and Florida.

3. The majority of the firm's income is generated from clients located outside of Virginia and is billed from and paid to the Virginia office.

Under § 58-266.1 of the Code of Virginia (1950), as amended, localities are authorized to levy local license taxes on all licensable businesses, trades, professions, and occupations operating within their jurisdictions. The tax is
levied on gross receipts in accordance with the rates and limitations provided in §§ 58-266.1(B) and 58-266.1(C).

In the situation you describe, maintenance of an office in Chesterfield County is sufficient "nexus" to support imposition of the tax. See my earlier Opinion to you dated May 29, 1981. The taxable base or measure of the local tax is limited to gross receipts derived from services or activities performed by the firm within Chesterfield County. This would include services performed in Chesterfield for customers located out-of-state. Evco v. Jones, 409 U.S. 91, 93 S.Ct. 349, 34 L.Ed.2d 325 (1972); Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313 (1941); Western Livestock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed, 823 (1938). Gross receipts derived from services and activities performed both within and outside of your jurisdiction must be fairly apportioned. Evco and Western Livestock, supra. And, see, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 94 S.Ct. 1076, 51 L.Ed.2d 326 (1977).

TAXATION. LOCAL LEVIES. UNDERTAKER'S INVENTORY SUBJECT TO MERCHANTS' CAPITAL TAX ONLY IF SOLD DIRECTLY.

June 25, 1982

The Honorable Charles T. Sturgill
Commissioner of the Revenue for Grayson County

You have asked whether your local undertaker is "required to pay the merchants' capital tax based on his inventory of caskets, suits, etc. that he sells to the families of the deceased." Grayson County has imposed a tax on merchants' capital under § 58-833 of the Code of Virginia (1950), as amended, and you are presently taxing merchants based upon the inventory of stock on hand.

Sections 58-9 and 58-10 segregate the capital of merchants from other taxable subjects and restrict it to local taxation only. On the other hand, Ch. 8 of Title 58, §§ 58-405 through 58-441, provides for the taxation of certain personal property defined as capital not otherwise taxed which is to be taxed by the State only. Thus, the inventory of your local undertaker will be subject to either State or local taxation depending upon whether he is a merchant for purposes of these taxes.

"A 'merchant' in the sense of our tax statutes, 'is a dealer in goods, wares, and merchandise, who has the same on hand for sale and present delivery.'" Commonwealth v. Wytheville Knitting Mills Employees Welfare Association, 195 Va. 663, 669, 79 S.E.2d 621, 624 (1954). Although an undertaker selling individual items from his inventory comes within this definition of "merchant," an undertaker selling items from his inventory solely incident to providing a funeral service does not.
It has been the long-standing interpretation of the Virginia Department of Taxation "that caskets, etc., used for customers in burying the dead will be regarded as previously held by the undertaker for resale either directly or indirectly" and shall be included in capital not otherwise taxed within the meaning of § 58-412.2

The manner by which the items are taxable will depend upon the manner in which the undertaker conducts his business. You must determine whether the undertaker includes these items as a part of a complete funeral service or whether the undertaker sells such funeral supplies independently of their use in connection with a funeral. In the former case, the undertaker is not a merchant and is, therefore, not subject to the merchants' capital tax imposed under the authority of § 58-833. In the latter case, the undertaker is a merchant and will be subject to the merchants' capital tax. Cf., Report of the Attorney General (1959-1960) at 366(2). If the undertaker is conducting both types of business transactions, he must be taxed separately on each branch of his business. Section 58-246.

For purposes of clarification, I note that the General Assembly has recently required that funeral directors and embalmers furnish a written itemized statement of charges in connection with care and disposition of the body of the deceased person. See Ch. 8 [1979] Acts of Assembly, enacted in § 54-260.71:1. The itemized statement includes a listing of the charges for the types of items which you have described. However, this individual listing of charges by itself does not result in the undertaker being treated as a "merchant" for purposes of the local merchants' capital tax or the State tax on capital not otherwise taxed.

1Article X, § 1 of the Constitution of Virginia (1971) provides that the General Assembly may define and classify taxable subjects.

2See Opinion of the Honorable C. H. Morrisssett, State Tax Commissioner, to the Honorable W. R. Moore, Commissioner of the Revenue of the City of Norfolk, dated September 3, 1954 (copy enclosed). This position was recently reaffirmed by the Virginia Department of Taxation in its proposed regulations for the Virginia Tax On Capital Not Otherwise Taxed, February 20, 1981, at page 4, where it is stated that the "casket inventory of an undertaker is not normally held for resale directly, but such inventories become component parts of the products or services to be sold. They are, therefore, held for resale indirectly and are includible in taxable capital."

TAXATION. LOCAL LICENSE TAX. ENACTMENT OF CATEGORIES CONTAINED IN § 58-266.1B NOT REQUIRED.
June 11, 1982

The Honorable Thomas D. Horne
Commonwealth's Attorney for Loudoun County

You have asked whether a town may enact an ordinance pursuant to § 58-266.1 of the Code of Virginia (1950), as amended, without establishing the separate classes of enterprises listed in subsection B. You advise that the ordinance proposed would set a maximum rate less than that required for any class under subsection B, thereby ensuring that no business enterprise would be taxed at a rate exceeding the lowest permissible maximum rate.

Section 58-266.1 does not require that the classes of enterprises listed in subsection B be incorporated into a local taxing ordinance. Section 58-266.1 merely prohibits localities from enacting tax rates in excess of the rate ceilings applicable to businesses falling within the categories listed. Nevertheless, the town's ordinance must be sufficiently "certain, clear and unambiguous" to avoid a vagueness objection. See City of Richmond v. Fary, 210 Va. 338, 345, 171 S.E.2d 257, 263 (1969). If there is doubt "as to whether or not a particular business is included within the descriptive or designating language" of an enactment imposing a license tax, courts will resolve that doubt in favor of the taxpayer. See Estes v. City of Richmond, 193 Va. 181, 189, 68 S.E.2d 109, 114 (1951).

Therefore, I am of the opinion that a town may enact an ordinance which does not contain the categories listed in § 58-266.1B, if such ordinance is drafted to satisfy the rate limitations of that subsection and, at the same time, is sufficiently specific to withstand attacks of vagueness or uncertainty.

1Section 58-266.1B provides in pertinent part as follows: "Except as specifically provided in this section, no such local license tax, imposed pursuant to the provisions of this section, or any other provision of this title or charter except § 58-266.1:1, shall be greater than thirty dollars or the rate set forth below for the class of enterprise listed, whichever is higher...."

You have inquired as to the proper method of valuing an assignment of an oil and gas lease for purposes of recordation tax. Under § 58-54, et seq., of the Code of Virginia (1950), as amended, the recording of a lease agreement is taxed differently than a subsequent assignment of the same lease.

Leases are valued and made subject to recordation tax under § 58-58 which provides:

"On every contract or memorandum thereof, relating to real or personal property, except as hereinafter provided, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration or value contracted for; provided, however, that the tax for recording a deed of lease for a term of years, or memorandum thereof, shall be taxed according to the provisions of this section, except that when the annual rental, multiplied by the term for which the lease runs, equals or exceeds the actual value of the property leased, then the tax for recording the deed of lease shall be based upon the actual value of the property at the date of lease, but including the value of any realty required by the terms of the lease to be constructed thereon by the lessee. Notwithstanding the other provisions of this section, the tax on leases of oil and gas rights shall not exceed twenty-five dollars."

The last sentence of § 58-58 was added by H.B. 1650, effective March 21, 1981, and modifies previously existing law by limiting recordation tax on leases of oil and gas rights to an amount not to exceed twenty-five dollars. However, this modification does not alter the method of valuation.

The principal lease which you enclose is a standard form used in the industry providing for an initial term of ten years and for as long thereafter as oil and gas is produced or the lessee is engaged in drilling, mining or reworking operations. The actual term is, therefore, potentially indefinite and the "consideration or value contracted for" is not readily ascertainable. Under these circumstances, § 58-65 permits the clerk to request an affidavit from the lessee setting forth the value of the leasehold interest which may be accepted in assessing recordation tax on the principal lease. See Report of the Attorney General (1970-1971) at 384. If you are not satisfied with this evidence, § 58-65 permits you to make such further inquiry as you deem appropriate. You may not, in any event, assess more than twenty-five dollars to record a lease of oil and gas rights.

As indicated above, § 58-58 requires assessment of tax on recordation of the original lease. However, subsequent assignments of a lessee's interest in a previously recorded lease on which recordation tax has been paid are generally
not subject to further tax under recent amendments effective July 1, 1981, made by H.B. 1806 to § 58-60. As amended, § 58-60 provides:

"Sections 58-55, 58-58, and 58-59 are not to be construed as requiring the payment of any tax for the admitting to record of any deed of trust, deed of subordination, mortgage, contract, agreement, modification, addendum, or other writing supplemental to any such deeds, mortgage, contract, agreement, modification, addendum, or other writing theretofore admitted to record and upon which the tax herein imposed has been paid, or which is exempt from the tax herein imposed by reason of subsection (c) of § 58-55.1, hereinafter called the prior instrument, when the sole purpose and effect of the supplemental instrument, or other writing is to convey property, in addition to or in substitution, in whole or in part, of the property conveyed in a prior instrument, to secure or to better secure the payment of the amount contracted for in a prior instrument, or to alter the priority of the instrument, or to modify the terms, conditions, parties, or provisions of such prior instruments, other than to increase the amount of the principal obligation secured thereby, but in such case there shall be no tax for the admitting to record of such supplemental instrument or other writing. The assumption of a deed of trust shall not be separately taxable under §§ 58-54, 58-55, or § 58-58, whether such assumption is by a separate instrument or included in the deed of conveyance."

Under the circumstances you present, the original lease has been recorded and the appropriate tax paid. The assignment which you enclose is an assignment of all of the lessee's interest in and to the lease. This assignment alters only the parties to the prior instrument with all the other terms and conditions remaining the same. The assignment is, therefore, exempt from recordation tax under § 58-60 under the recently amended language of § 58-60.

TAXATION. PERSONAL PROPERTY. MOBILE HOME OWNER'S SURRENDER OF TITLE TO DMV NOT SUFFICIENT TO RECLASSIFY AS REAL PROPERTY.

March 16, 1982

The Honorable Gerald H. Gwaltney
Commissioner of the Revenue for Isle of Wight County

You have asked whether a mobile home which has had its wheels and axles removed and has been placed upon a permanent foundation should be classified as real property if and when the owner surrenders his certificate of title for the mobile home to the Virginia Division of Motor Vehicles. Your letter acknowledges your awareness of past rulings of this Office that removal of wheels and axles and placement upon a
permanent foundation is, standing alone, insufficient to compel a conclusion that a mobile home has been taken out of the separate classification of tangible personal property established by § 58-829.3 of the Code of Virginia (1950), as amended, and must be reclassified as real property. See e.g., Reports of the Attorney General (1977-1978) at 427; (1971-1972) at 406(1).

This Office has also previously opined that "mobile homes would be taxed as real or personal property depending on how the common law doctrine of fixtures would apply to the facts and circumstances of each case." See Report of the Attorney General (1977-1978) at 427, 428. The Virginia Supreme Court has set forth the following guidance to aid in reaching this determination.

"Three general tests are applied in order to determine whether an item of personal property placed upon realty becomes itself realty. They are: (1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of the parties. The intention of the party making the annexation is the chief test to be considered in determining whether the chattel has been converted into a fixture." Transco Corp. v. Prince William County, 210 Va. 550, 555, 172 S.E.2d 757, 761-762 (1970).

The court also indicated that "[w]hen the owner of land annexes chattels, any doubt as to his intention to annex them permanently will usually be resolved in favor of such intent." Id., 210 Va. at 556.

The fact that an owner of a mobile home surrenders his certificate of title for cancellation has two immediate consequences. The owner may not legally transport the mobile home on the highways of the Commonwealth and the owner may not sell or otherwise assign the title to the mobile home by utilizing the Division of Motor Vehicles certificate of title. See §§ 46.1-41 and 46.1-44. Surrender of the certificate of title, however, does not prevent the owner from obtaining another certificate of title for the same mobile home at a subsequent time. Consequently, although the surrender of the certificate of title may be evidence of the intent of the owner to annex the mobile home to the realty, it is clearly not conclusive evidence.

In light of the foregoing, it is my opinion that you may consider the surrender of the certificate of title to a mobile home in reaching your determination whether such mobile home has become a fixture to realty, but you may not rely exclusively upon that circumstance to conclude that the mobile home has become realty.
You have asked whether a tangible personal property tax may be assessed against a mobile home physically located in Franklin County under the following circumstances. The owner of the mobile home is a New York resident who is now stationed in Norfolk, Virginia, pursuant to military or naval orders. The owner purchased a lot in Franklin County after being stationed in Norfolk and has placed a mobile home there. The mobile home is not employed in a trade or business by its owner, but is used by the owner when he visits Franklin County. The facts contained in your letter indicate that the mobile home is tangible personal property and that the serviceman is the mobile home's sole owner.

The Soldiers' and Sailors' Civil Relief Act (the "Act"), 50 U.S.C.A. App. § 574, prohibits a host state from imposing a personal property tax upon a nonresident serviceman stationed there under military or naval orders. See Report of the Attorney General (1965-1966) at 196. This result obtains because the Act states that a serviceman's "personal property shall not be deemed to be located or present in or have a situs for taxation in" the host state, and the tax exemption is available as long as the serviceman is absent from his home state "solely by reason of compliance with military or naval orders."

Under the circumstances you have described, the serviceman is present in Virginia solely by reason of compliance with military or naval orders, and his home state is New York. His personal property, both in the City of Norfolk and in Franklin County, is deemed to have a situs in New York for property tax purposes, and neither Franklin County nor the City of Norfolk may assess a personal property tax against the mobile home. Of course, the real estate purchased in Franklin County is subject to local real estate taxation in that jurisdiction.

TAXATION. PROCEDURES SET FORTH IN §§ 58-983, 58-984 AND 58-985 APPLY TO TOWNS ELECTING TO ADOPT ORDINANCE FOR COLLECTION OF TAXES UNDER § 58-978(2).
You have asked whether town treasurers are required to report the collection of delinquent taxes to the clerk of the circuit court in the same manner as a county treasurer set forth in §§ 58-984 and 58-985 of the Code of Virginia (1950), as amended, or, may town treasurers collect delinquent real estate taxes after the third anniversary, recognizing that such delinquent records have been filed with the clerk of the circuit court. You are concerned with the provision in § 58-985 which requires the clerk to receive payment for delinquent taxes after the third anniversary of the original due date and a lien has been recorded by the clerk.

Section 58-978(2) requires city and county treasurers to prepare annually a list of real estate which is delinquent for nonpayment of taxes thereon. The section additionally provides in pertinent part as follows: "The governing body of any town may, by ordinance, adopt the procedures set forth in this section and § 58-983. If such ordinance is adopted, the town treasurer shall submit such lists to the governing body as provided herein." Section 58-983 provides the procedure for submission of the list referred to in § 58-978 to the governing body of the county, city or town for publication in the newspaper. If the taxes are not paid by the third anniversary of the due date a lien is recorded by the treasurer in the appropriate clerk's office.

Sections 58-984 and 58-985 provide for the recordation by the clerk of the names of the property owners on the list and for the subsequent collections and release of the liens. Section 58-985 provides that after the lien has been recorded, collections of such delinquent taxes are to be transmitted to the clerk.

Prior to 1977, towns were not referred to in either §§ 58-978, 58-983, 58-984 or 58-985. Prior to that time, town treasurers returned the list of delinquent town taxes to the clerk of the circuit court for recordation as provided in § 58-1000.1. Responsibility for collection remained with the town treasurer or other officer charged with the duty of collecting such taxes. In 1977, § 58-978 was amended to add the above quoted provision authorizing the governing body of towns to adopt the procedure set forth in that section and § 58-983. Section 58-983 was also amended to expressly include towns. Accordingly, the procedures applicable to counties and cities set forth in §§ 58-978, 58-983, 58-984 and 58-985 are available to towns. An ordinance adopting these procedures renders the provisions of § 58-1000.1 of no effect.

I, therefore, am of the opinion that collections of delinquent town taxes after the third anniversary of the due date and after recordation of the lien by the clerk pursuant to § 58-983(b) shall be transmitted to the clerk of the appropriate court as provided in § 58-985.
REPORT OF THE ATTORNEY GENERAL

TAXATION. REAL ESTATE. TAXPAYER GRANTED ACCESS TO ALL REAL PROPERTY APPRAISAL CARDS OR SHEETS UPON REQUEST.

December 29, 1981

The Honorable Marie W. Pollock
Commissioner of the Revenue for the City of Covington

You have asked whether a taxpayer has a right of access to (1) the real property appraisal card for this property, (2) the real property appraisal card for property owned by others, and (3) to the working papers used by an assessing official in determining appraised and assessed values. Section 58-792.02(A) of the Code of Virginia (1950), as amended, permits public access to all real property appraisal cards or sheets on request of any taxpayer or his representative unless disclosure is otherwise prohibited by § 58-46.

Each assessing officer is required under §58-817.1 to maintain current property appraisal cards for all parcels of real estate within his jurisdiction. Section 58-817.1 also requires that each property appraisal card state "the appraised value of the property and improvements, if any, and the calculations used in determining the assessed value of such property and improvements." This information together with the name, residence and description of the estate of the taxpayer is a matter of public record and may, therefore, be disclosed without violating § 58-46. See §§ 58-804, 58-805 and Reports of the Attorney General (1974-1975) at 382; (1964-1965) at 282. I am unaware of any section of the Code which requires or authorizes recordation of any other which might violate the secrecy provisions of § 58-46. See Reports of the Attorney General (1974-1975) at 524 and (1973-1974) at 412. In the event such cards do contain information protected under § 58-46, such information must be expunged before disclosure.

Working papers used by an assessing official are not open to the public generally but must be made available only to the owner or his authorized representative in accordance with § 58-792.02(B). It should be unnecessary to determine whether the previous year's assessment cards are working papers under § 58-792.02(B) as such cards are otherwise subject to public inspection under § 58-792.02(A). However, in a year when a general reassignment is made or a change in the assessed value of real estate is recorded and a new property appraisal card is made, the previous year's property assessment card would be considered as part of the working papers subject to disclosure to the owner if the information thereof was used in determining the current appraised or assessed value.

TAXATION. REAL PROPERTY. COUNTY MAY NOT USE GENERAL LAND USE PLAN OF PROPOSED FUTURE LAND USE AS SOLE BASIS FOR DETERMINING FAIR MARKET VALUE.
September 24, 1981

The Honorable Edward M. Holland
Member, Senate of Virginia

You have asked whether the Arlington County assessor's office may use the county's General Land Use Plan of Proposed Future Land Use (hereinafter referred to as the "General Land Use Plan") as the sole basis for valuing a certain subdivision of single-family, residential dwellings.1

The Constitution of Virginia (1971) establishes two requirements for the assessment of real estate: (1) the uniformity requirement of Art. X, § 1, and (2) the fair market value standard of Art. X, § 2. Your inquiry does not allege that the county assessor's office has applied the county's General Land Use Plan as an appraisal-assessment tool non-uniformly to particular geographical segments of the county to the exclusion of other geographical segments. See Perkins, et al. v. County of Albemarle, 214 Va. 416, 200 S.E.2d 566 (1973).

Your question involves the fair market value standard. You ask whether the General Land Use Plan can be used as the sole basis for determining the fair market value of the property in question. Tuckahoe Woman's Club v. City of Richmond, 199 Va. 734, 740, 101 S.E.2d 571, 575 (1958). Among the factors to be considered in determining fair market value are size and cost of the property, design, style, location, appearance, availability of use, and the economic situation prevailing in the area, as well as other circumstances. Smith v. City of Covington, 205 Va. 104, 108-109, 135 S.E.2d 220, 223 (1964). No authority exists for an assessor to extract one element from the formula and establish it as the only standard for assessment. Tuckahoe Woman's Club, supra, at 740. Therefore, a county may not rely upon its General Land Use Plan as the sole basis for its real estate assessments.

1The assessor's office disputes this statement and maintains that the General Land Use Plan was only one of many factors considered.


February 23, 1982

The Honorable Ivan D. Mapp
Commissioner of the Revenue for the
City of Virginia Beach
You have asked whether the 390 acres of land owned by Christian Broadcasting Network, Inc. ("CBN"), or any portion thereof, is exempt from local real property taxation.

According to information contained in your letter, CBN is a nonstock Virginia corporation whose stated primary purpose is the sharing of Christian ideas through various forms of telecommunication. A television and administrative center housing CBN's administrative offices, television production facilities, studios and equipment, a chapel, a national counseling center and foreign and domestic missions headquarters has been erected on a portion of the land in question. During 1979 and 1980, CBN utilized this facility to produce television programs which were aired on local and national television stations at CBN's expense. CBN received viewer contributions as a result of these programs.

In 1981, a subsidiary of CBN, CBN Continental Broadcasting Network, Inc. ("Continental"), a for-profit corporation formed in 1979, made use of CBN's facilities to produce secular programs. In addition, in 1981, CBN began to produce at its facilities certain programs for which paid advertising was sought. Also, apparently beginning in 1981, CBN from time to time began leasing its studios and production facilities to other, independent commercial interests for a fee. The production facilities used by CBN are the same facilities made available to Continental and leased to commercial interests.

You state that chapel services are held daily in the chapel and that separate areas are maintained for spiritual counseling of people who telephone CBN from across the nation. You also state that separate facilities housing CBN University have been constructed and that accreditation from the Southern Association of Colleges and Schools is being sought. Finally, you state that CBN is exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code.

Article X, § 6 of the Constitution of Virginia (1971) sets forth the classes and types of property which may be exempt from State and local taxation. Property owned by an organization exempt from federal income taxation is still subject to local real estate taxation, unless a specific State exemption applies. See Manassas Lodge v. County of Prince William, 218 Va. 220, 237 S.E.2d 102 (1977).

Section 58-12(5) of the Code of Virginia (1950), as amended, exempts:

"Real estate belonging to and actually and exclusively occupied and used by and personal property, including endowment funds, belonging to Young Men's Christian Associations and other similar religious associations, including religious mission boards and associations, orphan or other asylums, reformatories, hospitals and
nunneries, conducted not for profit but exclusively as charities...."

The General Assembly has further defined under § 58-12.24 the following as tax exempt:

"Property owned by any church, religious association or denomination or its trustees or duly designated ecclesiastical officer, and used exclusively on a nonprofit basis for charitable, religious or educational purposes...."

The exemption under § 58-12(5) is limited to real estate belonging to Young Men's Christian Associations and "other similar religious associations...conducted not for profit but exclusively as charities...." When contrasted with the broad limits of § 58-12.24, the phrase "conducted...exclusively as charities" found in § 58-12(5) makes it clear that the General Assembly intended that the type of organization exempted pursuant to § 58-12(5) be limited to those whose "exclusive" purpose is "liberal in benefactions to the poor; beneficent." See City of Richmond v. United Givers Fund, 205 Va. 432, 137 S.E.2d 876 (1964), construing the term "charitable." CBN is a corporation whose purpose and production activities are religious in nature and not charitable as that term is used in § 58-12(5). Consequently, its purpose excludes it from coming within § 58-12(5), and it is unnecessary to determine whether its corporate structure also excludes it from the exemption found in that section.

Turning to § 58-12.24, I will assume that CBN met the purpose test of § 58-12.24 for the tax years 1979 and 1980 when it apparently used its property exclusively for religious purposes. The question remains, however, whether the corporation qualifies as a "church, religious association, or denomination, or its trustees or duly designated ecclesiastical officer" as specified in that section. In my opinion, it does not.

The General Assembly is obviously aware of the distinction between a corporation and other non-incorporated entities. In several subsections of § 58-12, the General Assembly provided for exemptions to corporations. Its omission of corporations from § 58-12.24 evidences its intent not to provide exceptions for corporations seeking to come within the protection afforded by that section. Rather, giving the phrase "church, religious association..." its natural meaning, it is clear that the Assembly intended to exempt a relatively narrow range of entities which may be defined, in other terms, as a body of communicants or group gathered in common membership for religious purposes. Of course the trustees or chief ecclesiastical officers of such groups are also exempted. See Mordecai F. Ham Evangelistic Assoc. v. Matthews, 300 Ky. 402, 189 S.W.2d 524 (1945), where the Kentucky Court of Appeals held that an incorporated evangelistic association was not a "religious society" for purposes of tax exemption.
Accordingly, I am of the opinion that CBN is not entitled to exemption from real property taxation under either § 58-12(5) or § 58-12.24.

You also inquired if a tax exempt organization would lose that status due to partial commercial usage of the property, or if a partial exemption of the total value could be established. In view of my conclusion that CBN is not entitled to exemption under either section for any period of time, it is unnecessary to consider your second question.

TAXATION. RECORDATION. WHERE DOCUMENT CONTAINS DEED OF CONVEYANCE AND AGREEMENT TO ASSUME PRESENTLY EXISTING DEED OF TRUST TAX IS ASSESSED UNDER § 58-54 ONLY ON AMOUNT OF CONSIDERATION PAID OR VALUE OF PROPERTY CONVEYED.

September 14, 1981

The Honorable Luther E. Miller, Clerk
Circuit Court of Page County

This is in response to your letter of July 6, 1981, in which you inquire as to the proper method of assessing recordation taxes pursuant to § 58-54, et seq., of the Code of Virginia (1950), as amended, on a document which conveys real property and contains an agreement by the grantees to assume an existing deed of trust.

The agreement to assume an existing deed of trust is a transaction separate from the agreement to convey property subject to the deed of trust, although both transactions are commonly found in one document. See Report of the Attorney General (1972-1973) at 435. Under the provisions of § 58-54, the grantee's tax is assessed on recordation of the deed of conveyance on the "consideration of the deed or the actual value of the property conveyed, whichever is greater." Section 58-60, however, as recently amended by H.B. 1806 effective July 1, 1981, exempts the agreement of assumption from separate assessment. Section 58-60 now states, in part:

"The assumption of a deed of trust shall not be separately taxable under §§ 58-54, 58-55, or § 58-58, whether such assumption is by a separate instrument or included in the deed of conveyance."

Thus, where a document contains both a deed of conveyance and an agreement to assume a presently existing deed of trust, recordation tax is assessed under § 58-54 only on the amount of consideration paid or value of the property conveyed. The agreement to assume is exempt from separate taxation under § 58-60.
Report of the Attorney General

TAXATION. RECORDATION TAXES. FEDERAL LAND BANK OF STAUNTON AND STAUNTON PRODUCTION CREDIT ARE EXEMPT FROM RECORDATION TAX IMPOSED BY § 58-54.

June 14, 1982

The Honorable L. Wayne Harper, Clerk
Circuit Court of Rockingham County

You ask whether the Federal Land Bank of Staunton and Staunton Production Credit are exempt from recordation taxes imposed under § 58-54 of the Code of Virginia (1950), as amended.

The Supreme Court of Virginia in Federal Land Bank v. Hubard, 163 Va. 860, 178 S.E. 16 (1935), held that a recordation tax was unenforceable against the Federal Land Bank of Baltimore under the Supremacy Clause of the United States Constitution and the predecessor to 12 U.S.C. § 2055 (1980). Although the federal legislation involving federal land banks has been amended several times since the Hubard decision was rendered, those amendments did not make a sufficient change to the language construed by the court in Hubard to permit me to believe that a different result would obtain today should the issue be relitigated. Therefore, I am of the opinion that the Federal Land Bank of Staunton is not subject to the recordation tax imposed by § 58-54.

With respect to the second portion of your question, 12 U.S.C. § 2098 (1980) exempts production credit associations from all State taxes, except surtaxes, estate, inheritance, gift taxes, and real and tangible personal property taxes. Accordingly, I am of the opinion that Staunton Production Credit is also exempt from the recordation tax imposed by § 58-54.

March 5, 1982

The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have asked whether § 58-46 of the Code of Virginia (1950), as amended, prohibits (1) the disclosure of the business addresses of licensees or (2) the type of business for which the license has been issued. In a prior Opinion to the Honorable W. D. Johnson, Sr., Commissioner of the Revenue of the City of Franklin, dated February 24, 1967, and found in Report of the Attorney General (1966-1967) at 67, 68, this Office held that releasing "a mere list of licensees, without amounts [of business done], would not be a violation of this section of the Code."
The pertinent language of § 58-46 reads as follows: "[I]t shall be unlawful for the...commissioner of the revenue...to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties...." (Emphasis added.) The statute furnishes interpretative guidance by further stating that "[t]his section shall not be construed to prohibit a local tax official from disclosing whether a person, firm or corporation is licensed to do business in that locality." This latter provision was added by the 1980 session of the General Assembly.

Section 58-46 affords protection to information about the business affairs of any person, firm or corporation. The terms included within the phrase "transactions, property, income or business" are descriptive of financial information. Taxpayers are required to furnish such information involuntarily in order that State and local tax laws may be properly administered. Thus, in the context of a business license tax, it is clear that the protection afforded by § 58-46 is intended to embrace financial information relating to business receipts and any other information which may be reasonably necessary to permit the commissioner of the revenue to make a proper determination of the amount of tax due and owing.

Although the business address may suggest ownership of real property by the business, if it does in fact own the property used as the business office, the address is not indicative of any financial information. Thus, in my opinion disclosure of the address of a business licensee does not violate § 58-46. It is only logical that, if the tax official may disclose whether a business is licensed by the locality, the official may disclose the location where the licensee is doing business.

Implicit in the language permitting disclosure of the fact that a person, firm or corporation is licensed to do business in the locality is the authority to disclose whether a person, firm or corporation holds a particular type of business license. While the 1980 disclosure amendment suggests that it contemplates a specific inquiry about a particular person, firm or corporation, I can find no reason why it should not extend to disclosure and preparation of a list of business licensees and their addresses. I conclude, therefore, that § 58-46 does not prohibit the disclosure of the type of business for which a taxpayer is licensed.

There is no requirement that a local tax official prepare a list such as the one you have described. It remains within the discretion of such official whether a request for such a list should be granted. However, once the list is prepared, it would be subject to further disclosure in accordance with the Virginia Freedom of Information Act, § 2.1-340, et seq.
TAXATION. SECRECY OF INFORMATION. DISCLOSURE OF NAMES OF DELINQUENT TAXPAYERS NOT PROHIBITED.

March 22, 1982

The Honorable Danny C. Ball
Commissioner of the Revenue for Wise County

You have asked whether you may release the names of delinquent taxpayers to third persons without violating the secrecy requirements of § 58-46 of the Code of Virginia (1950), as amended. You have furnished the following factual background as the basis for your question. Wise County has levied a license tax on every person engaging in the business of severing coal or gases from the earth. In some cases, coal producers, also known as coal operators, lease the rights to sever coal from larger coal companies which apparently own the mineral rights. A number of the coal operators in Wise County are delinquent in paying the severance license tax. Several coal owner-lessees have indicated their willingness to notify their coal operator-lessees who have failed to pay the tax that they are delinquent. You have expressed your belief that this would be helpful to Wise County in collecting such delinquencies. Therefore, you wish to know whether you may release to the coal owner-lessee the names of its coal operator-lessees who are delinquent in paying their severance license tax.

Section 58 46 contains several limitations on the scope of its operation including the proviso that "[n]othing contained herein shall be construed to prohibit the publication...of delinquent lists showing the names of taxpayers who failed to timely pay their taxes...." Because this section does not prohibit public disclosure of the names of delinquent taxpayers, the names of coal operator-lessees who are delinquent in paying the severance license tax are not protected by the nondisclosure provisions of § 58-46. I am, therefore, of the opinion that you may release the names of delinquent coal operator-lessees to their respective coal owner-lessee without violating the nondisclosure rules of § 58-46.

TAXATION. SECRECY OF INFORMATION. STATISTICAL DATA ON PROFESSIONAL LICENSES MAY BE RELEASED.

March 31, 1982

The Honorable Ora A. Maupin
Commissioner of the Revenue for the City of Charlottesville

This is in reply to your letter of March 17, 1982, in which you asked whether § 58-46 of the Code of Virginia (1950), as amended, prevents you from releasing information which reveals (1) the total revenue that the City of Charlottesville receives in the form of license taxes from attorneys, (2) the total number of licenses issued to...
attorneys reporting gross income of $2,500 or less and, (3) the number of licenses issued to attorneys reporting gross income in excess of that figure. The person making the request wishes to know this information for the period from 1975 through the most recent year for which such figures are available and claims entitlement to this data under the Virginia Freedom of Information Act, § 2.1-340, et seq. (the "Act").

Section 58-46 makes it unlawful for you to divulge any information acquired by you in the performance of your public duties in respect to the transactions, property, income or business of any person, firm or corporation. However, this statute also limits its application so that "[n]othing contained [therein] shall be construed to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns...." It is my opinion that the release of the statistical information requested in this case, if it exists, is not prohibited by § 58-46 because it does not identify particular reports or returns. See Reports of the Attorney General (1974-1975) at 524, (1973-1974) at 412(1), (1967-1968) at 58, and (1959-1960) at 344.

Although you are obligated under the Act to furnish "records" as defined in the Act, you are not obligated to tabulate individual returns existing in your office and prepare statistical analyses which may be released under § 58-46 if such statistics do not presently exist. If, however, the statistics have been assembled, they may be released under § 58-46 and, pursuant to a request under the Act, must be released. You "may make reasonable charges for the copying and search time expended in the supplying of such records; however, in no event shall such charges exceed the actual cost...in supplying such records. Such charges for the supplying of requested records shall be estimated in advance at the request of the citizen." Section 2.1-342.

TAXATION. SECRECY OF INFORMATION. TAX BILL BEARING ITEMIZED PROPERTY LISTING NOT OTHERWISE MATTER OF PUBLIC RECORD MAY NOT BE DIVULGED.

December 16, 1981

The Honorable Gerald H. Gwaltney
Commissioner of the Revenue for Isle of Wight County

You have asked whether § 58-46 of the Code of Virginia (1950), as amended, prohibits any person from divulging the tax bills of individual taxpayers to persons other than the taxpayer or officials acting in the line of duty. Your letter indicates that the Isle of Wight County personal property tax bills contain an itemized listing of the taxpayer's property based upon the personal property return filed with the commissioner of the revenue. You have further
indicated that the itemized listing of the taxpayer's property does not appear in the personal property book which is prepared and made a matter of public record according to §§ 58-881 and 58-884.

This Office has held that taxpayer information beyond that which is required to be recorded in the tangible personal property book may be revealed to the treasurer for actions performed in the line of duty and may be revealed to the taxpayer without violating § 58-46. See Report of the Attorney General (1975-1976) at 394. Moreover, information appearing on the tangible personal property tax return which does not appear on the personal property book but which may be obtained from other public sources is also not subject to the restrictions of § 58-46. Report of the Attorney General (1974-1975) at 382. However, information appearing on a personal property tax return not otherwise a matter of public record may not be divulged without violating § 58-46. I am of the opinion that this prohibition would extend to any document which itemizes the taxpayer's property, including a tax bill.

TAXATION. SERVICE CHARGE LIABILITY NOT FROZEN AS OF JANUARY ONE OF THE YEAR.

October 14, 1981

The Honorable Frank L. Hereford, Jr., President
University of Virginia

You have asked whether the University of Virginia (the "University") is liable for the service charge imposed by the City of Charlottesville in light of the 1981 amendment to § 58-16.2 of the Code of Virginia (1950), as amended, which for the most part repealed the city's authority to impose such a charge against the University. The 1981 amendment was effective July 1, 1981, and because the City of Charlottesville does not satisfy the requirements of § 58-16.2(B), only faculty and staff housing will be liable for the charge in the future.

The Charlottesville City Code provides that the city treasurer shall bill the owners of tax-exempt property "on the same due dates and in the same manner and subject to the same penalties and interest as are applicable to real estate taxes." Section 10-71, Charlottesville City Code (4-16-79). The University paid the service charge in 1979 and 1980. In March 1981, the city notified the University of the city's appraisal of University real estate for service charge purposes; however, the University was not notified of the amount of service charge claimed by the city until it received the city treasurer's letter dated June 24, 1981. Sections 10-71, 10-20, and 10-21 of the city code require that the city treasurer mail out the tax bills, for at least one-half of the service charge amount, not later than June 1 of each year.
REPORT OF THE ATTORNEY GENERAL

University's Position

The University contends that the service charge bill was not due and payable until some reasonable time after its receipt on June 26, 1981, and that such reasonable time did not expire until after July 1, 1981. The amendment of § 58-16.2, effective July 1, 1981, limited the City of Charlottesville's authority to impose a service charge to faculty and staff housing. The University asserts that the service charge cannot now be collected by the city because it has no authority to "impose and collect" a service charge on the bulk of University property after July 1, 1981.

City's Position

The city contends that the service charge authorized by § 58-16.2 is analogous to real estate taxes because it is levied against assessed values and that the city code imposes the service charge as of January 1 of each year. The service charge for 1981 was assessed as of January 1, 1981, and the city argues that liability for the entire service charge amount was "frozen" on that date.

Ruling

Article X, § 6(g) of the Constitution of Virginia (1971) states that local governments may be authorized by general law "to impose a service charge upon the owners of...exempt property for services provided by such governments." Section 58-16.2 effectuates that constitutional provision and delineates those services upon which the charge is to be based.

Section 58-16.2 is the sole statutory authority under which the City of Charlottesville may act. That the city chooses to administer imposition and collection of the service charge under its general taxing ordinances may have enabled the city to ease its administrative burden; however, unless the city can specifically point to language in § 58-16.2, which permits it to impose and collect service charges "on the same due dates and in the same manner and subject to the same penalties and interest as are applicable to real estate taxes..." no such authority exists. See, for example, Report of the Attorney General (1971-1972) at 106(2).

I am of the opinion that no authority exists for the proposition that the University's service charge liability was determined (and under the city's theory, frozen) as of January 1, 1981. The liability for a service charge is not a tax. John L. Fretwell, Treasurer, City of Staunton v. Virginia School for the Deaf & Blind, Opinion of the Circuit Court dated September 17, 1980, Final Order entered June 30, 1981. The framers of the constitution specifically exempted the Commonwealth from property taxes, leaving to the General Assembly the power to adopt enabling legislation to permit service charges. See Art. X, §§ 6(a)(1) and 6(g) of the
Virginia Constitution. The General Assembly in enacting § 58-16.2 authorized a service charge, not a tax. See City of Roanoke v. Fisher, 193 Va. 651, 655, 70 S.E.2d 274, 278 (1952). Therefore, the city's contention that the service charge is to be administered just as real estate taxes are is not supported by the statute, and the University is not liable for the amount determined as of January 1, 1981.

However, neither do I find support for the University's argument that it is not liable for any portion of the 1981 service charge. On its face, the bill forwarded by the city to the University contained a payment date of June 5, 1981. The city treasurer's failure to mail the bill on a more timely basis does not estop the locality from enforcing the law. See Report of the Attorney General (1975-1976) at 33. Because the city clearly imposed the service charge prior to July 1, 1981, and because § 4-9.14 of the 1980 Appropriations Act (Ch. 760 [1980] Acts of Assembly 1203, 1439) was applicable for the first half of 1981, I am of the opinion that the University is subject to the service charge for services rendered by the city prior to the effective date of the 1981 amendment to § 58-16.2 (July 1, 1981).

The General Assembly did not attempt to relieve or forgive whatever service charge liability may have accrued prior to the effective date of the amendment's enactment. As services were rendered by the city which then-existing law permitted to be billed to the University, such charges through the end of June 1981 were properly imposed. The 1981 amendment was not intended to relieve retroactively that service charge liability which accrued prior to its effective date. See Town of Culpeper v. Vepco, 215 Va. 189, 207 S.E.2d 864 (1974); Ferguson v. Ferguson, 169 Va. 77, 192 S.E. 774 (1937).

1In Fretwell, the City of Staunton attempted to impose interest on past-due, unpaid service charges. The circuit court opined that such a "position is inconsistent with the basic position that the service charge is not a tax. If it is not a tax, it is not a tax. The City of Staunton cannot rely on a taxation statute [§ 58-964] for authority to impose interest on a charge which it says is not a tax."

TAXATION. SINGLE METHOD OF ASSESSMENT MUST BE UNIFORMLY APPLIED FOR EACH CATEGORY OF PROPERTY LISTED UNDER § 58-829.

June 29, 1982

The Honorable R. Wayne Compton
Commissioner of the Revenue for the County of Roanoke

You have requested my Opinion as to whether a commissioner of the revenue may utilize different methods of
assessment in valuing automobiles and trucks belonging to businesses and individuals for purposes of tangible personal property taxation under § 58-829, et seq., of the Code of Virginia (1950), as amended.

Section 58-829 lists categories of tangible personal property which are separated for purposes of valuation only. See Report of the Attorney General (1979-1980) at 333. The first paragraph of § 58-829 states:

"Tangible personal property is segregated for local taxation only. The following categories are not to be considered separate classes for rate purposes, but separate categories for valuation purposes. Methods of valuing property may differ among the separate categories listed below, so long as each method used is uniform within each category, is consistent with requirements of this section and may reasonably be expected to determine actual fair market value. Nothing herein shall be construed to prevent a commissioner of revenue from taking into account the condition of the property...."

Automobiles, with certain stated exceptions, are listed for assessment purposes as a separate category under § 58-829C and are required to be valued "by means of a recognized pricing guide or a percentage or percentages of original cost." Trucks, with certain exceptions, are divided into two categories under the provisions of subsections C1 and D. Trucks, under category C1 may be valued in the same manner as automobiles. Those trucks falling within category D, on the other hand, may be valued only "by means of a percentage or percentages of original cost." Thus, these subsections not only separate automobiles and trucks into separate categories for purposes of valuation but also describe the permissible or alternative methods of assessment which may be used with respect to each designated category.

As noted above, the first paragraph of § 58-829 requires that the method of assessment used be "uniform within each category" listed. Subsections C, C1 and D refer only to automobiles and trucks as general categories and make no distinction on the basis of business or individual use or the character of the owner. I am, therefore, of the opinion that the same method of assessment must be applied uniformly to all property within a stated category, regardless of the ownership of the property and regardless of whether its use is by an individual or a business. This does not prohibit the commissioner of revenue from choosing one or the other of the methods of assessment authorized under C and C1. However, the permitted method, once chosen, must be applied to all property within the designated category.

You have also asked whether allowances may be made in the assessment process for such factors as mileage, damage and original cost as evidenced by a bill of sale. Section 58-829 specifically provides that "[n]othing herein shall be
construed to prevent a commissioner of revenue from taking into account the condition of the property...." Mileage and damage to a vehicle are factors affecting its condition. I am, therefore, of the opinion that these two factors may be taken into consideration whether the method of assessment used is original cost or a recognized pricing guide. A bill of sale, on the other hand, is evidence of original cost and may be taken into account only if that method of assessment is chosen for uniform application within a stated category.

TAXATION. SPECIAL SERVICE DISTRICTS. CONSTITUTIONALLY VALID IF TAX IS UNIFORM WITHIN THE SERVICE DISTRICT.

February 10, 1982

The Honorable C. Richard Cranwell
Member, House of Delegates

You have asked my opinion as to the constitutionality of downtown assessment districts and special service districts which are the subject of H.B. 20 and 109, now pending before your subcommittee. House Bill 20 would amend the charter of the City of Portsmouth allowing the creation of a special service district and designating the powers of city council in connection therewith. House Bill 109 would amend and re-enact § 15.1-18.3 of the Code of Virginia (1950), as amended. The Bill itself only changes the population bracket of a statute that was approved by the 1981 session of the General Assembly. Section 15.1-18.3 does not authorize or designate special service districts but authorizes the governing body of any city within a stated population range to designate primary and secondary downtown assessment districts and impose taxes or assessments with different rates upon property owners within those districts.

For the reasons stated below, I am of the opinion that the district authorized by H.B. 20, if enacted, would be facially valid. However, the constitutionality of the district as presently authorized by the existing statute which is to be amended by H.B. 109 is questionable.

House Bill 20 confers special powers upon the City of Portsmouth to create, operate and maintain special service districts within its downtown business district for the purposes and in accordance with the procedures outlined in that Bill. Article VII, § 2 of the Constitution of Virginia (1971) permits the General Assembly to provide by special act for the organization, government and powers of any county, city, town or regional government. Municipal charters conferring powers different from those conferred by general statutes have been uniformly upheld unless they are violative of some competing constitutional mandate. City of Colonial Heights v. Loper, 208 Va. 580, 159 S.E.2d 843 (1968) and Pierce v. Dennis, 205 Va. 478, 138 S.E.2d 6 (1964). Delegation to local governing bodies, by charter amendment or otherwise, of the power to establish incorporated districts
or authorities for purposes defined by the General Assembly has likewise been upheld. Industrial Development Authority of the City of Chesapeake v. Suthers, 208 Va. 51, 155 S.E.2d 326 (1967), reh. den., 208 Va. 347, 157 S.E.2d 245 (1967) and Farquhar v. Board of Supervisors of Fairfax County, 196 Va. 54, 82 S.E.2d 577 (1954). The legislature's authority to create unincorporated special use districts has also been sustained. Town of Narrows v. Board of Supervisors of Giles County, 128 Va. 572, 105 S.E. 82 (1920).

House Bill 20 authorizes city council to levy and collect an annual tax upon property in the designated service district. These revenues must be segregated and used only to pay for the expenses and charges of the additional governmental services or facilities in the designated district or to construct, maintain and operate such facilities. Article X, § 1 of the Constitution requires all taxes to be uniform "within the territorial limits of the authority levying the tax...." This limitation has been construed to include only the limits of the particular district for the benefit of which the taxes are imposed. This may include all or only a portion of the land lying within the jurisdiction of the authority levying the tax. Watkins v. Barrow, 121 Va. 236, 92 S.E. 908 (1917); Town of Narrows v. Board of Supervisors of Giles County, supra; Moss v. County of Tazewell, 112 Va. 878, 72 S.E. 945 (1911). Thus, the proposed amendments to H.B. 20 do not violate the uniformity provisions of Art. X, § 1. The proposed district tax must, of course, be uniform within the service district and must be an addition to and not in substitution of the general real property tax and other assessments borne by the citizens of the City of Portsmouth for general support of their government.

House Bill 109 by general act confers on the governing body of any city within the stated population requirements the authority to designate primary and secondary downtown assessment districts and impose taxes or assessments thereon with different tax or assessment rates. As noted above, the legislature may delegate to a local governing body the power to designate special use districts and to levy a tax to pay for the particular benefits provided. However, any such delegation of authority must be accompanied with sufficient standards and policies to guide and direct the localities as to the authorized purposes and intent of the legislature. See Chapel v. Commonwealth, 197 Va. 406, 89 S.E.2d 337 (1955); Dickerson v. Commonwealth, 181 Va. 313, 24 S.E.2d 550 (1943); Panama Refining Co. v. Ryan, 295 U.S. 385, 55 S.Ct. 241, 79 L.Ed. 446 (1935). House Bill 109 does not clearly set forth the purposes and uses for which the separate assessment districts may be created nor does it limit the uses or purposes for which the taxes stated therein may be imposed. For these reasons it is of questionable constitutionality. I have enclosed suggested amendments to H.B. 109 for your consideration.
TAXATION. STATE BUSINESS LICENSE TAX. MAINTENANCE OF HOME OFFICE BY SALESMAN REQUIRES PURCHASE OF STATE BUSINESS LICENSE TAX UNDER § 58-293.

May 13, 1982

The Honorable N. Everette Carmichael
Commissioner of the Revenue for Chesterfield County

You have asked whether a salesman who solicits orders for an out-of-town manufacturer of hardware, marine and industrial supplies is subject to the State business license tax under § 58-293 of the Code of Virginia (1950), as amended. You state that the salesman in question claims a portion of his house as an office expense on his federal income tax returns, that he makes and receives telephone calls at home from customers and that his home address and telephone number are listed on his business card. Section 58-293 states, in pertinent part:

"Every person, firm or corporation buying or selling for another any kind of merchandise on commission...shall be a commission merchant, provided, however, that this section shall not be construed as applying...to any person who on commission sells merchandise by sample, circular, or catalogue, where the merchandise subsequently delivered is not samples, who has no office, display room, store, or other definite place of business in the State, who has no stock of merchandise in his custody or possession or under his control at any time during the year, and who employs no person, nor as applying to any person who on commission sells merchandise at retail to consumers pursuant to a written agreement with a regularly established retail merchant on whose behalf such merchandise is being sold."

The term "office" as it appears under § 58-293 has been construed in Commonwealth v. Manzer, 207 Va. 996, 154 S.E.2d 185 (1967). The Virginia Supreme Court noted in that case that the tax exemption provided in § 58-293 is to be strictly construed and that the burden is upon the taxpayer to show that he maintains no office before he may take advantage of that exemption. In Manzer, as in this case, the taxpayer was a manufacturer's representative soliciting orders through the use of samples. In Manzer, the taxpayer denied that customers telephoned him at his home. Nonetheless, the court found that use of the taxpayer's home as a place for the regular transaction of business was equivalent to the maintenance of a "office" within the meaning of § 58-293. The fact that the taxpayer claimed home office expenditures on his federal income returns was persuasive, although not controlling, in the determination.

Based on the foregoing facts, I am of the opinion that in accordance with the opinion in Manzer, supra, the taxpayer in question maintains an office and is, thereby, subject to State business license tax under § 58-293.
REPORT OF THE ATTORNEY GENERAL

1Senate Bill 69, enacted during the recent session of the General Assembly, repeals § 58-293 effective January 1, 1983.

TAXATION. TAX ON RECORDING DEED OF TRUST UNDER § 58-55 IS MEASURED BY VALUE OF SECURITY DESCRIBED.

May 5, 1982

The Honorable J. Curtis Fruit, Clerk
Circuit Court of Virginia Beach

You have asked whether the recordation tax on deeds of trust under § 58-55 of the Code of Virginia (1950), as amended, is measured by the full amount of notes or obligations secured by the deed of trust, or is limited to the amount actually secured, which is the fair market value of the property conveyed. In the transaction you describe, the principal amount of the loan involved is $1,000,000. You have been advised that the fair market value of the property subject to the deed of trust is $250,000. The deed of trust to be recorded states that it is given

"to secure the holder or holders thereof, without preference, the payment of the sum of $250,000.00 plus interest...evidenced by a certain note of even date...in the amount of $1,000,000.00...and also to secure the payment of any note or notes, bond or bonds, given and received in curtail or renewal, in whole or in part of the above described debt...Additional collateral has been pledged as additional security for the remaining balance of said note or $750,000.00 plus interest."

Section 58-55 states, in pertinent part:

"On deeds of trust or mortgages the tax shall be fifteen cents upon every hundred dollars or portion thereof of the amount of bonds or other obligations secured thereby. In the event of an open or revolving deed of trust, the amount of obligation for purposes of this section shall be the maximum amount which may be outstanding at any one time. In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust or mortgage, but including the value of any realty required by the terms of the deed of trust or mortgage to be constructed thereon...."

This Office has held that the measure of recordation tax under § 58-55 is the amount of the obligation secured. See Report of the Attorney General (1975-1976) at 387. In the circumstances you present, the instrument itself specifically
provides that only $250,000 is secured; the remainder of the note is secured elsewhere. For this reason, the tax should be assessed only upon the value of the security described, in this case $250,000.

TAXATION. TAX RELIEF FOR ELDERLY.

June 11, 1982

The Honorable Floyd C. Bagley
Member, House of Delegates

You have asked whether a local ordinance promulgated pursuant to § 58-760.1 of the Code of Virginia (1950), as amended, permitting tax relief for the elderly, must prohibit exemption for the tax year in which the qualifying owner dies.

Section 58-760.1(a) permits the governing body of any county, city or town to provide by ordinance for the exemption or deferral of taxes on real estate, or any portion thereof, "owned by, and occupied as the sole dwelling of a person or persons not less than sixty-five years of age..." subject to the restrictions and conditions set forth therein. Section 58-760.1(b) further restricts the availability of relief which may be provided under § 58-760.1(a) and states, in part:

"Changes in respect to income, financial worth, ownership of property or other factors occurring during the taxable year for which the affidavit is filed and having the effect of exceeding or violating the limitations and conditions provided herein or by county, city or town ordinance shall nullify any exemption or deferral for the then current taxable year and the taxable year immediately following...."

Section 58-760.1 is enabling legislation and is based upon Art. X, § 6(b) of the Constitution of Virginia (1971) which authorizes the General Assembly to provide tax relief for the elderly.1 The history of Art. X, § 6(b) indicates that the purpose for its adoption was to aid elderly persons during their lives. See Proceedings and Debates of the House of Delegates Pertaining to Amendment of the Constitution, March 31, 1969, at 355. It was recognized that this purpose could be served even if the deferred taxes were later collected out of their estates. See Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution, April 11, 1969, at 451. In commenting upon the authority of the General Assembly to restrict and condition the tax relief authorized under Art. X, § 6(b), Senator Breeden stated:

"[T]he assistance to be granted sixty-five year olds could be restricted in such manner that while the tax was not to be a burden on the persons using the
property, the sixty-five year olds that we are trying to help, it would nevertheless be possible for it to be collected out of their estates." Id. at 451.

The language of § 58-760.1(b), quoted above, is a specific restriction or condition upon the exemption or deferral from taxes. It denies exemption for the "then current taxable year" in which a change in ownership occurs. In a previous Opinion, this Office held that § 58-760.1(b) prohibits the granting of an exemption for a portion of the year if the property qualifies for only part of a year. See Report of the Attorney General (1976-1977) at 293.

Accordingly, in light of the history of Art. X, § 6(b), the language of the enabling legislation, and the principles of construction which apply, I am of the opinion that a local ordinance must provide that the exemption will not apply for the tax year in which the qualifying owner dies, assuming that the resulting change in ownership will violate the requirements of § 58-760.1.

1 Article X, § 6(b) provides: "The General Assembly may by general law authorize the governing body of any county, city, town, or regional government to provide for the exemption from local real property taxation, or a portion thereof, within such restrictions and upon such conditions as may be prescribed, of real estate owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said real estate in relation to their income and financial worth."

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REPORT OF THE ATTORNEY GENERAL

TAXATION. TAXABLE SITUS OF PROFESSIONAL PARTNERSHIP FOR LOCAL BUSINESS LICENSE TAX.

April 26, 1982

The Honorable Geraldine M. Whiting
Commissioner of the Revenue for Arlington County

You have inquired as to the situs and taxability of a professional accounting partnership for purposes of local business license taxation under § 58-266.1, et seq., of the Code of Virginia (1950), as amended. You refer to a partnership which maintains its base of operations and only business office in Arlington County, Virginia, but performs the majority of its accounting services at the offices of its clients which are located both within and without the Commonwealth of Virginia. You state that all billings and receivables are processed at the partnership's office in Arlington County, although approximately two-thirds of the partnership's income is earned in other states.
Section 58-266.1 permits localities to levy a local license tax on the gross receipts of any person, firm or corporation operating a licensable business, trade, profession, or occupation within their jurisdiction. Section 58-266.4 states that the situs for local license taxation of practitioners of a profession, such as the accounting partnership you describe, is the city, town or county in which such practitioner maintains its office.


In the circumstances you describe, the professional partnership has not established a taxable situs or location other than in your jurisdiction and apportionment of its gross receipts among competing taxing districts is not required. Norton, supra. And, see, Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 100 S.Ct. 1223 (1980). I am, therefore, of the opinion that in these circumstances the taxable situs of the partnership is Arlington County and that the full amount of the partnership's gross receipts is includable in its taxable base or measure for purposes of the Arlington County business license tax. See Report of the Attorney General (1978-1979) at 276.

Previous Opinions of this Office to which you refer construe the situs requirements for businesses and occupations under § 58-266.5 and address situations in which the taxpayer has established two or more business offices or locations, one or more of which is located without the jurisdiction of the locality imposing the tax. See Reports of the Attorney General (1980-1981) at 349, (1979-1980) at 344 and (1978-1979) at 279. These Opinions apply the tests summarized in Complete Auto Transit, Inc. v. Brady, 430 U.S. 280, 97 S.Ct. 1076 (1977), sustaining state taxes which are (1) applied to an activity with a substantial nexus within the taxing state, (2) fairly apportioned among competing jurisdictions in which nexus is established, (3) do not discriminate against interstate commerce and (4) are fairly related to services provided by the state. For the reasons and under the authorities noted above, the Arlington County tax, as applied to the partnership you describe, meets these tests.
TAXATION. TRANSPORTATION DISTRICT MOTOR FUELS TAX. APPLICATION OF TAX PROCEEDS LEFT TO TRANSPORTATION DISTRICT COMMISSION.

April 8, 1982

The Honorable Frank Medico
Member, House of Delegates

This is in reply to your letter of March 23, 1982, in which you asked three questions concerning §§ 58-730.5B and 58-730.5C of the Code of Virginia (1950), as amended. Section 58-730.5B provides that the motor fuels tax imposed by § 58-730.5A shall be distributed monthly to the applicable transportation district commission of which the county or city is a member to be applied to the operating deficit and debt service of the mass transit system of such district. Section 58-730.5C requires that a locality within such a district reduce its tax revenues by an amount equal to the amount which has been or would have been allocated to a locality for rail and bus services but is paid by the commission from the motor fuels tax levy.

Your questions, and the responses thereto, are as follows:

1. May localities apply motor fuels tax collections to either operating deficit or debt service, or must such taxes be applied to both?

The statute provides no direction in answering this question. The decision was left to the transportation district commission to adopt reasonable procedures by which the determination may be made. See Report of the Attorney General (1979-1980) at 356.

2. Must localities reduce real estate tax rates or real estate tax revenues when the tax collections are to be applied to the operating deficit and debt service of the mass transit system of the transportation district?

Section 58-730.5C requires that localities reduce their local tax revenues, by reducing their real estate tax rates (either singly or in combination with other local taxes), to the extent that a particular locality's allocated share of rail and bus service costs were paid through the State's distribution of motor fuels tax proceeds. See Report of the Attorney General (1980-1981) at 362. Those taxpayers burdened by the motor fuels tax imposed by § 58-730.5A were granted entitlement to real estate tax relief under § 58-730.5C. While the governing body has discretion to base a portion of the relief on reductions of local levies other than real estate, the governing body must grant the full measure of relief mandated by the General Assembly. The governing body has no discretion to avoid the legislative dictates. Id.
3. What authority, if any, do localities have to defer or avoid the real estate tax reduction required by § 58-730.5C?

The unequivocal language of subparagraph C requires a real estate tax reduction. See Report of the Attorney General (1980-1981) at 362. Except in the circumstance of an imminent default on a locality's general obligation debt, the required real estate tax reduction must be enacted. Id. As noted above, however, the governing body has the discretion to include in its grant of tax relief other local levies in addition to real estate.


TAXATION. WAIVER OF PENALTY FOR LATE PAYMENT UNDER § 58-963.

March 25, 1982

The Honorable Archer L. Jones, II
Commonwealth's Attorney for Isle of Wight County

You have asked whether penalty and interest may be waived under §§ 58-963 and 58-964 of the Code of Virginia (1950), as amended, when a taxpayer fails to pay his taxes on time because he did not receive a tax bill. Such situations may arise, among other reasons, because the local treasurer has incorrect address information. In addition, you have asked whether an ordinance adopted pursuant to § 58-847 would vest in the treasurer greater discretion to waive interest and penalty than that permitted by § 58-963.

Prior to 1976, when § 58-963 was amended, a local treasurer was empowered to accept a late payment of taxes without assessing a penalty only if the underlying assessment itself was invalid. See Report of the Attorney General (1971-1972) at 382. On several occasions prior to 1976, this Office ruled that a taxpayer's failure to timely pay properly assessed local levies invoked the penalty required under § 58-963, regardless of whether a tax bill had been received by the taxpayer. See Reports of the Attorney General (1971-1972) at 382, (1970-1971) at 373, (1966-1967) at 280, and (1960-1961) at 303.

The 1976 amendment rewrote the second sentence of § 58-963 which now provides, "[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." This amendment creates a different test from that existing prior to the amendment and obviously permits a waiver of the penalty under a broader range of circumstances.
The no fault standard contained in § 58-963 has not been interpreted by the Supreme Court of Virginia. However, the intermediate courts of Illinois have had occasion to construe the term "without fault or negligence" under the provisions of its Revenue Act of 1939. Garcia v. Rosewell, 43 Ill.App.3d 512, 2 Ill. Dec. 392, 357 N.E.2d 559 (1976). The term appears in a statute providing for indemnity of persons who suffer the loss of title to property by reason of the issuance of a tax deed, when such persons are "without fault or negligence." The intermediate appellate court held that the person claiming indemnity "must not have purposefully failed in a duty or engaged in conduct that materially contributed to the problem complained of." Id. Conscious acts of fraud and deception practiced upon the claimant bring the claimant within the bounds of being without fault or negligence. Id. For purposes of this inquiry, the terms "without fault or negligence" and "not in any way the fault of the taxpayer" are sufficiently similar that a similar meaning can be attributed to the Virginia term.2

There is no legislative history which indicates that this 1976 amendment was intended to overrule or reduce the responsibilities of the taxpayer vis-a-vis the government. This Office has described those responsibilities as including the following:

"The taxpayer knew he owned the property and had not received a tax bill on the same. He knew it was taxable and the duty was on him to investigate the amount of the tax and to pay the same." See Report of the Attorney General (1966-1967) at 280, 287.

Moreover, the same rule applies in other states; i.e., it is state policy that owners of property are charged with knowledge of the fact that property is taxable every year. Spokane County v. Glover, 97 P.2d 628, 632 (Wash. 1940); see, also, Bornstein Sea Foods, Inc. v. Whatcom County, 345 P.2d 601 (Wash. 1959).

The 1976 amendment to § 58-963, although permitting waiver of the penalty on a more lenient basis from the taxpayer's point of view, did not relieve the taxpayer of his responsibilities as stated above. Taxpayers continue to bear the same obligation. Thus, I am unable to conclude that the taxpayer's failure to timely pay, simply because he did not receive a bill, "was not in any way the fault of the taxpayer." Accordingly, in my opinion, the penalty required by § 58-963 must be imposed in the case which you have described.

Section 58-964, which pertains to interest on unpaid taxes, does not contain any mechanism by which interest on a delinquent tax may be forgiven short of a determination that the underlying assessment is invalid; consequently, I must likewise opine that interest must be imposed upon the taxpayer's failure to pay his taxes on time.
In response to your second question, § 58-847 provides that a locality, by ordinance, may provide "for the waiver of the penalty and interest for failure...to pay a tax if such failure was not in any way the fault of the taxpayer." (Emphasis added.) The language used in this section is identical to that contained in § 58-963. Therefore, I am of the opinion that the General Assembly intended that the same standards be employed under both provisions and, if a penalty must be imposed under § 58-963, it must likewise be imposed under § 58-847. Cf. Report of the Attorney General (1979-1980) at 354. Thus, I conclude that an ordinance adopted pursuant to § 58-847 would not provide the treasurer with greater authority to waive penalty and interest than exists under § 58-963.


2However, that is not to say that Virginia courts would construe the term as liberally as the Illinois courts should a case or controversy arise.

TOWNS. CHARTERS. CH. 17 OF TITLE 15.1 DOES NOT APPLY TO CONVERSION OF UNINCORPORATED COMMUNITIES INTO MUNICIPAL CORPORATIONS. COMMON TOWN IS UNINCORPORATED COMMUNITY.

January 11, 1982

The Honorable Harvey B. Morgan
Member, House of Delegates

You ask whether Ch. 17 of Title 15.1 of the Code of Virginia (1950), as amended, applies to the conversion of a common town into an incorporated town.¹

The principal provisions of Ch. 17 are §§ 15.1-834 and 15.1-835. Section 15.1-834 provides for holding a special election to determine if the qualified voters of a municipal corporation desire that the municipal corporation request the General Assembly to grant it a new charter or to amend its existing charter. Section 15.1-835 provides that, in lieu of an election under § 15.1-834, a municipal corporation desiring the General Assembly to grant it a new charter or to amend its existing charter may hold a public hearing with respect thereto.

By their terms, §§ 15.1-834 and 15.1-835 presuppose an existing municipal corporation. A common town is an unincorporated community, and not a municipal corporation.²

This Office has previously ruled that Ch. 17 of Title 15.1, consisting of §§ 15.1-833 to 15.1-836.2, does not provide for the incorporation of communities into municipal corporations.³ I concur in that earlier ruling.
Accordingly, it is my opinion that Ch. 17 of Title 15.1 does not apply to the conversion of a common town into an incorporated town.

1The common town in question is Botetourt town which adjoins Gloucester Courthouse. This Office has previously ruled that Botetourt town is an unincorporated community. See Opinion to you dated December 30, 1980, found in Report of the Attorney General (1980-1981) at 43.

2See Opinion cited above.


November 9, 1981

The Honorable Kevin G. Miller
Member, House of Delegates

You ask whether a town is authorized to reimburse its council members for attorneys' fees in a proceeding where one member successfully sues the others to establish his continuing right to office.

Section 15.1-19.2 of the Code of Virginia (1950), as amended, provides that the governing body of any town may employ counsel to defend it, or any member thereof, in any legal proceeding to which such governing body, or any member thereof, may be a defendant, when such proceeding is instituted against it, or them by virtue of any actions in furtherance of their duties in serving such town as its governing body or as members thereof. Further, under § 15.1-19.2, the costs and expenses of such proceedings shall be charged against the treasury of the town, and shall be paid out of funds provided by the governing body.

The proceeding was instituted by one member of council when the remaining members treated the first member's office vacant by reason of resignation. The circuit court found the law to be obscure, and the parties to be acting in good faith. The circuit court also found that the purported resignation was ineffective, having been withdrawn prior to acceptance.

Town councils have responsibilities in connection with the status of their members, and the filling of vacancies in their membership. See, for example, § 15.1-830. The
proceeding therefore involved actions of the members in furtherance of their duties on the governing body.

Since the proceeding was instituted against the remaining members (rather than by them), I find that the town is authorized, under § 15.1-19.2, to reimburse the remaining members for attorneys' fees. At the same time, since the proceeding was instituted by (rather than against) the first member, I find the town is not authorized, under § 15.1-19.2, to reimburse the first member for attorneys' fees.

May 27, 1982

The Honorable W. Tayloe Murphy, Jr.
Member, House of Delegates

This is in reply to your recent letter in which you inquire whether the mayor of the Town of Colonial Beach is entitled to vote as a member of the town council. According to the facts you have presented, the town has not adopted one of the optional forms of government for municipalities provided in Ch. 19 of Title 15.1 of the Code of Virginia (1950), as amended.

Generally, a mayor's powers and duties are derived from the charter of the municipality and any other applicable provision of law. Hammer v. Commonwealth, 169 Va. 355, 193 S.E. 496 (1937); 62 C.J.S. Municipal Corporations § 405 (1949); Report of the Attorney General (1976-1977) at 161. Thus, an interpretation of the Colonial Beach town charter is necessary to ascertain the status of the mayor's voting power.

Under the previous Colonial Beach town charters, the General Assembly limited the mayor's right to vote to that of casting a vote in case of a tie only. The current town charter was enacted in 1960 and does not contain any limitation on the mayor's voting privileges. The language of the charter designates the mayor as a member of the town council. There is no indication from the language of the charter that the mayor is to be treated differently from the other members of council. It thus appears that the legislative intent was to remove the previous limitation on the voting privileges of the mayor. Therefore, I am of the opinion that the mayor of Colonial Beach may vote as any other member of council.

1The relevant provisions of the 1892 town charter read as follows: "The administration and government of the said town shall consist of one principal officer, to be styled the
mayor, and four councilmen, who, together with the Mayor shall constitute the council of the town and such other officers as are hereinafter mentioned, or may be provided for by the council for the efficient government of the said town and carrying out the provisions of this charter. Three of the council shall constitute a quorum for the transaction of business, and the mayor shall have a vote only in case of a tie...."

The relevant portions of the 1906 town charter read as follows:

"The administration and government of the said town shall consist of one principal officer, to be styled the mayor, and six councilmen, who, together with the mayor, shall constitute the council of the town, and such other officers as are hereinafter mentioned, or may be provided for by the council for the efficient government of the said town and carrying out of the provisions of this charter.

Four of the council shall constitute a quorum for the transaction of business, and the mayor shall have a vote only in the case of a tie, unless otherwise provided by law...."

2 The relevant provision of the present town charter reads in pertinent part as follows: "§ 3. The administration and government of the town shall be vested in a council, composed of a mayor and six councilmen, all of whom shall be qualified electors of the town and all of whom shall be elected pursuant to the provisions of §§ 24-168 through 24-175 of the Code of Virginia...."

TOWNS. MUNICIPAL UTILITIES. TOWN OF HILLSVILLE MAY CHARGE MINIMUM MONTHLY FEE FOR WATER AND SEWER SERVICES.

April 9, 1982

The Honorable W. Ward Teel
Member, House of Delegates

This is in reply to your letter dated March 29, 1982, in which you inquired whether the Town of Hillsville, an incorporated town, is authorized to adopt a new system of billing water and sewerage users. You advise that a lessor of space for mobile homes has furnished water and sewer service for his tenants. The lessor received one bill from the town for the water consumed.

Recently, the town began charging all tenants a minimum charge of $3.50 for water, and a minimum of $7.00 for sewerage, without metering.

Sections 15.1-875 and 15.1-876 of the Code of Virginia (1950), as amended, authorize municipalities to maintain water and sewer systems and to collect fees and compensation for the use of these services. Further, when the General Assembly enacted the Hillsville Town Charter (Ch. 64 [1940] Acts of Assembly 89), it empowered the town to maintain water and sewer systems. Thus, the town has the authority to maintain water and sewer systems and to establish a system of
charging and collecting compensation for the use of these services. The enabling provisions do not limit the authority of towns to charge only for metered service; rather, it can impose charges for metered and unmetered service.

This Office has previously held, however, that such fees are subject to the implicit general requirement of reasonableness. See Report of the Attorney General (1976-1977) at 219. I am unaware of any facts which permit me to conclude that the fee system instituted by the town in this instance is unreasonable.

Accordingly, I conclude that the Town of Hillsville is authorized to institute the fee system described herein and that the fees are at least reasonable on their face.

TREASURERS. CONTRACT BETWEEN CITY OF EMPORIA AND COUNTY OF GREENSVILLE TO FURNISH SCHOOL FACILITIES UNDER § 22.1-27. HAS NO STATUTORY AUTHORITY TO PAY CITY TREASURER AS FISCAL AGENT. CONTRACT CAN BE AMENDED TO PERMIT PAYMENT.

July 2, 1981

The Honorable Charles A. Reid
Treasurer of Greensville County

You have asked several questions regarding the consent order recently entered in the case of Wright v. County School Board of Greensville County, Virginia, and Council of the City of Emporia, et al., and several sections of the Code of Virginia (1950), as amended. You have provided me with a copy of the consent order and the underlying agreement upon which it is based. The agreement is dated December 11, 1980, and is between the School Board and Board of Supervisors of the County of Greensville and the Council and School Board for the City of Emporia.

The agreement sets up a system whereby the County of Greensville educates both the children of Greensville County and the children of the City of Emporia. Title to all school buildings, facilities, equipment and supplies is held by the county. The school system is run by a six-member school board, four of whom are residents of the county and two of whom are residents of the city. This board is denominated as the Greensville County School Board. The school board each year submits its budgeting estimate to the governing body of both the county and the city. A mechanism is provided in the agreement for the resolution of budget disputes. A formula for determining the respective contributions of the county and the city is also set forth. Finally, the agreement recites that the city shall pay to the fiscal agent of the school board, who is the Treasurer of Greensville County, its share of the costs of maintaining the school system in twelve equal installments.
You have inquired: 1) whether as fiscal agent of a joint school board you may be paid such salary as you and the school board agree upon; 2) whether the funds of the school system must be kept in a separate account; and 3) what is the degree of review to be used by the accounting firm auditing the county books when it reviews the independent audit of the books of the school board?

First, although you refer to your school system as "joint," it is clear that it is not a joint school board as defined in § 22.1-26 of the Code. In a truly "joint school system," both the city and county would have school boards which would jointly hold title to property, manage the schools, etc. Such a relationship must be approved by the State Board of Education, which approval has not been given. Neither is yours the situation found in § 22.1-52, et seq., since the county has retained title to the school property. The Greensville situation is more properly authorized by § 22.1-27, which permits a school board to "enter into a contract with the school board of an adjacent school division for furnishing public school facilities."

Sections 22.1-26 and 22.1-56, cited above, have complimentary statutes, §§ 22.1-118 and 22.1-117, respectively, which permit the fiscal agent to receive an agreed-upon salary as compensation for the extra duties involved in handling the school board's financial affairs. Unfortunately, there is no statute permitting such payment which directly or indirectly relates to the statute most analogous to your situation, that is, § 22.1-27. However, this section contemplates that your compensation may be established by agreement of the two school boards and in accordance with law. Accordingly, I see no statutory bar to the parties amending the said agreement to permit such payment if they wish. Of course, since the agreement is part of a court decree, the parties may need to seek approval from the federal court for any amendment.

Second, § 22.1-116 requires the treasurer or comparable officer for each area constituting a school division to "keep [the school] funds in an account or accounts separate and distinct from all other funds." This is a statute of general application, having no exceptions. Therefore, the funds of the school board must be kept in a separate and distinct account.

Third, § 22.1-115 requires the State Board of Education, in conjunction with the Comptroller, to "establish and require of each school division a modern system of accounting for all school funds...." I believe your question regarding the degree of review of the independent audit is not a question of law, but a question more properly addressed to the agencies cited above.
Section 22-100.3:1 authorized the county and city to enter into this arrangement. This section has since been repealed.

UNEMPLOYMENT COMPENSATION ACT. EMPLOYMENT SUBJECT TO UNEMPLOYMENT COMPENSATION TAX INCLUDES SERVICES PERFORMED BY INDIVIDUAL IN EMPLOY OF RELIGIOUS, CHARITABLE, EDUCATIONAL OR OTHER NON-PROFIT ORGANIZATION PURSUANT TO § 60.1-14(1)(c).

June 23, 1982

The Honorable Kevin G. Miller
Member, House of Delegates

This is in reply to your recent letter asking whether a non-profit organization qualifying for tax-exempt status under Internal Revenue Code § 501(c)(3) is subject to taxation under the Unemployment Compensation Act of Virginia (the "Act"), § 60.1-1, et seq., of the Code of Virginia (1950), as amended. You further indicate that such organization operates to provide lodging, meals, and education to severely physically handicapped children and adults. The organization's staff is compensated entirely through grants and contributions, and from such compensation social security payments and State and federal income taxes are withheld.

Employers for whom services coming within the definition of "employment" as set forth in the Act are performed become subject to the tax imposed by the Act. Subject to certain conditions, § 60.1-14(1)(c) of the Act provides that "employment" includes "[s]ervice performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization...." Thus, any such organization which employs individuals who perform services within the definition of employment is subject to the tax levied by the Act, provided the organization meets the additional requirements of employing four or more persons during some part of twenty weeks in the current or preceding calendar year, whether or not such weeks are consecutive. See §§ 60.1-14(1)(c)(i) and 60.1-14(1)(c)(ii).

The language of § 60.1-14(1)(c) and its subsections reflects amendments to the Code adopted in 1971. Chapter 235 [1971] Acts of Assembly 467. The purpose of the amendments was to bring the Act into conformity with requirements of federal law. At that time, nearly all non-profit organizations were made subject to the tax.

All such taxable organizations are normally required to make quarterly payments to the Commonwealth. These payments would then go into the fund which the State utilizes to pay unemployment benefits. The tax rate for these payments would be determined by the number of claims filed by former
employees of the organization. As more claims were filed and paid from the fund, the tax rate would increase to a statutory maximum. Conversely, as the frequency of claims decreased, the quarterly tax rate would also decrease to a statutory minimum.

Pursuant to § 60.1-89(1), however, all taxable 501(c)(3) organizations may avoid payment of the quarterly unemployment tax by exercising an option to reimburse the Commonwealth on a dollar for dollar basis for unemployment benefits actually paid. This payment would be due only in the event of payment of a properly compensable claim, attributable to service performed in the employ of the 501(c)(3) organization. This payment method excuses qualifying organizations from making regular quarterly payments to the Commonwealth.

Consequently, I am of the opinion that the organization you describe would be subject to the tax imposed by the Act, unless it qualifies for exclusion based on the number and duration of individuals employed. The organization could, however, elect reimbursable status pursuant to § 60.1-89(1), thereby avoiding liability until unemployment benefits are actually paid.

UNIFORM STATEWIDE BUILDING CODE. BOCA § 106 CANNOT BE CONSIDERED PART OF STATEWIDE CODE AND § 36-103 PROVIDES THAT SUBSEQUENT RENOVATION OR REPAIR SHALL BE SUBJECT TO PERTINENT PROVISIONS OF USBC.

May 19, 1982

The Honorable Kenneth E. Calvert
Member, House of Delegates

This letter is in response to your recent inquiry regarding the Building Officials and Code Administrators model code (hereinafter "BOCA") and § 36-103 of the Code of Virginia (1950), as amended.

You first ask whether § 106 of the BOCA standards must be considered part of the Uniform Statewide Building Code (hereinafter "statewide code" or "USBC"). Section 36-98 directs and empowers the Board of Housing and Community Development (hereinafter "Board") to adopt and promulgate a statewide code. Section 36-99 further provides that in formulating the statewide code, the Board shall have "due regard" for accepted standards as recommended by nationally recognized organizations, including, but not limited to, the standards of the National Fire Protection Association, Southern Building Code Congress and BOCA. Even though the Board must give due regard to these standards, it is not required to adopt any provision recommended by BOCA or any other organization. Because the Board did not adopt § 106 of the BOCA code as part of the statewide code, it is my opinion that § 106 of the BOCA code cannot be considered part of the statewide code.
You next ask how § 36-103 applies to existing buildings or structures. Section 36-103 specifically provides that buildings or structures for which a building permit has been issued, or for which working drawings have been prepared, or on which construction has commenced in the year prior to the effective date of the statewide code, shall "remain subject to the building regulations in effect at the time of such issuance or commencement of construction." Such buildings, therefore, will continue to be governed by the regulations that were applicable at the time of construction or issuance of the building permit.

Section 36-103 further provides that subsequent reconstruction, renovation, repair or demolition of these buildings or structures will be subject to the pertinent provisions of the statewide code. You indicated in your letter your concern that any remodeling or repair of a structure, no matter how significant in relation to the entire structure, could require the owner to make his entire building comply with all provisions of the statewide code. Section 36-103 only requires that the owner comply with the provisions that are pertinent to the renovation, repair, demolition or reconstruction. The local building official is charged with the responsibility of enforcing the code and determining which code provisions are pertinent or applicable to a given situation. See § 36-105 and USBC §§ 108 through 114. If the owner disagrees with the building official's application of the code, he may appeal to the local board of building code appeals and the State Technical Review Board. See § 36-105 and USBC § 114.

UNIFORM STATEWIDE BUILDING CODE. LOCAL GOVERNING BODY CANNOT ENACT ORDINANCE PURSUANT TO § 15.1-29.9 THAT REQUIRES SMOKE DETECTORS BE LOCATED CONTRARY TO INTERPRETATIONS OF STATE TECHNICAL REVIEW BOARD.

March 22, 1982

The Honorable James F. Almand
Member, House of Delegates

You have asked whether § 15.1-29.9 of the Code of Virginia (1950), as amended, allows a local governing body to enact an ordinance that would require that "smoke detectors be located contrary to interpretations rendered by the State Building Code Technical Review Board pursuant to Section 36-118 of the Code of Virginia."

Section 15.1-29.9 permits the local governing body to enact an ordinance which requires the installation of smoke detectors in certain multifamily buildings, hotels, motels and rooming houses constructed prior to the adoption of the Uniform Statewide Building Code (hereinafter "USBC"). The statute specifically requires that all installations must comply with the USBC.
USBC § 1216 sets forth the installation requirements for smoke detectors and § 1216.3.3 specifically provides that detectors shall be installed in a manner and location approved by the building official. The USBC mandates that the Technical Review Board interpret the provisions of the USBC for the Board of Housing and Community Development and the building official who is charged with enforcement of the USBC. See § 36-118 and § 36-105. If an individual is aggrieved by the building official's application of the USBC requirements pertaining to the installation of smoke detectors, he may appeal to the local appeals board and then to the State Technical Review Board. See §§ 36-114 through 36-116. Because § 15.1-29.9 requires that smoke detectors be installed in conformance with the USBC requirements, the local governing body is not permitted to deviate from those provisions.

In view of the foregoing, it is my opinion that a local governing body may not enact an ordinance that would require or permit smoke detectors to be installed contrary to USBC installation provisions as promulgated by the Board of Housing and Community Development and as interpreted by the State Technical Review Board. Accordingly, your inquiry is answered in the negative.

1Section 15.1-29.9 provides, in pertinent part: "The governing body of any county, city, or town, notwithstanding any contrary provision of law, general or special, may require by ordinance that smoke detectors be installed in the following structures or buildings constructed prior to the adoption of the Uniform Statewide Building Code: (i) any multifamily building containing four or more dwelling units, (ii) any hotel or motel regularly used, offered for, or intended to be used to provide overnight sleeping accommodations for one or more persons, and (iii) rooming houses regularly used, offered for, or intended to be used to provide overnight sleeping accommodations and which contain more than four units. Smoke detectors installed pursuant to this section shall be installed in conformance with the provisions of the Uniform Statewide Building Code...."

UNIFORM STATEWIDE BUILDING CODE. LOCAL GOVERNING BODY PRECLUDED FROM ENACTING ORDINANCE THAT ESTABLISHES PERMIT REQUIREMENTS CONTRARY TO CODE.

March 22, 1982

The Honorable Benjamin L. Pinckard
Commissioner of the Revenue for Franklin County

You have asked whether a county may enact an ordinance that will require building permits for all structures that have a market value of fifteen hundred dollars ($1,500) or
more. The purpose of the ordinance would be to gather information for local tax assessment purposes.

Prior to its repeal in 1978, § 58-766 of the Code of Virginia (1950), as amended, required the commissioner of the revenue to issue building permits for any building or structure in excess of five hundred dollars ($500) that was to be built in the county of his jurisdiction. Significantly, that section did not apply to counties which required a building permit under other provisions of Title 15.1 of the Code. The sole basis for the issuance of building permits is now found in the Uniform Statewide Building Code (hereinafter "USBC").

In a prior Opinion of this office, which was rendered prior to the repeal of § 58-766, it was held that the USBC did not supersede § 58-766, because each had a different purpose. See Report of the Attorney General (1973-1974) at 422. With the repeal of § 58-766 in 1978, the basis for that Opinion no longer exists.

Because only the building official is authorized by the USBC to issue building permits, and the General Assembly has not authorized the local commissioner of revenue to require such permits, I am of the opinion that a locality may not enact an ordinance that would grant such authority to the commissioner. I note, however, that the commissioner of the revenue may review the permits issued by the building official and obtain such information from such permits as may be helpful to him for local tax assessment purposes.

UNIFORM STATEWIDE BUILDING CODE. § 872.6 OF BUILDING CODE DOES NOT APPLY UNLESS LOCAL GOVERNING BODY DESIGNATES FLOOD PLAIN PURSUANT TO § 15.1-486.

July 10, 1981

The Honorable C. Jefferson Stafford
Member, House of Delegates

This is in response to your request for my Opinion relating to the Uniform Statewide Building Code ("USBC"). Specifically, you have inquired:

"If the Giles County Board of Supervisors does not adopt a legally enforceable instrument for flood plain management...does Section 872.6 of the Uniform Statewide Building Code still mandate performance standards for construction in a 100 year flood plain."

The governing body of a county or municipality has the authority to designate a flood plain zone. Section 15.1-486 of the Code of Virginia (1950), as amended, states, in part:

"The governing body of any county or municipality may, by ordinance, classify the territory under its
jurisdiction or any substantial portion thereof into
districts...and in each district it may regulate,
restrict, permit, prohibit, and determine the following:

(a) The use of land, buildings, structures and
other premises for...flood plain and other specific
uses...."

Section 872.6 of the 1978 USBC states in its prefatory
language that "[w]here a structure is located in a One
Hundred (100) Year flood plain, the following performance
standards must be satisfied...." The section continues by
listing specific construction requirements for structures in
such a plain. These requirements only apply where a flood
plain exists.

Accordingly, it is my opinion that if the governing body
of a county or municipality has not designated a flood plain
pursuant to § 15.1-486, then the provisions of § 872.6 of the
USBC are inapplicable.

VIRGINIA COAL AND ENERGY COMMISSION. MAY ACCEPT PRIVATE
FUNDS TO CONDUCT STUDY ON FEASIBILITY OF COAL SLURRY PIPELINE
IN VIRGINIA.

April 1, 1982

The Honorable Orby L. Cantrell
Member, House of Delegates

This is in reply to your letter of March 16, 1982, in
which you inquired whether an existing State commission may
accept private funds to study the feasibility of developing a
coal slurry pipeline in Virginia. You suggest that the most
logical body to undertake the study would be the Virginia
Coal and Energy Commission (the "Commission").

One of the primary functions of the Commission is to
study all aspects of coal as an energy resource. The
undertaking of a feasibility study is consistent with the
powers, duties and purposes of the Commission.1 Thus, I am
of the opinion that the undertaking of such a study would be
a proper function of the Commission.

I am also of the opinion that the Commission may accept
private funds to conduct the study in question. In fact, the
Commission is specifically charged by law to actively seek
funding from outside sources.2

1 The powers and duties of the Commission are found in
§ 9-145.1, et seq. Section 9-145.1 provides in pertinent
part as follows: "The Commission shall generally study all
aspects of coal as an energy resource and endeavor to
stimulate, encourage, promote, and assist in the development
of renewable and alternative energy resources other than petroleum."

Section 9-145.1 further provides: "In addition to the aforementioned general powers, the Commission shall also perform the following functions:

H. Actively seek federal and other funds to be used to carry out its functions."

VIRGINIA CONFLICT OF INTERESTS ACT. ADVISORY AGENCIES.
MEMBERS NOT PROHIBITED FROM BEING CONTRACTOR WITH GOVERNMENTAL AGENCY BUT MUST COMPLY WITH DISCLOSURE AND ABSTENTION PROVISIONS IN § 2.1-352.

April 16, 1982

The Honorable William E. Fears
Member, Senate of Virginia

This is in reply to your letter of April 2, 1982, in which you asked to be advised if the chairman of the York County Planning Commission (the "Commission") may contract with the county to perform architectural design work on county projects without being in violation of the Virginia Conflict of Interests Act, § 2.1-347, et seq., of the Code of Virginia (1950), as amended (the "Act").

Local planning commissions are creatures of statute, and although some of their functions may appear to be an exercise of sovereign power, such commissions are "advisory agencies." See § 15.1-427.11 and Reports of the Attorney General (1972-1973) at 479 and 482, and (1973-1974) at 439.

Section 2.1-349 prohibits contracts between officers and employees with their own governmental agency, or with any other governmental agency except under specified conditions. Inasmuch as the county planning commission is an advisory agency as defined in § 2.1-348(b), as opposed to a "governmental" agency, the members are not prohibited from being a contractor with any governmental agency as proscribed by § 2.1-349. Accordingly, your inquiry is answered in the affirmative.

I hasten to point out, however, that, while § 2.1-349 is inapplicable to the contract, the other requirements in §§ 2.1-352 and 2.1-353 are applicable to advisory agencies as well as governmental agencies. Accordingly, the individual in question must comply with such disclosure requirements by giving written notice to both his own agency and the county agency with which he is contracting, and to the attorney for the Commonwealth. Such disclosure shall be a matter of public record and filed at the time of entering into the contract and thereafter during the month of January of each succeeding year. Additionally, if the planning commission should have a transaction before it which involves the
member's firm, it will be necessary for him to disqualify himself as provided in § 2.1-352.

Section 15.1-427.1 reads in pertinent part as follows: "The governing body of every county and municipality shall by resolution or ordinance create a local planning commission by July one, nineteen hundred seventy-six, in order to promote the orderly development of such political subdivision and its environs. In accomplishing the objectives of § 15.1-427 such planning commissions shall serve primarily in an advisory capacity to the governing bodies...."

VIRGINIA CONFLICT OF INTERESTS ACT. BOARD OF VISITORS MEMBER MAY HAVE INTEREST IN FIRM WHICH SELLS INSURANCE AND INVESTMENT PLANS TO FACULTY AND STAFF MEMBERS.

May 6, 1982

The Honorable Preston M. Royster, Rector
Board of Visitors
Virginia State University

This is in reply to your letter of April 13, 1982, inquiring whether there is a violation of the Virginia Conflict of Interests Act, §§ 2.1-347 through 2.1-358 of the Code of Virginia (1950), as amended, (the "Act") where a business entity of which a member of the Virginia State University Board of Visitors (the "Board") is an employee, is selling insurance and investment plans to faculty and staff members of Virginia State University (the "University").

Under the facts as you have described them, I find no violation of the Act. While there are provisions prohibiting an officer of a governmental agency, such as a member of the Board, from contracting with his own agency, i.e., the University, in this instance it appears from the facts that you have supplied that the member, through his business, is contracting with faculty and staff privately and is not paid by or through the University. Consequently, there is no contractual relationship with the University and no violation of the Act.

This practice, while not illegal, is highly undesirable in an institution having a large number of employees who may feel intimidated by a Board member's solicitation of business. It may be a proper subject for Board action to restrict the membership in business transactions within the institution.

You also inquire whether a member of the Board who is currently serving in his third consecutive term is in violation of § 23-165.5. Section 23-165.5 provides that "[n]o person shall be eligible to serve for or during more than two successive terms." (Emphasis added.) Unlike many
of the legislative enactments creating boards that allow members to serve two full four-year terms in addition to serving a portion of a term either before, between or after two four-year terms, § 23-165.5 restricts its members to two successive terms. Therefore, I conclude that the member of the Board who is now serving in his third successive term is in violation of § 23-165.5 and is not entitled to continued service on the Board.

1See University of Virginia--§ 23-72; Mary Washington College--§ 23-91.38; Virginia Military Institute--§ 23-95; Virginia Polytechnic and State University--§ 23-117; Radford University--§ 23-155.6; Norfolk State University--§ 23-174.4(c); and Longwood College--§ 23-187.

2The same restriction applies to James Madison University. See § 23-164.5.

VIRGINIA CONFLICT OF INTERESTS ACT. COMMONWEALTH'S ATTORNEYS. § 2.1-349(A)(2) REQUIREMENT THAT PUBLIC OFFICER DISCLOSE CERTAIN CONTRACTS TO OFFICER'S GOVERNMENTAL AGENCY. REQUIREMENT DOES NOT PROHIBIT COMMONWEALTH'S ATTORNEY FROM HAVING SUCH CONTRACTS MERELY BECAUSE OFFICER AND GOVERNMENTAL AGENCY ARE SAME AS INDIVIDUAL IN SUCH SITUATION.

December 16, 1981

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

You ask whether the provision in § 2.1-349(a)(2) of the Code of Virginia (1950), as amended, requiring a public officer to disclose certain contracts to the officer's governmental agency, prohibits the Commonwealth's attorney of a city from having such contracts, because the officer and the governmental agency are the same individual in such a situation.

The individual in question has been an assistant Commonwealth's attorney for six years. In 1980, after appropriate disclosures by the assistant to the Commonwealth's attorney, the assistant was awarded, after competitive bidding, a contract to represent the city social service department in legal matters at an hourly rate. The city has a city attorney, but the terms of the city attorney's appointment do not call for representation of the social service department.

The assistant to the Commonwealth's attorney has therefore been serving, since 1980, in much the same capacity as a special city attorney. The assistant is now to become the Commonwealth's attorney, but desires to continue representing the city social service department under the existing arrangement, if the disclosure requirements of § 2.1-349(a)(2) allow.
I am advised that, according to the 1980 decennial census, the city has a population of less than 23,000. Therefore, under § 15.1-821, there is no requirement that the Commonwealth's attorney devote full time to his duties, and not engage in the private practice of law. Further, § 15.1-50(A)(1) specifically provides that a Commonwealth's attorney may at the same time hold the office of city attorney.

Dual employment is therefore expressly sanctioned for certain Commonwealth's attorneys by statutes dealing directly with the office of Commonwealth's attorney. A statute dealing directly with a particular office is generally to be interpreted as controlling in the event of conflict with a general statute - in this case, a statute dealing with all public officers and employees. The net effect of any such repealer would be to place Commonwealth's attorneys under a special disability with respect to their financial affairs. I do not read § 2.1-349(a)(2) as intending any such special disability.

Accordingly, it is my opinion that the provision in § 2.1-349(a)(2), requiring a public officer to disclose certain contracts to the officer's governmental agency, does not prohibit the Commonwealth's attorney of a city from having such contracts, even though the officer and the agency are the same individual in such a situation.

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1 Section 2.1-349(a)(2) provides that no officer shall be a contractor with any governmental agency other than his own, unless written disclosure be made in advance, both to the governmental agency of which he is an officer, and to the governmental agency with which such contract is proposed to be made.

2 Section 15.1-822 provides that the Commonwealth's attorney of a city shall perform like duties as the Commonwealth's attorneys of counties.

Therefore, attendance to civil matters on behalf of the city is not inconsistent with the duties of a Commonwealth's attorney. See Opinion to the Honorable E. Bruce Harvey, Commonwealth's Attorney for Campbell County, dated October 26, 1979, found in Report of the Attorney General (1979-1980) at 93.


4 See, for example, Opinion to the Honorable Douglas S. Mitchell, Commonwealth's Attorney for King and Queen County,
dated February 27, 1974, found in Report of the Attorney General (1973-1974) at 431 (Commonwealth's attorney's law firm may not contract with board of supervisors to sell land for delinquent taxes until compliance with § 2.1-349(a)(2)).

VIRGINIA CONFLICT OF INTERESTS ACT. CONSTITUTIONAL OFFICERS. SHERIFF. RELATIVE OF SHERIFF NOT PROHIBITED FROM ACCEPTING ANONYMOUS CONTRIBUTIONS TO PAY INDEBTEDNESS RELATIVE CONTRACTED TO ASSIST SHERIFF TO SATISFY CIVIL JUDGMENT.

January 13, 1982

The Honorable William M. Harris
Sheriff of Nelson County

You ask whether § 2.1-349(a)(4) or 2.1-351 of the Code of Virginia (1950), as amended, prohibits your father-in-law from accepting anonymous contributions to pay an indebtedness he contracted to assist you to satisfy a civil judgment rendered against you in your individual and official capacity.

The judgment arose out of a dispute involving the discharge of a deputy sheriff. The judgment has now been satisfied, without compromise of any right you may have against Nelson County and others. An informal committee has been established with an escrow account to receive anonymous contributions for the discharge of the indebtedness contracted by your father-in-law. You and your father-in-law do not live in the same household.\(^1\)

Section 2.1-349(a)(4) provides that no officer of any governmental agency shall accept money or other thing of value, in addition to the remuneration paid directly to him or approved for him by his governmental agency, for services performed within the scope of his duties.

Section 2.1-351(a) provides that no officer of any governmental agency shall accept money or anything of value for or in consideration of obtaining an appointment, promotion or privilege with any governmental agency. Section 2.1-351(c) provides that no officer of any governmental agency shall accept any gift, favor or service that might reasonably tend to influence him in the discharge of his duties.

Given the facts stated, there is no indication 1) that the contributions are for services performed within the scope of your duties, or 2) that the contributions are in consideration of any governmental privilege, or 3) that the contributions are a gift that might reasonably influence you in the discharge of your duties.\(^2\)

Further, it is well recognized under Virginia law that constitutional officers, who are elected by the people, may receive gifts as campaign contributions. Also, it is
recognized that what a candidate may do with surplus campaign contributions is a matter for the candidate's discretion, at least under the election laws. So there is no blanket prohibition under Virginia law against a candidate or public officer receiving personal gifts or campaign contributions. The prohibitions under §§ 2.1-349(a)(4) and 2.1-351 are limited to specified transactions with a corrupt purpose or effect.

Accordingly, on the facts given, it is my opinion that §§ 2.1-349(a)(4) and 2.1-351 do not prohibit your father-in-law from accepting contributions from the public to pay the indebtedness he contracted to assist you to satisfy the judgment in question.

1 For present purposes, however, I assume the gifts to your father-in-law are in effect gifts to you.
4 Compare Canons 5 and 6 of Canons of Judicial Conduct, Rule 6III of Supreme Court of Virginia, 216 Va. 1132, 1136-1138 (1976).
5 There still remains the matter of protecting the public's confidence in its public officers. In the area of campaign contributions, the Virginia solution is disclosure of contributions, and identification of donors giving more than $100.00. See Fair Elections Practices Act, Ch. 9 of Title 24.1 (§§ 24.1-251 to 24.1-263).
6 In the present situation, the informal committee has chosen to receive contributions on an anonymous basis. I do not view the contributions as covered by the Fair Elections Practices Act, and I have found no other requirement for mandatory disclosure. So, the choice of anonymity or disclosure rests with the parties involved. However, the underlying problem is the same for all contributions, so thought may need to be given to disclosure.

VIRGINIA CONFLICT OF INTERESTS ACT. COUNCIL OF HIGHER EDUCATION. MEMBERS OF COUNCIL EXEMPT FROM ANNUAL DISCLOSURE REQUIREMENTS OF § 2.1-353.2 BUT MUST COMPLY WITH OTHER PROVISIONS OF CONFLICT OF INTERESTS ACT.
March 4, 1982

Mr. Gordon K. Davies, Director
Council of Higher Education

This is in reply to your recent letter in which you inquire if members of the Council of Higher Education are exempted from filing the Virginia Conflict of Interests forms forwarded to them by this Office.

I presume the forms in question are those forwarded by this Office or the Office of the Secretary of the Commonwealth to all State agency officials to be filed in January of each year on which such officials disclose any material financial interest which they think may be substantially affected by actions of their respective agencies, as required by § 2.1-353 of the Code of Virginia (1950), as amended. Many public officials also received a form from the Secretary of the Commonwealth for the purpose of disclosing annually, during the month of December, a statement of economic interest as required in § 2.1-353.2. Public officials subject to that section make the disclosure in lieu of the disclosure required by § 2.1-353.

By opinion dated January 27, 1982, this Office advised the Director of the Science Museum of Virginia that members of the Board of Trustees of the Science Museum of Virginia are exempted from the filing requirements of § 2.1-353.2, due to the express exception in that section for "persons appointed to boards and agencies whose functions are solely cultural, historical or educational." In that Opinion, I drew attention to the fact that the members of excepted boards and agencies would nevertheless be required to comply with other provisions of the Virginia Conflict of Interests Act; e.g., the disclosure requirements of § 2.1-353.

I am of the opinion that the members of the Council of Higher Education, whose functions are solely educational, are exempted from the annual disclosure required by § 2.1-353.2, but must nonetheless comply with other provisions of the Virginia Conflict of Interests Act, including the disclosure provisions of § 2.1-353.

VIRGINIA CONFLICT OF INTERESTS ACT. GENERAL ASSEMBLY MEMBERS MAY CONTRACT WITH OTHER GOVERNMENTAL AGENCIES IF DISCLOSURE AND BIDDING REQUIREMENTS OF § 2.1-349(A)(2) ARE COMPLIED WITH.

April 28, 1982

The Honorable Kenneth E. Calvert
Member, House of Delegates

This is in reply to your letter of April 19, 1982, requesting an Opinion whether a member of the General
Assembly who has an interest in an architectural firm may provide architectural services for State funded projects.

Even though § 2.1-358 of the Code of Virginia (1950), as amended, exempts members of the General Assembly from the provisions of §§ 2.1-351, 2.1-352 and 2.1-353 of the Conflict of Interests Act, it does not exempt such individuals from the provisions of § 2.1-349. Section 2.1-349(a)(1) prohibits an officer or employee of a governmental agency (which would include a member of the General Assembly) from contracting with his own agency, i.e., the General Assembly. Section 2.1-349(a)(2) provides that an officer or employee of a governmental agency shall not contract with or have a material financial interest in a contract with a governmental agency other than the one of which he is an officer or employee unless:

1. written disclosure by the officer of his interest in the contract is made in advance to the governmental agency of which he is an officer and to the governmental agency with which the contract is proposed to be made, and

2. (i) the contract be let after public bidding, or (ii) the administrative head of the governmental agency with which he wishes to contract determines that the property or services that are the subject of the proposed contract in the public interest should not be acquired through competitive bidding. The administrative head must make this determination in writing and as a matter of public record.

If these requirements are complied with and the member determines that there is no substantial likelihood that the opportunity for the contract is being afforded with intent to influence his conduct in the performance of his official duties (§ 2.1-358(c)(ii)), then the Conflict of Interests Act does not prohibit the contract.

VIRGINIA CONFLICT OF INTERESTS ACT. GOVERNOR'S ECONOMIC ADVISORY COUNCIL MEMBERS EXEMPT FROM DISCLOSURE REQUIREMENTS OF § 2.1-353 BY A DIRECTIVE ISSUED BY GOVERNOR IN ACCORDANCE WITH § 2.1-353.01. INDIVIDUAL MEMBERS OF COUNCIL MAY STILL BE SUBJECT TO PROVISIONS OF § 2.1-352.

March 11, 1982

The Honorable Laurie Naismith
Secretary of the Commonwealth

This is in reply to your letter of March 5, 1982, inquiring whether it is necessary for any member who serves on the Governor's Economic Advisory Council to file with any person, agency, institution, authority, government, or governmental agency, State or local, any form, disclosure or
other paper of any kind whatever under any statute or regulation of the Commonwealth of Virginia.

You enclosed with your letter a copy of Executive Order No. 4, issued by the Governor on January 22, 1982, creating the Governor's Economic Advisory Council (the "Council"). You also enclosed a letter addressed to me by the Governor pursuant to § 2.1-353.01 of the Code of Virginia (1950), as amended, part of the Virginia Conflict of Interests Act (the "Act"), excluding the Council from the obligation of § 2.1-353.

Section 2.1-353 is the portion of the Act which requires the written disclosure of a possible material financial interest of any officer or employee of any governmental agency or advisory agency which may be substantially affected by the actions of his agency. Section 2.1-353.01 permits advisory agencies, such as the Economic Advisory Council, to be excluded from the obligations of § 2.1-353. Accordingly, the members of the Council are relieved of any obligation to file any disclosure form pursuant to that section. For purposes of this Opinion, I assume the Governor has no intention of designating the members of the Council as "public officials" as is permitted by § 2.1-353.2. Therefore, the members are under no obligation to file a disclosure form of their economic interest pursuant to that section.

Accordingly, you are advised that there is no statute or regulation requiring the filing of any form of disclosure of any economic or financial interest by the members of the Council with any person, agency, institution, authority, government, or governmental agency, State or local.

I draw your attention, however, to the provisions of § 2.1-352 which could possibly affect some of the members of the Council in the event they should have occasion to consider some transaction, not of general application, in which they may have a material financial interest. For example, the Council may have occasion to consider a matter specifically involving an entity of which a member owns more than five percent or from which he receives in excess of $5,000 per year, exclusive of dividends or interest. In that event, it will be necessary for the member to disclose that interest to the Council and abstain from any consideration of the matter.

VIRGINIA CONFLICT OF INTERESTS ACT. "GRANDFATHER" EXEMPTION, UNDER § 2.1-348(5), AS APPLICABLE TO MARRIED COUPLES. NOT ALTERED BY 1980 AMENDMENTS.

July 2, 1981

Mrs. Diane G. Jennings
C/O Don R. Pippin, Esq.
Pippin & Pippin
You ask whether the 1980 amendments to the Virginia Conflict of Interests Act (the "Act") alter the exemptions applicable to married couples employed prior to 1971. Your inquiry is a request for review pursuant to § 2.1-356(b) made by your attorney.

The first paragraph of § 2.1-348(f)(5) of the Code of Virginia (1950), as amended, states that the provisions of the Act relating to personal service or employment contracts shall not apply to any persons who were regularly employed by the same governmental agency on or prior to June 30, 1971, with regard to personal service or employment contracts with such governmental agency.1

In 1975, the Commonwealth's attorney ruled that, under § 2.1-348(f)(5), there was no violation of the Act, even though your spouse was employed by the same governmental agency in a direct supervisory and/or administrative position with respect to yourself. Both your spouse and yourself were regularly employed by the governmental agency on or prior to June 30, 1971.

This year, however, the Commonwealth's attorney has ruled that, under the 1980 amendments to § 2.1-348, you are no longer entitled to an exemption under § 2.1-348(f)(5).

I do not see that the 1980 amendment in question2 makes any change to the pre-existing exemptions from the Act. It merely adds a second paragraph in § 2.1-348(f)(5), to make available, in exceptional circumstances, a new administrative exemption for State employees. In turn, the new exemption is made subject to protective conditions, once granted.

To be sure, the new exemption is prefaced by the phrase "notwithstanding any other provision of" § 2.1-348, but I read this phrase as giving overriding effect solely to the new exemption and not to repeal other exemptions provided in the law.3

Accordingly, I am of the opinion that the 1980 amendments to § 2.1-348 do not alter your exempt status under § 2.1-348(f)(5).

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1For a summary of the history and purpose of § 2.1-348(f)(5), see Opinion to the Honorable Herman E. Fauntleroy, Mayor of the City of Petersburg, dated December 20, 1979, found in Report of the Attorney General (1979-1980) at 373.

2The pertinent 1980 amendments to § 2.1-348(f)(5), as stated in Ch. 552 [1980] Acts of Assembly 668, are as follows (deletions and additions per original):

'(f) The provisions of this chapter relating to personal service or employment contracts shall not apply to any persons who were regularly employed by the same governmental agency or unit of government on or prior to June thirty,
nineteen hundred seventy-one, with regard to personal service or employment contracts with such governmental agency or unit of government.

Notwithstanding any other provision of this section, no material financial interest shall be deemed to exist when, upon the request of an agency head, a cabinet secretary finds in writing that there are exceptional circumstances for exempting a particular employee of the Commonwealth from the restrictions of this section; provided, however, that in the case of employment by a governmental agency of an officer or employee in a direct supervisory or administrative position, or both, with respect to the spouse of such officer or employee, or other relative residing in the same household, if all subsequent decisions relating to hiring, promotion, termination, transfer, disciplinary actions, merit increases, salary raises or decreases, or evaluations of the subordinate officer or employee are made by a higher level of authority than the person in the supervisory or administrative position.

The protective conditions do not appear in a separate sentence from the new exemption. Chapter 552 makes the new exemption available, "provided, however," the protective conditions are enforced, where applicable.

VIRGINIA CONFLICT OF INTERESTS ACT. MEMBER OF GENERAL ASSEMBLY MAY CONTRACT WITH NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY. DISCLOSURE AND BIDDING REQUIREMENTS.

March 4, 1982

The Honorable William P. Robinson, Jr.
Member, House of Delegates

This is in reply to your recent letter, in which you inquire whether you would be prohibited by the Virginia Conflict of Interests Act from participating in the redevelopment plans of a private corporation of which you are a stockholder under the following circumstances. The corporation anticipates construction of an office facility upon land to be made available by the Norfolk Redevelopment and Housing Authority (the "Authority"). The Authority is a governmental agency.

While § 2.1-358 of the Code of Virginia (1950), as amended, exempts members of the General Assembly from the provisions of §§ 2.1-351, 2.1-352, and 2.1-353 of the Virginia Conflict of Interests Act, it does not exempt such individuals from the provisions of § 2.1-349. The General Assembly and the Authority are separate governmental agencies, and § 2.1-349(a)(2) prohibits you, as a member of the General Assembly, from contracting or having a material financial interest in a contract with another governmental agency unless 1) advance written disclosure is made to the Clerk of the House and to the Authority and 2) either the contract is let after competitive bidding or the Authority makes the determination, in writing and as a matter of public
record, that the services or property should not be acquired through competitive bidding. Section 2.1-348(f) defines "material financial interest" as an "[o]wnership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business...."

If your interest in the private corporation is a material financial interest as defined above, you are required to comply with the two requirements of § 2.1-349(a)(2) before proceeding in order to avoid violating the Virginia Conflict of Interests Act. If these requirements are complied with and you, as a member of the General Assembly, determine that there is no substantial likelihood that the opportunity for the contract is being afforded with intent to influence your conduct in the performance of your official duties (§ 2.1-358(c)(ii)), then the Virginia Conflict of Interests Act does not prohibit the contract.

VIRGINIA CONFLICT OF INTERESTS ACT. MEMBER OF INDUSTRIAL DEVELOPMENT AUTHORITY MAY NOT BE PARTY TO FINANCING ARRANGEMENT BETWEEN AUTHORITY AND BUSINESS IN WHICH HE MAINTAINS MATERIAL FINANCIAL INTEREST.

March 5, 1982

The Honorable Charles L. Waddell
Member, Senate of Virginia

This is in reply to your letter of February 23, 1982, in which you present the following question:

May an appointed member of an industrial development authority organized under Title 15.1, Ch. 33 of the Code of Virginia (1950), as amended, himself, either as an individual, as a partnership of which he is a general partner, or as a closely held corporation of which he is a principal, receive financing through the action of the same industrial development authority of which he is a member?

You state that the financial arrangements regarding such a transaction would involve the following transactions between the authority and the financing business:

"(a) a Deed of Sale of the subject property from the business to the Authority,  
(b) a Deed of Assumption, or a Lease Back, of the same property from the Authority to the Business setting forth numerous restrictive covenants,  
(c) a Note or Bond Purchase Agreement between the Authority, the Business and the Noteholder (assuming for purposes of this inquiry a private placement of the Note or Bond) setting forth numerous terms and conditions."
Section 2.1-349(a)(1) prohibits an officer or employee of a governmental agency from contracting with his own agency. Section 2.1-349(b)(1) provides an exception to this prohibition under certain circumstances for the sale, lease or exchange of real property between the officer and his governmental agency.2

I am of the opinion that the transactions of which you inquire involve more than simply the sale or lease of real property; hence, the exceptions in § 2.1-349(b)(1) do not apply. The third stage of the transactions as you describe it involves a contract by which the authority assists in making favorable financial arrangements available to the business. This exceeds the mere sale, lease or exchange of realty. Accordingly, your inquiry is answered in the negative.

1Section 2.1-349(a) provides, inter alia: "[n]o officer or employee of any governmental agency shall: (1) Be a contractor or subcontractor with the governmental agency of which he is an officer or employee, other than in his contract of employment, or have a material financial interest in any contract or subcontract with the governmental agency of which he is an officer or employee, and the fact that any such contract or subcontract is let after competitive bidding or by negotiations shall be irrelevant...."

2Section 2.1-349(b) provides, inter alia: "The provisions of paragraphs (1) and (2) of subsection (a) of this section shall not be applicable: (1) To the sale, lease or exchange of real property between an officer or employee and a governmental agency provided the officer or employee does not participate in any way as such officer or employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of such governmental agency or by the administrative head thereof...."

VIRGINIA CONFLICT OF INTERESTS ACT. MEMBER OF VIRGINIA HISTORIC LANDMARKS COMMISSION WITH MATERIAL FINANCIAL INTEREST IN OFFICIAL TRANSACTION MUST DISCLOSE AND DISQUALIFY.

March 8, 1982

The Honorable George W. Grayson
Member, House of Delegates

This is in reply to your letter of February 23, 1982, requesting an Opinion whether a violation of the Virginia Conflict of Interests Act occurred when a member of the Virginia Historic Landmarks Commission (the "Commission") spoke and voted against a proposal that an area known as Peacock Hill be nominated for the Landmarks Register. The member is a consultant to the Colonial Williamsburg
Foundation (the "Foundation") which owns some of the land on Peacock Hill.

Section 2.1-352 of the Code of Virginia (1950), as amended, requires that an officer or employee of any governmental agency or advisory agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned, disclose such interest to the governing board of his agency and disqualify himself from voting on or participating in any consideration of the transaction. The Commission member is deemed to be an "officer" and, therefore, comes within the purview of this section. See § 2.1-348(d) and Report of the Attorney General (1975-1976) at 406.

The determination of whether a transaction is "not of general application" must be made on a case-by-case basis. See Reports of the Attorney General (1977-1978) at 480; (1973-1974) at 439. In this instance, because the transaction deals with a special limited section of land, I am inclined to the view that it was a transaction not of general application.

Section 2.1-348(f)(1) defines "material financial interest" as "[o]wnership of an interest of five percent or more in a firm, partnership or other business, or aggregate annual income, exclusive of dividend income and interest income, of five thousand dollars or more from a firm, partnership or other business...." Your letter, with enclosure, stated that the Commission member is a consultant to the Foundation, but the nature of his employment is unclear. Essential to the inquiry is whether he has an interest in the Foundation of five percent or more, or receives $5,000 or more annually from the Foundation, exclusive of dividend income or interest income. If his interest exceeds the five percentum or $5,000 limits, he has a "material financial interest" in the transaction as contemplated by § 2.1-352 and should have disclosed his interest and abstained from any action regarding the Peacock Hill transaction. A failure to do so would constitute a violation of the Virginia Conflict of Interests Act.

1Section 2.1-348(d) states as follows: "'Officer' shall include any person appointed or elected to any governmental or advisory agency, and who shall be deemed an officer of such agency, whether or not such person receives compensation or other emolument of office, but as to §§ 2.1-351, 2.1-352 and 2.1-353 shall not include any member of the General Assembly of Virginia."
You ask whether the members of the Board of Trustees of the Science Museum of Virginia are "public officials" within the purview of § 2.1-353.2 of the Code of Virginia (1950), as amended, for purposes of filing the annual conflict of interests disclosure statement, required by that section.

Section 2.1-353.2 requires certain public officials to file annual statements which disclose their financial interests. Subsection (A)(2) empowers the Governor to designate certain persons as "public officials."

Subsection (A)(3) specifically excludes "from the term 'public official' all persons appointed to...boards and agencies whose functions are solely cultural, historical or educational." The Science Museum is an educational institution of the State. Section 23-239, et seq.

It is a settled principle of statutory construction that the terms used in a statute should be given their usual meaning. The Covington Virginian v. Woods, 182 Va. 538, 29 S.E.2d 406 (1944). In addition, statutes dealing with the same subject matter should be read in pari materia so as to produce a harmonious result. See Reports of the Attorney General (1974-1975) at 219 and (1980-1981) at 265. In this context, it is clear that the trustees of the Science Museum of Virginia are exempted from the filing requirements of § 2.1-353.2, because the purposes and functions of the Science Museum of Virginia are solely cultural and educational in nature.1

1The members would nevertheless be required to comply with other provisions of the Virginia Conflict of Interests Act. For example, § 2.1-353 requires disclosure whenever a material financial interest of the member may be affected by actions of his agency.
October 27, 1981

The Honorable Nathan H. Miller
Member, Senate of Virginia

You ask whether, under § 2.1-352 of the Code of Virginia (1950), as amended, a town councilman must disqualify himself from consideration of a rezoning request, when the request is on behalf of a second councilman, and the first councilman owns a lot adjoining the lot covered by the rezoning request.

Section 2.1-352 provides that any officer of any governmental agency who knows, or may reasonably be expected to know, that he has a material financial interest in any transaction, not of general application, in which the agency in which he is an officer is or may be in any way concerned, shall disclose interest to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency.

The rezoning of an individual lot is a transaction not of general application. It is unclear, however, whether the councilman who owns the adjoining lot has a material financial interest in the rezoning. The rezoning of the adjoining lot could enhance or diminish the value of the first councilman's lot, or it could have no material effect whatsoever. 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.

In the absence of any material effect, it is my opinion that a town councilman need not disqualify himself, under § 2.1-352, from consideration of a rezoning request, when the request is on behalf of a second councilman, and the first councilman owns a lot adjoining the lot covered by the rezoning request.


February 8, 1982

The Honorable Charles J. Colgan
Member, Senate of Virginia

This is in reply to your letter requesting an Opinion as to whether there would be a conflict of interest if a company owned by a member of the Senate of Virginia were to sell jet fuel to the Virginia State Police for its helicopter which is based at an airport located adjacent to the member's company. While the State Police helicopter is usually fueled and serviced at its base, there are times when fuel is needed before the airport opens (8:00 a.m.) and after it closes (6:00 p.m.). The company owned by the member has been requested by the agency to supply fuel at those times, in order that the State Police might avoid the extra time and expense that otherwise would be included if required to fly to Dulles International Airport for the needed fuel.

While § 2.1-358 of the Code of Virginia (1950), as amended, exempts members of the General Assembly from the provisions of §§ 2.1-351, 2.1-352, and 2.1-353 of the Conflict of Interests Act, it does not exempt such individuals from the provisions of § 2.1-349. Section 2.1-349(a)(2) provides that no officer or employee of a governmental agency (which would include a member of the General Assembly) shall contract or have a material financial interest in a contract with another governmental agency except under certain circumstances. The two requirements that must be complied with in order to fall within the exception are:

1. written disclosure by the officer of his interest in the contract must be made in advance to the governmental agency of which he is an officer and to the governmental agency with which the contract is proposed to be made, and

2. (i) the contract be let after public bidding, or (ii) the administrative head of the governmental agency with which he wishes to contract determines that the property or services that are the subject of the proposed contract in the public interest should not be acquired through competitive bidding. The administrative head must make this determination in writing and as a matter of public record.

If these requirements are complied with and the member determines that there is no substantial likelihood that the opportunity for the contract is being afforded with intent to influence his conduct in the performance of his official duties (§ 2.1-358(c)(ii)), then the Conflict of Interests Act does not prohibit the contract.
VIRGINIA CONFLICT OF INTERESTS ACT. OFFICER OF AGENCY MAY CONTRACT WITH ANOTHER AGENCY IF DISCLOSURE REQUIREMENTS OF § 2.1-349 ARE MET.

February 18, 1982

The Honorable C. Phillips Ferguson
Commonwealth's Attorney for the City of Suffolk

This is in reply to your letter of January 29, 1982, in which you inquired whether it is permissible for a commissioner of the Suffolk Redevelopment and Housing Authority Board of Commissioners (the "Board"), a board appointed by the Suffolk City Council, to contract for independent auditing services with any of the following agencies: (1) City of Suffolk; (2) the Industrial Development Authority of Suffolk (the "Authority"); (3) the Western Tidewater Mental Health and Mental Retardation Services Board (the "Services Board"). You also inquired as to whether the existence of a cooperation agreement between the Board and the Services Board renders such a contract for the auditing services impermissible.

Your inquiries are governed by the provisions of the Virginia Conflict of Interests Act, §§ 2.1-347 to 2.1-358 of the Code of Virginia (1950), as amended. Subject to certain exceptions, § 2.1-349(a)(1) prohibits contracts between public officers or employees and their own governmental agencies. Section 2.1-349(a)(2) prohibits public officers and employees from contracting with another governmental agency, unless (1) written disclosure of the interest they have in the contract be made in advance, both to the agency of which they are an officer or employee and to the agency with which such contract is proposed, and (2) the contract is let after competitive bidding, or the contract is for property and services which, in the judgment of the governing body or administrative head of the governmental agency, made in writing and as a matter of public record, in the public interest should not be acquired through competitive bidding. If those requirements are met, the contract would not be prohibited.

The existence of a cooperation agreement between the Board and the Services Board has no effect on the legality of a contract between a commissioner of the Board and Services Board. Such a cooperative agreement does not make the agencies one and the same, thus bringing about the prohibitions of § 2.1-349(a)(1).1

I am of the opinion that a commissioner of the Board may contract with the other governmental agencies mentioned in your letter, provided all disclosure requirements are met, and the contracts be let after competitive bidding, unless such bidding is omitted in accordance with § 2.1-349(a)(2).
Section 2.1-349(a)(1) prohibits an officer or employee from contracting with his own agency (other than his contract of employment).

VIRGINIA CONFLICT OF INTERESTS ACT. TOWN COUNCILMAN MAY VOTE ON ORDINANCE OF GENERAL APPLICATION.

May 5, 1982

The Honorable Thomas D. Horne
Commonwealth's Attorney for Loudoun County

This is in reply to your letter of March 12, 1982, requesting me to review your opinion that § 2.1-352 of the Code of Virginia (1950), as amended, required a town councilman's disclosure and disqualification from voting and consideration of an amendment to a town ordinance under the following circumstances:

A town councilman is the sole proprietor of a real estate business which acts as broker for the lease of space in a local shopping center. The councilman received a $500 downpayment, or deposit, from a company that wished to rent the space and establish an amusement center. That company and three other businesses were prepared to open "arcade centers" if the town council adopted an ordinance providing for use permits for "arcade and amusement centers." When the proposed ordinance was considered by the town council, the councilman did not disclose his interest and voted in favor of the amendment. The amendment was defeated by a tie vote.

Section 2.1-352 provides that if an officer or employee of a governmental or advisory agency "has a material financial interest in any transaction, not of general application, in which the agency of which he is an officer or employee is or may be in any way concerned..." the officer or employee shall "disclose such interest to the governing board thereof, and disqualify himself from voting thereon or participating in any consideration thereof in behalf of such agency...." (Emphasis added.)

The first issue is whether the councilman's interest in the transaction is a material financial interest. Although the councilman's 100 percent ownership of his real estate agency is a material financial interest in his agency (see § 2.1-348(f)(1)), the determinative factor for purposes of § 2.1-352 is his material financial interest in the transaction in which his agency is concerned, i.e., the proposed amendment.

Section 2.1-348(f) defines material financial interest as one that includes "a personal and pecuniary interest accruing to an officer or employee or to his spouse or to any other relative who resides in the same household...."
councilman's brokerage fee would be deemed to be a personal and pecuniary interest accruing to the councilman and is, therefore, a material financial interest for the purposes of § 2.1-352.

Under § 2.1-352, there must be some causal connection between the official transaction and the effect on the public official's pecuniary interests. Defining the required causal connection in each situation is largely a question of factual analysis. See Report of the Attorney General (1980-1981) at 381. The causal connection in the instant case is evidenced by the fact that if the amendment had passed, the business would have used the space for an "amusement center" and the councilman would have benefited financially by receiving his broker's fee. I concur in your view that the councilman had a material financial interest in the transaction, but I believe that the transaction was of general application.

The determination of whether a transaction is "not of general application" must be made on a case by case basis. See Report of the Attorney General (1977-1978) at 480. In this instance, because the transaction, i.e., the amendment, would have allowed the issuance of the use permit to any applicant at any qualifying location, I am inclined to the view that it was a transaction of general application, and required no disqualification.

On the other hand, § 2.1-353 requires a written disclosure of the existence of a material financial interest which one believes, or has reason to believe, may be substantially affected by actions of the governmental agency of which he is an officer. Under the circumstances described in your letter, I am of the opinion that the official had ample reason to know that his material financial interest in his business would be substantially affected by the action of the council, and should have filed a disclosure of that interest as contemplated by § 2.1-353.

In summary, I am of the opinion that the disclosure requirement of § 2.1-353 applies to the councilman in this case, despite the inapplicability of the disqualification requirement in § 2.1-352.

VIRGINIA CONFLICT OF INTERESTS ACT. TRANSACTION OF GENERAL APPLICATION. NINE-MILE WATER TRANSMISSION LINE OF GENERAL APPLICATION AS TO LIMITED ACREAGE ABUTTING LIN:.

September 8, 1981

The Honorable Martin J. McGetrick
Commonwealth's Attorney for Madison County

You ask whether, under the Virginia Conflict of Interests Act, the construction of a nine-mile water transmission line is a transaction of general application as
to a public official who is an owner of acreage abutting the line.

The proposed line, along the so-called "Route 29 Corridor" is intended to connect the Town of Madison with the water facilities of a nearby service authority. The proposed line is a transmission line, and distribution lines to serve land parcels along the nine-mile route are not part of the present project.

Such a transaction is a transaction of general application, relating to water service for the general area, and not to any particular land parcel. See Opinion to the Honorable Henry E. Hudson, Commonwealth's Attorney for Arlington County, dated May 19, 1980, found in Report of the Attorney General (1979-1980) at 367 (only incidental connection between comprehensive plan and individual land parcels).

Accordingly, I concur with your opinion that the proposed construction of the nine-mile water transmission line is a transaction of general application as to an owner of limited acreage abutting the line.

It is also questionable that construction of the transmission line will give rise to a material financial interest. The value affected must be the present fair market value. Remote and speculative effects on value are not to be considered. See Opinion to the Honorable Richard H. Barrick, Commonwealth's Attorney for the City of Charlottesville, dated January 28, 1981 (copy enclosed).

See, also, 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).

VIRGINIA CONFLICT OF INTERESTS ACT. VIRGINIA HOUSING DEVELOPMENT AUTHORITY. COUNTY SUPERVISOR MAY CONTRACT WITH AUTHORITY, WHERE COUNTY ACTS AS AGENT FOR AUTHORITY, SUBJECT TO SAFEGUARDS UNDER § 2.1-349(A)(2). AUTHORITY'S DUTIES UNDER § 2.1-33(A)(2) NOT DELEGABLE TO COUNTY AS AGENT.

January 6, 1982

The Honorable Cynthia D. Kinser
Commonwealth's Attorney for Lee County

You ask whether, under § 2.1-349 of the Code of Virginia (1950), as amended, a member of a county governing body may rent mobile homes to individuals receiving rental assistance from the Virginia Housing Development Authority ("HDA"), where the county acts as agent for HDA.
I am advised the county is agent for HDA pursuant to an administrative services agreement. Under the agreement, location of a suitable housing unit is primarily the responsibility of the qualified family. However, once the family makes its selection, the family's lease must be approved by the county as agent for HDA.

At the time the county approves the lease, the county also determines what rental contributions are to be required of the family. Such contributions become a matter of contract between the qualified family and the owner of the housing unit. The balance of the rental becomes the subject of a housing assistance payments contract between the owner of the housing unit and HDA, with the county acting as HDA's agent.

Section 2.1-349(a)(1) provides that an officer of a governmental agency may not contract with the governmental agency of which he is an officer. Section 2.1-349(a)(2) states, however, that a governmental officer may contract with a governmental agency other than the agency of which he is an officer, provided certain safeguards are observed. The member of the governing body may not, therefore, contract with the county, but may contract with HDA.

Under the above facts, the housing assistance payment contracts are permissible under § 2.1-349(a)(2), provided the statutory safeguards are observed. Observance of these safeguards, however, may not be delegated by HDA to the county as agent for HDA. Instead, notice must be given directly to HDA, and HDA must itself make the determination as to competitive bidding.

Assuming compliance with § 2.1-349(a)(2) in the manner indicated, it is my opinion that a member of a county governing body may rent mobile homes to individuals receiving rental assistance from HDA, where the county acts as agent for HDA.

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1The HDA is a political subdivision of the Commonwealth, and a public instrumentality exercising public and essential governmental functions. See § 36-55.27.
2The rental assistance program is part of the Section 8 Housing Assistance Payments Program (Existing Housing) administered by the U.S. Department of Housing and Urban Development ("HUD").
4See Form HUD 52535 (9-80).

6 The safeguards involve disclosure to both governmental agencies, and a determination by HDA as to whether the public interest requires competitive bidding.

7 The member of the governing body may need to comply with §§ 2.1-352 and 2.1-353, as well. Further, I am advised that a waiver may need to be from HUD under paragraph 17 of the housing assistance payments contract. Paragraph 17 contains conflict of interest provisions specifically affecting members of governing bodies. Mr. Thomas Crawford in the HDA main office in Richmond can provide details.

VIRGINIA FREEDOM OF INFORMATION ACT. DOES NOT APPLY TO HOMEOWNERS' ASSOCIATION NOT SUPPORTED WHOLLY OR PRINCIPALLY BY PUBLIC FUNDS.

February 5, 1982

The Honorable Harry J. Parrish
Member, House of Delegates

This is in reply to your letter of January 27, 1982, requesting an Opinion as to whether members of a nonstock homeowners' association have a right of access to books, records and correspondence of the association. Your inquiry suggests that the Virginia Freedom of Information Act and the Virginia Nonstock Corporation Act may require such disclosure.

Under the Virginia Freedom of Information Act (§§ 2.1-340 through 2.1-346.1 of the Code of Virginia (1950), as amended), only official records of a public body are required to be open for public inspection. Because the homeowners' association does not qualify as a public body, i.e., it is not "supported wholly or principally by public funds," §§ 2.1-341(a) and 2.1-341(e), its records and books need not be made available to the public pursuant to the Virginia Freedom of Information Act.

Section 13.1-228 of the Virginia Nonstock Corporation Act (§§ 13.1-201 through 13.1-296) provides that "[a]ll books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time...." While it is clear that "all books and records" must be available under certain circumstances, two issues remain: (1) is the correspondence that is being sought part of the books and records of the association, and (2) what is a proper purpose for seeking such disclosure?

The requirement that the corporation "keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors..." relates to official documents necessary to the
functioning of this corporation. Correspondence, as such, is not included and would not fall within the designation of "books and records of account" or "minutes" of proceedings. Thus, disclosure of correspondence cannot be compelled under the Virginia Nonstock Corporation Act.

The issue regarding a proper purpose for requesting and being granted inspection privileges of appropriate records, etc., has been addressed by the Supreme Court of Virginia in Bank of Giles County v. Mason, 199 Va. 176, 98 S.E.2d 905 (1957). The court held that while a stockholder is entitled to inspect corporate books and records at a proper time and place and for a proper purpose, this right is not absolute and uncontrolled but must be exercised in good faith and for some reasonable purpose germane to his interest as a stockholder. The court further stated that the purpose of the stockholder must be to protect "his rights as an owner of stock, and that to grant the relief will not adversely affect the interests of the corporation." Bank of Giles County v. Mason, supra, at 181. While the case addresses the disclosure requirements of a stock corporation, the interests of a member of a nonstock corporation and the language of the disclosure statutes for stock and nonstock corporations are so similar as to make the holding in Bank of Giles County v. Mason, supra, relevant to a nonstock corporation. Therefore, a member of a nonstock corporation must be able to show that the purpose for which he seeks inspection of the records is a reasonable purpose and germane to his interest as a member of the corporation. Otherwise, no such inspection need be granted.

I am, therefore, of the opinion that the association's books and records need not be made available under the Virginia Freedom of Information Act, but, depending on the purpose of the inspection, they may have to be made available under the Virginia Nonstock Corporation Act.

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS AND PROCEDURAL REQUIREMENTS.

April 16, 1982

The Honorable Frederick C. Boucher
Member, Senate of Virginia

This is in reply to your letter of March 30, 1982, which reads in part as follows:

"Your opinion is hereby requested concerning the validity under Code of Virginia § 2.1-344(c) of a resolution adopted by the governing body of a county when six of the seven members of the governing body meet without notice to the public in a special executive session, in a place other than its regular meeting place, pursuant to written waiver of notice signed by all seven members."
Section 2.1-344(c) of the Code of Virginia (1950), as amended, is part of the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 (the "Act"). The Act requires that all meetings of public bodies be open meetings, unless otherwise specifically provided by law. See, also, § 15.1-539 requiring the board of supervisors to sit with open doors. You did not state whether the meeting was conducted in open session, but your question implies that the meeting was conducted as a closed executive meeting. If, in fact, the meeting was open, § 2.1-344(c) has no application. If it is an "executive" meeting as defined in § 2.1-341(c), the procedural requirements hereinafter discussed would apply.

The procedural requirements for conducting executive meetings are set forth in §§ 2.1-344(b) and 2.1-344(c). Before a governmental body subject to the Act may go into closed, executive session, an affirmative vote must have been recorded in open meeting on a motion to go into executive session. Such motion must state specifically the purpose or purposes set forth in §§ 2.1-344(a)(1) through 2.1-344(a)(9) which are to be the subject of such meeting and a statement must be included in the minutes of such meeting which shall make reference to the applicable exemption. Subsection (c) of § 2.1-344 provides that "[n]o resolution...adopted, passed or agreed to in an executive or closed meeting shall become effective unless such public body, following such meeting, reconvenes in open meeting and takes a vote of the membership on such resolution...which shall have its substance reasonably identified in the open meeting."

Assuming, arguendo, that an "executive" meeting was conducted, that session was not violative of § 2.1-344(c) if the board complied with the procedural requirements of §§ 2.1-344(b) and 2.1-344(c). Your letter did not indicate whether there was such a compliance.

The fact that no announcement of the time and location of the meeting was provided does not necessarily constitute a violation of the Act. The Act requires notice only to those individuals who request notice in writing. See § 2.1-341; Report of the Attorney General (1979-1980) at 380. The Act must be read with other provisions of law relating to meetings of the board of supervisors. See § 15.1-536, et seq. Section 15.1-537 provides for special meetings, and § 15.1-538 specifies the manner in which such meetings may be called. Notice is mandatory to the members of the governmental body and the county's attorney, but that notice may be waived. See Report of the Attorney General (1950-1951) at 35. You indicate that the notice was waived in the instant case; hence, the special meeting was not violative of basic law governing special meetings.
Section 2.1-341(c) reads as follows: "'Executive meeting' or 'closed meeting' means a meeting from which the public is excluded."

VIRGINIA FREEDOM OF INFORMATION ACT. EXECUTIVE MEETINGS TO DISCUSS "LEGAL MATTERS." CHANGES TO CONTRACTS NOT "LEGAL MATTERS" MERELY BECAUSE PROPOSED ACTION TO BE REFLECTED IN LEGAL DOCUMENTS.

September 11, 1981

The Honorable Robert C. Scott
Member, House of Delegates

You have asked whether the Newport News Redevelopment and Housing Authority (the "Authority") may legally hold an executive meeting to discuss the following matters: (1) a change in the terms of a consultant's contract with the Authority; and (2) a change in the terms of a commercial rehabilitation loan made by the Authority under the Business Incentive Loan program.

The Virginia Freedom of Information Act (the "Act") requires that the meetings of all public bodies shall be public meetings except as specifically otherwise provided by law. See §2.1-343 of the Code of Virginia (1950), as amended. Local governmental bodies, such as the Authority, are subject to the requirements of the Act. Section 2.1-341(a).

Consultant Contract

I am advised that Authority minutes show that the matter relating to the consultant's contract involved a proposed change in the amount of compensation to be paid to the consultant under the contract. There is no indication that the Authority was concerned with the legality of the proposed change or the effect of the proposed change upon the Authority's legal rights and responsibilities. Accordingly, there was no matter involved which would fall within the provisions of § 2.1-344(a)(6), authorizing executive discussions of "legal matters." The mere fact that the proposed Authority action would be reflected in a legal document does not, in my view, make the proposed action a legal matter under § 2.1-344(a)(6).

Section 2.1-344(a)(2), permitting executive discussions of "disposition of publicly held property," is similarly inapplicable to this situation. If every matter involving expenditure of public funds were considered "disposition of publicly held property," most governmental decision-making would be exempt from the public meetings requirement of the Act. The Act expressly states that exceptions to the general
rules requiring open meetings and public records shall be narrowly applied. See § 2.1-340.1.

I am, therefore, of the opinion that the Authority may not legally hold an executive meeting to discuss whether to change the amount of compensation to be paid its consultant.

Change in Authority Loan to Business

The Authority's minutes indicate that the loan matter involved a commercial loan financed, in part, by an Authority note and, in part, by a rehabilitation loan. The proposed change would have altered the portion of the total loan to be financed by the Authority note, thereby affecting the effective interest rate paid by the commercial borrower. For the reasons stated above, I conclude that the proposed change in the terms of the loan did not involve any "legal matter" or "disposition of publicly held property" which could legally have been discussed in an executive meeting under either § 2.1-344(a)(6) or § 2.1-344(a)(2) respectively.

I am, therefore, of the opinion that the Authority may not legally hold an executive meeting to discuss the proposed change in the loan as described above.

VIRGINIA FREEDOM OF INFORMATION ACT. EXEMPTION FROM MANDATORY DISCLOSURE FOR PERSONNEL RECORDS. APPLICATIONS AND NAMES OF PERSONS WHO, AFTER PUBLIC INVITATION, HAVE APPLIED FOR NONPAYING POSITIONS ON PUBLIC BOARD OR COMMISSION.

August 3, 1981

The Honorable George W. Grayson
Member, House of Delegates

You ask whether the Virginia Freedom of Information Act (the "Act") allows a local governing body not to disclose the applications and names of persons who, after public invitation, have applied for nonpaying positions on a public board or commission.

Under § 2.1-342(a), all official records shall be open to inspection and copying, except as otherwise specifically provided by law. Under § 2.1-342(b)(3), certain records are excluded from the Act, including personnel records. 1

Applications are personnel records, whether for paying or nonpaying positions. 2 The identity of the individual is an integral part of any personnel record, and personnel records are defined in part as the records of identifiable individuals. 3

By way of comparison, § 2.1-342(b)(1) provides that certain records are exempt from mandatory disclosure, but the identity of certain individuals is nevertheless subject to
mandatory disclosure. Section 2.1-342(b)(3) contains no such provision for mandatory disclosure of identities.

Accordingly, I am of the opinion that § 2.1-342(b)(3) allows a local governing body not to disclose the applications and names of persons who, after public invitation, have applied for nonpaying positions on a public board or commission.4

1 Apparently there are no public records containing the applicants' names other than the applications. Under the Act, a public body is not required to abstract or summarize information from official records.


3 See, for example, Opinion to the Honorable Vincent F. Callahan, Jr., Member, House of Delegates, dated April 13, 1979, found in Report of the Attorney General (1978-1979) at 316 (pension records of "identifiable individuals").

4 Once an individual is appointed to a public board or commission, the individual's name and appointment presumably will appear in public records other than personnel records. See Opinion to the Honorable Claude V. Swanson, Member, House of Delegates, dated May 24, 1978, found in Report of the Attorney General (1977-1978) at 481 (list of county employees under CETA program is official record--status as personnel record not decided).

VIRGINIA FREEDOM OF INFORMATION ACT. MEETINGS. TELEPHONE POLL NOT VIOLATIVE OF ACT.

June 14, 1982

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

This is in response to your recent letter requesting an Opinion whether the action herein described is consistent with the requirements of the Virginia Freedom of Information Act (§§ 2.1-340 through 2.1-346.1 of the Code of Virginia (1950), as amended) (hereinafter the "Act").

According to the facts set forth in your letter, a public meeting was held on February 20, 1982, by the Alexandria City Council at which the council adopted a motion stating that "in the present form, we do not support SB 402 and HB 324, but would like to see them amended to change the implementation date to January 1, 1984, and further modifications considered to more narrowly target the benefits to the moderate and low income rentals." A city staff member communicated this action to the city's General Assembly delegation. Subsequent to the February 20 meeting, S.B. 402 was withdrawn by its chief patron and an amendment to H.B.
324 postponing the bill's effective date to January 1, 1984, was proposed. Prior to final action by the General Assembly on H.B. 324 and the amendment thereto, an Alexandria City Manager staff member separately polled each of the seven members of Alexandria's city council by telephone for the purpose of determining the position of each member of council concerning H.B. 324. Each member was asked, in effect, whether he or she would support H.B. 324 should the amendment be approved. As a result of the poll, it was determined that a majority of the members of city council supported the bill with the amendment. The city communicated the poll results to the city's legislative delegation in Richmond. No formal vote at a public meeting concerning the city council's position on the bill has been taken subsequent to the telephone poll.

Section 2.1-343 of the Act requires that, except as otherwise provided, all meetings of public bodies shall be public meetings at which the public may be present. Section 2.1-341(a) defines "meeting" or "meetings" as:

"the meetings, 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, wherever held, with or without minutes being taken, whether or not votes are cast, of...municipal councils...."

Whether the situation you describe is consistent with the requirements of the Act depends upon whether polling all members of city council separately by telephone for the purpose of ascertaining each member's position on a Bill previously considered at a public meeting constitutes a "meeting" or "informal assemblage" within § 2.1-341(a).

Section 2.1-341(a)(ii) requires that at least three members, or a quorum if less than three, have been assembled in order to constitute a meeting or informal assemblage within the contemplation of the Act. Meeting or assemblage is generally defined to mean a gathering of persons for discussion wherein each person is able to participate in the discussion and to hear the others. Because separately telephoning each council member does not permit of such group presence and participation in discussion, I am of the opinion that the telephone poll in question was not a meeting or informal assemblage within the contemplation of the Act.

In light of the foregoing, I am of the opinion that the telephone poll did not violate the provisions of the Act. I note that the results of the poll would not constitute a valid action having any binding effect upon the council. The poll results merely represented the collected opinions of the individual members of council.
VIRGINIA FREEDOM OF INFORMATION ACT. MEETINGS BETWEEN REPRESENTATIVES OF SEVERAL LOCAL GOVERNING BODIES TO DISCUSS REGIONAL MATTERS. NOT MEETINGS UNDER § 2.1-343 IF REPRESENTATION RESTRICTED TO TWO INDIVIDUAL MEMBERS FROM EACH GOVERNING BODY.

December 29, 1981

The Honorable George W. Grayson
Member, House of Delegates

You ask whether meetings between representatives of several local governing bodies to discuss regional matters, such as water resources, are meetings under § 2.1-343 of the Code of Virginia (1950), as amended, if representation is restricted to two members from each governing body.

Section 2.1-343 states that, except as otherwise specifically provided by law and except as provided in §§ 2.1-344 and 2.1-345, all meetings shall be public meetings.

Section 2.1-341(a) provides that "meetings" means the meetings, 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 municipal councils, governing bodies of counties, or other organizations or agencies in the Commonwealth, supported wholly or principally by public funds. Section 2.1-341(a), therefore, permits two members of a public body to meet privately without violating the Virginia Freedom of Information Act (the "Act"), except where such two members constitute a standing committee acting on behalf of the full membership of the public body.

It is my understanding that the two representatives from each governing body are not standing or established committees of the governing bodies with authority to act for their governing bodies. Under these circumstances, the two representatives from each jurisdiction would not constitute a legislative body or agency of a local political subdivision.

Section 2.1-344(d) provides that nothing therein shall be construed to prevent the holding of conferences between two or more public bodies, or their representatives, but these conferences shall be subject to the same regulations for holding executive or closed sessions as are applicable to
any other public body. Since the two representatives of each jurisdiction do not constitute a meeting of a public body, their joint conference does not constitute a meeting subject to the public meeting requirements of the Act.

Accordingly, it is my opinion that the meetings you describe between representatives of several local governing bodies to discuss regional matters, such as water resources, are not required to be public meetings under § 2.1-343.


VIRGINIA FREEDOM OF INFORMATION ACT. MEETINGS OF CURRICULUM STUDY COMMITTEE APPOINTED BY LOCAL SCHOOL BOARD ARE MEETINGS SUBJECT TO ACT.

January 28, 1982

The Honorable M. Frederick King
Commonwealth's Attorney for the City of Salem

You ask whether meetings of a curriculum study committee appointed by a local school board are subject to the Virginia Freedom of Information Act (the "Act"). Section 2.1-343 of the Code of Virginia (1950), as amended, requires that all meetings shall be public meetings except as otherwise provided by law and except as provided in §§ 2.1-344 and 2.1-345.

Section 2.1-341(a) provides that "meetings," as used in the Act, means the meetings, when sitting as a body or entity, of the constituent membership of any agency of any political subdivision of the Commonwealth, including school boards, and other organizations or agencies in the Commonwealth, supported wholly or principally by public funds.

I am advised that the committee in question consists of 11 members, as follows: 1 school board member, 6 teachers, and 4 persons from the community. The committee was appointed by formal resolution of the school board. The committee has been directed to study various questions associated with a school system reorganization, and to report back to the school board with recommendations.

The school board is expressly designated, under § 2.1-341(a), as an agency subject to the Act. This Office has previously held that committees established by the bodies subject to the Act must comply with the Act. See Reports of the Attorney General (1974-1975) at 584; (1977-1978) at 482.
There was once an exemption for study committees, which has been repealed. See Report of the Attorney General (1973-1974) at 459.

Accordingly, it is my opinion that the curriculum study committee is subject to the Act.

VIRGINIA FREEDOM OF INFORMATION ACT. NEWSLETTERS PREPARED BY COUNTY ADMINISTRATOR AND DISTRIBUTED TO MEMBERS OF BOARD OF SUPERVISORS BETWEEN MEETINGS ARE AVAILABLE FOR INSPECTION UNDER THE ACT.

February 1, 1982

The Honorable Robert M. Galumbeck
Commonwealth's Attorney for Tazewell County

This will acknowledge receipt of your letter requesting an Opinion as to whether the weekly newsletter-type reports of the county administrator (executive secretary) to the board of supervisors must be furnished to the press pursuant to the Virginia Freedom of Information Act (the "Act") (§§ 2.1-340 through 2.1-346.1 of the Code of Virginia (1950), as amended). You indicated that the purpose of these newsletters is to supply the members of the board of supervisors with summaries of those matters of which the board should be kept abreast between their monthly meetings. You further indicated that some information concerns matters to be discussed in executive session prior to final disposition, while others will be general in nature.

I am of the opinion that the newsletter you describe comes within the Act and must be made available to the public for inspection.

The newsletter falls within the category of "official records" as defined in § 2.1-341(b) and must be open to inspection unless otherwise provided by law. Exceptions to this disclosure requirement are found in § 2.1-342(b)(1) through 2.1-342(b)(14). Section 2.1-342(b)(4) excludes "[m]emoranda, working papers and correspondence held or requested by...[the] chief executive officer of any political subdivision of the Commonwealth...." This Office has held that the county administrator is the chief executive officer of a county and as such his memoranda, working papers and correspondence are exempt from the disclosure requirements of the Act. However, if these papers are distributed by him to members of the board of supervisors, they are no longer exempt under § 2.1-342(b)(4). See Reports of the Attorney General (1975-1976) at 415; (1976-1977) at 315.

An additional factor that must be considered is the nature of the contents of the newsletter. Your letter implies that the newsletter would probably contain information dealing with matters that are permitted to be taken up at executive meetings of the board, as well as
general information. Section 2.1-342(b)(11) exempts
"[m]emoranda, working papers and records...compiled
exclusively for executive or closed meetings lawfully held
pursuant to § 2.1-344." (Emphasis added.) Because your
newsletter will contain both types of information, however,
It would not meet the "exclusive" requirement and, therefore,
would not be exempt from disclosure under § 2.1-342(b)(11).

The intent of the legislature, as enunciated in
§ 2.1-340.1, is to narrowly construe exemption provisions so
that "no thing which should be public may be hidden from any
person." In keeping with this provision and in the absence
of an express exception, it appears that these newsletters,
as you described them, must be made available to the public
for inspection.

VIRGINIA FREEDOM OF INFORMATION ACT. OYSTER POINT
DEVELOPMENT CORPORATION CAN MEET IN EXECUTIVE SESSION TO
DISCUSS BOND FINANCING FOR DEVELOPMENT, ACQUISITION AND SALE
OF PROPERTY FOR PUBLIC PURPOSES. IT CANNOT MEET IN EXECUTIVE
SESSION TO DISCUSS FUNDING FOR DEVELOPMENT OR ACQUISITION OF
PROPERTY FOR PRIVATE PURPOSES.

September 14, 1981

The Honorable Theodore V. Morrison, Jr.
Member, House of Delegates

This is in reply to your request for my opinion as to
whether executive sessions may be held by the Oyster Point
Development Corporation (hereinafter "OPDC") for discussion
of the following topics: industrial revenue bond financing
to develop sites owned by OPDC and acquire property for OPDC;
the sale of land owned by OPDC to private persons for
industrial and commercial purposes; and industrial revenue
bond financing for industrial or commercial development of
property not owned by OPDC or within the tract managed by it.

You have described OPDC as a political subdivision
created by the legislature for the primary purpose of
developing and marketing parcels of real estate from a large
tract of land formerly owned by the City of Newport News. In
furthe ran e of this purpose, the legislature has given OPDC
authority to issue industrial revenue bonds to finance the
purchase and development of sites within that tract, and also
for the financing of industrial revenue bonds for sites in
areas beyond the tract. See Ch. 285 [1979] Acts of Assembly
391.

The Virginia Freedom of Information Act requires that
public bodies meet in public session except as otherwise
provided by law. See § 2.1-343 of the Code of Virginia
(1950), as amended. Sections 2.1-344(a)(1) through
2.1-344(a)(9) authorizes executive or closed meetings in
certain circumstances. Section 2.1-344(a)(2) permits public
bodies to meet in executive session to discuss the
"condition, acquisition or use of real property for public purpose[s], or...the disposition of publicly held property...." The purpose of this exception is to avoid premature exposure of the public body's interest in acquiring and developing land. See Report of the Attorney General (1976-1977) at 316.

Financing Purchase and Sale of Land

The discussion of bond financing to acquire property for OPDC and to develop property owned by OPDC clearly is a subject which may be discussed in executive session. See § 2.1-344(a)(2). In addition, discussions regarding the sale of OPDC property is also covered because it involves disposition of publicly held property. For this reason, it is my opinion that these topics can be discussed in executive session.

Discussion of Financing

You also ask whether the discussion of bond financing for industrial or commercial development of property not owned by OPDC constitutes an exception covered by § 2.1-344(a)(2). The discussion of financing for development of privately owned property for private purposes does not fall within the exception outlined in § 2.1-344(a)(2), since they do not concern "condition, acquisition or use of real property for public purpose[s], or...the disposition of publicly held property...." (Emphasis added.) See Report of the Attorney General (1978-1979) at 314.

You also suggest that OPDC can meet in executive session to discuss the development of privately owned property under § 2.1-344(a)(6). You state that the discussion of an inducement resolution is a potential contract and thus a legal matter falling within this exception. A resolution, however, cannot be considered a contract because it is merely a formal expression of opinion expressed by a public body. Since such a discussion does not relate to pending litigation or other legal matters, it must comply with the open meeting provisions of § 2.1-343. See Report of the Attorney General (1976-1977) at 316.

Accordingly, it is my opinion that the OPDC is authorized to meet in executive session to discuss bond financing for the development and sale of property owned by OPDC. In addition, acquisition of property for OPDC may also be discussed in such sessions. The corporation, however, cannot meet in executive session to discuss industrial revenue bond financing of privately owned property for private commercial or industrial purposes.

VIRGINIA FREEDOM OF INFORMATION ACT. NO ACTUAL VIOLATION OF ACT, BUT VIOLATION OF SPIRIT OF ACT IN WITHHOLDING RECORDS IF AVAILABLE AND NO DISRUPTION OF GOVERNMENT WOULD HAVE RESULTED.
June 25, 1982

The Honorable W. Ward Teel
Member, House of Delegates

This is in reply to your recent letter in which you request an opinion whether a denial by a public office of a request for information under the Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (1950), as amended, (the "Act") was proper.

Your letter provides the following facts. The Montgomery County School Board recently completed a study concerning possible school consolidation and a board committee distributed copies of the report to all school board members in private. The findings were to be held in private until they were announced to the public. Four days prior to the announcement, a representative of a Virginia newspaper requested a copy of the report. The school board denied this request, stating that the Act gives it fourteen days in which to respond to the request. Consequently, the release of the report was effectively blocked until the board made it public four days later.

Section 2.1-342 provides, in pertinent part, that "[e]xcept as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of this Commonwealth...Access to such records shall not be denied...to representatives of newspapers...with circulation in this Commonwealth...." I am unaware of any provision of law which would exempt the report in question from the mandatory disclosure provisions of the Act. Additionally, this Office has held that a report to a public body is an official record subject to the Act when it comes into the possession of the public body. See Report of the Attorney General (1978-1979) at 317. Therefore, the Act requires that this report shall be made available for inspection and copying by the newspaper representative who requested it.

Section 2.1-342 of the Act also sets forth the procedure to follow in responding to requests for inspection. It provides that "[a]ny public body covered under the provisions of this chapter shall make an initial response to citizens requesting records open to inspection within fourteen calendar days from the receipt of the request by the public body...." I further note that § 2.1-340.1 provides that the Act "shall be liberally construed to promote an increased awareness by all persons of governmental activities...." That construction is required because, as § 2.1-340.1 further states, "the affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government...."

Bearing in mind the liberal construction to be accorded the Act, I am of the opinion that the fourteen-day response
provision of § 2.1-342(a) is a recognition by the General Assembly that some reasonable time may be required to permit government employees to perform any necessary clerical duties which may be required to gather the records and make them available for inspection in a public place without substantially disrupting their other governmental duties. Certainly, the purpose of the provision is not to give government a fourteen-day grace period within which it may withhold official records to which the public is entitled and within which it may control the dissemination at a time which is more convenient to the government.

The foregoing conclusion is supported by an oral opinion in an unreported chancery case decided by the Circuit Court of the City of Richmond on November 16, 1978, styled Miller v. Virginia State Board of Elections, No. G-2806-1. In that case, involving a refusal by the State Board of Elections to release copies of election returns to the unsuccessful candidate, the court required a release prior to the expiration of the fourteen days on the ground that time was of the essence and the delay would defeat the purpose of the disclosure.

Based upon the facts contained in your letter, I am unable to conclude that the school board violated the Act when it failed to make available an official record within a period shorter than the fourteen days specified in § 2.1-342(a). If, however, the board had the record readily available and could have disseminated it immediately without causing any disruption to the routine operation of government, then the school board's use of the fourteen-day period as a basis for failure to release such a record pursuant to a request does not comply with the spirit of the Act. Depending upon the factual circumstances regarding interest in--and need for--the document in question, a court might well conclude that the failure to make the report available would constitute a violation of the Act.

**VIRGINIA FREEDOM OF INFORMATION ACT. SCHOOL BOARD'S "WORKSHOP" MEETING WITH DIVISION SUPERINTENDENT TO DISCUSS DIVISION'S ORGANIZATION, OPERATION AND PHILOSOPHY. MUST BE OPEN MEETING UNDER § 2.1-343.**

August 24, 1981

The Honorable George W. Grayson
Member, House of Delegates

You ask whether a school board may meet in a "workshop" setting with the division superintendent to discuss the division's organization, operation and philosophy, without the meeting being open to the public and press under the Virginia Freedom of Information Act (Ch. 21 of Title 2.1) of the Code of Virginia (1950), as amended.
Section 2.1-343 requires that all meetings of public bodies be public meetings, except as otherwise specifically provided by law. Section 2.1-344 allows public bodies to discuss certain matters in executive session. There is no provision in § 2.1-344 that permits closed meetings on such broad topics as a school division's organization, operation and philosophy. The purposes authorized for closed meetings are more narrow and limited.1

Further, there is no exemption for meetings held in an informal or "workshop" setting. Under § 2.1-341(a), meetings include any informal assemblage of as many as three members of a public body's constituent membership. Under § 2.1-341(a), however, the membership may gather at any place or function where no part of the purpose of such gathering is the discussion of any public business, and such gathering was not prearranged with any purpose of discussing any business of the public body. Of course, "workshop" meetings are informal, but the workshops you describe are to be prearranged, and for the discussion of public business.2

Accordingly, I am of the opinion that a "workshop" meeting of a school board with the division superintendent to discuss the division's organization, operation and philosophy must be open to the public and press under § 2.1-343.

1Opinion to the Honorable Virgil H. Goode, Jr., Member, Senate of Virginia, dated August 13, 1979, found in Report of the Attorney General (1979-1980) at 378 (meeting of school board and superintendent to assess priority among administrative positions).

VIRGINIA FREEDOM OF INFORMATION ACT. TOPOGRAPHIC MAPS REQUIRED TO BE OPEN TO INSPECTION AND COPYING.
March 25, 1982

The Honorable Kenneth B. Rollins
Member, House of Delegates

This is in reply to your letter of March 3, 1982, in which you request my opinion on the following questions relating to the reproduction of certain copyrighted topographic maps produced by Loudoun County at the taxpayers' expense.
"1. May the county impose limits on the reproduction of copies of the maps obtained by citizens (or by a town within the county) either by request or under the Freedom of Information Act?

2. May a county charge more than the actual cost (direct labor, equipment and materials) for supplying a copy of such maps?

3. May a county, as a condition precedent to a lease or loan, limit the reproduction of such maps by citizens (or by a town within the county)?"

Your questions are answered by the Virginia Freedom of Information Act (the "Act") and applicable copyright laws. The Act requires the disclosure of public records upon proper request, unless there is an exception or prohibition provided by law. Maps are included in the definition of "official records" that are required to be open to inspection and copying. See §§ 2.1-341(b) and 2.1-342(a) of the Code of Virginia (1950), as amended. Section 2.1-342(a) provides that, while the public body may make reasonable charges for the copying and search time expended in the supplying of such records, "in no event shall the charges exceed the actual cost of the public body in supplying such records."


The Act requires that the maps you refer to be made available for public inspection and allow the county to make reasonable charges for copying and search time expended in the supplying of such records. The U.S. copyright laws give the county, as owner of the copyright, the exclusive right to reproduce such maps, thereby prohibiting reproduction of the maps by anyone other than the county without its consent.

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT. ACTUAL DAMAGES DESCRIBED IN § 55-248.35 CANNOT BE ESTABLISHED UNTIL EXPIRATION OF BREACHED TERM OR COMMENCEMENT OF NEW TENANCY.

September 14, 1981

The Honorable S. Lee Morris, Judge
Portsmouth General District Court

This is in reply to your inquiry concerning how the landlord's remedy after breach of a rental agreement is determined under § 55-248.35 of the Code of Virginia (1950),
as amended. This section is part of the Virginia Residential Landlord and Tenant Act (the "Act") was amended by Ch. 539 [1981] Acts of Assembly 831, to provide a method for calculating actual damages in the event of termination:

"Actual damages for breach of the rental agreement may include a claim for such rent as would have accrued until the expiration of the term thereof or until a tenancy pursuant to a new rental agreement commences, whichever first occurs; provided that nothing herein contained shall diminish the duty of the landlord to mitigate actual damages for breach of the rental agreement."

Future Rent

You ask whether a landlord may obtain a judgment for rent due on the remaining term of the lease prior to expiration of the lease. In order to answer this question, the termination and enforcement procedures of the Act must be examined.

Section 55-248.35 states that if a rental agreement is terminated, the landlord may have a claim for possession of the premises, rent and a separate claim for actual damages. The Act provides that a rental agreement may be terminated by the landlord where there is material non-compliance by the tenant or a failure to pay rent. See § 55-248.31. If the tenant fails to remedy the breach within the prescribed statutory period, the landlord may terminate the agreement. In addition, the landlord may terminate an agreement pursuant to § 55-248.33 when he has notice of the tenant's abandonment.

With the exception of abandonment, the tenant usually remains on the premises after termination of the rental agreement. For this reason, § 55-248.35 requires that all claims after termination for accrued rent, possession and damages be enforced by the institution of an action for unlawful entry and detainer. Section 8.01-128 provides that if the premises have been unlawfully detained from the landlord, he shall be granted judgment for such premises. In addition, it states that any judgment rendered in such an action shall include rent and damages:

"The verdict or judgment shall also be for such damages as the plaintiff may prove to have been sustained by him by reason of...unlawful detention, of such premises, and such rent as he may prove to have been owing to him...No such verdict or judgment shall bar any separate concurrent or future action for any such damages or rent as may not be so claimed."

In essence, this statute provides that any judgment rendered in an unlawful detainer action should only include those damages that can be established to the satisfaction of the trier of fact. It would not be possible to establish the precise amount of damages described in § 55-248.35 (i.e.,
future rent) until the occurrence of either the expiration of the breached agreement or the commencement of a new tenancy. It is my opinion that a claim for such damages could not arise until the occurrence of one of these crucial events.

It should be noted that a new tenancy cannot commence until the landlord has regained possession of the premises at the unlawful detainer proceeding. After regaining possession, he has an opportunity to secure a new tenant and mitigate damages as required by § 55-248.35. If the landlord secures a new tenant, he can institute a subsequent action pursuant to § 8.01-128 for rent that has accrued prior to the commencement of the new tenancy. If he cannot secure such a tenancy, he can then institute an action at the expiration of the breached term for actual damages. At these subsequent hearings, the trier of fact can calculate the extent of damages according to the method described in § 55-248.35 and also determine whether the landlord has properly discharged his duty to mitigate damages.

New Tenancy

You ask when a tenancy commencing pursuant to a new rental agreement may be created. As stated above, when a landlord institutes an unlawful detainer action, the breaching tenant is usually still in possession of the premises and the landlord cannot secure a new tenant until possession is regained. If, however, the tenant has abandoned the premises, it may be possible for the landlord to re-enter the premises and secure a new tenant prior to the institution of a judicial proceeding. In this limited circumstance, a new tenancy could occur prior to an action for unlawful detainer against the breaching tenant. If the landlord was able to secure a new tenant after abandonment and prior to any court proceeding, the breaching tenant would only be responsible for rents that would have accrued prior to the commencement of the new rental agreement. See § 55-248.35.

Accordingly, it is my opinion that a claim for damages described in § 55-248.35 cannot be established until the expiration of the breached rental term or the commencement of a new tenancy, whichever occurs first. When such an event does occur, a subsequent action can be instituted to establish damages according to the methods and considerations found in § 55-248.35.

You asked two additional questions about the landlord's duty to mitigate which were predicated upon an assumption that future rents could be recovered as actual damages. Thus, I need not address those questions.

1Section 55-248.35 codifies the common law duty to mitigate damages. This duty prevents the plaintiff-landlord from
recovering for avoidable consequences. See Crowder v.
Virginian Bank, 127 Va. 299, 103 S.E. 578 (1920).

VIRGINIA RESIDENTIAL LANDLORD AND TENANT ACT. APPLICABILITY TO RENTAL OF CONDOMINIUM UNITS WHERE SUCH UNITS NOT SINGLE-FAMILY RESIDENCES.

December 2, 1981

The Honorable Charles G. Flinn
Acting County Attorney for Arlington County

You have asked whether the Virginia Residential Landlord and Tenant Act (the "Act"), §§ 55-248.2 through 55-248.40 of the Code of Virginia (1950), as amended, applies to the rental of condominium units that are not "single-family residences" as defined in § 55-248.4(m), where the owner is a natural person or his estate and owns no more than ten units.

I believe that the answer to your question is yes.

Section 55-248.4(m) defines "single-family residence" as "a structure maintained and used as a single dwelling unit or any dwelling unit which has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment nor any other essential facility or service with any other dwelling unit...." Section 55-248.5(10) exempts from the Act "[o]ccupancy in single-family residences where the owner(s) are natural persons or their estates who own in their own name no more than ten (10) single-family residences subject to a rental agreement."

Where rented condominium units are single-family residences as defined in § 55-248.4(m), the exemption stated in § 55-248.5(10) would apply; however, condominium units are not ordinarily single-family residences as defined in the Act. Rather, they are typically "dwelling units" as defined in § 55-248.4(o), that is structures or parts of structures "used as a home or residence by one or more persons who maintain a household, including, but not limited to, a mobile home...."

It is therefore my conclusion that the Act would apply to the rental of condominium units by owners who were natural persons or their estates who owned in their name no more than ten dwelling units; it would not apply where such owners owned no more than ten condominium units that were single-family residences.

The impact of the Act upon individual owners of condominiums may be more of an accident rather than an express determination of appropriate policy. However, any change in the express and unqualified language of the Act would require legislative action.
VIRGINIA SUPPLEMENTAL RETIREMENT ACT. § 51-111.31 APPLIES TO EMPLOYEES OF LOCALITIES AND NOT APPLICABLE TO ABC EMPLOYEES.

July 10, 1981

The Honorable Robert W. Jeffrey, Chairman
Department of Alcoholic Beverage Control

You inquire whether §§ 51-111.31 and 51-111.37 of the Code of Virginia (1950), as amended, establishing a procedure whereby certain governing bodies may elect to provide benefits to their law-enforcement personnel which are equivalent to those provided for State police officers, are applicable to law-enforcement personnel of the Department of Alcoholic Beverage Control ("ABC"). You further ask, should my response to your first inquiry be negative, whether there are other provisions under the Virginia Supplemental Retirement System ("VSRS"), that could be used to provide such coverage. It is my opinion that ABC enforcement personnel are not covered under the statutes cited nor are benefits comparable to State police officers' available to ABC enforcement personnel under any other existing statute.

Section 51-111.37 authorizes certain employers to provide the described benefit for certain police officers. Section 51-111.31 describes the employer as:

"The governing body of any county, city or town, and the directing or governing body of any political entity, subdivision, branch or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly specifying the power or powers, privileges or authority capable of exercise by the Commission or public authority or body corporate, as distinguished from §§ 15.1-20, 15.1-21, or similar statutes...."

The question is whether the language "any political entity, subdivision, branch or unit of the Commonwealth or of any commission or public authority or body corporate created by or under an act of the General Assembly..." can be interpreted to include the Alcoholic Beverage Control Commission.

Interpreted in its broadest sense, this language would appear to be applicable to essentially any government agency or body. However, the language cannot be interpreted out of context or without regard to legislative intent. The primary goal of statutory interpretation is to ascertain and give effect to the intention of the legislature. 17 M.J. Statutes § 35.

First, it should be noted that the section cited is contained in an article that bears the headline "Participation of Localities in Retirement System." While not determinating of the issue, the "caption or headline of a section of the code or an act while, accurately speaking, not
a part of it, is valuable and indicating of legislative intent." 17 M.J. Statutes, supra.

Second, it does not appear that the legislature could have intended a general application of this section for all employees of governmental bodies as this is already provided for in § 51-111.27. The legislature must have intended the language to apply to a more restricted group. In light of the definition of "employee" in § 51-111.10(6): "any teacher, State employee, officer or employee of a locality participating in the retirement system as provided in article 4 (§ 51-111.31 et seq.)..." it would be logical to conclude that the legislature did, indeed, intend to limit the coverage of this section to employees of the localities.

Further, the language must be construed in context:

"When a particular class of persons or things is spoken of in a statute and general words follow, the class first mentioned must be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis 1 with such class, the effect of general words when they follow particular words being thus restricted." 17 M.J. Statutes § 62.

The language "governing body of any county, city or town" must be viewed as the particular class and the more general terms following must be interpreted as being restricted so as to apply to entities that are a part of the local government.

That this is the proper interpretation is buttressed by the fact that the section as a whole makes many references to subparts of local governments such as social work and welfare boards. Additionally, reference is made to §§ 15.1-20 and 15.1-21 both of which refer to activities of political subdivisions. Thus, in regarding § 51-111.31 as an entity, it appears clear that the section is intended to govern localities and could not reasonably be construed so as to extend to any body created by the General Assembly.

Had the legislature intended ABC law-enforcement personnel to be included in the benefits extended to State police officers, it could have so specified. In fact, in the past few years, two bills have been introduced that would have specifically extended coverage to ABC law-enforcement personnel. In 1976, S.B. 365 was introduced to amend §§ 51-143 and 51-144(3). This would have included "a member of the Enforcement Division of the Virginia Alcoholic Beverage Control Board vested with police authority..." within the definition of "employee" for purposes of participation in the retirement system for State police. In 1979, H.B. 1390 proposed to amend § 51-111.37 to extend benefits to law-enforcement officers of the ABC and the State Corporation Commission. Both Bills were defeated.
In considering the latter Bill, the study commission recognized certain parallels between State police and other State law-enforcement personnel but concluded:

"[T]hat it [the commission] was unable to arrive at a definition which would bring one more group of state employees into SPORS [State Police Officers Retirement System] without excluding other groups with equally reasonable claims - at least reasonable in the view of their proponents. Based on testimony provided to the Commission's committee considering the matter, an additional 3,600 State employees in 'risk' positions could have a possible claim to membership in SPORS if it were expanded beyond the current approximately 1,200 officers." Report of the Virginia Retirement Study Commission to the Governor and the General Assembly of Virginia, at 16.

Based on this, the Commission advised against passage of H.B. 1390. In light of the failure of past attempts to specify ABC personnel in the appropriate statutes, and in light of the sentiments of the study commission, I conclude that the intent of the legislature to exclude ABC law-enforcement personnel from coverage is clear.

As to your second inquiry, I do not believe any current statute could be interpreted to provide the coverage you seek. I believe a statutory change would be necessary to obtain the result sought.

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1"Ejusdem generis" is defined by Black's Law Dictionary (4th ed., 1968) as "of the same kind, class or nature."

WATER AND SEWER AUTHORITIES. HAVE SUFFICIENT AUTHORITY TO ACCOMPLISH THEIR PURPOSES AND MAY NOT BE CONTROLLED BY COUNTY ORDINANCES.

November 5, 1981

The Honorable Larry G. Elder
Commonwealth's Attorney for Dinwiddie County

This is in response to your letter concerning the role a local governing body in the conduct of the affairs of a water and sewer authority, created under the Virginia Water and Sewer Authorities Act (the "Act"), § 15.1-1239, et seq., of the Code of Virginia (1950), as amended.

1. You first ask whether local governing bodies which lawfully create an authority are required to adopt a detailed ordinance providing for the operation of such authority, regulations governing service to customers, and penalties for failure to comply?
Section 15.1-1241 provides that the governing bodies of one or more political subdivisions may create by ordinance, resolution or agreement, a water and sewer authority which shall be a "public body politic and corporate." Section 15.1-1242 requires that the ordinance establishing an authority shall include articles of incorporation, setting forth the name and the location of the principal office of the authority, its member political subdivisions, the names of the members appointed to the governing board of the authority, and the purposes for which it is created. Public notice and hearings on the ordinance creating an authority are required, and a referendum on the question is provided for in certain circumstances. See §§ 15.1-1243, 15.1-1244 and 15.1-1244.1. Section 15.1-1246 provides that the State Corporation Commission shall, after approval of the authority's articles of incorporation, issue a certificate of incorporation or charter, after which the authority is "conclusively deemed to have been lawfully and properly created...and authorized to exercise its powers under this chapter." (Emphasis added.)

Section 15.1-1250 sets out in detail extensive powers granted to an authority organized under the Act. Those powers include, inter alia, authority to adopt bylaws for conduct of its affairs, sue and be sued, acquire real property, issue revenue bonds, borrow money, and enter into contracts. Section 15.1-1261 contemplates the establishment and enforcement of authority rules and regulations governing services provided to customers. Section 15.1-1249 provides that the powers of each authority shall be exercised by the appointed members of such authority. Thus, the Act provides the authority itself with broad authority to conduct its affairs and accomplish its purposes.

The Act, however, does reserve certain specific powers to the governing bodies which establish an authority. Section 15.1-1247 prohibits an authority from undertaking projects or services other than those specified in the articles of incorporation, unless the member governing bodies lawfully adopt ordinances authorizing such additional projects. Section 15.1-1261 requires the concurrence of member governing bodies if the authority wishes to establish a rule or regulation requiring that properties adjoining its system connect to such system. Enforcement of such requirements connection, however, is the responsibility of the authority. See Opinion to the Honorable William H. Logan, Jr., Commonwealth's Attorney for Shenandoah County, dated December 19, 1979, found in Report of the Attorney General (1979-1980) at 395.

I conclude from the foregoing that the Act provides water and sewer authorities ample powers to conduct their operations and pursue their stated purposes without enactment of any detailed ordinance by the governing bodies of the member political subdivisions.
2. You have also asked whether the board of supervisors may adopt such an ordinance even if such ordinance is not legally required?

Nowhere in the Act are the governing bodies of jurisdictions creating an authority empowered to prescribe rules for operating an authority by ordinance, or to enforce penalties for failure to comply with such ordinance. See Opinion to the Honorable William C. Carter, Commonwealth's Attorney for Cumberland County, dated May 9, 1966, found in Report of the Attorney General (1965-1966) at 308. The powers of local governments in Virginia are narrowly construed to embrace only those powers expressly granted by statute or necessarily implied from express powers. Commonwealth v. Arlington County Board, 217 Va. 558, 573-574, 232 S.E.2d 30 (1977). The Act instead provides the authority broad powers necessary to govern and maintain its operations. See § 15.1-1250. Thus, such powers are not necessarily implied as powers of the local governing bodies. I am, therefore, of the opinion that local governing bodies which establish a water and sewer authority are not empowered to adopt an ordinance detailing the operations of an authority.1

3. Your third inquiry assumed that such an ordinance was permitted and asked whether local governing bodies have the power to impose criminal sanctions against individuals who violate the ordinance by refusing to pay the required service charges or comply with an authority's regulations and orders. I have already determined that no such ordinance may be adopted by a local governing body. Moreover, the Act provides no criminal penalties for failure to comply with regulations or orders of an authority. The Act does provide for mandatory connections, customer service charges (§ 15.1-1261), authority enforcement of such charges (§ 15.1-1262) and provides the authority a lien for unpaid charges (§ 15.1-1263). Thus, the remedies available for enforcing authority regulations, fees and orders are civil rather than criminal. I am, therefore, of the opinion that the Act does not provide either the authority or the local governing body with power to enforce authority orders, regulations or service charges through criminal sanctions.

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1The Act, as mentioned above, provides local governing bodies authority to determine the broad purposes of an authority. See §§ 15.1-1242 and 15.1-1247. But regulation of daily operations is the province of the authority and its governing board. See § 15.1-1250.

WATER AND SEWERAGE SYSTEMS. CUSTOMERS OF COMPANY VERSUS CUSTOMERS OF SEPARATE SYSTEM. "MAJORITY OF THE CUSTOMERS," UNDER § 13.1-50, REFERS TO CUSTOMERS OF SEPARATE SYSTEM.
August 17, 1981

The Honorable George W. Grayson
Member, House of Delegates

You ask whether the phrase, "a majority of the customers," in the last paragraph of § 13.1-50 of the Code of Virginia (1950), as amended, refers to the customers of a separate water or sewer system, or to all the customers of a company operating several such systems.

The last paragraph of § 13.1-50 provides that a water or sewer company shall not serve more than 50 customers unless its charter states the corporation is a public service company. The section, however, contains a "grandfather" exemption as to companies incorporated and operating a water or sewer system on January 1, 1970.

Notwithstanding the "grandfather" exemption, special provisions apply to a system serving more than 50 customers. As to such systems, upon application to the State Corporation Commission by a majority of the customers or the company, a hearing may be held after notice to the company and the system's customers or a majority thereof, and the Commission may order such improvements or rate changes as are just and reasonable.

Upon any such order, the last paragraph of § 13.1-50 further provides the system shall remain subject to the Commission's regulatory authority in the same manner as a public utility for such reasonable period as the Commission may direct.

A water or sewer company may, of course, operate more than one system. By the nature of such operations, each separate system may be expected to use separate facilities and serve separate areas. As a result, each system may be expected to be a separate functional unit from the standpoint of the customers served.

For example, each system may be expected to experience separate costs and separate operating problems. Under such circumstances, one would expect each system to be treated as a separate functional unit for purposes of public utility regulation.

The express language of the last paragraph of § 13.1-50 is consistent with this "separate system" approach. For example, the power of the Commission to retain regulatory authority is cast in terms of separate systems. In addition, the limitation on the "grandfather" exemption is stated in terms of any system serving more than 50 customers. Further, the requirement for notice is in terms of the system's customers or a majority thereof.

Accordingly, I am of the opinion that the phrase, "a majority of the customers," in the last paragraph of
§ 13.1-50, refers to the customers of a separate water or sewer system, rather than to all the customers of a company operating several such systems.

1Compare § 15.1-1261 and Opinion to the Honorable J. G. Overstreet, County Attorney of Bedford County, dated January 16, 1981 (copy enclosed).

WEAPONS. PERMIT TO CARRY CONCEALED WEAPON IS VALID THROUGHOUT THE STATE.

February 10, 1982

The Honorable Charles E. King, Jr., Clerk
Circuit Court of Gloucester County

This is in reply to your letter of January 29, 1982, in which you ask whether the circuit court may issue a permit to carry a concealed weapon pursuant to § 18.2-308 of the Code of Virginia (1950), as amended, which permit is valid throughout the Commonwealth of Virginia.

This Office has ruled previously that a permit to carry a concealed weapon is valid throughout the State. See Reports of the Attorney General (1968-1969) at 45; (1954-1955) at 48. Although § 18.2-308 has been amended since those Opinions, the provision upon which those Opinions was based has remained substantially unchanged. Accordingly, I adhere to the prior Opinions and conclude that such a permit is valid throughout the entire Commonwealth.

WELFARE. FRAUD PROSECUTION UNDER § 63.1-112 OR 63.1-124 IS DISCRETIONARY.

April 9, 1982

The Honorable Sidney Barney
Commonwealth's Attorney for the City of Petersburg

This is in reply to your recent letter in which you ask whether a particular factual situation involving alleged welfare fraud must be prosecuted under § 63.1-112 of the Code of Virginia (1950), as amended, rather than under § 63.1-124. In the factual situation described in your inquiry, several welfare recipients were employed after completing public assistance applications. They failed to notify the local department of welfare of their change in employment status and each was thus able illegally to continue receiving welfare benefits until their employment was discovered by the local department. A conviction under § 63.1-112 constitutes a misdemeanor. One who is convicted under § 63.1-124 is guilty of larceny which can be punishable as a felony.
I am unable to conclude that one of the statutes is more specific than the other concerning welfare fraud, or that one is more tailored to the welfare fraud situation than the other. For example, the relevant language in § 63.1-112 states as follows:

"Any recipient who knows or reasonably should know that such change in circumstances will materially affect his eligibility for assistance or the amount thereof and willfully fails to comply with the provisions of this section, shall be guilty of a misdemeanor and, upon conviction, shall be punished accordingly."

The relevant language of § 63.1-124 says:

"Whoever obtains, or attempts to obtain, or aids or abets any person in obtaining, by means of a willfully false statement or representation, or by impersonation, or other fraudulent device, assistance to which he is not entitled shall be deemed guilty of larceny, and upon conviction, shall be punished accordingly. Willful failure to notify the Department of change in conditions which could result in a reduction or termination of assistance received hereunder shall constitute a violation of this section...." (Emphasis added.)

The above-stated statutory provisions clearly show that both statutes specifically deal only with failure to report changes in welfare conditions or circumstances. Both are found in Title 63.1 of the Code, the welfare title, and not in Title 18.2 which contains the general references to crimes and offenses. Furthermore, nothing in § 63.1-112 indicates that it establishes the exclusive offense for welfare fraud, and the same is true for § 63.1-124. On the other hand, I cannot conclude from the statutory language cited above that these two statutes overlap; or that each requires proof of some fact that the other does not. To the contrary, both appear to require the same elements of proof as their language is similar except for the potential punishment. See Brooks v. Commonwealth, 220 Va. 405, 407, 258 S.E.2d 507 (1979).

In Brooks, a welfare recipient received funds from her estranged husband after filing the initial application. She failed to report the change in conditions. She was prosecuted under § 63.1-124 for "willful false statement" and under other provisions of § 63.1-112. In dicta, the court at least impliedly approved of the prosecution under § 63.1-124 and it affirmed the conviction.

In situations where welfare recipients appear to violate either of these two statutes by their willful failure to report changes in employment status and where the language of the two statutes is similar except for the potential punishment, I am of the opinion that it is a matter of prosecutorial discretion whether the Commonwealth proceeds
under one statute or the other. Mason v. Commonwealth, 217 Va. 321, 228 S.E.2d 683 (1976).

WET SETTLEMENT ACT. VALIDITY OF WAIVER SIGNED BY PARTIES TO REAL ESTATE TRANSACTION.

July 27, 1981

The Honorable James F. Almand
Member, House of Delegates

You have asked whether a lender can request that the parties to a real estate settlement waive the protections afforded to them by § 6.1-2.10, et seq., of the Code of Virginia (1950), as amended, which is popularly known as the Wet Settlement Act (the "Act"). You further inquire about the effectiveness of any waiver signed by the parties.

The Act was passed in 1980 in response to a growing awareness of the problems caused by the delay in the disbursement of loan funds pursuant to a real estate settlement, a practice that was becoming commonplace in certain parts of our State. During the period between the date on which settlement took place and the date on which the disbursement of loan funds took place, the seller and buyer often paid interest on two different loans on the same house. In addition, the delay in disbursement caused uncertainty in the flow of money in real estate transactions and ethical considerations for settlement attorneys who wanted to disburse funds promptly. The Act, which was passed after the issues were considered by a legislative subcommittee, was designed to insure that the business of real estate settlements be conducted in an expeditious manner.

According to the information which you have provided, it has now become the practice in certain parts of the State for lenders routinely to request that the parties to a real estate transaction waive their protections under the Act. The consequence is to nullify the effect of the statute with respect to the lender's responsibilities. The Act can be difficult to apply in all situations and it is assumed that the waiver practice has developed out of a desire to avoid practical problems presented in the application of the statute.

Although an individual may generally waive a personal right granted to him by statute if the statute is designed solely for his own protection, waivers may not be used to defeat a statute designed to effect a broad change in public policy. 17 C.J.S. Contracts § 207 (1963); 17 Am.Jur.2d Contracts § 173 (1964). The use of a routine waiver form in this case has the effect of negating the statutory duty that the legislature imposed on lenders engaging in certain real estate transactions to disburse loan funds promptly. It is my opinion that routine waivers may not be used by such lenders to relieve themselves of their statutory duties,
thereby nullifying the change in public policy intended by the legislature. See Bowersock v. Smith, 243 U.S. 29 (1917); Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949); Bott v. Hampton Roads Sanitation District Commission, 190 Va. 775, 783, 58 S.E.2d 306, 309 (1950). 2

You also ask whether by signing a waiver form, the parties to a real estate transaction have effectively waived the protections afforded to them by statute. As I have just discussed, where such a waiver is part of the business practice of the lender to obtain relief from its statutory responsibilities under the Act, such a waiver is contrary to public policy and unenforceable.


2In addition, a waiver signed by the parties to a real estate transaction is not binding on the State Corporation Commission which regulates certain lenders. Under §§ 6.1-195.70 and 6.1-92, the State Corporation Commission may consider in its review of the business practices of the lender whether the laws of the State have been fully observed. Thus, the State Corporation Commission may determine that, despite a signed waiver, the lender has not complied with its statutory duties under the Act.

WETLANDS ACT. TOWNS DO NOT HAVE OPTION OF ADOPTING THEIR OWN WETLANDS ZONING ORDINANCE WHERE COUNTY OF WHICH THEY ARE A PART HAS HAD WETLANDS ZONING ORDINANCE IN EFFECT FOR OVER ONE YEAR AND AMENDS SUCH LAWS TO CONFORM WITH 1982 AMENDMENTS OF § 62.1-13.5.

May 25, 1982

The Honorable James E. Douglas, Jr., Commissioner
Marine Resources Commission

You ask whether towns which previously lost their option to adopt a wetlands ordinance pursuant to § 62.1-13.6(b) of the Code of Virginia (1950), as amended, will again, in view of changes made in § 62.1-13.5, Ch. 300 [1982] Acts of Assembly, have authority to adopt their own ordinances if the county of which they are a part (1) amends its ordinance to conform with the recently enacted form of ordinance in § 62.1-13.5, or (2) fails to so amend its ordinance.

Chapter 300 requires the conformation of existing wetlands zoning ordinances to the new Act. Any
non-conforming wetlands zoning ordinances will become ineffective January 1, 1983.

Section 62.1-13.6(b) provides that a town which "does not enact a wetlands zoning ordinance within one year from the time the county in which such town is found enacts a wetlands zoning ordinance, application for wetlands found in such town shall be made to the county wetlands board." It is keyed to enactment of "a wetlands zoning ordinance." It says nothing about later amendment. Towns were given an option by the original legislation to choose to administer their own programs, but this option was of limited duration. The provisions of § 62.1-13.6(b) suggest that, once a decision on local administration of the wetlands program was made, the need for certainty precluded leaving the town option perpetually available.

The fact that new legislation requires the conformance of all wetlands zoning ordinances to the amended law does not change this situation. Chapter 300 does not amend § 62.1-13.6(b). That provision clearly refers to enactment, not amendment. I am, therefore, of the opinion that your first question must be answered in the negative. A town does not have the option of adopting its own wetlands zoning ordinance merely because the county of which it is a part amends its wetlands zoning ordinance, as is required by the recent amendments to § 62.1-13.5.

The situation would be different, however, in the case posed by your second question. If the county should fail to bring its wetlands zoning ordinance into compliance with the amended law, that county would have no wetlands zoning ordinance in effect as of January 1, 1983. Section 62.1-13.6(b) only limits the adoption of town wetlands zoning ordinances where a county has enacted such an ordinance. Where a county enactment is no longer valid, there is nothing to prevent the town from enacting its own wetlands zoning ordinance. Because the obvious intent of the Wetlands Act is that the wetlands program be ultimately administered at the local level (see §§ 62.1-13.5 and 62.1-13.9), and because there would be no county regulations governing wetlands, the town would then be able to enact a wetlands zoning ordinance.

I am, therefore, of the opinion that your second question must be answered in the affirmative. If the county of which a town is a part does not amend its wetlands zoning ordinance to conform to the recent amendments to § 62.1-13.5, it will cease to have a wetlands zoning ordinance and a town may, at that time, adopt its own wetlands zoning ordinance.

WILLS. SELF-PROVING AFFIDAVIT DOES NOT REQUIRE MORE THAN TWO WITNESSES.
The Honorable D. Wayne O’Bryan
Member, House of Delegates

You have asked whether a testator’s use of a self-proving affidavit authorized by § 64.1-87.1 of the Code of Virginia (1950), as amended, will require the testator to execute or acknowledge his will before three attesting witnesses. Section 64.1-87.1 provides a means by which a will may be made self-proving, thereby avoiding the necessity of producing witnesses before the court to establish its authenticity after the death of the testator. The General Assembly has incorporated into § 64.1-87.1 a form of certificate, to be executed by the testator, the witnesses and an officer authorized to administer oaths under the laws of this State, which is annexed to the will making the will self-proving. The form set out in § 64.1-87.1 includes blanks for signatures of up to three witnesses. The statute, however, expressly permits the use of other forms of certificate so long as they are “in form and content substantially” as set forth in § 64.1-87.1. (Emphasis added.) Section 64.1-87.1 does not expressly prescribe requirements for proper execution and attestation of wills, but instead prescribes a means of proof of proper execution. On the other hand, § 64.1-49 specifically governs the execution of the will itself and requires that, unless it is a holographic will, “the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses....” (Emphasis added.) I conclude that § 64.1-49, which specifically prescribes requirements of attestation, is controlling on the question of the number of witnesses required for execution of the will.

Thus, it is my opinion that the use of a self-proving affidavit authorized by § 64.1-87.1 does not require the testator to execute or acknowledge his will before more than two attesting witnesses.

WORKMEN’S COMPENSATION ACT. § 65.1-88 DOES NOT REQUIRE EMPLOYER TO OBTAIN EMPLOYMENT FOR INJURED EMPLOYEE. ACCEPTANCE OF REMUNERATION FOR OTHER EMPLOYMENT PURSUANT TO TITLE 65.1 NOT PROHIBITED BY § 2.1-349(A)(4).

May 5, 1982

Col. D. M. Slane, Superintendent
Department of State Police

You have asked a question regarding the requirement that an employer furnish vocational rehabilitation training services to injured employees under § 65.1-88 of the Code of Virginia (1950), as amended. You have also asked a question concerning the applicability of § 2.1-349 when an employee accepts new employment procured under Title 65.1.
non-conforming wetlands zoning ordinances will become ineffective January 1, 1983.

Section 62.1-13.6(b) provides that a town which "does not enact a wetlands zoning ordinance within one year from the time the county in which such town is found enacts a wetlands zoning ordinance, application for wetlands found in such town shall be made to the county wetlands board." It is keyed to enactment of "a wetlands zoning ordinance." It says nothing about later amendment. Towns were given an option by the original legislation to choose to administer their own programs, but this option was of limited duration. The provisions of § 62.1-13.6(b) suggest that, once a decision on local administration of the wetlands program was made, the need for certainty precluded leaving the town option perpetually available.

The fact that new legislation requires the conformance of all wetlands zoning ordinances to the amended law does not change this situation. Chapter 300 does not amend § 62.1-13.6(b). That provision clearly refers to enactment, not amendment. I am, therefore, of the opinion that your first question must be answered in the negative. A town does not have the option of adopting its own wetlands zoning ordinance merely because the county of which it is a part amends its wetlands zoning ordinance, as is required by the recent amendments to § 62.1-13.5.

The situation would be different, however, in the case posed by your second question. If the county should fail to bring its wetlands zoning ordinance into compliance with the amended law, that county would have no wetlands zoning ordinance in effect as of January 1, 1983. Section 62.1-13.6(b) only limits the adoption of town wetlands zoning ordinances where a county has enacted such an ordinance. Where a county enactment is no longer valid, there is nothing to prevent the town from enacting its own wetlands zoning ordinance. Because the obvious intent of the Wetlands Act is that the wetlands program be ultimately administered at the local level (see §§ 62.1-13.5 and 62.1-13.9), and because there would be no county regulations governing wetlands, the town would then be able to enact a wetlands zoning ordinance.

I am, therefore, of the opinion that your second question must be answered in the affirmative. If the county of which a town is a part does not amend its wetlands zoning ordinance to conform to the recent amendments to § 62.1-13.5, it will cease to have a wetlands zoning ordinance and a town may, at that time, adopt its own wetlands zoning ordinance.

WILLS. SELF-PROVING AFFIDAVIT DOES NOT REQUIRE MORE THAN TWO WITNESSES.
REPORT OF THE ATTORNEY GENERAL

October 27, 1981

The Honorable D. Wayne O'Bryan
Member, House of Delegates

You have asked whether a testator's use of a self-proving affidavit authorized by § 64.1-87.1 of the Code of Virginia (1950), as amended, will require the testator to execute or acknowledge his will before three attesting witnesses. Section 64.1-87.1 provides a means by which a will may be made self-proving, thereby avoiding the necessity of producing witnesses before the court to establish its authenticity after the death of the testator. The General Assembly has incorporated into § 64.1-87.1 a form of certificate, to be executed by the testator, the witnesses and an officer authorized to administer oaths under the laws of this State, which is annexed to the will making the will self-proving. The form set out in § 64.1-87.1 includes blanks for signatures of up to three witnesses. The statute, however, expressly permits the use of other forms of certificate so long as they are "in form and content substantially" as set forth in § 64.1-87.1. (Emphasis added.) Section 64.1-87.1 does not expressly prescribe requirements for proper execution and attestation of wills, but instead prescribes a means of proof of proper execution. On the other hand, § 64.1-49 specifically governs the execution of the will itself and requires that, unless it is a holographic will, "the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses...." (Emphasis added.) I conclude that § 64.1-49, which specifically prescribes requirements of attestation, is controlling on the question of the number of witnesses required for execution of the will.

Thus, it is my opinion that the use of a self-proving affidavit authorized by § 64.1-87.1 does not require the testator to execute or acknowledge his will before more than two attesting witnesses.

WORKMEN'S COMPENSATION ACT. § 65.1-88 DOES NOT REQUIRE EMPLOYER TO OBTAIN EMPLOYMENT FOR INJURED EMPLOYEE. ACCEPTANCE OF REMUNERATION FOR OTHER EMPLOYMENT PURSUANT TO TITLE 65.1 NOT PROHIBITED BY § 2.1-349(A)(4).

May 5, 1982

Col. D. M. Slane, Superintendent
Department of State Police

You have asked a question regarding the requirement that an employer furnish vocational rehabilitation training services to injured employees under § 65.1-88 of the Code of Virginia (1950), as amended. You have also asked a question concerning the applicability of § 2.1-349 when an employee accepts new employment procured under Title 65.1.
You first ask whether the requirements of § 65.1-88 pertaining to the provision of vocational rehabilitation services include an obligation that employment be obtained within the abilities and capacity of the employee. If an injured employee is unable to return to his former occupation, § 65.1-88 requires that the employer, at the direction of the Industrial Commission, furnish to the employee reasonable and necessary vocational rehabilitation training services. That section does not, however, require an employer to obtain employment for the injured employee. Nevertheless, it is clear that the mere provision of vocational rehabilitation services does not terminate the employer's obligation to continue payment of workmen's compensation benefits to which the employee is entitled. Section 65.1-63 becomes relevant at this point. That section provides:

"If an injured employee refuses employment procured for him suitable to his capacity, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified."

In sum then, § 65.1-88 does not require an employee to procure employment for an injured employee suitable to his capacity, but, if such employment is procured and refused, § 65.1-63 provides for suspension of compensation benefits during the period of refusal unless, in the opinion of the Industrial Commission, such refusal was justified. I note for your information that one factor the Industrial Commission may consider in determining whether the refusal is justified is whether the location of the new employment is an unreasonable distance from the prior place of employment. Jones v. Allegheny Pepsi Cola Bottling Co., 59 O.I.C. 161 (1980); Tucker v. Riggs Distler & Co., 54 O.I.C. 381 (1972).

You next inquire whether the acceptance of employment by an employee outside the agency as a result of employment procured pursuant to § 65.1-63 creates a conflict of interest pursuant to § 2.1-349 if the employee remains on the agency's payroll in a paid sick leave status. Section 2.1-349(a)(4) prohibits the acceptance or solicitation of any additional remuneration for services performed by an officer or employee of a governmental agency within the scope of his official duties. That section only applies to additional remuneration received for services performed within the scope of an employee's official duties with the governmental agency. The acceptance of remuneration for other employment pursuant to Title 65.1 is not acceptance of remuneration for services which were within the employee's official duties in his first job, and, therefore, is not prohibited by § 2.1-349(a)(4). However, it appears that the retention of the employee on the agency's payroll following his being employed elsewhere may constitute a violation of the Rules for the Administration of the Virginia Personnel Act, relating to employment outside State service. I suggest you explore this question with the Department of Personnel and Training.
ZONING. COOPERATIVE APARTMENTS. USE OF SPECIAL USE PERMITS AS PREREQUISITE TO CONVERSION.

December 9, 1981

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

You have asked whether a locality may require that a special use permit be obtained as a prerequisite to the conversion of a rental apartment into a cooperative apartment. Such special use permit would require conformance to current land use, zoning or site plan ordinances of the city.

Currently § 55-79.43 of the Code of Virginia (1950), as amended, provides that, in the case of the conversion of a rental apartment to a condominium, a locality may require that such proposed condominium conversion, which does not otherwise conform to the zoning, land use and site plan regulations of that locality, secure a special use permit prior to conversion. Section 55-79.43 also provides that no locality may by zoning ordinance discriminate against the condominium form of ownership. There is no similar statutory provision with regard to conversions to cooperative ownership.

Article VII, § 3 of the Constitution of Virginia (1971) states that the General Assembly may provide by general law or special act that a local governmental unit may exercise any of its legislative powers. Localities are authorized to enact zoning ordinances under § 15.1-486, et seq., and have wide discretion in enacting such ordinances. Byrum v. Board of Supervisors of Orange County, 217 Va. 37, 225 S.E.2d 369 (1976). This discretion must be exercised with deference to the fact that the legislative intent of the statutes enabling zoning ordinances "was to permit localities to enact only traditional zoning ordinances directed to physical characteristics and having the purpose neither to include nor exclude any particular socio-economic group," Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 233, 238, 198 S.E.2d 600, 602 (1973). The conversion of a rental apartment to a cooperative apartment, while it changes the form of property ownership, has no effect on the physical characteristics of the property. Because of this fact, and because there is no statute which expressly authorizes the special use permit requirement about which you inquire, I am of the opinion that a local government could not require such special use permit as a prerequisite to conversion to a cooperative.

ZONING. LAND USE. ORDINANCES. HOUSING FOR ELDERLY SPECIAL EXCEPTION USE TO RESIDENTIAL ZONING REGULATION IS NOT SOCIAL ECONOMIC ZONING PROHIBITED BY LAW.
June 16, 1982

The Honorable Gwendalyn F. Cody
Member, House of Delegates

This is in reply to your recent letter in which you made several inquiries concerning the Fairfax County Zoning Ordinance. Section 3-104(3)(D) of that ordinance provides that special exceptions may be issued to permit certain uses in the R-1 residential district. Among those uses are:

"public and quasi-public uses, limited to:
...D. Housing for the elderly...."

Your first inquiry is whether the actions of the Fairfax County Board of Supervisors in allowing a private party to construct housing for the elderly in the R-1 zoning district by obtaining a special exception exceeds the authority conferred on the board of supervisors in the enactment of zoning ordinances by § 15.1-486, et seq., of the Code of Virginia (1950), as amended.

Section 15.1-486 grants to the governing body of any county or municipality the power to enact zoning ordinances to classify the territory under its jurisdiction into districts. Among the activities which may be regulated in a zoning district are "[t]he use of land, buildings, structures or other premises...." See § 15.1-486(a). The regulation of "housing for the elderly" is clearly a regulation affecting the use of land, buildings, structures or premises pursuant to the express authority of § 15.1-486.

Section 15.1-491(c) permits zoning ordinances to contain provisions "[f]or the granting of special exceptions under suitable regulations and safeguards...." Section 15.1-430(i) defines "special exception" as a "special use, that is a use not permitted in a particular district except by special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." A special exception is a device which furnishes flexibility to a zoning ordinance. See Report of the Attorney General (1976-1977) at 332. Accordingly, I conclude that the Fairfax County Board of Supervisors does have the authority to provide for special uses by permit such as housing for the elderly in residentially zoned districts without exceeding the power conferred upon the board by § 15.1-486.

You next ask if the elderly are a "socio-economic group," which, if specially recognized in the zoning ordinance, creates preferential or discriminatory zoning. Section 15.1-489 provides that zoning ordinances are to be promulgated for the general purposes of promoting the health, safety or general welfare of the public. Any zoning ordinance enacted must bear a reasonable relationship to these purposes. Among the prohibited purposes for which zoning ordinances may not be enacted, however, are those purposes designated to mandatorily exclude or include any
particular socio-economic group from or in a particular district. Board of Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959), and Board of Supervisors of Fairfax County v. DeGroff Enterprises, Inc., 214 Va. 235, 198 S.E.2d 600 (1973). In Carper, the court invalidated an ordinance which it found would serve private purposes by actually preventing people in low income brackets from living in the western area of the county and forcing them into the eastern area. In DeGroff, the court held invalid an ordinance mandating that certain apartment developers set aside at least 15% of the units of new developments for low and moderate income housing with rental prices being set by the local authorities.

Housing for the elderly is but one type of structure permitted by special exception in the R-1 residential district in Fairfax County. Section 3-104 of the county ordinance provides for five separate categories of uses for which special exceptions may be granted. Among the uses for which special exceptions may be obtained are light public utility uses; land fills; public and quasi-public uses; transportation facilities and commercial and industrial uses of special impact. The term "public and quasi-public uses," as used in the ordinance, includes thirteen different types of facilities. These facilities include, but are not limited to housing for the elderly, colleges, cultural centers, fire stations, libraries, police stations and medical care facilities. These uses do not necessarily include or exclude any particular socio-economic group from the R-1 district, as was found repugnant in DeGroff, supra. Rather, these special use regulations merely recognize that certain specified types of uses may be, under certain circumstances, compatible with the general conditions prevailing in the R-1 residential district. Accordingly, I am of the opinion that the permissive provision permitting housing for the elderly is not socio-economic zoning of the type proscribed by law. Therefore, I conclude that the special exception provision of the Fairfax County zoning ordinance applicable to housing the elderly is a valid land use regulation enacted under the police power accorded local governments.

Your last question is whether, under the ordinance, non-elderly persons may reside in housing provided for the elderly. This particular question requires an interpretation of a local ordinance apart from any question of authority to adopt the ordinance or any question of conflict with State statutes. Such an interpretation lies peculiarly within the province of local officials, in this case the Zoning Administrator of Fairfax County. I am advised that the Zoning Administrator has addressed your specific question and has concluded that, under the ordinance, non-elderly persons may reside in housing for the elderly provided such use is related to the principal use of housing for the elderly and the principal use remains the dominant use. This interpretation is in accord with the general principles of law concerning accessory uses, see, generally, 82 Am.Jur.2d
Zoning and Planning §§ 170-177 (1976), and I have no basis to conclude that that is an improper interpretation.

ZONING. NOTICE. INDIVIDUAL WRITTEN NOTICE REQUIRED TO ADJACENT LANDOWNER IN OTHER COUNTY OR MUNICIPALITY.

March 24, 1982

The Honorable William L. Heartwell, III
County Attorney for Botetourt County

Botetourt County is considering substantial revisions to its zoning ordinance. Because more than twenty-five parcels are affected, notice may be given to the landowners by publication. See § 15.1-431 of the Code of Virginia (1950), as amended. You have asked whether individual, written notice must also be given under § 15.1-431 to landowners of property abutting the affected properties when the abutting properties lie in other political subdivisions.

The second paragraph of § 15.1-431 requires newspaper publication of notice of intent prior to the recommendation by the planning commission, and the adoption by the governing body of any plan, ordinance or amendment. The first two sentences, in the third paragraph read as follows:

"When a proposed amendment of the zoning ordinance involves a change in the zoning classification of twenty-five or less parcels of land, then, in addition to the advertising as above required, written notice shall be given by the local commission at least five days before the hearing to the owner or owners, their agent or the occupant, of each parcel involved, and to the owners, their agent or the occupant, of all abutting property and property immediately across the street or road from the property affected. In any county or municipality where notice is required under the provisions of this section, notice shall also be given to the owner, their agent or the occupant, of all abutting property and property immediately across the street from the property affected which lies in an adjoining county or municipality of the Commonwealth...."

The requirement of the statute is plain and capable of only one interpretation: notice must be given as required. Accordingly, I am of the opinion that the second sentence of the third paragraph requires that written notice be given to the owner or owners, their agent or the occupant, of all abutting property and property immediately across the street from the property affected which lies in an adjoining county or municipality of the Commonwealth in any case in which notice of any nature is required under the provisions of § 15.1-431.
REPORT OF THE ATTORNEY GENERAL

ZONING. REGULATION OF SIGNS. PRESUMED VALID AND NORMALLY PERMISSIBLE.

September 8, 1981

The Honorable Elmo G. Cross, Jr.
Member, Senate of Virginia

You ask whether the Town of Ashland may enact a zoning ordinance which regulates signs, and whether the ordinance may prescribe some reasonable period for removal of nonconforming uses.

Regulation of Signs

As a general rule of law, zoning ordinances may include signs as a permissible subject of regulation. See 6 Yokley, Zoning Law & Practice § 35-63 (4th ed. 1980). Localities may also exercise authority over signs under the general police power to abate nuisances or protect the public welfare. City of Escondido v. Desert Outdoor Advertising, Inc., 106 Cal.Rptr. 172, 505 P.2d 1012 (1973), cert. denied, 414 U.S. 828 (1973).


In Virginia, it is recognized that in adopting a zoning ordinance, the action of a governing body is presumed valid as long as it is not "unreasonable and arbitrary"; the burden is on the party challenging the ordinance to show that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare. Board of Supervisors of Fairfax County v. Carper, 200 Va. 653, 660, 107 S.E.2d 390 (1959).

Purposes for which an ordinance may be enacted are set forth in § 15.1-489 of the Code of Virginia (1950), as amended. Consideration of aesthetics is not a permissible basis for a zoning requirement unless other elements within the scope of police power are present. Board of Supervisors of James City County v. Rowe, 216 Va. 128, 145, 216 S.E.2d 199 (1975); Kenyon Peck v. Kennedy, 210 Va. 60, 168 S.E.2d 117 (1969).

Whether a particular regulation of signs is permissible necessarily depends on the facts of a given case. I note that the portion of the ordinance in question is lengthy and contains many different provisions. Cases from other
jurisdictions may be found on both sides of most issues. See e.g., Donnelly Advertising Corp. v. Mayor of Baltimore, 370 A.2d 1127 (Md. 1977) (total ban on signs in historic area upheld). However, in Virginia the Supreme Court has indicated in the Carper, Rowe and other decisions, that it will "scrutinize provisions of zoning ordinances carefully for reasonableness and relationship to valid public interests.

Requiring Removal of a Nonconforming Use

I am of the opinion that it is not constitutional to require removal of a nonconforming use, even if a generous time period for the removal is allowed.

In Board of Supervisors v. Carper, supra, the court struck down a two-year period for permitting building on nonconforming lots. In an Opinion of this Office found in Report of the Attorney General (1964-1965) at 360, it was noted that Carper likely meant that a two-year period for removing nonconforming signs would be invalid.

Section 15.1-492 permits nonconforming uses to continue indefinitely. Article I, § 11 of the Constitution of Virginia (1971), prohibits taking private property without just compensation. This provision would preclude an ordinance which attempted to remove vested property rights preexisting adoption of the ordinance. See Board of Supervisors v. Rowe, supra, 216 Va. at 138.

1Section 15.1-489 provides: "Zoning 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. To these ends, such ordinances shall be designed (1) to provide for adequate light, air, convenience of access, and safety from fire, flood and other dangers; (2) to reduce or prevent congestion in the public streets; (3) to facilitate the creation of a convenient, attractive and harmonious community; (4) to facilitate the provision of adequate police and fire protection, disaster evacuation, civil defense, transportation, water, sewerage, floor protection, schools, parks, forests, playgrounds, recreational facilities, airports and other public requirements; (5) to protect against destruction of or encroachment upon historic areas; (6) to protect against one or more of the following: overcrowding of land, undue density of population in relation to the community facilities existing or available, obstruction of light and air, danger and congestion in travel and transportation, or loss of life, health, or property from fire, flood, panic or other dangers; (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."

2Section 15.1-492 provides as follows: "Nothing in this article shall be construed to authorize the impairment of any
vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years, and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered and may further provide that no 'nonconforming' building or structure may be moved on the same lot or to any other lot which is not properly zoned to permit such 'nonconforming' use."

ZONING. "SUBSTANTIAL PORTION" OF COUNTY, AS MINIMUM UNDER § 15.1-486. MAGISTERIAL DISTRICT CONTAINING 3.2 SQUARE MILES AND ONE-FIFTH OF POPULATION CONSTITUTES "SUBSTANTIAL PORTION" OF COUNTY.

January 15, 1982

The Honorable J. Edgar Pointer, Jr.,
County Attorney for the County of Gloucester

You ask several questions about the status of a proposed zoning ordinance under Art. 8 (Zoning) of Ch. 11 (Planning, Subdivision of Land and Zoning) of Title 15.1 of the Code of Virginia (1950), as amended.

You first ask whether, under § 15.1-486, a magisterial district containing only 3.2 square miles (1.2 percent of the county's land area) is a "substantial portion" of the county, allowing the governing body to enact a zoning ordinance for that magisterial district alone.

Section 15.1-486 provides that the governing body of any county may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purposes of Art. 8, the zoning article of Ch. 11 of Title 15.1.

I am advised that the magisterial district in question has 4,092 residents, or 20.35 percent of the county's 1980 population. The magisterial district is therefore highly concentrated compared to the rest of the county. Zoning ordinances are particularly appropriate for areas where population is concentrated.

Accordingly, it is my opinion that a magisterial district containing 3.2 square miles (and 4,092 residents) is a "substantial portion" of the county, under § 15.1-486, allowing the governing body to enact a zoning ordinance for that magisterial district alone.
You next ask whether four features of the proposed ordinance render it discriminatory, unreasonable, arbitrary or illegal. The four features are as follows:

A. The proposed ordinance places only two districts into immediate effect, although the ordinance describes seven districts. The two districts placed into immediate effect are single-family residential, and business. The five remaining districts are rural, multi-family residential, limited industrial, planned-unit development, and mobile home. These five remaining districts are so-called "floater" districts requiring ordinance amendments to put them into effect.

B. The proposed ordinance does not permit mobile home districts except in an existing rural district, and since there presently is no rural district, mobile homes are effectively excluded from the zoned magisterial district. At the same time, mobile homes are not excluded from the county's four other magisterial districts which are unzoned.

C. The proposed ordinance, for a distance of 2.1 miles along arterial highway U.S. Route No. 17, zones the west side of the highway as business, leaving the east side of such highway (in another magisterial district) unzoned.

D. The proposed ordinance zones property of the county and the Commonwealth as single-family residential or commercial. The Commonwealth's property is occupied by the Virginia Institute of Marine Science. The county's property is used largely for recreational purposes.

With regard to inquiry A, I have no difficulty with only two districts being placed into immediate effect. These two districts apparently cover existing uses in the magisterial district. Variances are available without amendment to the zoning ordinance. The other uses not permitted are permitted in the unzoned magisterial districts. Accordingly, it is my opinion that placing only two districts into immediate effect does not, under the circumstances, render the proposed ordinance discriminatory, unreasonable, arbitrary or illegal.

With regard to inquiry B, I have no difficulty with mobile homes being effectively excluded from the zoned magisterial district. Mobile homes are not excluded from the county's four other magisterial districts which are unzoned, and variances are available without amendment to the zoning ordinance. There is no indication that lack of an existing mobile home district is unreasonable in relation to present or anticipated uses in the zoned magisterial district. Accordingly, it is my opinion that lack of a mobile home district presently in effect does not, under the circumstances, render the ordinance discriminatory, unreasonable, arbitrary or illegal.
With regard to inquiry C, on the facts given, I cannot conclude that the ordinance is invalid because it zones the west side of arterial highway U.S. Route No. 17 for a distance of 2.1 miles, leaving the east side of such highway (in another magisterial district) unzoned. Boundary lines of zoning districts must be struck somewhere, and are to some degree arbitrary. Adjacent properties may be zoned differently when there is a rational basis for different classifications, and the presumption of legislative validity prevails unless overcome by evidence of discrimination. Accordingly, on the facts given, I cannot say that zoning the west side of the arterial highway, and leaving the east side unzoned, renders the ordinance discriminatory, unreasonable, arbitrary or illegal.5

With regard to inquiry D, I find unenforceable the zoning of property of the county and the Commonwealth. I am advised the county's property is used largely for recreational purposes. A county, however, is not subject to zoning ordinances when using property for governmental purposes, and recreation is a governmental purpose.6 The property of the Commonwealth is also not subject to zoning ordinances.7 Accordingly, it is my opinion that the ordinance is unenforceable to the extent it attempts to zone property of the county and the Commonwealth.

You also ask whether the county has authority to treat the zoned magisterial district as a special taxing district to raise moneys for administration of the zoning ordinance in that one magisterial district. I find no such authority.8 Accordingly, it is my opinion that the county does not have authority to treat the zoned magisterial district as such a special taxing district.

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1 See Opinion to the Honorable A. Dow Owens, Commonwealth's Attorney for Pulaski County, dated July 18, 1972, found in Report of the Attorney General (1972-1973) at 300.

2 The ordinance does describe an eighth district, which is also in immediate effect. This is a conservation district limited to islands in the York River.

3 A zoning ordinance is presumed to be valid, and in a homogeneous area, a two-district ordinance may be appropriate if the districts bear a reasonable relationship to present or anticipated uses. See Matthews v. Board of Zoning Appeals of Greene County, 218 Va. 270, 237 S.E.2d 128 (1977).

4 For example, a one-district ordinance is not arbitrary or unreasonable for a small community to preserve its existing character, so long as other land-use needs are supplied by accessible areas outside the zoned community. Id. In the present situation, the five remaining districts in the ordinance serve to accommodate either a) change in the zoned magisterial district or b) extension of the ordinance.

5 See, again, Matthews v. Board of Zoning Appeals, supra.

6 See Board of Supervisors of James City County v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975). But see, Town of Vienna
Council v. Kohler, 218 Va. 966, 244 S.E.2d 542 (1978) (evidence held not to support selection of street as district boundary line, there being no "rational basis" why line should be street rather than natural boundary on tract).


However, § 15.1-491(f) provides that zoning ordinances may include reasonable regulations for the collection of fees to cover the cost of making inspections, issuing permits, advertising of notices and other expenses incident to the administration of a zoning ordinance. See Opinion to the Honorable William H. Harris, County Attorney for Stafford County, dated February 21, 1978, found in Report of the Attorney General (1977-1978) at 285.

ZONING. VARIANCES. BOARDS OF ZONING APPEALS. BOARD HAS AUTHORITY TO GRANT VARIANCE AS TO MINIMUM LOT-SIZE REQUIREMENT IN ZONING ORDINANCE.

January 6, 1982

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for the County of Rappahannock

You ask whether, under § 15.1-495 of the Code of Virginia (1950), as amended, a board of zoning appeals has authority to grant a variance as to a minimum lot-size requirement in a zoning ordinance.

Section 15.1-495(b) provides that boards of zoning appeals shall have the power and duty to authorize in specific cases certain variances from the terms of the ordinance, where by reason of the exceptional narrowness, shallowness, size or shape of a specific piece of property, the strict application of the terms of the ordinance would lead to certain results.1

In a recent case, the Supreme Court of Virginia has ruled that a landowner may not bring an action to declare a minimum lot-size requirement invalid as to one piece of property until the landowner has exhausted his administrative remedies before the board of zoning appeals. In making its ruling, the court stated that the challenged lot-size restriction could be remedied by a variance. The court then added that one element which a board of zoning appeals may consider, under § 15.1-495(b), as the basis for a variance, is the "size" of a specific piece of property.2
Accordingly, it is my opinion that, under § 15.1-495(b), a board of zoning appeals has authority to grant a variance as to a minimum lot-size requirement in a zoning ordinance.

1 For a discussion of other elements in a variance proceeding under § 15.1-495(b), see Hendrix v. Board of Zoning Appeals of the City of Virginia Beach, 222 Va. 57, 267 S.E.2d 140 (1981); Packer v. Hornsby, 221 Va. 117, 267 S.E.2d 140 (1980).


ZONING. VARIANCES. "PROPERTY OWNER." REQUIREMENT OF GOOD FAITH ACQUISITION UNDER § 15.1-495(b) APPLIES TO BOTH AREA AND USE VARIANCES. "GOOD FAITH" REQUIREMENT OF § 15.1-495(b) APPLIES TO CONTRACT PURCHASER AS WELL AS TO RECORD PROPERTY OWNER.

May 25, 1982

The Honorable Douglas K. Baumgardner
Commonwealth's Attorney for Rappahannock County

This is in reply to your recent letter in which you made the following inquiries concerning zoning:

1. Does the Virginia Supreme Court ruling in Alleghany Enterprises, Inc. v. Board of Zoning Appeals of the City of Covington, 217 Va. 64, 225 S.E.2d 383 (1976), concerning the good faith acquisition requirement apply to "area" variances as well as "use" variances?

2. Does the "good faith" requirement of § 15.1-495(b) of the Code of Virginia (1950), as amended, apply to a contract purchaser, who seeks a variance for a nonconforming lot, as well as to the record property owner?

3. Does Art. 14-6 of the Rappahannock County Zoning Ordinance waive the side-yard and set-back requirements of the ordinance as to nonconforming lots?

In Alleghany, the court, in interpreting § 15.1-495(b), held that an applicant for a zoning ordinance variance is not entitled to such a variance if the hardship for which relief is sought is self inflicted. The applicant in Alleghany sought a "use" variance. However, the court in its decision did not distinguish between "area" and "use" variances. In imposing the good faith requirement on applicants for a variance, the language of § 15.1-495(b) does not distinguish between the two variances and there appears to be no reason to distinguish between the two. Therefore, your question is answered in the affirmative.
Turning to your second question, § 15.1-495(b) requires a "property owner," as a prerequisite to being granted a variance, to acquire the property in question in "good faith." As a matter of statutory construction, any ambiguity as to the meaning of the term "property owner" should be construed to promote, in the fullest manner, the objective of the statute. See 17 M.J. Statutes § 61 (1979). The objective of § 15.1-495(b) is to provide standards for the granting of variances from zoning restrictions. It is consistent with the objective of the statute that the good faith requirement imposed upon a "property owner," as used in the statute, be similarly imposed upon any applicant for a zoning variance. Otherwise, a person could easily avoid the good faith requirements. Thus, the question is answered affirmatively.

Your third inquiry does not present a question of statutory or constitutional construction. It involves an interpretation of the local ordinance and, pursuant to the policy of this Office to abstain in purely local legislative interpretations, I prefer to forego answering this inquiry.

1In 1976, the General Assembly added to Ch. 11 (Planning, Subdivision of Land, and Zoning) of Title 15.1 of the Code a definition of "variance." See § 15.1-430(p). That definition permits only a variance for those types of requirements which are normally included within the phrase "area" variance.
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Local governing body cannot enact ordinance pursuant to § 15.1-29.9 that requires smoke detectors be located contrary to interpretations of State Technical Review Board.  

Local governing body precluded from enacting ordinance that establishes permit requirements contrary to code.  

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State Water Control Board, Health Department and Uniform Statewide Building Code have established standards for all water wells.  

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Commonwealth's attorneys. § 2.1-349(a)(2) requirement that public officer disclose certain contracts to officer's governmental agency. Requirement does not prohibit Commonwealth's attorney from having such contracts merely because officer and governmental agency are same individual in such situation.
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Disclosure required under § 2.1-353 where councilman has material financial interest in business which would be substantially affected by action of council.

General Assembly members may contract with other governmental agencies if disclosure and bidding requirements of § 2.1-349(a)(2) are complied with.

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If no substantial likelihood that contract is afforded with intent to influence conduct in performance of official duties, contract between legislator and State Police for jet fuel not prohibited under § 2.1-358(c)(ii).

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Member of industrial development authority may not be party to financing arrangement between authority and business in which he maintains material financial interest.

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